271 N.C. App.—No. 2 Pages 181-382

# ADVANCE SHEETS

OF

# CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

## NORTH CAROLINA

*APRIL 19, 2021*

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

**THE COURT OF APPEALS**

**OF**

**NORTH CAROLINA**

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# COURT OF APPEALS

## CASES REPORTED

### FILED 5 MAY 2020



## CASES REPORTED WITHOUT PUBLISHED OPINIONS



**HEADNOTE INDEX**

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## ATTORNEY FEES



## CHILD ABUSE, DEPENDENCY, AND NEGLECT

constitutional rights), the Court of Appeals held that none of the prosecutor's remarks prejudiced defendant—regardless of the applicable standard of review—in light of the overwhelming evidence of his guilt, including the victims' testimony, corroborative testimony by the victims' family members, and DNA evidence linking defendant to the crimes. **State v. Ricks, 348.**

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**Equitable distribution—subject matter jurisdiction—claim asserted after separation—**The trial court had subject matter jurisdiction to hear a husband's claim for equitable distribution (ED), which was asserted as a counterclaim filed after the parties' date of separation. The husband's previous responsive pleading (filed prior to separation), in which he stated his intention to file an ED claim upon the parties' separation, did not constitute an actual ED claim. **Best v. Staton, 181.**

**Equitable distribution—value of marital home—evidentiary support—**In an equitable distribution action, the trial court abused its discretion by relying on a tax value when determining the post-separation passive increase in value of the marital home. Tax value listings are not competent evidence of a property's value, and in this case, the tax value was apparently never introduced by either party, precluding any opportunity for an objection. The court's order was vacated and the matter remanded for the trial court to reconsider its finding on the marital home value in light of the actual record evidence. **Best v. Staton, 181.**

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**IDENTIFICATION OF DEFENDANTS**

**Out-of-court identification—pre-trial show-up—eyewitness confidence statement—victim's vision information—motion to suppress—**In an attempted armed robbery prosecution, the trial court did not err when, in denying defendant's motion to suppress an out-of-court identification, it failed to make findings regarding the police officer's failure to obtain a confidence statement from the victim and failure to obtain information about the victim's vision because they were not requirements for show-up identifications under N.C.G.S. § 15A-284.52(c1) (the Eyewitness Identification Reform Act). **State v. Reaves-Smith, 337.**

**Out-of-court identification—pre-trial show-up—immediate display of suspect—Eyewitness Identification Reform Act—motion to suppress—**In an attempted robbery prosecution, the trial court did not err in denying defendant's motion to suppress an out-of-court identification where two men attempted to rob the victim and fired a gun, the victim gave a detailed description of the men to a policeman who was nearby and heard the gunshot, defendant was seen 800 feet from the crime scene seven minutes after the officer broadcast their descriptions and was apprehended shortly thereafter, and the victim identified him as one of the robbers and the person who fired the gun. The trial court's findings of fact and conclusions of law—supported by the evidence—showed that the immediate display of defendant, an armed and violent suspect, was required by the circumstances and the show-up complied with the Eyewitness Identification Reform Act. **State v. Reaves-Smith, 337.**

**Out-of-court identification—pre-trial show-up—impermissibly suggestive—likelihood of misidentification—motion to suppress—**In an attempted robbery prosecution where the victim had the opportunity to view the defendant during the crime and provided detailed descriptions of the two suspects to police, within seven minutes the suspects were seen 800 feet from the crime scene, and fourteen minutes after the attempted robbery the victim identified defendant as the person who shot at him, the pre-trial show-up identification of defendant was not impermissbly suggestive, it did not create a substantial likelihood of misidentification, and the trial court did not err in denying defendant's motion to suppress the out-of-court identification. **State v. Reaves-Smith, 337.**

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**Judicial authority—advisory opinion—ex parte motion—no active case—disclosure of criminal investigative file—**A trial court exceeded its judicial authority by entering an advisory opinion on an ex parte motion, filed by the State and not in connection with any ongoing trial or criminal prosecution, which sought an in camera review and a determination of whether a criminal investigative file contained potentially exculpatory information subject to disclosure. The order was vacated because the court's directive to the State to disclose the file, which involved a law enforcement officer's conduct, to defendants and their

## 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.

**BEST v. STATON**

[271 N.C. App. 181 (2020)]

KIMBERLY BEST (FORMERLY BEST-STATON), PLAINTIFF
v.
RANDALL STATON, DEFENDANT

No. COA19-638

Filed 5 May 2020

**1. Divorce—equitable distribution—subject matter jurisdiction—claim asserted after separation**

The trial court had subject matter jurisdiction to hear a husband's claim for equitable distribution (ED), which was asserted as a counterclaim filed after the parties' date of separation. The husband's previous responsive pleading (filed prior to separation), in which he stated his intention to file an ED claim upon the parties' separation, did not constitute an actual ED claim.

**2. Divorce—equitable distribution—value of marital home—evidentiary support**

In an equitable distribution action, the trial court abused its discretion by relying on a tax value when determining the post-separation passive increase in value of the marital home. Tax value listings are not competent evidence of a property's value, and in this case, the tax value was apparently never introduced by either party, precluding any opportunity for an objection. The court's order was vacated and the matter remanded for the trial court to reconsider its finding on the marital home value in light of the actual record evidence.

**3. Appeal and Error—preservation of issues—hearsay evidence—objection on other grounds—no ruling obtained**

In an equitable distribution action, a wife failed to preserve for appellate review the issue of whether the trial court erred by allowing hearsay evidence of a retirement plan valuation, because the wife objected to the evidence on different grounds before the trial court and failed to obtain a ruling on the objection she did lodge.

Appeal by Plaintiff from judgment entered 21 December 2018 and from order entered 18 September 2018 by Judge William G. Hamby, Jr., in Cabarrus County District Court. Heard in the Court of Appeals 19 February 2020.

*Plumides, Romano, Johnson, & Cacheris, P.C., by Richard B. Johnson, for Plaintiff-Appellant.*

*No brief filed for Defendant-Appellee.*

DILLON, Judge.

Plaintiff appeals from an Order Dismissing Plaintiff's Claim for Equitable Distribution and Denying Plaintiff's Motion to Dismiss Defendant's Claim for Equitable Distribution and from Judgment of Equitable Distribution.

## I. Background

On 25 April 2009, Defendant Randall Staton ("Husband") and Plaintiff Kimberly Best ("Wife") were married. In November 2016, Husband and Wife officially separated.

In this action, Husband and Wife each filed a claim seeking equitable distribution. Wife filed her claim for equitable distribution three months *before* the parties separated. One month before the parties separated, Husband filed a responsive pleading, which included his *statement of intent* to file a claim for equitable distribution. Then, a month *after* the parties separated, Husband filed his counterclaim for equitable distribution.

Husband and Wife each moved to dismiss the other's claim for equitable distribution. The trial court granted Husband's motion and denied Wife's motion, reasoning that because Wife's claim was filed before the parties' date of separation, it lacked jurisdiction over *her* claim.

Later, in December 2018, the trial court entered a Judgment of Equitable Distribution based on Husband's claim.

## II. Analysis

Wife makes three arguments on appeal, which we address in turn.

### A. Subject Matter Jurisdiction

**[1]** First, Wife argues that the trial court did not have subject matter jurisdiction over Husband's equitable distribution claim. We disagree and conclude that the trial court had jurisdiction over that claim.

Whether a trial court has subject matter jurisdiction is a question of law, reviewed *de novo* on appeal. *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 594, 821 S.E.2d 711, 722 (2018).

Our courts have consistently found there to be no subject matter jurisdiction where a party files an equitable distribution claim *prior* to the date of the couple's separation. *See, e.g.*, *Atkinson v. Atkinson*,

350 N.C. 590, 590, 516 S.E.2d 381, 381 (1999) (per curiam). However, our Court has found subject matter jurisdiction over a defendant's counterclaim for equitable distribution filed after separation though plaintiff filed her complaint for equitable distribution before the date of separation. *Gurganus v. Gurganus*, 252 N.C. App 1, 4-5, 796 S.E.2d 811, 814 (2017).

Wife argues that Husband's statement in his responsive pleading filed a month before separation was, in effect, a claim for equitable distribution. We disagree. Husband did not pray for equitable distribution in that pleading, but rather simply prayed that he be allowed to file such claim when the parties separated. He specifically requested to "*be allowed* to file for equitable distribution *upon separation of the parties or a ruling on the Divorce from Bed and Board.*" (Emphasis added).

Wife, though, contends that this case is controlled by our decision in *Coleman v. Coleman*, 182 N.C. App. 25, 641 S.E.2d 332 (2007). In that case, we determined that a counterclaim that "hereby *requests and reserves* the right for equitable distribution" was a valid equitable distribution claim. 182 N.C. App. at 26, 641 S.E.2d at 334 (emphasis added). We held that the defendant's "request" was "sufficient to put [p]laintiff on notice that [d]efendant was [presently] asking the court to equitably distribute the parties' marital and divisible property[.]" *Id.* at 29, 641 S.E.2d at 336. Our Court concluded that the use of the word "request" showed that "[the d]efendant did not merely assert that she intended to file a claim for equitable distribution . . . at some indefinite time in the future." *Id.* at 30, 641 S.E.2d at 337.

But Husband's language in his initial pleading is different. Husband merely expressed an intent to file an equitable distribution claim in the future "upon separation of the parties[.]" Husband's did not pray for equitable distribution until after the couple's date of separation. Therefore, we conclude that the trial court had subject matter jurisdiction over Husband's equitable distribution claim.

B. Property Value of Marital Home

**[2]** Wife next argues that the trial court abused its discretion when it determined on its own that the marital home had a property value increase of $23,700 from the date of separation to the date of the hearing, based on the property's tax value.

In its order, the trial court noted that the parties agreed that the marital home had a net value *at the time of separation* of $91,195. The trial court then made findings which generally reflected this value, finding a gross value of $352,000 and a debt of $260,805 at the time of separation

(for a net value of $91,195). However, the trial court found that *after* the date of separation, the value of the marital home passively increased in value by $23,700:

> Item I-8 is the passive increase in the value of the marital residence, which the Court determines *from the public records* to be $23,700, in the absence of any other credible evidence of current valuation, leaving the residence with a current valuation of $275,700 [sic] as opposed to the valuation of $252,000 [sic] at the time of separation.

Wife, though, states in her brief that neither party offered the tax value into evidence to show a passive increase in the home value. As explained below, tax value evidence is incompetent to prove value, and it would be an abuse of discretion for a trial court to take judicial notice of and rely upon a tax value to support a finding. Husband has not filed an appellee's brief. The record is rather voluminous, and our review has not uncovered a point in the proceeding before the trial court where the tax value was offered by either party as evidence to prove a passive increase in value.

The tax value – that is, the value assigned by the county in assessing *ad valorem* taxes against real estate – is not *competent* evidence of a property's value. *See Mfg. Co. v. R.R.*, 222 N.C. 330, 332, 23 S.E.2d 32, 36 (1942) (emphasis added) ("The rule with us, ordinarily, is that evidence of tax value listings on real estate is not competent on an issue of valuation[.]"). This is so because, as our Supreme Court has explained, "in the valuation of [ ] land for taxation the owner is not consulted . . . It is well understood that it is the custom of the assessors to fix a uniform rather than an actual valuation." *Bunn v. Harris*, 216 N.C. 366, 373, 5 S.E.2d 149, 153 (1939). We note, though, that the tax value of real property "may be considered by the fact-finder *if its introduction is not properly objected to*." *Edwards v. Edwards*, 251 N.C. App. 549, 551, 795 S.E.2d 823, 825 (2017) (emphasis added).

Though a trial court is vested with broad discretion in ordering equitable distribution, *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992), we hold that it is an abuse of discretion for a trial court rely on incompetent evidence that was not introduced into evidence by either party. As to this issue, we direct the trial court to act as indicated in the Conclusion section below.

C. Plaintiff's Consolidated Judicial Retirement Plan

**[3]** Finally, Wife argues that the trial court abused its discretion when it admitted hearsay evidence of Wife's consolidated judicial retirement

plan. For the following reasons, we hold that Wife has failed to preserve this issue for our review.

Our Rules of Appellate Procedure state that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Rule 10 also requires that the complaining party "obtain a ruling upon the party's request, objection, or motion." *Id.*

Wife argues on appeal that the trial court erred by admitting into evidence a valuation of her retirement plan and an affidavit from the expert who valued it because "[t]he valuation and affidavit do not fall under any of the exceptions of Rule 803." However, Wife did not object at trial to the admission of this evidence on hearsay grounds. Furthermore, although Wife objected to the admission of the valuation and affidavit based on a violation of deadlines set in a pretrial order, Wife failed to obtain a ruling upon her objection:

> [Husband's Counsel:] And Your Honor, along with that, if I may … admit the affidavit of Ann Marie Joseph along with that - -
>
> [Wife's Counsel:] Objection, I've never seen the affidavit. Didn't even know it existed until a few minutes ago. And objection, uh, note - - I'd ask the court to note my exception to Number 15.
>
> [Judge:] Absolutely.
>
> [Wife's Counsel:] And Your Honor, may we approach? (Inaudible – 03:12:30) objection with the exception to your ruling.
>
> [Judge:] Absolutely.

The parties continued to question the witness following this interaction, but the judge never ruled on Wife's objection and Wife never sought a ruling. Thus, Wife has failed to preserve this issue for our review.

## III. Conclusion

We hold that the trial court had subject matter jurisdiction over Husband's equitable distribution claim.

Regarding the trial court's reliance on the tax value to support its finding of a post-separation, passive increase in the value of the marital

home, we have been unable to locate anything in the record indicating that either party offered the tax value as evidence for this purpose. And Husband has not filed an appellee's brief to counter Wife's contention that no such evidence was offered. Therefore, we must vacate and remand the Judgment of Equitable Distribution.

On remand, the trial court must reconsider its finding regarding the post-separation, passive increase in value of the marital home. If the record, indeed, shows that the tax value was offered as evidence of a passive increase and if this evidence was not objected to, then we direct the trial court to re-enter its judgment with a cite from the record of that evidence. Otherwise, the trial court may make a new finding of a passive increase (or decrease) based on any competent or unobjected-to incompetent evidence in the record. But if there is no such evidence in the record, then the trial court shall strike its finding regarding the passive increase in value of the marital home. If the trial court modifies its finding regarding the passive increase, the trial court shall then modify the remainder of the order, if necessary, to achieve a distribution that it determines to be equitable.

VACATED AND REMANDED.

Judges BERGER and COLLINS concur.

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IN THE MATTER OF J.M.

No. COA19-421

Filed 5 May 2020

**1. Child Abuse, Dependency, and Neglect—permanency planning order—waiver of future six-month review hearings—sufficiency of the evidence**

The trial court's waiver of future six-month review hearings was supported by clear, cogent, and convincing evidence of the factors required by N.C.G.S. § 7B-906.1(n) where the evidence showed respondent-mother had been unable to adequately care for her children without additional supervision and she routinely made poor decisions—including feeding her children large amounts of sugary food despite their need for significant dental work, showing three-year-old J.M. a graphic picture, and asking J.M. to watch over a baby while she attended to another child.

**2. Child Abuse, Dependency, and Neglect—permanency planning order—unfit parent—sufficiency of the evidence**

The trial court's finding that respondent-mother was an unfit parent was supported by clear, cogent, and convincing evidence where the evidence showed that over a three-year period respondent consistently exhibited concerning behavior when caring for her children, she hit one child with a broomstick, when her children visited she often lost track of them and needed redirection to manage the children's behavior, she directed the children to sit and watch television extensively, and she allowed three-year-old J.M. to spend excessive amounts of time on a phone playing video games.

**3. Child Abuse, Dependency, and Neglect—permanency planning hearing—appointment as guardians—understanding of legal significance—sufficiency of findings**

Where the trial court found that the foster parents were committed to providing for the child during her minority and beyond and were willing to become parties to this action, and where the foster parents testified they understood they would be responsible for the care and expenses and medical and legal decisions for the child until she reached the age of majority, the trial court performed its duty under N.C.G.S. § 7B-600(c) in verifying that the foster parents understood the legal significance of their appointment as guardians.

**4. Child Abuse, Dependency, and Neglect—permanency planning hearing—ceasing reunification efforts—required findings**

The trial court's guardianship order ceasing reunification efforts with respondent-mother was vacated and remanded for additional findings where the order did not make findings required by N.C.G.S. § 7B-906.2(d) regarding whether respondent demonstrated a lack of success in participating or cooperating with the Wake County Human Services Department and the guardian ad litem or regarding whether respondent remained available to the court, the department, or the guardian ad litem.

Appeal by Respondent Mother from order entered 16 January 2019 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 18 February 2020.

*Assistant County Attorney Julia B. Southwick for Petitioner-Appellee Wake County Human Services.*

*Christopher M. Watford for Respondent Appellant Mother.*

*Battle, Winslow, Scott & Wiley, PA, by M. Greg Crumpler, and Senior Deputy County Attorney Roger A. Askew for guardian ad litem.*

INMAN, Judge.

Respondent Jessica Hayes ("Mother") appeals the district court's permanency planning order, pursuant to N.C. Gen. Stat. § 7B-1001(a)(4), placing guardianship of her infant daughter Jane[1] with foster parents.[2] Mother contends the trial court erred in: (1) waiving further review hearings; (2) finding that she was an unfit parent; (3) failing to make an evidentiary finding that the foster parents understood the legal significance of their appointment as guardians of Jane; and (4) ceasing reunification efforts without first making the necessary findings of fact.

After careful review, we hold that the trial court properly waived further review hearings, found that Mother is an unfit parent, and verified that Jane's foster parents understood their appointment as guardians. But we vacate the trial court's order and remand for the trial court to make the necessary findings in ceasing reunification efforts.

## I. FACTUAL AND PROCEDURAL BACKGROUND

The record reflects the following facts:

On 15 January 2016, Wake County Human Services ("WCHS") filed a juvenile petition alleging Mother was neglecting her four young children, nine-year old Damon, four-year old Joanne, two-year old Jake, and six-month old Jane. WCHS had been involved with Mother and the children for the last two years by that time. In December 2014, Mother created a safety plan that stemmed from instances of domestic violence between her and the father of the three younger children ("Father"). In May 2015, safety agreements were created to prevent Father and the maternal grandfather from contacting the children due to reported instances of sexual abuse.

In early January 2016, a report indicated that Father had been seen around Mother's home with the children despite the safety plans being in place. Mother resided at her sister's residence for a short time and lived in a hotel before Father eventually located her and the children and stole her car and phone. Although Mother was able to retrieve

1. We employ pseudonyms to preserve the anonymity of the juveniles.

2. Jane's father does not appeal.

her stolen property, Father severely assaulted her, causing her to file a police report for domestic violence. Mother and the children subsequently became homeless days before WCHS filed its juvenile petition. The children were then placed in non-secure custody with WCHS the day of the petition.

On 28 March 2016, the court adjudicated all four children neglected and kept non-secure custody with WCHS. WCHS placed Joanne and Jake in a licensed foster home together, while another foster family cared for Jane. Damon has mental health issues and was placed in a psychiatric hospital. The trial court ordered Mother to comply with a family services agreement, consisting of: obtaining and maintaining sufficient housing; maintaining adequate employment; submitting to a parenting evaluation and attending parenting classes; submitting to a domestic violence evaluation and participating in counseling; regularly notifying the social worker of any change in circumstances; and following the visitation agreement. Mother was allowed to visit the children once per week for one hour.

Over the next two years, the trial court continually attempted to reunify the children with Mother, with adoption being a secondary option. The trial court found that Mother, in 2016, informed Damon that his father died without consulting his therapist and posted a video on Facebook of her engaging in a fight, while she was pregnant, with another pregnant woman. Mother received an unrelated court settlement and, instead of paying child support, bought a vehicle and vacationed in the Bahamas. Mother also bought shoes for the children but did not allow them to keep them, telling them "that the sneakers would be for when they 'came home.' "

Despite these shortcomings, the trial court also found that Mother actively participated in her case plan, maintained housing, regularly visited the children, gained employment, and progressed in her parenting skills.

Mother gave birth to her fifth child, Danielle, in November 2016, which limited the hours she worked.[3] Beginning in July 2017, Mother transitioned from supervised to unsupervised and overnight visits with Joanne, Jake, and Jane.

However, by the fifth review hearing, on 29 January 2018, more than two years after WCHS' juvenile petition, the trial court still had concerns about Mother's ability to successfully parent her children. Mother had

3. WCHS did not petition for custody of Danielle, who has a different father.

regressed to supervised visits because she unsatisfactorily cared for the children without a parenting coach or social worker present. Joanne told WCHS that she saw Mother hit Jake on the head with a broom, but Mother denied the act ever occurred.[4] Mother told the children that they were coming home soon, that their foster parents did not love them, and that the foster parents cared for the children because they were being paid. The trial court changed the primary plan to adoption and ordered reunification as a secondary plan.

In November 2017, despite having her electricity turned off because she said she could not pay the bill, Mother hosted a first birthday party for Danielle at an amusement park and "assist[ed] her sister with her new born baby." Mother still failed to acknowledge that Damon—who had recently been moved to a group home—suffered from mental illness and needed extensive treatment. Mother refused to allow the children's guardian *ad litem* to enter her residence and observe her visits with them.

Following the sixth review hearing in July 2018, the trial court kept in place the permanent plan of adoption with a secondary plan of reunification. The trial court noted that Mother "continue[d] to require significant monitoring during her visits with the children" and was "failing to provide appropriate supervision for all of the children when the visits occur in her home." Although Mother claimed she was earning $477 a week, she failed to provide proof of income. Mother admitted that "many individuals" help care for Danielle because "she doesn't have a consistent person to provide care for her." Mother had reached the maximum amount of sessions with a parenting coach available to her. At one point, Mother visited Damon unannounced and falsely claimed that she had approval to be there.

By December 2018, nearly three years after the four children were removed from Mother's home, and despite protracted juvenile proceedings and supervision, WCHS observed that Mother continued to need supervision and re-direction when visiting the children and frequently exhibited poor decision-making skills. By that time, Jane had developed a significant attachment to her foster parents and often secluded herself when visiting Mother and her siblings.

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4. Harnett County screened the report and concluded that "there was no indication that it occurred by any other way than accidental means, and there were no injuries." In a later review hearing, Mother testified it was an accident.

On 16 January 2019, following another review hearing, the trial court awarded guardianship of Jane to her foster parents and waived further review hearings.[5]

Mother appeals.

## II. ANALYSIS

### *A. Waiving Review Hearings*

**[1]** Mother first argues that the trial court erroneously waived future review hearings because the evidence was insufficient to support the court's necessary findings. We disagree.

In juvenile proceedings, the trial court must conduct review hearings every six months or earlier "to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile." N.C. Gen. Stat. § 7B-906.1(a) (2017). The trial court may waive future review hearings if it "finds by clear, cogent, and convincing evidence each of the following":

> (1) The juvenile has resided in the placement for a period of at least one year.
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

*Id.* §§ 7B-906.1(n)(1)-(5). The trial court cannot "waive or refuse to conduct a review hearing if a party files a motion seeking the review." *Id.* § 7B-906.1(n).

Mother concedes that the trial court made the statutory findings of fact, but contends that no evidence supports some of those findings. Finding 21 provides that "[n]either the best interests . . . of any party require that review hearings be held every six (6) months." The social

5. The record does not disclose the updated statuses of Mother's remaining children in WCHS custody.

worker for WCHS, Christina Dillahunt ("Dillahunt"), testified at the most recent review hearing that, over the past three years since WCHS obtained non-secure custody, Mother has been unable to adequately care for the children without additional supervision and proper direction. Dillahunt testified, for example, that Mother routinely made poor decisions while monitoring the children, including feeding the children large amounts of sugary food, despite their needing significant dental work; attempted to show Jane a graphic picture of Mother's sister's vehicle crash; and asked Jane, then age three, to watch Danielle while she attended to another child. Mother does not contest the finding that "it does not appear likely that either parent will be in a position to safely parent [Jane] with the next six (6) months." We hold this evidence provides, clear, cogent, and convincing support for the factors required by Section 7B-906.1(n) and the trial court's waiver of future six-month review hearings.

Finding 22 states that "[a]ll of the parties are aware that the matter may be reviewed upon motion for review of any party." The hearing transcript reveals that the trial court informed the parties and their counsel who were present that "the matter may be brought before the Court for review at any time by filing a motion for review or on the court's own motion." Thus, the transcript establishes that the parties were aware that the matter could be reviewed upon a motion by any party, notwithstanding the trial court's waiver of further periodic review hearings.

*B. Fitness as a Parent*

**[2]** Mother next argues that the trial court's finding that she was unfit as a parent was not supported by the evidence and violated her constitutional right as a parent. We disagree.

"A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child." *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). However, "the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child." *Id.*

"[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status."

*David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005). "Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy." *Price*, 346 N.C. at 79, 484 S.E.2d at 534. "Therefore, the trial court must clearly address whether [the parent] is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent, should the trial court . . . consider granting custody or guardianship to a nonparent." *In re J.L.*, __ N.C. App. __, __, 826 S.E.2d 258, 266 (2019) (quotation marks, citations, and alterations omitted); *see also In re D.A.*, 258 N.C. App. 247, 250, 811 S.E.2d 729, 732 (2018) (requiring the trial court "to find that the parents were either unfit or had acted inconsistently with their constitutionally protected status as parents").

At the end of the hearing, the trial court made an oral finding from the bench that "both parents are still unfit and have acted in a manner inconsistent with their constitutionally protected right as a parent." In its written order, the trial court found that "[b]oth parents are acting inconsistently with the health and safety of the child and are unfit to have custody of the child."

A trial court's finding that a parent is unfit will be affirmed on appeal if we conclude that the finding is supported by clear and convincing evidence. *See*, *e.g.*, *Adams v. Tessener*, 354 N.C. 57, 66, 550 S.E.2d 499, 505 (2001) (concluding, to affirm the trial court's award of custody to grandparents, that "the evidence of record constitutes clear and convincing proof that [the parent's] conduct was inconsistent with his right to custody of the child").

The trial court made the following pertinent findings of fact:

> 6. The mother has not been able to adequately demonstrate the ability to parent the child. She continues to require significant monitoring during her visits with the children. She continues to fail to demonstrate the ability to safely parent the children without the intervention of the social worker. The mother has allowed the children to spend a great deal of time during the visits playing games on the mother's cell phone. The mother's behavior in visits was consistent with the mother failing to provide consistent and appropriate supervision for the child and her siblings when the visits occurred in her home. The mother may have completed the services which have been ordered over the nearly three (3) year period the child has been in custody but has not sufficiently demonstrated a change

> in her approach to parenting such that the child would be safe and have her needs met in the mother's care. . . .
>
> 11. Neither parent has been able to demonstrate an ability to safely care for the child such that the Court would be able to approve unsupervised visitation. The mother was awarded unsupervised visits at one time but was unable to maintain that level due to an incident in which an older sibling was hit in the forehead with a broom handle by the mother. . . .
>
> 19. The return of the child to [Mother's custody] would be contrary to the child's health and safety.

Dillahunt, the social worker responsible for monitoring Mother's contact with the children, testified as follows:

- Over a period of nearly three years, Mother consistently exhibited concerning behavior when caring for and visiting Jane and the other children.
- Mother hit Jake on the forehead with a broomstick.
- Mother frequently lost track of the children when they visited and needed redirection to effectively manage the children's behaviors and how to speak with them.
- When the children visited with Mother, she directed them to sit and watch television extensively, and allowed Jane, not yet four years old, to "spend[] excessive amount[s] of time on [Mother's] phone playing video games."

In light of the above evidence, we hold that the trial court did not err in determining that Mother was unfit to parent Jane.

To the extent Mother argues that her positive actions toward reunification were not given sufficient weight by the trial court, we emphasize that "[i]t is not the function of this Court to reweigh the evidence on appeal." *In re T.H. & M.H.*, __ N.C. App. __, __, 832 S.E.2d 162, 166 (2019) (quotations marks and citation omitted).

Although Mother argues that other findings of fact are unsupported by sufficient evidence, we need not address this argument, because the findings we have already concluded are supported by clear and convincing evidence are sufficient to support the trial court's ultimate finding that Mother is unfit to parent Jane. *See, e.g.*, *In re P.T.W.*, 250 N.C. App. 589, 602, 794 S.E.2d 843, 852 (2016) (citation omitted).

*C. Verification of Guardianship*

**[3]** Mother asserts that the trial court awarded guardianship to Jane's foster parents without making an evidentiary finding that they understood the legal significance of their appointment. We hold that the trial court performed its statutory duty.

Before a trial court can appoint a guardian, it must "verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-600(c) (2017); *see also* N.C. Gen. Stat. § 7B-906.1(j) (2017). The trial court does not need to "make any specific findings in order to make the verification." *In re J.E.*, 182 N.C. App. 612, 616-17, 643 S.E.2d 70, 73 (2007). "It is sufficient that the court receives and considers evidence that the guardians understand the legal significance of the guardianship." *In re L.M.*, 238 N.C. App. 345, 347, 767 S.E.2d 430, 432 (2014) (citation omitted).

Here, the foster parents testified at the hearing as to the following:

> [Trial Court]. Do you understand that, as the guardian, you would be—you would have the care, custody, and control of the child or could arrange a suitable placement for the child? Do you understand that?
>
> [Foster Father]. Yes.
>
> [Trial Court]. Do you understand that you would represent the child in legal actions before the Court?
>
> [Foster Father]. Yes.
>
> [Trial Court]. Do you understand—I'm not saying you would, but do you understand you could consent to marriage, enlisting in the armed forces, or enrollment in school?
>
> [Foster Father]. Yes.
>
> [Trial Court]. Do you understand that you could also consent to any necessary remedial, psychological, medical, or surgical treatment for the child?
>
> [Foster Father]. Yes.
>
> [Trial Court]. Do you understand that your authority as guardian shall continue until guardianship is terminated by a court order, until the child is emancipated

pursuant to a certain legal action or until she reached the age of majority?

[Foster Father]. Yes.

[Trial Court]. Do you understand that the Court would only terminate the guardianship if the Court found that the relationship between you and the child was no longer in the child's best interest, you became unfit, that you neglected your duties as guardian, or that you were unwilling or unable to continue assuming the guardian's duties?

[Foster Father]. Yes.

[Trial Court]. And are you willing and able to become a guardian?

[Foster Father]. Yes.

[Trial Court]. Are you willing to follow the Court's order regarding visitation with the parents?

[Foster Father]. Yes.

[Trial Court]. Are you willing to either—depending on what the Court would decide at some point, supervise or monitor the visitation or arrange for pick-up and drop-off if it ever became unsupervised that either you would do it, your wife would do it, or you would have someone that you designated do it?

[Foster Father]. Yes.

[Trial Court]. You are willing to accommodate that?

[Foster Father]. Yes, we will.

. . . .

[Direct Examination]. Okay. And did you hear everything your—

[Foster Mother]. I did.

[Direct Examination]. —husband testified to? And do you agree with all of that?

[Foster Mother]. Completely, yes.

[Direct Examination]. Do you understand the same things that the Judge has asked him, as far as your obligations?

[Foster Mother]. I do.

[Direct Examination]. And are you also willing to -- willing and able to provide for this child as her guardian?

[Foster Mother]. Completely, yes.

[Direct Examination]. Okay. And do you and your husband both care for her?

[Foster Mother]. Completely.

[Direct Examination]. Do you have—what type of emotions do you have with connection to her?

[Foster Mother]. A little too much.

[Direct Examination]. Okay. And you consider her as part of your family?

[Foster Mother]. Yes. . . .

[Cross Examination]. Will you provide a safe and loving home for her until she reaches the age of majority?

[Foster Mother]. Easily, yes.

[Cross Examination]. And meet all of her needs?

[Foster Mother]. Yes.

Dillahunt, the social worker, also testified that the foster parents understood their responsibilities as guardians and indicated their "desire to have [Jane] treated exactly as their biological children."

In its order, the trial court found that the foster parents "are committed to providing for the child for the remainder of her minority and beyond" and "are willing to become parties to this action." The above evidence and findings show that the trial court performed its duty under Section 7B-600(c) in verifying that Jane's foster parents understood the legal significance of their appointment as guardians. We need not review whether the trial court verified that the foster parents have the financial resources to care for Jane, as Mother does not argue that on appeal.

*D. Reunification Efforts*

**[4]** Mother finally argues that the trial court did not make all of the required findings of fact before ceasing reunification efforts. We agree and vacate the trial court's guardianship order and remand for the trial court to make the necessary findings.

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007) (citations omitted).

A trial court may cease reunification efforts following any permanency planning hearing if it "makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2017). In determining that efforts would be unsuccessful or contrary to the juvenile's well-being, the court must make written findings "demonstrat[ing] lack of success" as to each of the following:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

*Id.* § 7B-906.2(d).

Here, the trial court made limited findings relating only to portions of the factors listed above. The guardian *ad litem* concedes that the trial court made no finding regarding whether Mother demonstrated a lack of success in participating or cooperating with WCHS and the guardian *ad litem* or whether she has remained available to the court, WCHS, or the guardian *ad litem*.

Because "the trial court failed to make the requisite findings required to cease reunification efforts" under Section 7B-906.2(d), *In re D.A.*, 258 N.C. App. at 254, 811 S.E.2d at 734, we vacate the trial court's order and remand for it to make those findings. Although Mother also argues that the trial court's findings were not supported by credible evidence, we will not review that argument as we already determined its findings are deficient.

## III. CONCLUSION

We affirm the trial court's decision to waive further review hearings and hold that it properly found Mother is an unfit parent and that it performed its statutory duty in verifying that Jane's foster parents understood the legal significance of their appointment as guardians. We vacate and remand the trial court's guardianship order for it to make the required statutory findings before ceasing reunification efforts.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges STROUD and YOUNG concur.

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IN THE MATTER OF N.N.B.

No. COA19-261

Filed 5 May 2020

**Termination of Parental Rights—incarcerated parent—dependent juvenile—alternative child care arrangement**

The trial court did not err by terminating the parental rights of respondent-father on the ground the juvenile was a dependent juvenile where respondent was incarcerated for a term of 461 years and lacked an appropriate alternative child care arrangement because his mother and sister were not appropriate placements due to the juvenile's substantial need for psychiatric care.

Appeal by respondent from order entered on or about 6 November 2018 by Judge Tonia A. Cutchin in District Court, Guilford County. Heard in the Court of Appeals 18 February 2020.

*Mercedes O. Chut, for petitioner-appellee Guilford County Department of Health and Human Services.*

*David A. Perez for respondent-appellant father.*

*Parker Poe Adams & Bernstein LLP, by Lisa Sperber, for guardian ad litem.*

STROUD, Judge.

Respondent appeals termination of his parental rights. Because the evidence supports the trial court's finding of fact that respondent lacks an appropriate alternative child care arrangement, it did not err by concluding that Neal is a dependent juvenile or by terminating respondent's parental rights on this basis. We affirm.

## I. Background

On 30 May 2017, the Guilford County Department of Health and Human Services ("DHHS") filed a petition alleging that Neal,[1] age 11 at the time of the petition, was a neglected and dependent juvenile. The allegations in the petition focus on Neal's mental health issues exhibited in his problematic behaviors which include suicidal ideations, harming animals, and starting fires. This appeal concerns only Neal's father, respondent, as Neal's mother relinquished her parental rights in 2018.

Respondent is incarcerated serving a term of 461 years for rape, burglary, and other crimes. Respondent has not seen Neal since 2012 even though he was not incarcerated until 2014. Ultimately, respondent's rights were terminated based on failure to properly establish paternity, failure to provide proper care and supervision, and abandonment. Respondent appeals.

## II. Failure to Provide Proper Care and Supervision

Respondent challenges each ground of termination.

> A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage. A different standard of review applies to each stage. In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B–1111(a) exists. The standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law. Clear, cogent, and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt.
>
> If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under

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

> N.C. Gen. Stat. § 7B–1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child. The standard of review of the dispositional stage is whether the trial court abused its discretion in terminating parental rights.

*In re D.R.B.*, 182 N.C. App. 733, 735, 643 S.E.2d 77, 79 (2007). "Unchallenged findings are binding on appeal." *In re C.B.*, 245 N.C. App. 197, 199, 783 S.E.2d 206, 208 (2016).

North Carolina General Statute § 7B-1111 provides,

> (a) The court may terminate the parental rights upon a finding of one or more of the following:
>
> (6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111 (2017).

> A dependent child is defined as a juvenile in need of assistance or placement because the juvenile's parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement. Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.

*In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) (citation, quotation marks, ellipses, and brackets omitted).

Here, respondent concedes that due to his lengthy incarceration he cannot provide care or supervision but contends that he proposed two

relative placements – his mother and sister. Respondent contends "[t]he real issue before this Court is whether . . . [he] lacked an 'appropriate alternative child care arrangement.' " Respondent also does not challenge the trial court's findings of fact regarding his mother and sister. Respondent's mother "when contacted . . . stated she had failing health and was residing in a retirement community that did not allow children." The trial court found respondent's sister was not a "viable" option as Neal had been in level IV psychiatric treatment and had been moved to a level III group home. DHHS determined, and the trial court found, that no relative placement would be appropriate at this time because of the level of care Neal requires. Again, respondent does not challenge these findings of fact as unsupported by the evidence but contends "[t]his matter is unusual in that no relative placement could have been considered immediately appropriate as of the termination hearing."

Respondent notes his sister had been Neal's primary caregiver from his birth until 2008, when she moved to Georgia. Because respondent's sister lived in Georgia, an Interstate Compact on the Placement of Children ("ICPC") home study was required before Neal could be placed in her home. DHHS completed an ICPC Case Manager Statement of Interest form for respondent's sister and allowed her to have weekly telephone contact with Neal, continuing up to the time of the termination hearing. Respondent further explains that the trial court had also ordered DHHS to initiate the ICPC home study for his sister. But at that time, Neal was placed in Level IV Psychiatric Residential Treatment Facility ("PRTF"). When DHHS contacted the ICPC office, they asked that DHHS first determine the discharge plan for Neal from the PRTF. The PRTF recommended that Neal transition to a Level III group home and did not recommend placement with a relative because of Neal's substantial needs for psychiatric care. DHHS then suspended its plan to place Neal with respondent's sister, although DHHS still had plans to submit the ICPC request if a relative placement was ever deemed appropriate for Neal. Thus, respondent argues that he offered his sister as an appropriate child care arrangement but he was not allowed to have "any input or involvement whatsoever in the decision to transition Neal from a PRTF to a Level III group home." Respondent contends that even if he had not been incarcerated, "there is no reason to believe he would have had any more actual involvement as to the placement of his child in a level III group than he had while incarcerated."

Respondent cites to *In re C.B.*, where the child's mother did not propose appropriate child care alternatives and was uncooperative with DSS's attempts to provide mental health services for the child. 245 N.C.

App. at 211, 783 S.E.2d at 216. But *C.B.* is inapposite to this case. *See id.*, 245 N.C. App. 197, 783 S.E.2d 206.

In *C.B.*, the child suffered from severe mental health problems which resulted in "aggressive, assaultive, dangerous behaviors[.]" *Id.* at 203, 783 S.E.2d at 211. The child had been hospitalized several times, but the mother minimized the problem and claimed the child just had "seizures" although there was no evidence of any seizure disorder. *Id.* at 205, 783 S.E.2d at 212. The mother repeatedly refused to participate in intensive in-home treatment for the child because she believed she could handle the child on her own. *See id.* In *C.B.*, the mother challenged the trial court's findings of the severity of the child's mental needs and contended she was able to care for the child properly herself. *See id.* at 206, 783 S.E.2d at 212.

Respondent does not challenge the trial court's findings regarding Neal's serious mental health issues or need for a Level III placement. Respondent contends only that his sister is an "appropriate" placement in that she is available and willing and has a close relationship with Neal. But respondent's sister is not an "appropriate" placement for Neal because of his psychiatric needs. Respondent's sister may well be an "appropriate" placement for a child who does not require such a high level of care, but not for Neal.

Accordingly, the trial court did not err in concluding that Neal is a dependent juvenile and that respondent's rights should be terminated under North Carolina General Statute § 7B-1111(a)(6). This argument is overruled. As we have found one ground for termination, we need not address the others. *See In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93–94 (2004) ("Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground[s] . . . found by the trial court.").

## III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges INMAN and YOUNG concur.

IN RE WASHINGTON COUNTY SHERIFF'S OFFICE

No. COA18-653

Filed 5 May 2020

**Judges—judicial authority—advisory opinion—ex parte motion—no active case—disclosure of criminal investigative file**

A trial court exceeded its judicial authority by entering an advisory opinion on an ex parte motion, filed by the State and not in connection with any ongoing trial or criminal prosecution, which sought an in camera review and a determination of whether a criminal investigative file contained potentially exculpatory information subject to disclosure. The order was vacated because the court's directive to the State to disclose the file, which involved a law enforcement officer's conduct, to defendants and their counsel "in any criminal matter" in which the State intended to call the officer as a witness constituted an anticipatory and speculative judgment.

Judge BERGER dissenting.

Appeal by petitioner-appellant from orders entered 20 February and 1 March 2018 by Judge Wayland J. Sermons, Jr. in Washington County Superior Court. Heard in the Court of Appeals 28 March 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Jason P. Caccamo, for the State.*

*J. Michael McGuinness for petitioner-appellant.*

*Megan Milliken for The Southern States Police Benevolent Association and The North Carolina Police Benevolent Association, amicus curiae.*

MURPHY, Judge.

The District Attorney of Washington County ("the State") filed an Ex Parte Motion for In Camera Review in the Superior Court of Washington County "to determine whether or not [a criminal investigative file] contain[ed] potentially exculpatory information" involving Appellant "that the State would be required to disclose . . . in cases [in which] the State intends to call [Appellant] as a witness." The State's motion was not filed in correlation with any ongoing trial or criminal prosecution,

but for the purpose of determining whether the investigative file in question contained information the State would be required to disclose to potential criminal defendants in the future. The judge reviewed the file and ordered the District Attorney's Office to, "in any criminal matter wherein the State of North Carolina intends to call [Appellant] as a witness, disclose to the defendant and/or defendant's counsel the contents of" the investigative file.

On appeal, Appellant argues the judge erred in issuing the 20 February and 1 March 2018 *ex parte* orders because he was not provided notice and an opportunity to be heard. Appellant further contends that the judge erred in issuing the 1 March 2018 order because the judge (1) lacked subject matter jurisdiction to act on the State's *ex parte* motion for *in camera* review, (2) violated his procedural due process rights under the United States and North Carolina Constitutions, and (3) violated his rights to liberty and to enjoy the fruits of his labor under the North Carolina Constitution. The judge exceeded the limits of its jurisdiction by entering an advisory opinion, which is hereby vacated.

## BACKGROUND

Washington County Sheriff's Office criminal investigative file OCA #2017-08-0026 concerned an investigation conducted in part by Appellant, a North Carolina law enforcement officer. The State filed an *Ex Parte Motion for In Camera Review of Investigative Report and for Protective Order*.

Appellant was identified in the State's motion as "a potential witness in criminal cases." The State further alleged that Appellant "may have mislead [*sic*] and deceived a superior officer[,] . . . [and] may have not been truthful and honest in the preparation of the investigative report related to his actions that may have mislead [*sic*] and deceived a superior officer." Additionally, the State alleged that it had "a sufficient basis to believe that potential impeachment or exculpatory evidence exists within OCA #2017-08-0026."[1]

1. The State's motion references OCA #2017-08-0026 as an investigative file, but then alleges that the file is a personnel record and an internal affairs file. The judge's order makes the same statement. However, Appellant did not allege in any motion filed in the lower court that the file was a personnel record, nor does he argue on appeal that the criminal investigative file at issue is a personnel record that is subject to disclosure only pursuant to the terms of N.C.G.S. § 153A-98. In fact, in his brief, Appellant acknowledges that the records at issue are "investigative records involving [Appellant]." Moreover, there is no indication the file is an internal affairs file.

We note that an OCA number typically refers to the unique number assigned to criminal investigations by law enforcement agencies, and the file contained in the Record, Washington County Sheriff's Office OCA #2017-08-0026, concerned the investigation of a home invasion and shooting. Thus, we refer to the file as a criminal investigative file.

The judge ordered the District Attorney's Office, consistent with the request contained in the motion, to submit copies of the criminal investigative file to the judge "to determine whether or not it contain[ed] potentially exculpatory information that the State would be required to disclose" in future cases. The file contained documented inconsistencies in Appellant's reports relating to the criminal investigation and his description of events to his superiors.

On 1 March 2018, following the *in camera* review, the judge entered an order with the following findings of fact:

> 2. That [Appellant] was an investigatin[g] officer in Washington County Sheriff's Office OCA #2017-08-0026[.]
>
> . . .
>
> 5. The State has an affirmative ethical and constitutional obligation to disclose evidence favorable to a criminal defendant. . . . Counsel for the State is responsible for a failure to disclose exculpatory information in the possession of the police department, knowledge of which is imputed to the prosecutor.

The judge concluded as a matter of law that the information contained in the investigative file "contain[ed] potentially exculpatory information that the State would be required to disclose under *Brady*, *Giglio*[,] and/or *Laurie*, in cases involving [Appellant] as a witness." The judge also concluded as a matter of law that

> 8. The public policy concerns, and those of [Appellant], in protecting the confidentiality of this file is outweighed by the rights of criminal defendants in cases where [Appellant] is or may be a witness in accordance with *Brady*, *Giglio*[,] and *Laurie* material.
>
> 9. [T]here is a sufficient basis to believe that potential impeachment or exculpatory evidence exists within Washington County Sheriff's Office OCA #2017-08-0026[.]"

The judge ordered the State to "disclose to the defendant and/or defendant's counsel the contents" of the criminal investigative file "in any criminal matter" in which the State intends to call [Appellant] as a witness. The ordered disclosure was to be made "in compliance with the State's Constitutional responsibility to disclose potentially exculpatory information."

Per the terms of the order, the State notified Appellant of the order by a letter dated 1 March 2018. On 28 March 2018, Appellant noticed his

appeal from the judge's 20 February and 1 March 2018 orders. Appellant also filed a motion requesting the production of documents considered by the judge in issuing said orders. The judge granted Appellant's motion "on the express condition that such documents shall remain confidential between [Appellant] and his counsel." However, the judge authorized Appellant to "use [the] disclosed records in connection with any litigation arising out of the disclosure of [the] records," including the appeal now before us.

## ANALYSIS

In the context of *Brady* and *Giglio* disclosures, trial courts have the authority to require the government to disclose exculpatory and/or impeachment evidence. *State v. Martinez*, 212 N.C. App. 661, 666, 711 S.E.2d 787, 790-91 (2011); *see also State v. Lynn*, 157 N.C. App. 217, 224, 578 S.E.2d 628, 633 (2003). However, this matter is not a situation where the judge has issued an order requiring disclosure of exculpatory or impeachment evidence in a criminal matter over which the court is *presently* presiding. Instead, the judge's order here attempts to require disclosure "in any criminal matter wherein the State of North Carolina intends to call [Appellant] as a witness" in the future. There is a fine line between declaratory judgments, which trial courts have the statutory authority to enter, and advisory opinions, which go beyond a trial court's judicial authority. *See, e.g.*, *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949) ("The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice."); *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942) (noting that it is not the function of the courts "to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise"). Here, the judge's order is purely advisory and therefore an improper exercise of its power. *Duke Power Co.*, 222 at 204, 22 S.E.2d at 453 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 324, 80 L. Ed. 688, 699 (1936).

The judge's order in this matter is an anticipatory judgment providing for the contingency that Appellant is to be called as a witness by the State in a future criminal case. The judge's order requires the State to, "in any criminal matter wherein the State of North Carolina intends to call [Appellant] as a witness, disclose to the defendant and/or defendant's counsel the contents of Washington County Sheriff's Office OCA #2017-08-0026 . . . in compliance with the State's Constitutional responsibility to disclose potentially exculpatory information." Such an order is purely speculative and amounts to, using the language of our Supreme Court, "a purely advisory opinion which the parties might, so to speak,

put on ice to be used if and when occasion might arise." *Duke Power Co.*, 222 N.C. at 204, 22 S.E.2d at 453. Such an order exceeds the scope of the judge's power and must be vacated.

The advisory nature of the judge's order in this case is especially evident when we consider the alternative scenario in which it ruled the State is *not* required to disclose information contained in the investigative report in future cases. Would such a holding bind trial courts or District Attorneys from making independent *Brady* or *Giglio* determinations? Would future defendants be deprived of the opportunity to argue the exculpatory or impeachment value of the report? These questions are undoubtedly answered in the negative because in every criminal case, the prosecutor retains an "affirmative duty to disclose evidence favorable to a defendant[.]" *Kyles v. Whitley*, 514 U.S. 419, 432, 131 L. Ed. 2d 490, 505 (1995).

"The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . deal with theoretical problems, give advisory opinions, . . . , provide for contingencies which may hereafter arise, or give abstract opinions." *Little v. Wachovia Bank & Tr. Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960); *see also Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003) (holding that deciding an issue not "drawn into focus by [the court] proceedings" would "render an unnecessary advisory opinion"); *In re Davis' Custody*, 248 N.C. 423, 426, 103 S.E.2d 503, 505 (1958) (holding that a trial court "rendered an advisory opinion that [a father] shall not be bound by any order of the Domestic Relations Court . . . [regarding custody of two minors] . . . from this date forward") (internal quotation marks omitted); *State v. Herrin*, 213 N.C. App. 68, 75, 711 S.E.2d 802, 808 (2011) (holding that a sentencing matter was not ripe for appellate review because it would arise, if at all, only if defendant was ordered by a future court to serve a consecutive sentence); *In re Wright*, 137 N.C. App. 104, 112, 527 S.E.2d 70, 75 (2000) (holding that the question of whether a punishment was cruel and unusual was not "ripe for review" because the defendant had "been neither tried nor convicted of any crime"). Here, the trial court's order amounts to an improper advisory opinion, which must be vacated.

## CONCLUSION

Every defendant enjoys the right to evidence in the hands of the State which may have exculpatory or impeachment value. However, here, there is no actual controversy, as there are no actual defendants on the other side. Rather, the judge's order is an advisory opinion regarding

the State's obligation towards purely hypothetical future defendants. The issuance of the order was not a proper exercise of its judicial power.

VACATED.

Judge DILLON concurs.

Judge BERGER dissents with a separate opinion.

BERGER, Judge, dissenting in separate opinion.

I respectfully dissent.

First, it must be noted that petitioner seeks relief through a process which currently is not established in our law. Petitioner certainly advances reasonable concerns about the potential harm that could occur for law enforcement officers wrongly identified as having been untruthful. However, petitioner's concerns, and the procedure he seeks to implement, are better vetted and established by the legislature.

As Justice Scalia noted, "the court makes an amazing amount of decisions that ought to be made by the people." Judges are low-information decision makers. *See Dep't of Homeland Sec. v. New York*, 589 U.S. ___, ___ (2020) (Gorsuch, J., concurring). We are at all times limited to the parties before us, the information they provide, and the particular facts of their case. Before us in this case, we have a law enforcement officer from Washington County, in what is essentially an *in rem* proceeding. Petitioner seeks to establish a procedure that would impact prosecutors, police chiefs, sheriffs, and judges across the State of North Carolina. Petitioner wants the benefits of a new procedure with no input from public servants whose job it is to protect the public, protect constitutional rights, and seek justice.

"[R]ecognition of a new cause of action is a policy decision which falls within the province of the legislature." *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 656, 654 S.E.2d 76, 81 (2007) (quoting *Ipock v. Gilmore*, 85 N.C. App. 70, 73, 354 S.E.2d 315, 317 (1987)). Thus, these concerns should be addressed to the one hundred seventy men and women in our legislature. The people, through their elected representatives from across this state, would scrutinize information, arguments, and positions from all affected groups. In the long run, law enforcement officers may obtain a clear and certain process to not only establish a property right but to protect the same. If we do not stay in our separation-of-powers lane, we run the risk of creating, on the one extreme, a

system that does not adequately protect petitioner's concerns, and at the other, creating unworkable standards and procedures which lead to even more litigation.

To the merits of this matter, the majority concludes that the trial court did not have jurisdiction to issue the requested order. For the reasons stated below, I dissent from the majority opinion.

A prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

*Berger v. United States*, 295 U.S. 78, 88 (1935). "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice." N.C. Rules of Prof'l Conduct r. 3.8, cmt. 1 (2017).

North Carolina's District Attorneys are responsible for, *inter alia*, "the prosecution on behalf of the State of all criminal actions in" his or her prosecutorial district. N.C. Const. art. IV, § 18(1); *see also* N.C. Gen. Stat. § 7A-61 (2019). "The district attorney's performance of his duties . . . is tempered by his obligation to the defendant to assure that he is afforded his right to a fair trial." *State v. Barfield*, 298 N.C. 306, 331, 259 S.E.2d 510, 531 (1979).

The United States Supreme Court has acknowledged that criminal defendants have "what might loosely be called . . . constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). In *Brady v. Maryland*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "The *Brady* rule is based on the requirement of due process. Its purpose is . . . to ensure that a miscarriage of justice does not occur." *United States v. Bagley*, 473 U.S. 667, 675 (1985) (footnote omitted).

In *Giglio v. United States*, the United States Supreme Court expanded *Brady* to require disclosure of evidence that could be used to impeach the credibility of a State's witness "[w]hen the reliability of

[the] witness may well be determinative of guilt or innocence." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citation and quotation marks omitted). Further, "suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution." *Id.* at 153 (citation and quotation marks omitted).

In addition, prosecutors in the State of North Carolina are required to "make timely disclosure to the defense of all evidence or information . . . that tends to negate the guilt of the accused or mitigates the offense" without regard to materiality. N.C. Rules of Prof'l Conduct r. 3.8(d), r. 3.8 cmt. 4 (2017).

Evidence that a witness has been untruthful may be useful to a defendant, not only in calling into question the credibility of that witness, but also to attack "the reliability of [an] investigation." *Kyles v. Whitley*, 514 U.S. 419, 447 (1995). Thus, even without the issuance of the *Giglio* order by the trial court, pursuant to *Brady* and Rule 3.8(d) of the North Carolina Rules of Professional Conduct, the State would have a duty to disclose the criminal investigative file at issue here to any future defendant in any future case in which petitioner would testify.

In this case, the criminal investigative file in question contained evidence suggesting that petitioner "may have mislead (*sic*) and deceived a superior officer in the performance of his duties" and "may have not been truthful and honest in the preparation of the investigative report related to his actions that may have mislead (*sic*) and deceived a superior officer" such that the State had "a sufficient basis to believe that potential impeachment or exculpatory evidence" existed within the file. Disclosure of this evidence would be required for every criminal defendant in a case where petitioner was a potential witness. This is not speculative or anticipatory; it is basic criminal procedure. In fact, petitioner has not argued that the information contained in the criminal investigative file would not be subject to disclosure under *Brady* or *Giglio*, or the Rules of Professional Conduct.

The question of "[w]hether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted). "[A]n order of a court is void where the court's [subject matter] jurisdiction was never properly invoked." *State v. Santifort*, 257 N.C. App. 211, 219, 809 S.E.2d 213, 219 (2017).

"Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). Our General Assembly,

"within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State." *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975). Where jurisdiction is statutory and our legislature *has not* prescribed a certain manner, procedure, or limitation, the court is required to "utilize its inherent power and implement and follow procedures which effectively and practically . . . effectuate the intent of [the statute.]" *Santifort*, 257 N.C. App. at 221, 809 S.E.2d at 220-21; *see also State v. Hardy*, 293 N.C. 105, 124, 235 S.E.2d 828, 840 (1977) (explaining that the trial court is "not necessarily preclude[d] . . . from ordering discovery in his discretion.").

"Disclosure of records of criminal investigations . . . that have been transmitted to a district attorney or other attorney authorized to prosecute a violation of law shall be governed by [Section 132-1.4] and Chapter 15A of the General Statutes." N.C. Gen. Stat. § 132-1.4(g) (2019). "Records of criminal investigations conducted by public law enforcement agencies . . . may be released by order of a court of competent jurisdiction." N.C. Gen. Stat. § 132-1.4(a).

Pursuant to Section 132-1.4(b)(1),

> "Records of criminal investigations" means all records or any information that pertains to a person or group of persons that is compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law, including information derived from witnesses, laboratory tests, surveillance, investigators, confidential informants, photographs, and measurements. The term also includes any records, worksheets, reports, or analyses prepared or conducted by the North Carolina State Crime Laboratory at the request of any public law enforcement agency in connection with a criminal investigation.

N.C. Gen. Stat. § 132-1.4(b)(1).

Section 132-1.4 does not provide a precise procedure for a trial court's authorization to release records of criminal investigations. Thus, the trial court must "utilize its inherent power and implement and follow procedures which effectively and practically effectuate the intent of [the statute]" if it is to order the release of records of criminal

investigations. *In re Brooks*, 143 N.C. App. 601, 611, 548 S.E.2d 748, 755 (2001) (*purgandum*).

This Court has not specifically ruled on whether, and by what process, a trial court may properly review law enforcement investigation files *in camera* pursuant to an *ex parte* motion of a prosecutor to determine whether the content of the files requires disclosure under *Brady*, *Giglio*, or the Rules of Professional Conduct. However, our opinions in *In re Albemarle Mental Health Center*, 42 N.C. App. 292, 256 S.E.2d 818 (1979) and *In re Brooks* are instructive.[1]

In *Albemarle Mental Health* and *Brooks*, this Court determined whether the superior court had jurisdiction to issue *ex parte* orders for disclosure of certain records or information after *in camera* review where the General Statutes provided for judicial disclosure but did not "provide precise statutory directions for fulfilling this responsibility." *Albemarle Mental Health*, 42 N.C. App. at 296, 256 S.E.2d at 821. In those cases, this Court considered (1) whether the superior court's jurisdiction had been properly invoked under applicable statute, and (2) whether the process used to obtain the *ex parte* orders was in keeping with the intent of the statute.

In *Albemarle Mental Health*, a District Attorney learned that an employee at the Albemarle Mental Health Center had obtained information about an alleged murder from an unnamed patient. The District Attorney requested that the clinic's director provide the information either to him or to an agent at the State Bureau of Investigation. *Id.* at 293, 256 S.E.2d at 819. The clinic's director declined to provide the

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1. In *Santifort*, this Court deviated from its earlier holdings in *Albemarle Mental Health* and *Brooks* that a district attorney's failure to follow the Rules of Civil Procedure to initiate a special proceeding need not preclude the superior court's jurisdiction. *Santifort*, 257 N.C. App. at 222, 809 S.E.2d at 221. While the *Santifort* court noted that the State's *ex parte* motions should have been treated as initiating a special proceeding, it nonetheless held that "the State never took the steps necessary to invoke the superior court's jurisdiction" where a "special proceeding was not officially initiated nor docketed." *Id.* at 216, 222, 809 S.E.2d at 218, 221.

We note that "our Supreme Court has instructed this Court, 'where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.' *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). [*Santifort*] created a direct conflict in this area of the law by deviating from precedent." *In re I.W.P.*, 259 N.C. App. 254, 263, 815 S.E.2d 696, 704 (2018). "[W]here there is a conflicting line of cases, a panel of this Court should follow the older of those two lines." *Id.* at 263, 815 S.E.2d at 704 (quoting *Respess v. Respess*, 232 N.C. App 611, 625, 754 SE.2d 691 701 (2014)). Accordingly, *Albemarle Mental Health* and *Brooks* should control.

information citing physician/patient privilege under N.C. Gen. Stat. § 8-53, or psychologist/client privilege under N.C. Gen. Stat. § 8-53.3. *Id.* at 298, 256 S.E.2d at 822.

"The District Attorney, sensitive to his responsibility to enforce the criminal law in his district," *Id.* at 300, 256 S.E.2d at 823, then filed a motion in the superior court, pursuant to N.C. Gen. Stat. § 8-53.3, requesting an *in camera* hearing "to determine: (1) whether [the requested] information . . . constituted privileged information; (2) whether such information was relevant to an alleged homicide . . . , and; (3) whether disclosure of such information to law enforcement officers was necessary to a proper administration of justice." *Id.* at 293, 256 S.E.2d at 819. The District Attorney asked that the superior court "issue an order . . . compelling disclosure of the information *if the court determined* that the information was relevant to criminal acts and that its disclosure was necessary to provide for the proper administration of justice." *Id.* at 293-94, 256 S.E.2d at 819-20 (emphasis added).

The superior court ordered the clinic director and employees to appear, but concluded that it did not have jurisdiction "to proceed and to determine the merits, rights and duties of the parties" because "[n]o criminal proceeding ha[d] been instituted," and "[n]o subpoena or other lawful process of the Court had been issued in any judicial proceeding giving the Court jurisdiction over the . . . [c]enter." *Id.* at 294-95, 256 S.E.2d at 818.

On appeal, the State argued that the "cause [was] in the nature of a special proceeding." *Id.* at 295, 256 S.E.2d at 820.

> G.S. 1-2 provides that "An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." G.S. 1-3 provides that "Every other remedy is a special proceeding." Moreover, G.S. 1-394 provides in part that "Special proceedings against *adverse parties* shall be commenced as is prescribed for civil actions." . . . [P]ursuant to G.S. 1A-1, Rule 3 . . . a civil action may be commenced only by the filing of a complaint or by the issuance of a summons with permission of the court to file complaint within twenty days.

*Id.* at 295-96, 256 S.E.2d at 820-21 (emphasis added). The respondent argued that because the special proceeding was not commenced pursuant to the Rules of Civil Procedure, the superior court did not have jurisdiction. *Id.* at 295, 256 S.E.2d at 820.

This Court noted that while the proceeding was "[c]learly . . . not commenced pursuant to our statutory requirements for initiating a civil action . . . our law is [not] so inflexible as to preclude the superior court's jurisdiction in a matter of such moment." *Id.* at 296, 256 S.E.2d at 821. This Court further stated that

> [t]he superior court is the proper trial division for [a special] proceeding of this nature. *See* G.S. 7A-246. The judicial power of the superior court is that which is granted by the Constitution and laws of the State. *Baker v. Varser*, 239 N.C. 180, 79 S.E. 2d 757 (1954). Within the guidelines of our Constitution, the legislature is charged with the responsibility of providing the necessary procedures for the proper commencement of a matter before the courts. Occasionally, however, the proscribed (*sic*) procedures of a statutory scheme fail to embrace the unanticipated and extraordinary proceeding such as that disclosed by the record before us. In similar situations, it has been long held that courts have the inherent power to assume jurisdiction and issue necessary process in order to fulfill their assigned mission of administering justice efficiently and promptly.

*Id.* at 296, 256 S.E.2d at 821. Where "[o]ur legislature plainly intended that the implementation of [statutory] provisos . . . be a function of the judiciary[,]" but failed to "provide precise statutory directions for fulfilling this responsibility, it becomes incumbent upon the courts to proceed in a manner consistent with law." *Id.* at 296, 256 S.E.2d at 821.

Under the above facts, this Court determined that the superior court in *Albemarle Mental Health* had "proceed[ed] in a manner consistent with" the statutory proviso that "the presiding judge of a superior court may compel [ ] disclosure, if in his opinion the same is necessary to a proper administration of justice." *Id.* at 296-97, 256 S.E.2d at 821-22 (citation and quotation marks omitted).

In *Brooks*, the Orange County District Attorney filed *ex parte* petitions seeking the release of the personnel and internal affairs files of two police officers. The petitions included factual allegations related to an assault allegedly committed by the officers, as well as a statement by the District Attorney that the files were "necessary to a full and complete investigation . . . and [release of the files] would be in the best interest of the administration of justice." *Brooks*, 143 N.C. App. at 602, 548 S.E.2d at 750. The petitions "were not supported by affidavits, [and did not] reference any legal authority allowing [the District Attorney] to seek

the release." *Id.* at 602, 548 S.E.2d at 750. The superior court granted the District Attorney's requests and ordered the release of the personnel and internal affairs records. The officers appealed, arguing, *inter alia*, that the superior court had neither jurisdiction, nor the authority to order the disclosure of the records. *Id.* at 606, 548 S.E.2d at 752. The State argued that "the [s]uperior [c]ourt retained the authority to grant [the District Attorney's] request pursuant to North Carolina General Statutes section 160A-168." *Id.* at 606, 548 N.C. App. at 752. According to the officers, because the applicable statute "provide[d] no statutory basis to initiate such a release of documents on an *ex parte* basis," it does not authorize the release of their personnel files. *Id.* at 606, 548 N.C. App. at 752 (quotation marks omitted).

This Court concluded that where a statute authorizes the disclosure of "personnel files by order of a court of competent jurisdiction," but does not "specify the exact procedure required to obtain such an order, or whether such an order could be sought without first filing a civil or criminal action." *Id.* at 608-09, 548 S.E.2d at 753.

> [T]here is nothing inherent in the wording of [the statute] that would *prohibit* the court in the proper administration of justice from requiring disclosure . . . the [s]uperior [c]ourt [is] required to exercise its inherent or implied power for the proper administration of justice and fashion an order allowing for the disclosure of the records pursuant to [the statute].

*Id.* at 608-09, 548 S.E.2d at 753 (quotation marks omitted). Furthermore, this Court reasoned that the proceeding before the superior court was a special proceeding because "it was not an action in an ordinary proceeding in a court of justice." *Id.* at 609, 548 S.E.2d at 754 (*purgandum*). "[T]he [s]uperior [c]ourt is the proper division . . . for the hearing and trial of all special proceedings." *Id.* at 609, 548 S.E.2d at 754. (citation and quotation marks omitted). Therefore, the District Attorney's failure to "comply with the Rules of Civil Procedure . . . was not fatal." *Id.* at 609, 548 S.E.2d at 754.

This Court ultimately held that the superior court erred in ordering the release of the police officer's personnel files. We found the superior court had failed to "implement and follow procedures which 'effectively and practically . . . effectuate[d] the intent of [Section 160A-168],' that an officer's files remain confidential. . . ." where "[t]he petitions were unsworn, not accompanied by any affidavits or other similar evidence, and amounted to nothing more than [the District Attorney's] own opinion—that the disclosure of the officers' files was 'in the best

interest of the administration of justice.' " *Id.* at 611, 548 S.E.2d at 755 (citation omitted).

Similar to *Albemarle Mental Health* and *Brooks*, the prosecutor here filed the State's *Ex Parte* Motion for *In Camera* Review of Investigative Report and for Protective Order (State's *Ex Parte* Motion) in recognition of an underlying duty—in those cases, to investigate and prosecute an alleged crime, here, to disclose information pursuant to *Brady*, *Giglio*, and the Rules of Professional Conduct.

In this case, the criminal investigative file consists of investigation report forms, victim and witness statements, supplementary investigation reports, suspect interview notes, arrest warrants, arrest reports, release orders, DNA collection forms, fingerprint cards, suspect photos, and lineup related materials "that [were] compiled by [the Washington County Sheriff's Office] for the purpose of" solving a home invasion and alleged assault with a deadly weapon. N.G. Gen Stat. § 132-1.4(b)(1). Under the plain language of Section 132-1.4, these records are law enforcement "[r]ecords of criminal investigations" subject to disclosure "by order of a court of competent jurisdiction." N.C. Gen. Stat. § 132-1.4(a).

> However, the legislature failed to specify the exact procedure required to obtain such an order, or whether such an order could be sought without first filing a civil or criminal action. As in the case of [*Albemarle*] *Mental Health* [], the legislature's failure to provide for the proper procedure did not negate the Superior Court's authority, granted by [Section 132-1.4], to order the disclosure of the [law enforcement investigation files]. For there is "nothing inherent in the wording of [Section 132-1.4] that would *prohibit* the court in the proper administration of justice from requiring disclosure prior to the initiation of criminal charges or the commencement of a civil action." [*Albemarle*] *Mental Health Center*, 42 N.C. App. at 297, 256 S.E.2d at 822. As such, this is one of those "extraordinary proceedings" in which the Superior Court was required to exercise "its inherent or implied power for the proper administration of justice" and fashion an order allowing for the disclosure of the records pursuant to [Section 132-1.4]. *Id.* at 296, 256 S.E.2d at 821.
>
> Like the proceeding[s] in [*Albemarle*] *Mental Health* [] [and *Brooks*,] the proceeding in the present case was a "special proceeding," in that it was not "an action [] in an

> ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." N.C. Gen. Stat. § 1-2 (1999); *see also* N.C. Gen. Stat. § 1-3 (1999) (stating that actions not defined in section 1-2 are "special proceedings"). Unlike the statute discussed in [*Albemarle*] *Mental Health* [], the statute at issue in the present appeal does not specify which division of court is authorized to issue the order allowing disclosure. However, our General Statutes mandate that the Superior Court "is the proper division, without regard to amount in controversy, for the hearing and trial of all special proceedings." N.C. Gen. Stat. § 7A-246 (1999). Although [the district attorney] did not comply with the Rules of Civil Procedure, *see* N.C. Gen. Stat. § 1-393 (1999) (stating that Rules of Civil Procedure apply to special proceedings), like the DA's actions in [*Albemarle*] *Mental Health* [], such failure was not fatal to his [motion].

*Brooks*, 143 N.C. App. at 608-09, 548 S.E.2d at 753-54.

In both *Albemarle Mental Health* and *Brooks*, this Court held that the superior court had "jurisdiction to proceed and to determine the merits, rights and duties of the parties," in a special proceeding that was "not commenced pursuant to our statutory requirements for initiating a civil action." *Albemarle Mental Health*, 42 N.C. App. at 295-96, 256 S.E.2d at 820-21; *see also Brooks*, 143 N.C. App. at 609, 548 S.E.2d at 754 ("Although [the District Attorney] did not comply with the Rules of Civil Procedure, . . . such failure was not fatal to [his] petitions.").

Here, Section 132-1.4 provides that a court of competent jurisdiction may order the release of certain records. N.C. Gen Stat. § 132-1.4. However, Section 132-1.4 does not grant any individual a property or privacy interest in the content of criminal investigative files, or procedural safeguards surrounding disclosure of the information contained therein.

In addition, the underlying purpose of seeking the superior court's *ex parte* review and ultimate disclosure should be a relevant consideration. In *Brooks*, the evidence was necessary to allow the trial court to "make an independent determination as to whether the interests of justice require[d] disclosure of the confidential employment information." *Brooks*, 143 N.C. App. at 612, 548 S.E.2d at 755. Such is the case here. The prosecutor was seeking an independent judicial determination as to whether or not the criminal investigative file contained *Brady/Giglio*

information subject to disclosure. As noted above, all defendants have a constitutional right to exculpatory and impeachment evidence. Here, the disclosure of the evidence at issue is necessary to accomplish that constitutional requirement and to serve the ends of justice for all criminal cases in which petitioner may be called to testify.

However, unlike in *Brooks*, the prosecutor in this case neither encouraged nor discouraged disclosure of the criminal investigative file. Rather, as in *Albemarle Mental Health*, the prosecutor requested that the court conduct an independent review of the criminal investigative file to determine whether it should be disclosed under *Brady* and *Giglio*. Contrary to petitioner's argument, there was no additional or different information necessary to allow the trial court to make an independent judgment on disclosure of the criminal investigative file. The only question was whether the evidence contained in the file could implicate *Brady* or *Giglio* concerns.

The purpose of Section 132-1.4 is to limit access to criminal investigative files. There are relatively few protections or procedural guarantees available to any individual that provides or obtains information in a criminal investigation. The over-arching concern is protecting the constitutional rights of criminal defendants. The *ex parte* motion here sought to do just that: protect the rights of future criminal defendants by complying with legal and ethical requirements.

Here, the trial court proceeded within the intent of Section 132-1.4 to limit access to the file to appropriate parties and situations. The District Attorney's Office had a constitutional duty and ethical obligation to release the contents of this particular criminal investigative file. The trial court acted pursuant to statutory authority under Section 132-1.4 and followed a procedure consistent with the intent of that statute.

However, while the trial court had authority to order the release of the criminal investigative files subject to its *Giglio* order, this Court is without jurisdiction to reach the merits of petitioner's claims. "Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court." N.C. Gen. Stat. § 1A-1, Rule 3 (2019).

To appeal from a trial court to this Court, one must be an aggrieved party to the proceeding from which he or she wishes to appeal. N.C. Gen. Stat. § 1-271 (2019); *see also Duke Power Co. v. Salisbury Zoning Bd. of Adj.*, 20 N.C. App. 730, 731-32, 202 S.E.2d 607, 608 (1974). Petitioner was not a party to the special proceeding, which was initiated by the State's

*ex parte* motion. In addition, as touched on above, petitioner has no recognized personal, privacy, or property interest in the contents of the criminal investigative file. While one certainly understands petitioner's preference that the file not be released pursuant to *Brady* and *Giglio*, the petitioner was not a party to the proceeding within the meaning of our Appellate Rules. Thus, we should "dismiss the appeal for want of jurisdiction." *Langley v. Gore*, 242 N.C. 302, 303, 87 S.E. 2d 519, 520 (1955).

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PAMELA LAUZIERE, EMPLOYEE, PLAINTIFF
v.
STANLEY MARTIN COMMUNITIES, LLC, EMPLOYER, AND AMERICAN ZURICH INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA18-982

Filed 5 May 2020

**Workers' Compensation—failure to prosecute—claim dismissed with prejudice—findings—evidentiary support**

The Industrial Commission erred by upholding the dismissal with prejudice of plaintiff's worker's compensation claim as a sanction for failure to prosecute (based on plaintiff's failure to fully and timely comply with discovery requests and to take any action to pursue her claim for at least a year) where the Commission's findings were unsupported by the evidence, including that defendants were materially prejudiced and bore substantial monetary expenses as a result of plaintiff's lack of action, and that lesser sanctions would have been inadequate based on the damage to defendants' ability to defend the claim and because defendants would be unlikely to recoup their costs from plaintiff.

Judge DILLON concurring in part and dissenting in part.

Appeal by Plaintiff from Opinion and Award entered 22 May 2018 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 10 April 2019.

*Lennon, Camak & Bertics, PLLC, by S. Neal Camak and Michael W. Bertics, for plaintiff-appellant.*

*Lewis & Roberts, P.L.L.C., by Mallory E. Lidaka and Bryan L. Cantley, for defendants-appellees.*

MURPHY, Judge.

The North Carolina Industrial Commission's ("the Commission") conclusions of law must be justified by its findings of fact and its findings of fact must be supported by competent evidence. As a sanction, the Full Industrial Commission dismissed Pamela Lauziere's ("Lauziere") claim with prejudice for failure to prosecute after it found that the "monetary damages incurred by [Stanley Martin Communities ("Stanley Martin") and Zurich American Insurance, (together, "Defendants")] as a result of [Lauziere's] conduct could not be recouped by Defendants even if ordered by the Commission." This finding is unsupported by the evidence because no competent evidence suggests Lauziere is unable to pay monetary damages or the Defendants are unable to recoup their losses. Accordingly, we reverse and remand for further proceedings.

## BACKGROUND

Lauziere was a realtor for Stanley Martin. On 20 September 2015, Lauziere allegedly sustained an injury while trying to manually shut a garage door at a model home. Stanley Martin denied Lauziere's claim for the alleged injuries.

Lauziere filed her request for hearing with the Commission on 30 November 2015. On 7 January 2016, Defendants sent Lauziere prehearing interrogatories and a *Request for Production of Documents*. This first set of discovery requests asked for information including medical information or documentation detailing Lauziere's medical history before and after the alleged injury. In February 2016, Lauziere responded to Defendants' first set of discovery requests. In part, her counsel responded that certain medical records were unavailable and would be "supplemented" at a later time. Following an impasse at a Commission ordered mediation, Lauziere's attorney was allowed to withdraw by order filed 10 March 2016. On 16 March 2016, Defendants served a second set of discovery requests on the now pro se Lauziere. The parties received notice the case was set for hearing on 3 May 2016.

On 22 April 2016, seven days after the 30-day deadline for Lauziere to file her discovery responses, Defendants moved for an order compelling Lauziere to respond to their second set of discovery requests. Three days later, Lauziere underwent major lower back surgery, and she notified Defendants of her condition. Lauziere did not file a response to Defendants' Motion to Compel. On 28 April 2016, the deputy commissioner continued the case off of his 3 May 2016 hearing docket. On 16 June 2016, in an email to Defendant's counsel, Lauziere responded to

Defendants' second set of discovery and requested her case be set on an expedited hearing docket. Six days later, Lauziere emailed Defendants to confirm they received her 16 June 2016 correspondence, but Defendants responded alleging insufficiency.

Over a year passed.

On 13 June 2017, Defendants moved to dismiss with prejudice. Lauziere responded to that motion within 24 hours. On 6 September 2017, a hearing was held on the *Motion to Dismiss with Prejudice*, and Lauziere attended this hearing pro se. Five days later, the Commission filed an Opinion and Award dismissing Lauziere's case with prejudice in accordance with Industrial Commission Rule 616(b).

Lauziere obtained legal counsel and appealed to the Full Industrial Commission on 18 September 2017. On 22 May 2018, the Full Industrial Commission filed an Opinion and Award affirming the decision dismissing Lauziere's case with prejudice. Plaintiff timely appeals.

## ANALYSIS

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006) (citation omitted). However, "the choice of sanctions is a matter reviewed for abuse of discretion only." *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 16, 510 S.E.2d 388, 392 (1999). Factors we have considered include the exclusivity provision of the Workers' Compensation Act, "the appropriateness of alternative sanctions under Rule 37, the proportionality of dismissal to the actions meriting sanction, and whether other statutory powers, such as holding a person in contempt . . . , can effectuate the result desired by the imposition of sanctions." *Id.* at 17, 510 S.E.2d at 393. We held, "when viewed in light of policy concerns of the Workers' Compensation Act, dismissing [the plaintiff's] case was an abuse of discretion" "because it effectively terminate[d the plaintiff's] exclusive remedy when other less permanent sanctions, such as civil contempt, were available to [the] Deputy Commissioner." *Id.*

The sole issue on appeal is whether the Commission erred in dismissing Lauziere's claim with prejudice. The Commission has "inherent judicial authority to dismiss a claim with or without prejudice for failure to prosecute," and this reflects its "power to efficiently administer the Workers' Compensation Act." *Lee v. Roses*, 162 N.C. App. 129,

131, 590 S.E.2d 404, 406 (2004). Under Rule 616(b) of the Industrial Commission Rules,

> [u]pon notice and opportunity to be heard, any claim may be dismissed with or without prejudice by the Commission on its own motion or by motion of any party if the Commission finds that the party failed to prosecute or to comply with the rules in this Subchapter or any Order of the Commission.

11 N.C.A.C. 23A.0616(b) (2019).

Neither the Workers' Compensation Act nor the Commission's Rules provide much direction as to when a finding of failure to prosecute is proper or what types of sanctions are appropriate under the circumstances. *Lentz v. Phil's Toy Store*, 228 N.C. App. 416, 421, 747 S.E.2d 127, 131 (2013). As a result, we look to Civil Procedure Rule 41(b) for guidance. *Id.* Rule 41(b) "allows a defendant to move for dismissal of a case for failure of plaintiff to prosecute, and requires a determination that 'plaintiff or his attorney manifests an intent to thwart the progress of the action or engages in some delaying tactic.' " *Id.* (internal marks and alterations omitted) (quoting *Lee*, 162 N.C. App. at 132, 590 S.E.2d at 407). We have determined that, before the Commission can dismiss with prejudice a workers' compensation claim for failure to prosecute under Rule 616(b), the Commission "must address . . . three factors in its order." *Lee*, 162 N.C. App. at 132-33, 590 S.E.2d at 407.

First, "whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter." *Id.* at 133, 590 S.E.2d at 407 (quoting *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001)). Second, "the amount of prejudice, if any, to the defendant caused by the plaintiff's failure to prosecute." *Id.* (internal alterations omitted). Third, "the reason, if one exists, that sanctions short of dismissal would not suffice." *Id.* at 133, 590 S.E.2d at 407. The Commission's "findings of fact on these factors are conclusive on appeal if there is competent evidence to support its findings." *Lentz*, 228 N.C. App. at 421, 747 S.E.2d at 131-32.

"Our courts," however, "have stated that dismissal with prejudice is the most severe sanction available to the court in a civil case, and thus, it should not be readily granted." *Lee*, 162 N.C. App. at 132, 590 S.E.2d at 407. "This principle applies equally to the dismissal of a workers' compensation claim at the Industrial Commission since prosecution pursuant to the Workers' Compensation Act is an injured worker's exclusive remedy." *Id.* "Accordingly, the Full Commission err[s] as a matter of law when it . . . affirm[s] the deputy commissioner's order dismissing

plaintiff's claim with prejudice for failure to prosecute without . . . the necessary findings of fact and conclusions of law to support its order[,]" *Id.* at 133, 590 S.E.2d at 408, and is an abuse of the Commission's discretion. *See Matthews*, 132 N.C. App. at 17, 510 S.E.2d at 393.

Further, a finding of the Commission based on legally incompetent evidence is not conclusive. *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957); *see Ballenger v. Burris Indus., Inc.*, 66 N.C. App. 556, 568, 311 S.E.2d 881, 888 (1984) (providing that we can declare when proffered evidence "does not constitute any sufficient competent evidence on which to base a denial of" a workers' compensation claim). Upon our review of the Record—a record devoid of an evidentiary hearing—the Commission erred on three grounds due to a lack of competent evidence.

To begin, Finding of Fact 24 is unsupported by evidence. The finding states,

> [b]ased upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Defendants have been *materially prejudiced* by [Lauziere]'s failure to respond to discovery or otherwise prosecute her claim for a year. [Lauziere] has thereby delayed adjudication of this matter and deprived Defendants of any meaningful opportunity to investigate or present defenses to [Lauziere]'s claim or to *direct care* if the claim is ultimately determined on the merits and found to be compensable.

(Emphasis added). No competent evidence in the Record supports that Defendants have been materially prejudiced. For instance, Defendants proffered nothing to show how the delay impaired their ability to locate witnesses, medical records, treating physicians, or any other data. As to the argument Defendants were prejudiced by being unable to direct medical care, we have "long held that the right to direct medical treatment is triggered only when the employer has accepted the claim as compensable." *Yingling v. Bank of Am.*, 225 N.C. App. 820, 838, 741 S.E.2d 395, 407 (2013) (internal marks omitted). This principle still applies when an employer denies a claim and then seeks dismissal with prejudice for failure to prosecute; an employer cannot with one breath deny a worker's compensation claim and with the next breath cry prejudice. *See id.* at 839, 741 S.E.2d at 407; *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 624, 540 S.E.2d 785, 788 (2000) ("But until the employer accepts the obligations of its duty, i.e., paying for medical treatment, it should not enjoy the benefits of its right, i.e., directing how that treatment is to be carried out."). Defendants denied Lauziere's claim and had

no right to direct her medical care. Finding of Fact 24 is not supported by evidence.

Next, Finding of Fact 25 also lacks evidentiary support. The finding states,

> [b]ased upon a preponderance of the evidence in view of the entire record, the Full Commission finds that *Defendants have borne substantial monetary expenses* as a result of [Lauziere]'s behavior in this matter. Among other things, Defendants have been forced to maintain an open file and prepare and travel for anticipated litigation, including mediation and scheduled hearings.

(Emphasis added). Defendants may have maintained an open file as well as prepared and traveled for anticipated litigation. But no evidence in the Record provides how much money Defendants expended, how often they traveled, or how far they traveled, let alone the unsupported conclusion Defendants bore "substantial" expenses. We do not assume mere motions, orders, correspondence, or hearing transcripts can show prejudice. These documents, standing alone, do not shed light on how much time or money was expended. Contrast this with *Lentz* where "[c]ompetent evidence in the record support[ed] the Commission's finding that the file in plaintiff's case [was] 'replete with motions, correspondence, and hearing transcripts *documenting the time and effort defendants have expended* related to defending plaintiff's claim and preparing for multiple hearings.' " *Lentz*, 228 N.C. App. at 424, 747 S.E.2d at 133 (emphasis added). The Record here, by contrast, is bereft of anything "documenting the time and effort" Defendants expended over defending Lauziere's claim. *Id.* No evidence is referenced competent to provide an inference for the amounts of time, effort, or money Defendants expended. Thus, Finding of Fact 25 is also unsupported by evidence.

Finally, the Commission considered the sanctions prong of the *Lee* test and listed another finding[1] in Conclusion of Law 5:

> A sanction short of dismissal with prejudice will not suffice in this case because no other sanction is appropriate

1. "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." *Brown v. Charlotte-Mecklenburg Bd. of Ed.*, 269 N.C. 667, 670, 153 S.E.2d 335, 338 (1967). Although the Commission designated this statement a conclusion of law, it is a finding of fact. *See Martinez v. W. Carolina Univ.*, 49 N.C. App. 234, 239, 271 S.E.2d 91, 94 (1980) ("[T]he designations 'Finding of Fact' or 'Conclusion of Law' by the commission" are not conclusive).

> given that: (1) [Lauziere] delays and continues to delay this matter, (2) Defendants' ability to litigate and defend this claim has been irrevocably degraded by [Lauziere]'s actions and inactions, and (3) monetary damages incurred by Defendants as a result of [Lauziere]'s *conduct could not be recouped by Defendants* even if ordered by the Commission. Given the foregoing, sanctions short of dismissal could not provide appropriate or proportional relief to Defendants.

(Emphasis added). This suggests the Commission had evidence that Lauziere, if so ordered, could not pay a monetary sanction. Such evidence does not exist in the Record. At best, the Commission found that "Defendants have borne substantial monetary expenses as a result of [Lauziere's] behavior in this matter." This may be so, but neither this finding nor any evidence in the Record concerns Lauziere's ability to pay a monetary sanction or how costs to Defendants are otherwise unrecoupable. Thus, the finding that Defendants' "monetary damages . . . could not be recouped" is unsupported by the evidence in the Record.

Additionally, there is no finding of fact, nor any competent evidence, supporting the contention that "Defendants' ability to litigate and defend this claim has been irrevocably degraded." This claim has not yet been reached on the merits, and as outlined above there is no indication that Defendants cannot fully investigate and defend this claim with the same ferocity that they otherwise would have upon timely receiving the requested discovery. They seemingly will have the same access to evidence, witnesses, and medical records they otherwise would have had if discovery had been timely provided. The only irrevocably lost opportunity Defendants have suffered that is discussed by the Commission is the potential "to direct care if the claim is ultimately determined on the merits and found to be compensable." However, as discussed above, this is not a loss that could be properly considered by the Commission as an employer has no right to direct care until they accept the underlying claim as compensable. Even monetary losses in the form of legal expenses as a result of Plaintiff's delay seemingly could be recouped, as there is no evidence suggesting otherwise. As a result, there are no findings of fact to support the conclusion that the harm done to Defendants by Lauziere's delay was irrevocable.

Ultimately, this means the only finding the Commission used to support its conclusion that "[a] sanction short of dismissal with prejudice will not suffice" was "[Lauziere] delays and continues to delay this

matter[.]" This finding alone does not support the conclusion that other sanctions would not have sufficed. The test in *Lee* requires the analysis of all three factors, the first of which is there was an unreasonable delay, and the third of which is sanctions short of dismissal with prejudice are inadequate. If the Commission could satisfy this third factor simply by stating that the Plaintiff has delayed the matter, essentially restating a part of the first factor of the *Lee* test, then the third factor would be rendered mere surplusage.

"[T]he Commission's findings are conclusory and not supported by competent evidence." *See Shaw v. United Parcel Serv.*, 116 N.C. App. 598, 602, 449 S.E.2d 50, 53 (1994), *aff'd*, 342 N.C. 189, 463 S.E.2d 78 (1995). No competent evidence in the Record implies that Defendants were prejudiced by the delay, were wrongfully deprived of a right to direct care, were burdened with substantial monetary expenses or were unable to recoup the same.

To prevent future inefficiency, delay, or harm to the parties, we address the utility of available sanctions under the Workers' Compensation Act in these circumstances. Failure to comply with an order to compel is not the same as failure to prosecute, and evidence applicable to the former may be inapplicable to the latter. Without the necessary evidence or findings, other less permanent sanctions remained available, such as civil contempt. *See* N.C.G.S. § 97-80(g) (2019) ("The Commission or any member or deputy thereof shall have the same power as a judicial officer . . . to hold a person in civil contempt . . . for failure to comply with an order of the Commission, Commission member, or deputy"); *see*, *e.g.*, *In re Hayes*, 200 N.C. 133, 141, 156 S.E. 791, 795 (1931) (discussing "the power to adjudge [a] witness in contempt and to punish for such contempt"). This is not to say that an order for civil contempt is needed before the Commission can dismiss with prejudice for failure to prosecute. However, "in light of the policy behind North Carolina's Workers' Compensation Act, to provide a swift and certain remedy to an injured worker[,] to ensure a limited and determinate liability for employers[,]" and to furnish Lauziere's "exclusive remedy," *id.* at 16-17, 510 S.E.2d at 393, the Commission, when applying the *Lee* test, must ensure its conclusions are justified by the findings of fact and those findings of fact are supported by competent evidence. *See Chambers*, 360 N.C. at 611-12, 636 S.E.2d at 555 (declaring that "[i]f the conclusions of the Commission are based upon a deficiency of evidence or misapprehension of the law, the case should be remanded so that the evidence may be considered in its true legal light") (internal marks, alterations, and citations omitted).

## CONCLUSION

"[T]he Full Commission erred as a matter of law when it . . . affirmed the deputy commissioner's order dismissing plaintiff's claim with prejudice for failure to prosecute without . . . the necessary findings of fact and conclusions of law to support its order." *Lee*, 162 N.C. App. at 133, 590 S.E.2d at 408. "The order of dismissal is reversed and this cause remanded to the Industrial Commission for proceedings consistent with this opinion." *Id.* at 133-34, 590 S.E.2d at 408.

REVERSED AND REMANDED.

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

Judge HAMPSON concurs.

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

The Full Commission has entered an order dismissing Plaintiff's workers' compensation claim. The majority concludes that the Full Commission's order must be *reversed* and remanded because several of the Commission's findings are not supported by the evidence and that the remaining findings do not support an order of dismissal. I conclude, however, that the appropriate mandate is for the Full Commission's order to be *vacated* and remanded for further proceedings.[1] I believe that it would not be an abuse of discretion for the Full Commission to have ordered the dismissal based on its findings that I conclude *are*

1. The majority's mandate is "reversed and remanded." "Reverse" and "vacate" are often used interchangeably by appellate judges. There is, indeed, some gray areas as to when "reverse" is the appropriate mandate and when "vacate" may be more appropriate. To me, "vacate" generally suggests (absent any clearer instructions in the opinion) that an order is being eliminated but not being replaced with a contrary order, so that "vacate and remand" generally suggests that the trial court is to reconsider the matter, but still *could* reach the same result. "Reverse," though, suggests that the trial court got it wrong, so that "reverse and remanded" suggests that the trial court either enter a new order as directed or reconsider the matter, but may not reach the same result. Admittedly, I may not have always been consistent in my usage of these terms.

In any event, in the present case, I conclude that the trial court's order must be vacated, so that on remand the trial court *could* still reach the same result, dismissal, as I believe that there are other findings in the order to support dismissal. The majority, though, states that the trial court's order to dismiss was incorrect "as a matter of law" because it failed to make "the necessary findings of fact and conclusions of law to support its order."

supported by the evidence. (The majority concludes that several of the Commission's findings are not supported by the evidence. I, however, agree with the majority only with respect to some of these findings.)

In any event, I do not believe it would be appropriate for our Court to simply affirm the Full Commission based on the supported findings because we cannot know how the Commission would have exercised its discretion absent the unsupported findings. Therefore, my vote is to vacate and remand, such that the sanction of dismissal may still be considered by the Commission on remand.

1. Background

The findings, supported by the evidence, tend to show as follows:

Plaintiff, a residential real estate broker, seeks workers' compensation benefits, alleging that in September 2015, she suffered injuries to her back, neck, bilateral knees, and hips while trying to manually close a garage door at a home.

Plaintiff, however, suffered injuries *prior to* the garage door incident on a number of occasions. For instance, in June 2015, just three months prior to the garage door incident, Plaintiff was injured in an automobile accident, for which she received medical treatment. Also, Plaintiff had previously sought workers' compensation benefits for back and knee injuries, unrelated to her present claim.

Defendants initially denied liability for Plaintiff's September 2015 injuries, pending their investigation of the matter. As part of their investigation, Defendants sought discovery from Plaintiff of her medical history to determine whether, and to what extent, Plaintiff was injured by the garage door incident. However, Plaintiff has repeatedly failed to fully comply with Defendants' discovery requests, even though she has been compelled to do so by the Commission.

In the meantime, Plaintiff has undergone medical treatment at her own direction, which included major back surgery. Further, Plaintiff took no action to prosecute this matter for over a year, while Defendants continued to seek discovery of Plaintiff's medical history. Accordingly, in June 2017, Defendants moved to dismiss Plaintiff's claim.

In September 2017, the Deputy Commission dismissed Plaintiff's claim. Plaintiff appealed to the Full Commission. In its 2018 Opinion and Award, the Full Commission, agreeing with the Deputy Commissioner, ordered the matter dismissed with prejudice.

## II. Analysis

The majority recognizes that the Full Commission, *in the exercise of its discretion*, may dismiss a matter where the Plaintiff engages in delay tactics.

The majority also recognizes that the Commission must consider three factors before dismissing a matter, citing *Lee v. Roses*, 162 N.C. App. 129, 590 S.E.2d 404 (2004) and *Lentz v. Phil's Toy Store*, 228 N.C. App. 416, 747 S.E.2d 127 (2013).

First, the Full Commission must consider "whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter[.]" *Lee*, 162 N.C. App. at 133, 590 S.E.2d at 407. The majority is not contending that this prong was not satisfied. Indeed, the Commission did consider this factor, determining that Plaintiff had caused the "unreasonable delay[]" and that she continued to engage in the "unreasonable delay" of adjudication of the matter. And this determination could certainly be inferred from the findings and the evidence. For instance, the Commission found that Plaintiff repeatedly failed to fully comply with the discovery requests, even after being ordered by the Commission to do so. As found by the Commission, Plaintiff admitted to being lax in responding to the discovery requests and that she did nothing for over a year to prosecute her claim, all the while seeking medical treatment at her own direction.

Second, under *Lee*, the Commission must consider "the amount of prejudice, if any, to the defendant [caused by the plaintiff's failure to prosecute][.]" *Id.* at 133, 590 S.E.2d at 407. The order shows that the Commission considered this factor. The majority contends that certain findings in the order supporting the Commission's findings as to this prong are not supported by the evidence. I disagree.

The Commission expressly found, in Finding 24, that Defendants were "materially prejudiced by Plaintiff's failure to respond to discovery and otherwise prosecute her claim for a year" in that Plaintiff's actions deprived Defendants of "any meaningful opportunity to investigate . . . or to direct [Plaintiff's] care[.]" The majority, though, states that there is no evidence that Defendants were materially prejudiced, correctly noting that an employer's ability to direct an employee's medical care is triggered only after the employer has accepted liability.

However, this misses the point that the right of an employer who has initially denied liability to direct care *can still be subsequently triggered* once the employer accepts liability. *See Kanipe v. Lane Upholstery*, 141

N.C. App. 620, 624, 540 S.E.2d 785, 788 (2000). Here, the Commission essentially found that Plaintiff's improper conduct caused Defendants to lose its opportunity to make an informed decision to trigger their right to direct care.

Certainly, an employer should not be required to accept liability right away before it has investigated an alleged accident. For example, the General Assembly has provided in N.C. Gen. Stat. § 97-27(a) that an employer has the right to require its employee to submit to an examination, the purpose of which, according to our Court, "is to enable the employer to ascertain whether the injury is work-related or not and thus whether the claim is indeed compensable." *Id.* at 624, 540 S.E.2d at 788. In the same way, an employer has the right to discoverable medical records to ascertain whether an injury, in fact, was the result of a workplace accident.

To this end, an employee is required to provide her employer with the discoverable information necessary for the employer to make an informed decision whether to accept liability and exercise its right to direct care. This obligation is similar to an employee's statutory obligation to provide timely notice of her accident, the purpose of which (as described by our Supreme Court) "allows the employer to provide immediate medical diagnosis and treatment with a view to minimiz[e] the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury." *See, e.g.*, *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 481, 256 S.E.2d 189, 204 (1979). Indeed, our Court has recognized in such situations that "[p]ossible prejudice occurs where the employer is not able to provide immediate medical diagnosis and treatment with a view to minimiz[e] the seriousness of the injury and where the employer is unable to *sufficiently investigate* the incident causing the injury." *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 173, 573 S.E.2d 703, 706 (2002) (emphasis added).

Here, given Plaintiff suffered prior injuries and given the benign nature of the accident (closing a garage door) as the cause of Plaintiff's extensive injuries, it was certainly reasonable for Plaintiff's employer to require access to her discoverable medical records before accepting liability for her claimed new injuries. Plaintiff, though, thwarted Defendants' ability to investigate by withholding her medical records for years, all the while directing her own care. If those records demonstrate that Plaintiff did not suffer any further injury due to the garage door incident, then the dismissal by the Commission is of no harm to Plaintiff, as she would lose anyway. However, if the records are, indeed, favorable to Plaintiff's case, then Defendants have lost the opportunity to accept

liability based on a knowledge of those records, and to direct Plaintiff's care these past several years.

Further, I disagree with the majority that Finding 25, supporting the second *Lee* factor is not supported by the evidence. Specifically, the Commission found that Defendants had "borne substantial monetary expense" pursuing Plaintiff's medical records. Admittedly, as the majority points out, there is no evidence in the record as to *the precise amount* of money or time Defendants actually spent chasing discovery for two years. However, the Commission made no finding as to the precise money or time spent. What the Commission did find – that Defendants spent some unknown amount of resources that was "substantial" – can be inferred from the evidence. For instance, there is evidence that Defendants' attorneys had to prepare a second set of discovery requests when Plaintiff's responses to the first set were incomplete; Defendants' attorneys had to seek (successfully after a hearing on the matter) an order compelling Plaintiff to fully comply with the discovery request; and after Plaintiff continued directing her own medical treatment without prosecuting her claim for over a year and without complying with the Commission's order to compel, Defendant's attorneys sought a dismissal, first before the Deputy Commissioner, and then, after preparing a brief for attending a hearing, before the Full Commission.

Finding 25 is similar to a finding made in *Lentz* sustained by our Court in affirming the Commission's order dismissing the claim of the plaintiff in that case. In *Lentz*, the Commission found that "Plaintiff's failure to prosecute this claim has resulted in prejudice to defendants, who have expended considerable time and resources attempting to defend the claim. [Defendants] have repeatedly prepared for hearing and appeared at hearings with witnesses, and plaintiff has failed to appear, even when ordered to appear." 228 N.C. App. at 423, 747 S.E.2d at 132.

I have reviewed the *Lentz* record on appeal, and I found nothing in that record showing the *exact amount* of time or money the defendants spent. The Commission's finding that the defendants expended "considerable" time and resources, though, was sustained by our Court: "On this record, we determine that the Commission's findings of fact were supported by competent evidence and its conclusions of law were supported by its findings of fact." *Id.* at 423, 747 S.E.2d at 132.

I see no difference between "considerable," as used by the Commission in *Lentz*, and "substantial," as used by the Commission here. Accordingly, I disagree with the majority and conclude that the record supports Finding 25.

Under the third *Lee* prong, the Full Commission must consider "the reason, if one exists, that sanctions short of dismissal would not suffice." *Lee*, 162 N.C. App. at 133, 590 S.E.2d at 407. Here, the Full Commission expressly considered this factor. It determined that lesser sanctions would not suffice, citing three separate reasons: (1) Plaintiff delayed in prosecuting her claim for over a year; (2) Defendants' ability to litigate and defend the claim was "irrevocably degraded" by Plaintiff's delay and by her failure to fully comply with discovery; and (3) Defendants had incurred litigation expenses due to Plaintiff's conduct Defendants could never recoup from Plaintiff were Plaintiff ordered to pay Defendants for these expenses.

I disagree with the majority's conclusion that there is no evidence that Defendants' ability to litigate and defend has been "irrevocably degraded," as it can be inferred from the record that Plaintiff has undergone extensive treatment without Defendants' direction and that Plaintiff has delayed the matter *for the purpose of* completing her treatment before having to reengage with Defendants in this matter.

I agree, however, with the majority that there is no evidence regarding Plaintiff's inability to pay Defendants' expenses if ordered to do so. However, in my view, it would not be an abuse of discretion on remand for the Commission to otherwise determine that lesser sanctions would still be inappropriate based on the Commission's other findings.

## III. Conclusion

I may not have made all of the findings regarding Plaintiff's conduct, as made by the Commission or have exercised discretion in the same way. But, here, the Commission is the factfinder and is empowered with discretion to order a dismissal. Such order should be affirmed where it cannot be said that the Commission abused its discretion when its decision is supported by the findings and evidence.

But, here, not all of the Commission's findings are supported by the evidence. I do conclude, however, that the remaining findings are sufficient to support a dismissal in the exercise of discretion. However, I cannot conclude that the Commission would reach the same result based on the remaining findings. Therefore, my vote is to vacate the dismissal order and remand the matter for further proceedings and that, on remand, the Commission, in its discretion, may order dismissal or order lesser sanctions.

NORTH CAROLINA FARM BUREAU MUTUAL
INSURANCE COMPANY, INC., PLAINTIFF
v.
JUDY LUNSFORD, DEFENDANT

No. COA19-458

Filed 5 May 2020

**Motor Vehicles—insurance—underinsured motorist coverage—policies applicable—stacking—equal coverage limits**

The trial court's ruling that defendant was not entitled to underinsured motorist coverage under her policy issued by plaintiff was affirmed where defendant was seriously injured in an out-of-state accident while a passenger in a vehicle driven by her sister and the underinsured coverage limits of defendant's policy was equal to the personal injury coverage limits under her sister's policy. Because the sisters resided in separate states in separate households (and because North Carolina law applied to the construction and application of an insurance contract between a North Carolina insurer and a North Carolina insured), pursuant to N.C.G.S. § 20-279.21(b)(4) the policies were not both "policies applicable" allowing stacking of coverages and the sum of the limits of liability for bodily injury under the sister's policy was not less than the applicable limits of defendant's underinsured motorist coverage as required under that section. Therefore, the sister's car was not an underinsured vehicle.

Judge STROUD concurring in the result.

Judge MURPHY dissenting.

Appeal by Defendant from Order and Declaratory Judgment entered 3 February 2019 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 13 November 2019.

*William F. Lipscomb for the Plaintiff-Appellee.*

*Burton Law Firm, PLLC, by Jason M. Burton, for the Defendant-Appellant.*

BROOK, Judge.

Judy Lunsford ("Defendant") appeals from the trial court's grant of a motion for judgment on the pleadings in favor of North Carolina Farm Bureau Mutual Insurance Company, Inc. ("Plaintiff") and issuance of a declaratory judgment that Defendant is not entitled to underinsured motorist coverage under her policy issued by Plaintiff. We affirm the Order and Declaratory Judgment of the trial court.

## I. Factual and Procedural Background

On 22 May 2017, Defendant was a passenger in her sister's 2015 Chevrolet Silverado when the two were involved in a tragic accident. Defendant's sister lost control of the vehicle, ran over the median, and collided head-on with an oncoming 18-wheeler traveling in the opposite lane of traffic. Defendant's sister lost her life in the accident and Defendant suffered serious injuries. The accident occurred in DeKalb County, Alabama. At the time of the accident, Defendant was a resident of North Carolina and her sister was a resident of Tennessee.

At the time of the accident, both Defendant and her sister carried automotive insurance. Defendant's policy was issued by Plaintiff in North Carolina and her sister's policy was issued by Nationwide in Tennessee, where each resided in May 2017. The coverage amounts in the policies are similar. Both policies limit the respective insurer's liability for personal injuries to $100,000 per occurrence and for injuries to under- or un-insured motorists to $100,000 per occurrence.

Plaintiff initiated an action for a declaratory judgment on 24 October 2018 in Guilford County Superior Court requesting a determination that the underinsured motorist coverage in the policy it issued Defendant did not apply to the accident because her underinsured motorist coverage limits equaled her sister's personal injury coverage, meaning Defendant was not underinsured at the time of the accident. After Defendant answered, Plaintiff moved the trial court for judgment on the pleadings on 19 December 2018 under Rule 12(c) of the North Carolina Rules of Civil Procedure. Following a 28 January 2019 hearing on the matter, the trial court granted Plaintiff's motion and entered an Order and Declaratory Judgment in favor of Plaintiff on 13 February 2019. Plaintiff entered timely notice of appeal on 14 March 2019.

## II. Analysis

The dispositive issue in this appeal is whether the vehicle in which Defendant was traveling with her sister at the time of the May 2017 accident qualified as an "underinsured motor vehicle" as that term is defined

under North Carolina law. Because it did not, we affirm the Order and Declaratory Judgment of the trial court.

A. Standard of Review

Under Rule 12(c) of the North Carolina Rules of Civil Procedure, "any party may move for judgment on the pleadings." N.C. Gen. Stat. § 1A-1, Rule 12(c) (2019). "A motion for judgment on the pleadings should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Carpenter v. Carpenter*, 189 N.C. App. 755, 761, 659 S.E.2d 762, 767 (2008). However, the motion should be granted when "the moving party has shown that no material issue of fact exists . . . and that he is clearly entitled to judgment." *Affordable Care v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002). "This Court reviews a trial court's grant of a motion for judgment on the pleadings *de novo*." *Carpenter*, 189 N.C. App. at 757, 659 S.E.2d at 764.

B. Underinsured Motorist Coverage Under North Carolina Law

North Carolina law defines "underinsured motor vehicle" as

> a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is *less* than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

N.C. Gen. Stat. § 20-279.21(b)(4) (2019) (emphasis added). The statutory definition thus requires that the "sum of the limits of liability under all bodily injury liability . . . insurance policies applicable" be *less* "than the applicable limits of underinsured motorist coverage" for a vehicle involved in an accident to be considered underinsured. *Id.*

Whether an underinsured motorist policy is applicable at the time of an accident under N.C. Gen. Stat. § 20-279.21(b)(4) depends upon whether the claimant qualifies as a "person insured" as that term is defined by subdivision (3) of subsection (b) of the statute, which provides:

> "persons insured" means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent,

> expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of the motor vehicle.

*Id.* § 20-279.21(b)(3). The Supreme Court has explained:

> [t]his section of the statute essentially establishes two "classes" of "persons insured": (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

*Sproles v. Greene*, 329 N.C. 603, 608, 407 S.E.2d 497, 500 (1991) (citation omitted).

The reason the applicability of an underinsured motorist policy depends on whether the claimant qualifies as a "person insured" is that "[i]n North Carolina, insurance coverage for damages caused by uninsured and underinsured motorists 'follows the person, not the vehicle[.]' " *Beddard v. McDaniel*, 183 N.C. App. 476, 645 S.E.2d 153, 153-54 (2007) (quoting *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 204, 444 S.E.2d 664, 671 (1994)). The Supreme Court put it slightly differently in *Sproles*, observing that "[c]lass one insureds have UIM coverage even if they are not in a 'covered vehicle' when injured." 329 N.C. at 608, 407 S.E.2d at 500. The Supreme Court also noted in *Sproles* that "[a]ll other persons are class two insureds and are only covered while using [or guests in] 'the motor vehicle to which the policy applies.' " *Id.* Our Court has therefore described underinsured motorist insurance as "essentially person oriented, unlike liability insurance[,] which is vehicle oriented." *Honeycutt v. Walker*, 119 N.C. App. 220, 222, 458 S.E.2d 23, 25 (1995).

C. Application

In the present case, the parties do not dispute whether Defendant is a named insured under the policy issued to her by Plaintiff; instead, they dispute, amongst other things, whether Tennessee or North Carolina law supplies the legal standards applicable to determining whether Ms. Chapman was underinsured at the time of the accident. While Defendant's policy issued by Plaintiff is an insurance contract entered into by a North Carolina insurer and a North Carolina insured, and

concerning the interests of a North Carolina citizen, and North Carolina law therefore applies to its construction and application, the policy does not cover her injuries from the May 2017 accident.[1] The limits of the policy issued by Plaintiff are $50,000 per person and $100,000 per accident, which are the same as the limits of the personal injury coverage under her sister's policy with Nationwide. Because these are the only two policies at issue, and the limits of Defendant's underinsured motorist coverage and her sister's personal injury coverage are equal, in this case "the sum of the limits of liability under [the] bodily injury liability . . . policies applicable" *is not* less "than the applicable limits of underinsured motorist coverage[.]" N.C. Gen. Stat. § 20-279.21(b)(4) (2019). Defendant's sister's vehicle therefore was not underinsured as that term is defined by North Carolina law.

In arguing otherwise, Defendant contends—and the dissent accepts—that Defendant is entitled to "stack the $50,000.00 limit of UIM coverage in [Ms.] Chapman's Nationwide policy with the $50,000.00 limit of UIM coverage in [Defendant's] NCFB policy." *See infra* at 245 (Murphy, J., dissenting). But this argument smuggles its conclusion from its first premise. This conclusion would follow if Defendant and her sister were members of the same household because then, Defendant and her sister would both be class one insureds as that term was defined by our Supreme Court in *Sproles*. *See* 329 N.C. at 608, 407 S.E.2d at 500. If Defendant and her sister were members of the same household, both the underinsured motorist coverage of $50,000 per person and $100,000 per accident in Defendant's policy and the "uninsured" motorist coverage of $50,000 per person and $100,000 per accident in Defendant's sister's policy would qualify as "policies applicable" under N.C. Gen. Stat. § 20-279.21(b)(4); the sum of their limits would be more than the personal injury liability limits of $50,000 per person and $100,000 per accident in Defendant's sister's policy; and, therefore, the 2017 accident would be covered by Defendant's underinsured motorist policy because her sister's vehicle would have been an "underinsured motor vehicle" at the time of the accident as North Carolina law defines that term. *See* N.C. Gen. Stat. § 20-279.21(b)(4) (2019). However, at the time of the accident,

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1. The same would be true if the definition of underinsured vehicle under Tennessee law applied. Tennessee law terms underinsured motor vehicles "uninsured motor vehicles"; *see* Tenn. Code § 56-7-1202(a)(1) (2017); however, in essence the definition under Tennessee law mirrors that of North Carolina, providing that " 'uninsured motor vehicle' means a motor vehicle . . . for which the sum of the limits of liability available to the insured under all . . . insurance policies . . . applicable . . . is *less* than the applicable limits of uninsured motorist coverage provided to the insured under the policy against which the claim is made[.]" *Id.* (emphasis added).

Defendant was a resident of North Carolina and Defendant's sister was a resident of Tennessee. The underinsured motorist coverage in each of their policies were not *both* "policies applicable" to the accident, and the vehicle was not underinsured under North Carolina law. *See id.*

III. Conclusion

We affirm the order of the trial court because Defendant is not entitled to underinsured motorist coverage under her policy issued by Plaintiff.

AFFIRMED.

Judge STROUD concurs in result.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

Judy Lunsford ("Lunsford"), a North Carolina citizen, was severely injured in a car accident while riding in the car with her sister, Levonda Chapman ("Chapman"), in Alabama. Chapman's insurance policy contemplated coverage for a Tennessee resident and her Tennessee-registered vehicle. Nevertheless, Chapman's policy plainly states that it must be adjusted to comport with the Financial Responsibility Acts ("FRA") of other states if need be. Lunsford's personal auto insurance policy with the Plaintiff, North Carolina Farm Bureau Mutual Insurance Company, Inc. ("NCFB"), provides for $50,000.00 of underinsured/uninsured motorist ("UIM") coverage. NCFB brought this suit seeking declaratory judgment that it does not need to pay out the UIM coverage limit here because Chapman's vehicle does not fit the definition of an "underinsured motor vehicle" under Tennessee law. However, because Chapman's vehicle is an underinsured motor vehicle under our FRA and Chapman's policy must comport with our FRA, I would hold Chapman's vehicle is an underinsured motor vehicle, and Lunsford is entitled to the $50,000.00 of UIM coverage under her NCFB auto insurance policy.

**BACKGROUND**

This is a dispute over whether the Defendant-Appellant, Lunsford, is entitled to $50,000.00 of underinsured motorist coverage from her auto insurer, Plaintiff-Appellee NCFB. Lunsford was involved in a car accident while riding with her sister, Chapman, in Alabama. Chapman lost

control of her car, crossed the median of an interstate highway, and collided with a tractor-trailer. Chapman was killed and Lunsford sustained serious injuries.

At the time of the accident, Chapman was driving her car, which was covered by a Nationwide Insurance policy issued to her in her home state of Tennessee, with Lunsford as the sole passenger. Both Chapman's Nationwide policy and Lunsford's own auto insurance policy, issued by NCFB, provided coverage limits of $50,000.00 per-person and $100,000.00 per-accident. Nationwide has offered "the $50,000[.00] policy limit of its [bodily injury] liability coverage to Lunsford."

NCFB filed a *Complaint for Declaratory Judgment* in the Guilford County Superior Court seeking judicial decree "that the UIM coverage of [Lunsford's policy] does not apply to [her] injuries from the . . . motor vehicle collision in question and that [Lunsford] is not entitled to recover any UIM coverage from said policy regarding the . . . motor vehicle collision in question[.]" In answering NCFB's complaint, Lunsford argued that she is entitled to UIM coverage for three reasons: (1) she denied the applicability of Tennessee law in the interpretation of the Nationwide policy "as it relates to [NCFB's] North Carolina UIM policy" and, instead, argued "North Carolina law, and only North Carolina law, controls the interpretation of, and relationship between, a North Carolina UIM policy and any other insurance policy at issue"; (2) Lunsford argued NCFB's claim is either barred by or inconsistent with the North Carolina FRA (N.C.G.S. § 20-279.21, et. seq.); and (3) Lunsford argued NCFB's claim is barred by existing North Carolina law and Lunsford's policy with NCFB.

The parties each moved for a judgment on the pleadings pursuant to N.C.G.S. § 1A-1, Rule 12(c), and, after a hearing on the motions, the trial court entered an order granting NCFB's motion for judgment on the pleadings, granting declaratory judgment in favor of NCFB, and denying Lunsford's motion for judgment on the pleadings. The trial court concluded the UIM policy "issued by [NCFB] to [Lunsford] does not apply to [Lunsford's] injuries from the [22 May 2017] motor vehicle collision in question and defendant is not entitled to recover any UIM coverage from [her NCFB] policy . . . ." Lunsford timely appeals.

## ANALYSIS

### A. Standard of Review

Lunsford notes in her brief that "[t]his appeal concerns entirely a matter of law, not fact, and therefore the appropriate standard of review . . . is de novo." As is true in the analogous situation where we receive

an appeal from a grant of summary judgment, "[b]ecause the parties do not dispute any material facts, 'we review the trial court's order . . . de novo to determine whether either party is entitled to [declaratory judgment on the pleadings].' " *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 149, 731 S.E.2d 800, 806 (2012) (quoting *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007)) (internal alterations omitted). "Under a *de novo* review, the court 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 internal quotation marks omitted).

**B. Declaratory Judgment**

The only distinct issue on appeal is whether the trial court erred in granting NCFB's motion for judgment on the pleadings and, in turn, rendering a declaratory judgment that Lunsford is not entitled to the UIM coverage under her NCFB insurance policy. The parties' major point of disagreement on appeal, as below, is whether we should apply the North Carolina definition or the Tennessee definition of "underinsured motorist" in interpreting the meaning of that term as it relates to Lunsford's policy with NCFB. Lunsford is not entitled to receive UIM coverage unless Chapman's vehicle is an "underinsured motor vehicle."

In her brief, Lunsford argues Chapman's Nationwide policy is governed by "North Carolina law, and only North Carolina law," and should be interpreted as such. Lunsford further argues Chapman's car is underinsured pursuant to our statutes and caselaw and she is, therefore, entitled to the (to-date) unpaid $50,000.00 of UIM coverage contemplated in her policy with NCFB. NCFB concedes that Lunsford's argument would be correct if North Carolina law applies to Chapman's policy with Nationwide but argues Tennessee law—not ours—governs the applicable definition of "underinsured motor vehicle."

Our General Statutes provide, "All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State . . . are subject to the laws thereof." N.C.G.S. § 58-3-1 (2019). Lunsford's insurance policy with NCFB falls under this statute as an insurance contract entered into by a North Carolina insurer and North Carolina insured, and concerning the interests of a North Carolina citizen. The parties spent much of their briefs, as well as their oral arguments, arguing about the applicability of N.C.G.S. § 58-3-1—and the related caselaw regarding the nexus between the interests insured under the policy and North Carolina law—on Chapman's policy. *See*,

*e.g.*, *Collins v. Aikman Corp. v. Hartford Accident & Indemnity Co.*, 335 N.C. 91, 95, 436 S.E.2d 243, 246 (1993). However, this statute and the related cases do not factor in to today's decision, which is based instead on the conformity clause in Chapman's policy, our caselaw on such clauses, and our FRA. The caselaw regarding the nexus between the interests insured under Chapman's policy and our laws do not play a role in this decision.

Chapman's policy explicitly incorporates our FRA, and I would hold North Carolina's UIM definition in the FRA applies and Lunsford is entitled to $50,000.00 of UIM coverage pursuant to her agreement with NCFB. This holding would apply regardless of any "nexus" between Chapman's policy and North Carolina.

In relevant part, our FRA defines "underinsured motor vehicle" as:

> *a highway vehicle* with respect to the ownership, maintenance, or use *of which*, *the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.*

N.C.G.S. § 20-279.21(b)(4) (2019) (emphasis added). Lunsford's NCFB auto insurance policy incorporates our FRA, and defines "underinsured motor vehicle" as:

> [A] land motor vehicle or trailer of any type:
>
> 1. The ownership, maintenance or use of which is insured or bonded for liability at the time of accident; and
>
> 2. *The sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is equal to or greater than the minimum limit specified by the financial responsibility law of North Carolina* and:
>
> a. is less than the limit of liability for this coverage; or
>
> b. the total limit of liability available has been reduced to less than the limit of liability for this coverage by payment of damages to other persons.

Like Lunsford's policy, Chapman's Nationwide policy incorporates our FRA's definitions in certain circumstances, stating, "We will adjust

this policy to comply . . . [w]ith the financial responsibility law of any state or province which requires higher liability limits than those provided by this policy." We have held that where an out-of-state policy includes a conformity clause, "which, by its very terms, requires us to examine North Carolina law to determine" whether a certain kind of coverage is available, we will apply our laws in interpreting the out-of-state policy. *Cartner v. Nationwide Mut. Fire Ins. Co.*, 123 N.C. App. 251, 254, 472 S.E.2d 389, 391 (1996).

There was a provision nearly identical to the conformity clause in Chapman's policy in an out-of-state insurance policy at issue in *Cartner*, 123 N.C. App. at 252, 472 S.E.2d at 390. In *Cartner*, we reasoned that although the Florida insurance policy included a "family member exclusion," that exclusion did not comport with the " 'kind[s] of coverage' required by North Carolina's [FRA]." *Id.* at 255, 472 S.E.2d at 291. We required the defendant to "adjust the limits of its Florida policy to provide such coverage to plaintiff's decedent as required by North Carolina [law]." *Id.* In following our precedent from *Cartner* here, Chapman's Nationwide policy must be adjusted to comport with our FRA's definition of an underinsured motor vehicle and the accompanying caselaw.

Tennessee law relies upon a different definition of "uninsured motor vehicles."[1] Tennessee does not consider a vehicle "uninsured" where that vehicle is "[i]nsured under the liability coverage of the same policy of which the uninsured motor vehicle coverage is a part[.]" Tenn. Code. Ann. § 56-7-1202(2)(A) (West 2017). There is similar language in Chapman's insurance policy, which states that because she is entering into this insurance agreement to cover her car, that car can no longer be defined as an "uninsured motor vehicle." Applying only this part of Chapman's insurance policy and Tennessee's law, Lunsford would not receive UIM coverage under her policy with NCFB because her accident did not involve an underinsured highway vehicle.

However, our FRA's definition of "underinsured motor vehicle" is completely different from the one set out in Chapman's policy and Tennessee's statutes, and—as in *Cartner*—provides a different kind of coverage than what is contemplated in Chapman's policy. *See Cartner*, 123 N.C. App. at 255, 472 S.E.2d at 291. Unlike Chapman's policy, our FRA provides for UIM coverage in instances where, as here, the tortfeasor's vehicle was covered by a policy that had lower bodily injury liability

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1. Tennessee does not differentiate between uninsured and underinsured motorists, both of which fall under the definition of "uninsured motorist." Tenn. Code Ann. § 56-7-1202 (West 2017).

limits than the applicable UIM limits in the victim's policy. N.C.G.S. § 20-279.21(b)(4) (2019). Pursuant to its conformity clause, Chapman's policy must be adjusted in order to comply with our definition of "underinsured motor vehicle," which requires more coverage than Chapman's policy would allow if applying Tennessee law.

For a UIM policy to be applicable under N.C.G.S. § 20-279.21(b)(4) the claimant must be a "person insured" under N.C.G.S. § 20-279.21(b)(3). Our Supreme Court has clarified that there are two classes of insureds:

> [N.C.G.S. § 20-279.21(b)(3)] essentially establishes two "classes" of "persons insured": (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

*Sproles v. Greene*, 329 N.C. 603, 608, 407 S.E.2d 497, 500 (1991). "Class one insureds have UIM coverage even if they are not in a covered vehicle when injured. All other persons are class two insureds and are only covered while using the motor vehicle to which the policy applies." *Id.* (internal marks omitted). In this case, Lunsford, as the named insured, is a class one insured with respect to the NCFB policy, meaning that she has UIM coverage under this policy "even if [she is] not in a covered vehicle when injured." *Id.* (internal marks omitted). She is also a class two insured with respect to Chapman's Nationwide policy as a guest in the insured vehicle with consent of the named insured, meaning she also has UIM coverage under this policy because she was "using the motor vehicle to which the policy applies." *Id.* (internal marks omitted). In sum, Lunsford is able to receive UIM coverage under her own NCFB policy because, as a class one insured, it follows her even though she was injured in Chapman's car. Additionally, she is able to receive UIM coverage under Chapman's Nationwide policy because, as a class two insured, she was injured as a guest in a vehicle insured by Chapman's Nationwide policy.

In addition to the statutory definition of "underinsured motor vehicle," our caselaw provides that UIM limits in a tortfeasor's policy and the policy covering the injured passenger can be "stacked" to establish that the tortfeasor's car is an "underinsured highway vehicle." *Benton v. Hanford*, 195 N.C. App. 88, 94, 671 S.E.2d 31, 34 (2009). In *Benton*, much like the case *sub judice*, a guest in a car, Benton, was injured when the owner and operator of the car, Hanford, crashed the vehicle. *Id.* at

89, 671 S.E.2d at 32. There, we stacked the UIM coverage of $50,000.00 from the policy of the tortfeasor with the UIM coverage of $100,000.00 from the policy of the injured guest in the car to determine that the tortfeasor's car, which only carried $50,000.00 in liability coverage, was an underinsured motor vehicle under N.C.G.S. § 20-279.21(b)(4). *Id.* at 94, 671 S.E.2d at 35. Here, we should do the same; I would stack the $50,000.00 limit of UIM coverage in Chapman's Nationwide policy with the $50,000.00 limit of UIM coverage in Lunsford's NCFB policy. I would hold that, because the sum of the stacked UIM coverage ($100,000.00) is greater than the bodily injury liability limit of the Nationwide policy ($50,000.00), the tortfeasor's car (Chapman's) is an underinsured highway vehicle.

## CONCLUSION

Chapman's insurance policy states that it must be adjusted to comport with our FRA. Under our FRA, Chapman's vehicle fits the definition of an "underinsured motor vehicle." As Chapman's vehicle is an underinsured motor vehicle under North Carolina law, Lunsford is entitled to judgment on the pleadings and the $50,000.00 of UIM coverage under her NCFB insurance policy.

I respectfully dissent and would reverse.[2]

2. I do not address the issue of which insurer providing UIM coverage is entitled to a credit for the payment of liability insurance by Nationwide because Nationwide is not a party to this action, despite our prior language that "[w]hen there is more than one UIM carrier involved, allocation of the credit for liability payments is necessary." *Benton*, 195 N.C. App. at 95, 671 S.E.2d at 35 (citing *Onley v. Nationwide Mutual Ins. Co.*, 118 N.C. App. 686, 691, 456 S.E.2d 882, 885 (1995)).

FELIX C. PADILLA, Plaintiff
v.
KELLY D. WHITLEY DE PADILLA, Defendant

No. COA19-478

Filed 5 May 2020

**Child Custody and Support—modification of custody—substantial change in circumstances—positive changes for noncustodial parent**

The trial court's modification of custody to allow the father greater visitation and parental rights was not an abuse of discretion where father demonstrated numerous positive changes in his life—including having more stability with regard to his housing and personal relationships and addressing his mental health issues—to meet his burden of showing a substantial change in circumstances.

Appeal by Defendant from order entered 12 December 2018 by Judge Amanda L. Maris in Durham County District Court. Heard in the Court of Appeals 31 October 2019.

*No brief filed for Plaintiff-Appellee.*

*Foil Law Offices, by N. Joanne Foil and Laura E. Windley, for Defendant-Appellant.*

DILLON, Judge.

Defendant Kelly D. Whitley de Padilla ("Mother") appeals from an order ("2018 Order") modifying the parties' child custody arrangements. Specifically, Mother disagrees with the extension of rights given to Plaintiff Felix C. Padilla ("Father") in the 2018 Order.

## I. Background

Mother and Father were married from 2005 until 2014 and have two minor children together. The parties have been disputing child custody orders since 2015.

In 2016, the trial court entered an order ("2016 Order") granting sole custody of the children to Mother and granting Father very minimal rights to visitation. The trial court's 2016 Order was based substantially on findings concerning Father's unhealthy relationship with his then girlfriend, Father's mental health issues, and Father's unstable living conditions.

Sometime later, Father moved the trial court for an order modifying the custody arrangement. After a hearing on the matter, the trial court entered its 2018 Order which maintained primary physical custody of the children with Mother, but which granted Father greater visitation and parental rights. Mother timely appealed the 2018 Order.

## II. Standard of Review

In reviewing the trial court's decision to modify a prior custody order, "the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted). However, "findings of fact not having been excepted to are presumed to be supported by the evidence and are binding on appeal." *James v. Pretlow*, 242 N.C. 102, 104, 86 S.E.2d 759, 761 (1955) (internal quotation marks omitted) (citation omitted). Conclusions of law are reviewed *de novo* by this Court. *See In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

Further, as our Supreme Court has recognized, "[i]t is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998) (citation omitted). And, therefore, the decision of the trial court should not be upset on appeal "absent a clear showing of [an] abuse of discretion." *Id.* at 631, 501 S.E.2d at 906 (internal quotation marks omitted) (citation omitted).

## III. Analysis

Our Supreme Court has held that a custody order may be modified "if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody." *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253 (internal quotation marks omitted) (citation omitted). The burden of proving that there has been a substantial and material change of circumstances affecting the minor child is on the moving party, which here is Father. *See Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974).

Mother argues that Father has failed to meet his burden as there has been no adverse change concerning her care for the children and, therefore, there is no reason to change the custody arrangements. However, our Supreme Court has instructed that "[w]hile allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, *beneficial* to the child[ren] may also warrant a change in

custody." *Shipman*, 357 N.C. at 473-74, 586 S.E.2d at 253 (emphasis added) (internal marks omitted). Citing *Shipman*, our Court, in a case similar to the present case, has recognized that a changed circumstance justifying custody modification does not require a showing that something adverse has happened regarding the children's care, but can be justified based on the positive change in behavior in the non-custodial parent:

> If Father . . . can show he has changed and can provide a safe and loving environment for [his child], he has the same opportunity as any parent to request a change in custody based upon a substantial change in circumstances which would positively affect the minor child; *his positive behavior* could be such a change.

*Huml v. Huml*, ___ N.C. App. ___, ___, 826 S.E.2d 532, 549-50 (2019) (emphasis in original) (citation omitted).

Here, in its 2018 Order, the trial court essentially found that there had been many *positive* changes regarding Father's behavior and lifestyle since the entry of the 2016 Order and that it would be now in the children's best interest to have a more meaningful relationship with their father. For instance, the trial court found that Father is no longer dating the woman with whom he had the affair (Finding 24); Father is not dating anyone (Finding 25); Father's old girlfriend will not interfere with Father's ability to be a good father, and it will benefit the children to have contact with Father at school events (Finding 26); Father has stable housing as he has an apartment for the period of a 15-month lease, suitable for his children (Findings 27 and 70): though Father had once abandoned his kids, he now has a changed attitude and wants to spend time with them (Findings 31-32); and Father has taken great lengths to address his own mental health needs (Findings 46 and 59). The trial court ultimately found that a modification of custody to allow Father more contact with his children would be in the best interest of the children (Finding 84).

It is certainly not an abuse of discretion for a trial court to determine that it is in the best interest of children for them to have a meaningful relationship with *both* of their parents. Here, though, when the 2016 Order was entered, Father had a number of issues that he needed to deal with before it could be said that the children's welfare would benefit from extensive contact with him. In its 2018 Order, the trial court has determined that Father has adequately dealt with his issues. And though perhaps nothing has changed with Mother's continued ability to provide a safe, loving environment for the children, something substantial has

changed. Father's circumstances have improved. The children now have the opportunity to develop a more meaningful relationship with their father, while maintaining their healthy relationship with their mother.

## IV. Conclusion

We conclude that the trial court did not abuse its discretion by modifying custody.

AFFIRMED.

Judges DIETZ and YOUNG concur.

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RACHEL QUACKENBUSH, PLAINTIFF
v.
KENNETH GROAT, DEFENDANT

No. COA19-415

Filed 5 May 2020

**Domestic Violence—protective order—motion to dismiss complaint—sufficiency of allegations—attachments to complaint**

In a hearing seeking a domestic violence protective order, the trial court erred when it did not consider the detailed allegations contained in file-stamped pages attached to the AOC complaint form and dismissed the complaint for failure to state a claim. Although the completed complaint form did not directly reference the attachments, they were part of the filed complaint served on defendant, they contained sufficient allegations to state a claim under Chapter 50B, and they gave defendant proper notice of the allegations.

Appeal by plaintiff from order entered 19 December 2018 by Judge Donna F. Forga in District Court, Jackson County. Heard in the Court of Appeals 30 October 2019.

*Legal Aid of North Carolina, Inc., by Elysia Prendergast Jones, Suzanne Saucier, Devin Trego, TeAndra Miller and Celia Pistolis, for plaintiff-appellant.*

*No brief filed for defendant-appellee.*

STROUD, Judge.

Plaintiff appeals the dismissal of her complaint for a domestic violence protective order against defendant. Because the plaintiff's complaint, including the attached sheets filed with the complaint, stated sufficient factual allegations to establish a claim under Chapter 50B, the trial court erred by granting defendant's motion to dismiss the complaint. We reverse the trial court's order of dismissal and remand for further proceedings.

## I. Background

On 13 December 2018, plaintiff filed a "COMPLAINT AND MOTION FOR DOMESTIC VIOLENCE PROTECTIVE ORDER" against her husband, defendant. Plaintiff alleged that defendant had been verbally abusive to her and her children and her daughter had disclosed sexual abuse committed by defendant to a school counselor. The same day plaintiff's complaint was filed, an *ex parte* domestic violence protection order ("DVPO") was entered ordering defendant to stay away from the home and the children's schools. A hearing was scheduled for 19 December 2018 for consideration of entry of a DVPO.

On 19 December 2018, when the case was called for hearing on return of the *ex parte* order, defendant's attorney made an oral motion to dismiss the plaintiff's complaint under North Carolina General Statute § 1A-1, Rule 12(b)(6) and this Court's case of *Martin v. Martin*, ___ N.C. App. ___, 822 S.E.2d 756 (2018).[1] *Martin* was filed 18 December 2018, and the hearing in this case was conducted on 19 December 2018, but on 8 February 2019, a petition for rehearing was allowed, and on 16 July 2019 a new opinion was issued superseding the former version of the opinion upon which the trial court relied. *See Martin v. Martin*, ___ N.C. App. ___, ___, 832 S.E.2d 191, 194-95 (2019). Based upon the former *Martin* opinion, the trial court dismissed plaintiff's complaint for "due process" violations against defendant because plaintiff's allegations were not specific enough. Plaintiff appeals.

## II. Standard of Review

Plaintiff contends that the trial court erred in granting defendant's motion to dismiss her complaint.

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1. *Martin* is not identified by name but from the context of the transcript, which is eleven pages in its entirety, it is clear defendant's counsel and the trial court were referring to *Martin*.

> The standard of review of an order dismissing a complaint for failure to state a claim upon which relief can be granted, G.S. § 1A–1, Rule 12(b)(6), is to determine whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim.

*Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 760–61, 529 S.E.2d 693, 694 (2000) (citations and quotation marks omitted).

III. Attachments to Form Complaint

Because the trial court's dismissal of plaintiff's complaint was based upon defendant's motion to dismiss based upon a lack of sufficient detail in the allegations of domestic violence, we will address plaintiff's second issue on appeal first, regarding whether the trial court erred by failing to consider several pages of attachments to the complaint.

The order dismissing plaintiff's claim was on the form "Domestic Violence Order of Protection" AOC-CV-305 Rev 12/15. (Original in all caps.). Only conclusion of law number 5 was marked: "The plaintiff has failed to prove the grounds for issuance of a domestic violence protective order." But no evidentiary hearing was held, and the trial court clearly dismissed the complaint based upon defendant's oral motion to dismiss[2] when defendant argued,

> It has to be in the body of the Complaint. It doesn't say -- like Paragraph 4 doesn't say "see additional" -- like I understand you run out of room. But it doesn't say that. So these aren't necessarily verified Pleadings within that. These are just email attachments or documents that have been stapled to the back of a page. And even by then, they fail. But like Paragraph 4 which lists out what happened, it has a period, not "see Attachment 1, 2, 3 and 4." The same with No. 5. The problem with those is that I don't even know what these attachments are. Are they sworn to? Are they verified? I have no idea.

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2. Defendant's filed answer did not include a motion to dismiss based upon Rule 12(b)(6), but it was *signed* on 17 December 2018, one day before *Martin* was issued. (Emphasis added.)

In rendering the ruling, the trial court stated its rationale as follows:

> COURT: And again, there's nothing in the Complaint referencing those attachments?
>
> MS. HUGHES: Yes, your Honor.
>
> COURT: Okay. Then based on the Court of Appeals last case[3] which stated "it's clear that the plaintiff/wife testified several alleged actions of domestic violence that were not pleaded in her Complaint, the Court held that that -- that the protection order against the defendant was remanded to the trial for further proceedings consistent with the holding, that they hold that the admission of testimony of domestic violence not otherwise pleaded in the Complaint in a motion for domestic violence protective order violates the defendant's rights to due process." So based on that violation of the defendant's rights to due process, your motion to dismiss is allowed.

Plaintiff filed her complaint *pro se* and it was handwritten on the form AOC-CV-303 "COMPLAINT AND MOTION FOR DOMESTIC VIOLENCE PROTECTIVE ORDER[.]" At the top of the form, just below the case caption and preceding the numbered paragraphs of the allegations of the complaint, the form includes instructions as follows: "Check only boxes that apply and fill in the blanks. *Additional sheets may be attached*." (Emphasis added). Plaintiff marked the boxes numbered 4, 5, 6, 7, 8 and 11, and she wrote some allegations in the provided blank lines for all but paragraph 6, which has no blank for additional information. There were twelve additional sheets attached to the complaint, with detailed allegations of dates and events.

The additional pages were also file-stamped along with complaint on 13 December 2018.[4] The attached pages included three pages of notes as to specific dates and details of the allegations in the complaint, a domestic violence victim's statement, a safety assessment, and a safety agreement. The attached pages noted the paragraphs of the form complaint to which the information on that page related. The first three pages of the attachment each have "#4" handwritten at the top and are typed notes with dates and times and detailed allegations of instances of defendant

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3. The trial court was referring to *Martin* issued the previous day.

4. The first page of the complaint and the Servicemembers Civil Relief Act Affidavit were file-stamped at 2:43 pm and the first page of the attachments at 2:45 pm. The Affidavit of Status of Minor Child was stamped at 3:15 pm.

getting upset because plaintiff would not have sex with him and pushing her; of defendant yelling at Tamara[5] in Wendy's, where he sat by himself and then threw a hamburger at Tamara; and of several other instances of alleged verbal abuse of plaintiff. The next page has "#5" written at the top and is a form entitled "Domestic Violence Victims Statement[,]" with handwritten allegations and signed by plaintiff on 13 December 2018, and the following page, also noted as "#5" is the first page of a six-page "North Carolina Safety Assessment" dated 12 December 2018, regarding the report to the Department of Social Services of alleged sexual abuse of Tamara by defendant. Plaintiff's complaint was sworn and subscribed before the Assistant Clerk of Superior Court.[6] The trial court issued an "Ex Parte Domestic Violence Order of Protection[,]" (original in all caps), and the findings in the *ex parte* order included information from the attachments to the complaint. The summons and complaint were served on Defendant on 14 December 2018, and on 19 December 2018 he filed an answer in which he admitted some allegations, denied others, and requested that plaintiff's complaint be dismissed.

While plaintiff did not use legalese in her complaint, the attachments were included with the filed complaint and the purpose of each attachment was obvious by the numbers on the attached pages. Defendant did *not* contend to the trial court that he did not receive the attached pages with the filed complaint or that they were added after the complaint was filed. Defendant's argument was simply that the form complaint did not state "see [a]ttachment" or "see additional[.]" But even a brief examination of the complaint reveals that the numbered attachments each relate to a particular paragraph number in the form complaint. For example, as noted, the pages of the attachments with the large "#4" at the top are providing further detail to paragraph 4 on the complaint form about defendant being verbally abusive to her and the children.

The Rules of Civil Procedure require notice pleading, with a policy "to resolve controversies on the merits . . . rather than on technicalities of pleading." *Smith v. City of Charlotte*, 79 N.C. App. 517, 528, 339 S.E.2d 844, 851 (1986).

> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer

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5. We have used pseudonyms for the minor children.

6. The form complaint includes language and signature blocks for verification under oath, although North Carolina General Statute § 50B-2 does *not require* that the complaint be "sworn to" or "verified" as argued by defendant's counsel before the trial court. *See* N.C. Gen. Stat. § 50B-2(a) (2017).

> justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

*Harris v. Maready*, 311 N.C. 536, 544, 319 S.E.2d 912, 917–18 (1984) (citation and ellipses omitted).

The better practice would be for plaintiff to note on the form complaint that additional pages are attached, but the complaint as filed included the attachments and made the purpose of the attached pages clear. From defendant's argument to the trial court, there is no question defendant received the full complaint, with all attached pages, and he knew what they meant. It is not entirely clear whether the trial court considered the attached pages, although it appears from the colloquy at the hearing the trial court accepted defendant's argument that they should not be considered for purposes of the motion to dismiss. But all of the pages of the complaint, including the attached pages, were part of the complaint when it was filed; the trial court considered all of the pages when issuing the *ex parte* order; and defendant was served with the entire complaint. We will consider all of the pages for purposes of this appeal.

## IV. Motion to Dismiss

North Carolina General Statute § 50B-2(a) sets forth the requirements for a complaint seeking a DVPO:

> Any person residing in this State may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes *alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person*.

N.C. Gen. Stat. § 50B-2(a) (2017) (emphasis added). Allegations of domestic violence include

> the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:

> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33.

N.C. Gen. Stat. § 50B-1 (2017).

Before the trial court, defendant made an oral motion to dismiss based upon Rule 12(b)(6) and contended that based on *Martin v. Martin*, ___ N.C. App. ___, 822 S.E.2d 756 plaintiff's allegations were not sufficiently specific to afford defendant due process. The trial court agreed. Again, *Martin* was filed 18 December 2018, and the hearing in this case was conducted on 19 December 2018, but on 8 February 2019, a petition for rehearing was allowed, and on 16 July 2019 a new opinion was issued superseding the former version of the opinion upon which the trial court relied. *See Martin v. Martin*, ___ N.C. App. ____, 832 S.E.2d 191, 194-95 (2019).

The issue presented in *Martin* was *not* whether the plaintiff's complaint should be dismissed under Rule 12(b)(6) for failure to state a claim, and the defendant in *Martin* did not contend the complaint failed to state a claim upon which relief may be granted. *See generally Martin*, ___ N.C. App. ___, 832 S.E.2d 191. Thus, *Martin* did *not* involve a motion to dismiss the complaint for failure to state a claim. *See id.* The specific relevant issue in *Martin* was whether "the trial court erred by . . . allowing Plaintiff-Wife to present evidence of alleged incidents of domestic violence of which Defendant-Husband did not receive notice before trial, in violation of his due process rights[.]"[7] *Id.* at ___ 832 S.E.2d at 195. In *Martin*, the trial court held a hearing on the domestic violence claim, and the defendant objected to admission of evidence regarding some incidents of domestic violence which he claimed were not plead and of which he did not have sufficient notice to defend himself. *See id.* at ___, 832 S.E.2d at 196. This Court determined that the trial court should not have based a finding of domestic violence solely on evidence

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7. In context, the word "alleged" is referring to the wife's allegations in her trial testimony. There was no question she did not "allege" certain specific acts in the complaint as she did in her testimony; this was the basis of husband's objection. *Martin*, ___ N.C. App. at ___, 832 S.E.2d at 196.

presented by the plaintiff at trial which she had not mentioned in the complaint, based upon defendant's objection to that evidence at trial. *See id.* at ___, 832 S.E.2d at 196-97.[8]

Although *Martin* does not directly address a ruling on a motion to dismiss under Rule 12(b)(6), it does note that a complaint under Chapter 50B is subject to the same standards of notice pleading as any other claim:

> North Carolina remains a notice-pleading state, which means that a pleading filed in this state must contain a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief. A complaint is adequate, under notice pleading, if it gives a defendant sufficient notice of the nature and basis of the plaintiff's claim and allows the defendant to answer and prepare for trial. While Rule 8 does not require detailed fact pleading, it does require a certain degree of specificity, and sufficient detail must be given so that the defendant and the Court can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for relief.

*Id.* at ___, 832 S.E.2d at 195 (citations, quotation marks, ellipses, and brackets omitted).

Focusing now on plaintiff's last two arguments regarding the sufficiency of her claim for purposes of Rule 12(b)(6) and notice pleading, we turn to her complaint. Plaintiff alleged that defendant was "verbally abusive to [her] and [her] children" and her daughter had reported "allegations of sexual abuse committed by" defendant to her school counselor. The complaint gave additional details regarding some of the alleged acts of abuse, with sufficient detail "so that the defendant and the Court can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for relief." *Id.* at ___, 832 S.E.2d at 195. Plaintiff's allegations state a claim upon which relief may be granted as they are allegations of domestic violence against her and her children. *See* N.C. Gen. Stat. §§ 1A-1, Rule 12(b)(6); 50B-1, -2. *See generally* N.C.

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8. To the extent the defendant did not object to the plaintiff's testimony of other incidents of domestic violence not specifically mentioned in her complaint, this Court held the husband had waived review of the issue. *See Martin*, ___ N.C. App. at ___, 832 S.E.2d at 196-97.

Gen. Stat. § 1A-1, Rule 12(b)(6); *Martin*, ___ N.C. App. ___, 832 S.E.2d at 195. Therefore, we reverse and remand.

V. Conclusion

Because plaintiff's complaint alleged facts sufficient to state a claim for relief under Chapter 50B, we reverse the trial court's order dismissing the claim and remand for further proceedings.

REVERSED and REMANDED.

Judges ZACHARY and MURPHY concur.

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ANTHONY L. REGISTER, Administrator CTA of the ESTATE OF WILLIAM CURTIS ROGERS, Plaintiff

v.

WRIGHTSVILLE HEALTH HOLDINGS, LLC, d/b/a AZALEA HEALTH AND REHAB CENTER, and SABER HEALTHCARE HOLDINGS, LLC, Defendants

No. COA19-977

Filed 5 May 2020

**1. Arbitration and Mediation—motion to compel arbitration—existence of agreement to arbitrate—sufficiency of evidence**

In a negligence action filed against two elder care businesses (defendants) by the administrator of a deceased patient's estate (plaintiff), the trial court properly denied defendants' motion to compel arbitration where plaintiff submitted affidavits denying that the signature shown on defendants' copy of the arbitration agreement belonged to the patient's health care agent and defendants did not present any evidence in rebuttal, and therefore defendants failed to prove the existence of a valid arbitration agreement between the parties. Plaintiff's untimely submission of the affidavits did not prejudice defendants where the trial court provided defendants extra time to respond to them. Further, the trial court was not required to enter specific findings of fact regarding the affidavits' truthfulness where it adequately stated its bases for denying defendants' motion.

**2. Arbitration and Mediation—right to compel arbitration—waiver—acts inconsistent with arbitration—prejudice to nonmoving party**

In a negligence action filed against two elder care businesses (defendants) by the administrator of a deceased patient's estate

(plaintiff), the trial court properly denied defendants' second motion to compel arbitration because defendants waived any right to arbitrate by withdrawing their first motion to compel arbitration, emailing plaintiff's counsel to say they would not pursue that motion any further, objecting to discovery requests regarding the alleged arbitration agreement between the parties, and waiting fifteen months to file the second motion. Defendants' actions were inconsistent with any claimed right to arbitrate and prejudiced plaintiff, who incurred significant litigation expenses that could have been avoided if defendants had not withdrawn their first motion.

Appeal by Defendants from order entered 13 June 2019 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 18 March 2020.

*Henson Fuerst, P.A., by Rachel Fuerst, Carmaletta Henson, and Shannon Gurwitch, and Hall and Green, LLP, by John F. Green and Alex Hall, for the Plaintiff.*

*Young Moore and Henderson, P.A., by Madeleine M. Pfefferle, Dana H. Hoffman, and Angela Farag Craddock, for the Defendants.*

BROOK, Judge.

Wrightsville Health Holdings, LLC, doing business as Azalea Health and Rehab Center, and Saber Healthcare Holdings, LLC (collectively, "Defendants"), appeal from an order denying Defendants' motion to stay the proceedings and compel arbitration on 13 June 2019. Because we hold that Defendants failed to prove the existence of a valid arbitration agreement and, in the alternative, that they waived any contractual right to arbitrate, we affirm.

## I. Factual and Procedural Background

Anthony L. Register ("Plaintiff"), administrator of the estate of William S. Rogers, initiated this suit on 28 August 2017, alleging that Defendants were negligent in their treatment and care of Mr. Rogers while he was a patient and resident at Defendants' skilled nursing facility. Plaintiff is married to Mr. Rogers's daughter, Lisa Register, who had the authority to make healthcare decisions on behalf of Mr. Rogers under a health care power of attorney. Plaintiff brought claims for medical negligence, administrative/corporate negligence, ordinary negligence, a

survival action and wrongful death action, and asserted a claim for punitive damages.[1]

Defendants filed an answer to Plaintiff's complaint on 30 October 2017; their answer included a motion to compel arbitration. Plaintiff served discovery requests on Defendants, including requests for production of information and documents related to the alleged arbitration agreement. A hearing was set on the motion to compel arbitration; however, on 15 February 2018, Defendants withdrew their motion to compel arbitration. In Defendants' responses to Plaintiff's first set of interrogatories and requests for production, Defendants objected to questions relating to the alleged arbitration agreement, noting they had withdrawn their motion to compel arbitration.

Prior defense counsel filed a motion to withdraw as counsel on 6 March 2019, and the trial court allowed the motion the same day. Defendants then filed an amended Rule 15 motion and motion to stay the proceedings and compel arbitration on 29 May 2019; the motion included an electronic record that Defendants alleged was an arbitration agreement signed by Ms. Register when Mr. Rogers was admitted to Defendants' facility. On 4 June 2019, Plaintiff responded to Defendants' motion and included affidavits of Plaintiff and Ms. Register denying that Ms. Register signed the alleged arbitration agreement.

A hearing was held on Defendants' new motion to compel arbitration before Judge Harrell on 5 June 2019. At the hearing, Defendants objected to the affidavits as untimely because they were served on the eve of the hearing. The trial court offered Defendants a continuance to a later hearing date so that Defendants could prepare a response to the affidavits; Defendants declined the trial court's offer. The trial court accepted the affidavits.

The trial court denied Defendants' motion to compel arbitration by written order on 13 June 2019 and made the following relevant findings of fact:

> 1. That this action was commenced by the filing of the complaint by the Plaintiff on August 28, 2017.
>
> 2. That the defendants filed their answer on October 30, 2017. As part of that answer, the defendants included a motion to compel arbitration.

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1. Plaintiff's initial suit included as defendants Jeffrey D. Seder, M.D., and Brunswick Cardiology, P.C. Plaintiff voluntarily dismissed his claims against Dr. Seder and Brunswick Cardiology without prejudice on 30 April 2019.

3. Plaintiff served discovery requests on defendants which included requests for information and documents directly related to the alleged arbitration agreement.

4. The [first] motion to compel arbitration was noticed for hearing by the defendants on January 11, 2018 to be heard February 28, 2018

5. On February 9, 2018 counsel for the defendants emailed counsel for the plaintiff and stated "We do not intend to move forward with our motion to compel arbitration . . . I think you had served some discovery with respect to the arbitration issue. Please let me know if we still need to respond to that in light of our motion withdrawal."

6. That on February 14, 2018, the defendants filed with the court a Withdrawal of Motion which stated that defendants were withdrawing their motion to compel arbitration.

7. In response to plaintiff's first set of interrogatories and request for production of documents, the defendants lodged objections to the relevancy of questions relating to the alleged arbitration agreement and noted that it had withdrawn its motion to compel arbitration.

8. Plaintiff did not seek orders to compel productions to those specific discovery requests based on the defendant having withdrawn the motion to compel arbitration.

9. Following their withdrawal of the motion to compel arbitration, the defendants took the following actions:

a. Defendants served written interrogatories and request for production of documents on plaintiff on February 20, 2018.

b. Defendants circulated their proposed revised discovery scheduling order on February 26, 2018.

c. Defendants filed a motion requesting court involvement in the preparation of the discovery scheduling order on March 27, 2018.

d. Defendants noticed the depositions of Lisa Register and Tina Glisson on May 30, 2018. In defendants [sic] deposition of Lisa Register, counsel did not address any issues relating to the purported arbitration agreement which forms the basis of this motion.

e. Defendants took part in and questioned [ten] witnesses at depositions . . . .

. . .

f. Defendants agreed to terms of a consent order compelling it to respond to certain discovery requests of the plaintiff on December 3, 2018.

10. On March 6, 2019, counsel for the defendants filed a motion to withdraw due to issues that had arisen in their representation of the defendants. Counsel informed the court that Dana Hoffman (present counsel) had been retained, had been provided all discovery and was prepared to take over representation. In statements to the court, counsel indicated that "[h]er involvement will not change anything in terms of discovery scheduling order, the trial date, would not prejudice the administration of this case in any way. We're not asking for any modification to DSO [Discovery Scheduling Order], any attempt to move the trial date, so I don't think it's in any way prejudicial to the plaintiffs in this case."

11. Following the appearance of Ms. Hoffman as counsel for the defendants, interrogatories and requests for production of documents were sent by defendants to Dr. Jeffrey Seder and Brunswick Cardiology . . . on April 4, 2019.

12. Defendants then forwarded their second set of interrogatories and request for production of documents to the plaintiff on April 5, 2019.

13. On April 29, 2019 defendants filed a motion for protective order to quash the 30(b)(6) Notice of Deposition served by plaintiff on Defendant Saber Healthcare Holdings, LLC and noticed the same for hearing.

14. On May 8, 2019 in a hearing before the Honorable Paul Quinn on plaintiff's motion to compel, defendants admitted to violation of the prior order of the Court on December 3, 2018 compeling [sic] production of certain discovery. An order from that hearing addressing sanctions is still outstanding.

15. The defendants were also ordered by Judge Quinn in a written order entered May 13, 2019 to compel production

of information which defendants had failed to provide in response to other discovery requests. . . .

16. In support of their motion to compel arbitration, defendants produced a copy of an electronic record which purports to be an Arbitration Agreement signed at the time of the decedent's admission to the defendant's facility. The agreement purports to bear the signature of Lisa Register who was the health care power of attorney for the decedent.

17. Lisa Register and plaintiff in this action have filed affidavits in opposition to the motion to compel arbitration which deny that the signature shown on the electronic record is the signature of Lisa Register.

18. Defendants have failed or refused to provide information about the employee who purportedly signed the arbitration agreement on behalf of defendants. Plaintiff has been unable to complete discovery on issues relating to the arbitration agreement and reasonably relied on the defendants [sic] withdrawal of the motion and defendants [sic] statements that they would not move forward with the motion in not pursuing a motion to compel production of the information objected to in discovery requests.

19. As part of their preparation for litigation, counsel for the plaintiff retained a medical records expert who has reviewed the audit history for electronic records provided by defendants. The purported arbitration agreement was not provided in discovery and plaintiff was not able to have their expert review the audit trail for this document.

20. Plaintiffs have incurred $75,000.00 in litigation expenses including retention of expert witnesses and costs of discovery. Those expenses would not have been incurred if defendants had pursued its motion to compel arbitration at the earlier stage of this proceeding.

21. Counsel for the plaintiff is not paid hourly but have expended substantial time in preparation for and completion of numerous depositions, court hearings including motions to compel production of discovery responses, and completion of discovery responses.

. . .

25. More than 15 months elapsed after defendants withdrew the motion to compel arbitration before attempting to resurrect this issue.

The trial court then entered the following conclusions of law:

2. At an early stage of the litigation, defendants notified plaintiff of its intent to enforce a purported arbitration agreement but rather than simply removing the motion from a hearing calendar, the defendant withdrew the motion entirely.

. . .

5. Defendants have failed to carry their burden of establishing the validity of an enforceable arbitration agreement.

6. Even if the arbitration agreement were valid, withdrawing the motion to compel arbitration, indicating to the plaintiff that the motion would not be pursued, objecting to discovery responses from the plaintiff on the basis that the motion had been withdrawn and express assertions to the court that no impact on the course of litigation would be caused by withdrawal of counsel constitute actions inconsistent with arbitration.

7. That defendants [sic] actions have resulted in prejudice to the plaintiff in the expense of over $75,000.00 in costs incurred in pursuit of claims, completion of a large number of depositions that would have otherwise been unavailable in arbitration, and hundreds of hours of attorney time incurred in conducting hearings to compel defendants to respond to discovery and to seek sanctions for defendants [sic] failure to comply with [a] court order to compel that production.

. . .

9. The length of delay in asserting the right to arbitrate has been a factor considered in determining if waiver has occurred. Elliott v. KB Home N.C., Inc., 231 N.C. App. 332, 337, 752 S.E.2d 694, 698 (2013)[.]

10. When a party has allowed significant time to pass, participated in litigation involving judicial intervention and participation, and thereby caused the expenditure of

> significant expense, including attorneys' fees, the strong public policy in favor of arbitration is thereby diminished because the primary benefit of arbitration, namely expedited hearing of issues at a reduced cost to the parties, has been lost. Elliott v. KB Home N.C., Inc., 231 N.C. App. 332, 338, 752 S.E.2d 694, 698 (2013)[.]
>
> 11. Defendants cannot engage in protracted litigation and then assert a right to arbitrate when the course of that litigation has not been favorable to them, particularly where they are subject to contempt and sanction orders from the court for their failure to comply with prior court orders.

Concluding that Defendants had failed to meet their burden to establish the existence of a valid arbitration agreement, and in the alternative that Defendants had waived any right to compel arbitration, the trial court denied Defendants' motion to compel arbitration on 13 June 2019. Defendants filed notice of appeal on 20 June 2019.

## II. Jurisdiction

An appeal to this Court is proper from an order denying a motion to compel arbitration. N.C. Gen. Stat. § 1-569.28 (2019).

## III. Analysis

Defendants allege that the trial court erred in finding that Defendants failed to establish a valid and enforceable arbitration agreement and in finding that Defendants waived any right to compel arbitration. We disagree and affirm the order of the trial court.

### A. Existence of Valid Agreement

#### i. Standard of Review

"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." *Sciolino v. TD Waterhouse Investor Servs.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Eley v. Mid/East Acceptance Corp. of N.C., Inc.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005) (internal marks and citation omitted). "Accordingly, upon appellate review, we must determine whether there is evidence in the record supporting the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate." *Sciolino*, 149 N.C. App. at 645, 562 S.E.2d at 66.

ii. Merits

**[1]** Defendant, as the party seeking to compel arbitration, bears the burden of showing that a valid arbitration agreement exists. *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992). "The law of contracts governs the issue of whether an agreement to arbitrate exists." *Brown v. Centex Homes*, 171 N.C. App. 741, 744, 615 S.E.2d 86, 88 (2005). In North Carolina, "a valid contract requires (1) assent; (2) mutuality of obligation; and (3) definite terms." *Charlotte Motor Speedway, LLC v. County of Cabarrus*, 230 N.C. App. 1, 7, 748 S.E.2d 171, 176 (2013). Arbitration will not be compelled in the absence of such a showing. *Routh*, 108 N.C. App. at 271, 423 S.E.2d at 794.

Defendants first argue that the trial court's finding that they failed to meet their burden was unsupported by competent evidence. Chiefly, they contend, "Ms. Register's act of signing the Arbitration Agreement is sufficient to establish that the agreement is a valid agreement to arbitrate and Plaintiff is bound by the obligation to do so." However, Plaintiff contests whether Ms. Register actually signed the agreement, not whether the agreement would have been valid had she done so. As explained below, because competent evidence supports a finding that Defendants failed to establish assent—an essential element of a valid contract—we affirm the trial court's finding that Defendants did not show that a valid arbitration agreement exists, and thus we affirm its order denying Defendants' motion to compel arbitration.

Defendant concedes that the trial court admitted the affidavits of Plaintiff and Ms. Register in a proper exercise of its discretion under North Carolina Rules of Civil Procedure, Rule 6(d). N.C. Gen. Stat. § 1A-1, Rule 6(d) (2019) (granting trial courts the discretion to accept affidavits in support or opposition of motions even when not served upon opposing counsel two days in advance of hearing). Once admitted, affidavits disputing a fact material to Defendant's burden—here, whether Ms. Register assented to the contract—are competent evidence to support a trial court's conclusion that a defendant has not met its burden, even though "the evidence might have supported findings to the contrary." *Sciolino*, 149 N.C. App. at 645, 562 S.E.2d at 66. Further, Defendants did not produce any witnesses or affidavits attesting that Ms. Register did in fact read and sign the arbitration agreement. The trial court was therefore entitled to determine the credibility of the affidavits and to rely on them, as well as to consider the lack of rebuttal evidence from Defendants beyond the purported instrument, to come to the conclusion it did.

Defendants contend, however, that the affidavits were "inherently incredible" such that they did not constitute "competent evidence." Specifically, and relying on *In re Foreclosure of Real Prop. Under Deed of Trust from Brown*, 156 N.C. App. 477, 577 S.E.2d 398 (2003), Defendants argue that parties should be apprised of the contents of affidavits submitted by their opponents and allowed to object. In that case, this Court listed several potential ways in which a party could be prejudiced by the admission into evidence of untimely affidavits. *Id.* at 485, 577 S.E.2d at 403-04. But it then upheld the trial court's admission of affidavits because it appeared the appellants had not been so prejudiced—that is, they had been made aware of the affidavits' contents and had the opportunity to challenge them. *Id.*, 577 S.E.2d at 404. It is therefore not enough, as Defendants suggest, that there *may* be abstract "concerns about the ability the [sic] of opposing party's ability to effectively refute new allegations and the inherent credibility of untimely affidavits."

As Plaintiff notes, the trial court offered Defendants more time to respond to the untimely affidavits pursuant to the discretion Rule 6(d) affords. Once Defendants declined that offer, the trial court in its discretion refused to grant Defendants' motion to strike the affidavits. In a nearly identical case—one that also concerned the enforcement of an alleged arbitration agreement by an assisted living facility in the wake of an alleged wrongful death—we held that although it was "undisputed that plaintiff failed to serve her opposing affidavit on defendants within two days prior to the trial court's hearing[,] . . . [t]he trial court did not abuse its discretion when it '[took] such other action as the ends of justice require' and proceeded with the hearing." *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 418, 637 S.E.2d 551, 554 (2006) (quoting N.C. Gen. Stat. § 1A-1, Rule 6(d)).

Defendants also point to *Johnson v. Crossroads Ford, Inc.*, 230 N.C. App. 103, 108-09, 749 S.E.2d 102, 106-07 (2013), where this Court reversed a trial court's decision to strike an affidavit offered five days before a hearing. Even putting aside the trial court's offer here to Defendants to continue the hearing to ensure that Defendants had a chance to fully consider and respond to the affidavits, this Court's previous holding that a trial court was wrong to exclude affidavits that were timely served would not require us to now find that a trial court committed reversible error by *including* affidavits entered with less notice. *See id.* at 108, 749 S.E.2d at 106 ("[T]he trial court erred by finding that because Woods' affidavit was presented at the '11th hour,' it was inherently incredible."). We therefore do not agree with Defendants that "this Court has previously determined that affidavits are inherently incredible when served

at the eleventh hour to raise entirely new contentions of which defendants had never been made aware."

Defendants further argue that the trial court erred in failing to make affirmative findings that the affidavits are true or that the signature on the alleged arbitration agreement is not that of Ms. Register. North Carolina law requires that the trial court determine whether a valid arbitration agreement exists as a matter of law. N.C. Gen. Stat. § 1-569.6(b) (2019). We have also required that "the trial court [] state the basis for its decision in denying a defendant's motion to stay proceedings in order for this Court to properly review whether or not the trial court correctly denied the defendant's motion [to compel arbitration]." *Steffes v. DeLapp*, 177 N.C. App. 802, 804, 629 S.E.2d 892, 894 (2006).

The trial court has done so here. It concluded as a matter of law that "Defendants have failed to carry their burden of establishing the validity of an enforceable arbitration agreement." It made findings of fact acknowledging both the contents of the affidavits and Defendants' failure to produce either the purported agreement or the employee who allegedly signed the agreement on Azalea's behalf until 29 May 2019, approximately a year and a half after the initiation of the suit. The trial court thereby stated adequate bases for its decision. Because the trial court adequately supported its finding, an affirmative finding that the affidavits were in fact truthful is not required to support the conclusion that Defendants' burden remains unmet. *See Evangelistic Outreach Ctr. v. Gen. Steel Corp.*, 181 N.C. App. 723, 728, 640 S.E.2d 840, 844 (2007) (holding that "competent evidence supported the trial court's finding that there was no agreement to arbitrate" without the trial court's accepting a party's denial as a fact per se).

Finally, Defendants argue that state and national public policies in favor of arbitration must lead to a conclusion that the trial court erred in denying their motion to compel arbitration. But public policy favoring the enforcement of arbitration agreements and broad constructions of their scope depends on a predicate finding that there exists an arbitration agreement to be enforced and construed. *See Sears Roebuck v. Avery*, 163 N.C. App. 207, 211, 593 S.E.2d 424, 428 (2004) ("[T]his public policy does not come into play unless a court first finds that the parties entered into an enforceable agreement to arbitrate."). Defendants' lengthy appeals to public policy therefore put the cart before the horse. Policy plays no part in the trial court's otherwise routine determination of whether there is a valid contract at all.

We therefore hold the trial court correctly concluded that Defendants failed to meet their burden of proving the existence of a valid arbitration agreement.

B. Waiver of Right to Compel Arbitration

**[2]** Defendants further contend that the trial court erred in concluding, in the alternative, that Defendants waived any right to compel arbitration. We conclude that the trial court did not so err, and we affirm its order.

i. Standard of Review

Whether a party has engaged in conduct that constitutes waiver of its contractual right to arbitration is a question of fact. *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984). "[T]he trial court's findings of fact are binding on appeal when supported by competent evidence." *Herbert v. Marcaccio*, 213 N.C. App. 563, 567, 713 S.E.2d 531, 535 (2011). We apply a "general presumption of correctness [] to a trial court's findings of fact to its waiver determinations." *Elliott v. KB Home N.C., Inc.*, 231 N.C. App. 332, 337, 752 S.E.2d 694, 698 (2013). "[T]he question of whether those actions, once found as fact by the trial court, amount to waiver of the right to arbitrate a dispute is a question of law subject to *de novo* review." *IPayment, Inc. v. Grainger*, 257 N.C. App. 307, 315, 808 S.E.2d 796, 802 (2017).

ii. Merits

Public policy favors arbitration because it represents "an expedited, efficient, relatively uncomplicated, alternative means of dispute resolution, with limited judicial intervention or participation, and without the primary expense of litigation—attorneys' fees." *Nucor Corp. v. Gen. Bearing Corp.*, 333 N.C. 148, 154, 423 S.E.2d 747, 750 (1992). "Because of the strong public policy in North Carolina favoring arbitration, courts must closely scrutinize any allegation of waiver of such a favored right." *Cyclone*, 312 N.C. at 229, 321 S.E.2d at 876 (internal citation omitted). "[A] party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration." *Id.* "[T]he party opposing arbitration bears the burden of proving prejudice." *HCW Ret. & Fin. Servs. v. HCW Emp. Ben. Servs.*, 367 N.C. 104, 109, 747 S.E.2d 236, 240 (2013).

Our courts have found parties to have taken actions inconsistent with a right to arbitrate when they participate in lengthy litigation while doing "nothing to assert any right to arbitrate." *Elliott*, 231 N.C. App. at

342, 752 S.E.2d at 700 (involving a three-year period of litigation absent any assertion of a right to arbitrate).

And our courts have indicated that there are several ways in which a party can show prejudice. These include a "delay in the seeking of arbitration" resulting in a party's "expend[ing] significant amounts of money" in litigation. *Cyclone*, 312 N.C. at 229-30, 321 S.E.2d at 877. The reason is clear enough: "when a party has allowed significant time to pass, participated in litigation involving judicial intervention and participation, and thereby caused the expenditure of significant expense, including attorneys' fees, the strong public policy in favor of arbitration is thereby diminished." *Elliott*, 231 N.C. App. at 338, 752 S.E.2d at 698.

We consider below whether Defendants' actions were inconsistent with a claimed right to arbitration and whether Plaintiff was prejudiced by those actions. Deciding both of these issues in the affirmative, we conclude that Defendants waived any right to arbitrate they may have had.

Here, Defendants filed a withdrawal of their motion to compel arbitration. They also sent an email to Plaintiff's counsel stating, "[w]e do not intend to move forward with our motion to compel arbitration." Further, they objected to Plaintiff's requests for admission regarding the alleged agreement to arbitrate. These actions go beyond merely doing "nothing to assert any right to arbitrate" that our Court found sufficient to waive a right to arbitrate in *Elliott* and are entirely "inconsistent with [a] right to arbitration." *Id.* at 342, 752 S.E.2d at 700.

Having concluded that Defendants took actions "inconsistent with arbitration," we turn to whether Plaintiff was prejudiced by Defendants' actions. *Cyclone*, 312 N.C. at 229, 321 S.E.2d at 876. Plaintiff asserts that Defendants' delay in reasserting an alleged right to arbitrate prejudiced Plaintiff because Plaintiff was forced to expend significant amounts in litigation. As explained below, we agree.

First, the delay at issue here was consequential. While our Supreme Court found a one-month delay, in which no discovery was conducted and no evidence was lost, did not support a conclusion of prejudice, *id.* at 233, 321 S.E.2d at 878, our Court in *Herbert* concluded that litigation over a two-year period was significant and contributed to our conclusion that there was prejudice to the non-moving party, 213 N.C. App. at 569, 713 S.E.2d at 536. The delay here in asserting a right to arbitrate—after renouncing the same—is substantial, and, as such, bears more in common with *Herbert* than *Cyclone*. Specifically, competent evidence supports the trial court's finding that "[m]ore than 15 months elapsed

after [D]efendants withdrew the motion to compel arbitration before attempting to resurrect this issue." This finding in turn supports the trial court's conclusion that Defendants waived their alleged right to arbitrate this dispute.

> When considering whether a delay in requesting arbitration resulted in significant expense for the party opposing arbitration, the trial court must make findings (1) whether the expenses occurred after the right to arbitration accrued, and (2) whether the expenses could have been avoided through an earlier demand for arbitration.

*Elliott*, 231 N.C. App. at 343, 752 S.E.2d at 701. Because the party opposing arbitration bears the burden of proving prejudice, the non-moving party must present to the trial court actual evidence of the expenses incurred as a result of the moving party's failure to timely assert a right to arbitration. *See Herbert*, 213 N.C. App. at 569, 713 S.E.2d at 536 (affirming trial court's finding of significant expense where trial court relied on attorney affidavit and superior court record evidence that the litigation required "significant resources," although trial court did not find any "specific dollar amounts" of the expense). Our Court has considered fees and other litigation expenses as low as $10,000 to be prejudicial. *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 261, 401 S.E.2d 822, 826-27 (1991); *see also Elliott*, 231 N.C. App. at 343, 752 S.E.2d at 701 (concluding $100,000 in legal fees to be prejudicial); *Moose v. Versailles Condo. Ass'n*, 171 N.C. App. 377, 385, 614 S.E.2d 418, 424 (2005) (affirming trial court's finding that $32,854 showed prejudice).

Here, the record supports the trial court's findings that the delay caused Plaintiff to incur expenses and, thus, the court's conclusion regarding waiver. Plaintiff's counsel submitted a sworn affidavit averring that counsel expended approximately $75,000 in litigation, and that "[a]lmost half of the money has been spent o[n] preparation and taking depositions, travel, and preparation for and travel to multiple Court hearings." Counsel further averred that Plaintiff would not have hired seven different expert witnesses, participated in four superior court hearings, reserved over a dozen witnesses to appear for a peremptory trial setting on 9 December 2019, taken 12 depositions, or participated in mediation had Defendants not withdrawn their motion to compel arbitration. The trial court assessed this record evidence as credible and found that Plaintiff incurred significant litigation expenses that would not have accrued had Defendants not withdrawn the motion. The trial court further concluded as a matter of law that Plaintiff was prejudiced by expending

> $75,000.00 in costs [] in pursuit of claims, completion of a large number of depositions that would have otherwise been unavailable in arbitration, and hundreds of hours of attorney time incurred in conducting hearings to compel defendants to respond to discovery and to seek sanctions for defendants [sic] failure to comply with [a] court order to compel that production.

We therefore conclude that competent evidence supports the trial court's findings. These findings, in turn, support the court's conclusion that the Defendants' delay caused Plaintiff to suffer significant expense.

Competent evidence supports the trial court's findings that Defendants acted inconsistent with any claimed right to arbitrate. Competent evidence also supports the court's findings that these actions were to Plaintiff's detriment. These findings support the trial court's conclusion of a waiver of any purported right to arbitrate. "Holding otherwise would defeat, rather than promote, the public policy behind the favor with which the courts of this state generally view arbitration—expediting an efficient and relatively simple means of resolving disputes without the multitude of costs, in both time and money, generally associated with litigation." *Elliott*, 231 N.C. App. at 347, 752 S.E.2d at 703.

## IV. Conclusion

We conclude that the trial court did not err in concluding that Defendants failed to prove the existence of a valid arbitration agreement. We further conclude that the trial court did not err in finding that, even if there was a valid arbitration agreement, Defendants waived any right to arbitrate. We therefore affirm the order below denying Defendants' second motion to compel arbitration and stay the proceedings.

AFFIRMED.

Judges DILLON and COLLINS concur.

STATE OF NORTH CAROLINA EX REL. JOSEPH POLLINO AND KIMBERLY VANDENBERG, PLAINTIFFS

v.

MARY G. SHKUT, DEFENDANT

No. COA19-601

Filed 5 May 2020

**1. Appeal and Error—mootness—quo warranto action—procedural issues—no public interest exception**

An appeal from an order dismissing a quo warranto action (filed pursuant to N.C.G.S. § 1-516) as untimely was dismissed as moot where the matter in controversy—the manner in which a village council member was appointed—was no longer at issue because the member no longer served on the council. Where the appeal involved non-urgent procedural issues, it did not meet the standard for application of the public interest exception to mootness.

**2. Declaratory Judgments—quo warranto action—request for sanctions—improper procedure**

In a quo warranto action brought by a mayor and village council member (plaintiffs) challenging the appointment of another council member (defendant), which was dismissed for failure to timely effect service, defendant's motion for sanctions against plaintiffs' attorneys—for allegedly violating N.C.G.S. § 1-521 by using public funds for counsel fees—was properly dismissed where the declaratory and injunctive relief sought should have been brought by defendant in a separate civil action, or as a counterclaim or crossclaim in an active proceeding. Although defendant argued on appeal that the trial court could have granted relief by using its inherent authority to discipline attorneys practicing before it, defendant did not cite ethical rules or seek professional discipline in her motion.

Appeal by plaintiffs from orders entered 5 October 2018, 6 December 2018, and 12 March 2019, and appeal by defendant from order entered 12 March 2019 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 21 January 2020.

*The Brough Law Firm, PLLC, by T.C. Morphis, Jr., for plaintiffs-appellants and cross-appellees.*

*Weaver, Bennett & Bland, P.A., by Bo Caudill, Michael David Bland, and Abbey M. Krysak, for defendant-appellee and cross-appellant.*

DIETZ, Judge.

Plaintiffs Joseph Pollino and Kimberly Vandenberg brought a *quo warranto* action against Defendant Mary Shkut seeking a declaration that Shkut's appointment to the Village of Marvin's village council was unlawful.

The trial court dismissed the action for failure to timely serve the summons and complaint, leading to a long series of procedural battles and, ultimately, this appeal. But, while this appeal was pending, Shkut left the village council. As a result, this appeal is now moot and does not fall within any exception to the mootness doctrine. We therefore dismiss this portion of the appeal as no longer justiciable.

Shkut cross-appealed the denial of a motion for sanctions and that issue is not moot. But, for the reasons explained below, the trial court properly determined that it could not grant the relief Shkut sought. Accordingly, we affirm the order denying Shkut's motion for sanctions.

**Facts and Procedural History**

The Village of Marvin is a municipal corporation in Union County and is governed by the Marvin Village Council, which consists of four members and the mayor. During a council meeting in 2018, council member Ron Salimao moved to suspend the procedural rules for council meetings so he could tender his resignation from office and have the council vote to appoint Defendant Mary Shkut as his replacement. Plaintiffs Joseph Pollino, mayor of Marvin, and Kimberly Vandenberg, a council member at the time, objected to Salimao's motion and to Shkut's appointment. Nevertheless, the council, by majority vote, accepted Salimao's resignation and appointed Shkut.

Plaintiffs then filed a *quo warranto* action pursuant to N.C. Gen. Stat. § 1-516 challenging the lawfulness of Shkut's appointment. Several months later, the trial court dismissed Plaintiffs' complaint for failure to timely effect service. Plaintiffs moved to reconsider the dismissal and to alter or amend the judgment under Rule 59 of the North Carolina Rules of Civil Procedure, but the court denied the motion.

Plaintiffs then filed their first appeal to this Court, challenging the dismissal of their complaint. Shkut moved to dismiss that appeal as untimely. That same day, Shkut also filed a motion for sanctions against the law firm representing Plaintiffs.

The trial court granted Shkut's motion to dismiss Plaintiffs' appeal as untimely. The court denied Shkut's motion for sanctions. Both

Plaintiffs and Shkut then appealed to this Court and filed various procedural motions and petitions.

## Analysis

### I. Plaintiffs' Appeal - Mootness

**[1]** While this appeal was pending, Plaintiffs filed a "Notice of Mootness and Motion for Hearing" informing the Court that Shkut's term of office on the Village Council ended when new council members were sworn in on 18 December 2019. Plaintiffs thus acknowledge that "portions of the appeals" are now moot. We agree.

"Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed" as moot. *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131 (1994).

Here, the only relief Plaintiffs seek in their complaint is a declaration that Shkut's appointment to the Village Council was unlawful. As Plaintiffs concede in their notice, "[g]iven that [Shkut] no longer holds office and given that neither party has challenged the validity of actions taken by the Council during [Shkut's] term in office, the portions of the appeals challenging her right to hold office are now moot."

Nevertheless, Plaintiffs contend that, although otherwise moot, this dispute remains justiciable because it satisfies the "public importance" exception to mootness. Under this exception, we may adjudicate an appeal, despite mootness issues, if it "involves a matter of public interest, is of general importance, and deserves prompt resolution." *North Carolina State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). But "this is a very limited exception that our appellate courts have applied only in those cases involving clear and significant issues of public interest." *Anderson v. North Carolina State Bd. of Elections*, 248 N.C. App. 1, 13, 788 S.E.2d 179, 188 (2016).

This case does not meet the high standard for application of the public interest exception. First, although one might argue that a lawsuit addressing whether a public official properly holds her office is a matter of significant public importance, that is not what this appeal is about. The trial court dismissed Plaintiffs' suit for failure to timely serve the summons and complaint. All of the issues raised in this appeal are procedural in nature and address rather mundane aspects of litigation that are not of any particular public importance.

Plaintiffs contend that resolution of this appeal will aid "future litigants" in understanding the law that applies to "service of the summons and complaint in a *quo warranto* action." But we see nothing in our jurisprudence on this question that is either so urgent or so important that we must answer this question now. In our view, Plaintiffs seek "to fish in judicial ponds for legal advice." *Id.* at 13, 788 S.E.2d at 189. We therefore hold that this appeal is not sufficiently exceptional to warrant application of the public interest exception to mootness. Accordingly, we dismiss Plaintiffs' appeal as moot and no longer justiciable.

## II. Shkut's Appeal - Motion for Sanctions

**[2]** Shkut cross-appealed in this case, arguing that the trial court erred by denying her motion for sanctions against the law firm that represented Plaintiffs in the trial court.

In her motion, Shkut alleged that the law firm representing Plaintiffs impermissibly billed the Village of Marvin for legal services as part of this *quo warranto* suit. Shkut contends that these attorneys' fees violated a statutory provision governing *quo warranto* suits, N.C. Gen. Stat. § 1-521, which states that "[i]t is unlawful to appropriate any public funds to the payment of counsel fees in any such action." Shkut argues that the trial court had authority to grant her motion, and to sanction the law firm and its counsel, based on the trial court's "inherent authority to govern the conduct of attorneys that practice before" the court.

This argument is meritless for several reasons. First, although trial courts have authority to impose sanctions on attorneys in certain circumstances and under certain rules, none of those rules or circumstances are implicated here. *See*, *e.g.*, N.C. R. Civ. P. 11 and 37(g). Shkut's motion is, in effect, a request for a declaratory judgment that the Village of Marvin violated N.C. Gen. Stat. § 1-521 by appropriating public funds for counsel fees in a *quo warranto* action, and a corresponding mandatory injunction forcing the law firm to repay the money.

A request for a declaratory judgment that a municipality violated our General Statutes cannot be made in a motion for sanctions against a private party in a separate legal action. *Conner v. North Carolina Council of State*, 365 N.C. 242, 258–59, 716 S.E.2d 836, 846–47 (2011). To obtain this sort of declaratory and injunctive relief, Shkut must bring her own civil action or bring a counterclaim or crossclaim against the proper parties in an appropriate, pending proceeding.

Second, although there are circumstances in which a trial court may discipline counsel for unethical conduct, Shkut did not identify

any ethical rules that the law firm and its lawyers violated. *See generally Boyce v. North Carolina State Bar*, 258 N.C. App. 567, 575–76, 814 S.E.2d 127, 133 (2018). Indeed, Shkut's motion for sanctions did *not* seek ethical discipline—it instead requested declaratory and injunctive relief to force a law firm to repay funds to the Village of Marvin. Accordingly, the trial court properly determined that it could not grant Shkut the relief she sought in her unusual motion for sanctions.

**Conclusion**

We dismiss Plaintiffs' appeal as moot and affirm the trial court's denial of Shkut's motion for sanctions.

DISMISSED IN PART; AFFIRMED IN PART.

Judges TYSON and INMAN concur.

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STATE OF NORTH CAROLINA
v.
CHARLES BLAGG, DEFENDANT

No. COA18-1117

Filed 5 May 2020

**Drugs—possession with intent to sell and deliver—sufficiency of evidence**

Viewed in the light most favorable to the State, sufficient evidence was presented from which a jury could reasonably infer that defendant possessed methamphetamine with the intent to sell or deliver based on the amount seized from defendant's car (6.51 grams in a single bag), defendant's admission that he was on his way to meet another person who had been charged with drug trafficking, and defendant's possession of drug-related paraphernalia. Although the evidence also could have supported an interpretation that defendant possessed the drugs for personal use, given the totality of the circumstances, the issue was for the jury to resolve.

Chief Judge McGEE dissenting.

Appeal by defendant from judgments entered 29 January 2018 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 9 April 2019.

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

*Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant-appellant.*

BERGER, Judge.

Charles Blagg ("Defendant") was convicted of possession with intent to sell and deliver methamphetamine, possession of methamphetamine, possession of marijuana, and attaining habitual felon status on January 11, 2018. Defendant was sentenced on January 29, 2018, and he received concurrent sentences of 128 to 166 months and 50 to 72 months in prison. Defendant appeals, arguing the trial court erred in denying his motion to dismiss the possession with intent to sell or deliver methamphetamine charge. We disagree.

Factual and Procedural Background

Defendant failed to appear when his cases were called for trial, and he was tried *in absentia*. The evidence at trial tended to show that Buncombe County Sheriff's Office Deputies Darrell Maxwell ("Deputy Maxwell") and Jake Lambert ("Deputy Lambert"), along with a third deputy, were conducting surveillance of a home on Flint Hill Road in Weaverville on January 4, 2017.

Deputy Maxwell had been with the Sheriff's Office since 1999. At all relevant times herein, Deputy Maxwell was a member of the Sheriff's Community Enforcement Team, which specifically addressed drug crimes and service of high-risk warrants. He testified that he was familiar with the appearance, packaging, and distribution of methamphetamine and marijuana.

Deputy Maxwell was positioned across the street from the residence. Deputy Maxwell observed a vehicle pull into the driveway of the residence, and a man went inside "for approximately 10 minutes." Deputy Maxwell did not see the man re-enter the vehicle, but he saw the lights on the vehicle illuminate and the vehicle pull out of the driveway.

Deputy Maxwell followed the vehicle for approximately one mile. Deputy Maxwell observed the vehicle cross the double yellow line as it approached a blind curve, and he initiated a traffic stop. Defendant was driving the vehicle, and Deputy Maxwell asked Defendant for his driver's license to conduct a records check. Then, Deputy Maxwell conducted a pat-down search, which Defendant did not object to. Deputy Maxwell

recovered a pocketknife from Defendant's person but noted there was nothing unusual or uncommon about the discovery. Defendant denied having any drugs or contraband.

Deputy Maxwell asked Defendant for consent to search the vehicle. Defendant responded: "[N]ot without a warrant[.]" Deputy Maxwell returned to his patrol unit "to write [Defendant] a warning ticket for crossing over the double yellow line." While Deputy Maxwell was writing the warning citation, Deputy Lambert arrived with K-9 Officer Jedi.

Deputy Lambert had worked as a law enforcement officer for 13 years at the time of this incident. He had worked with the K-9 Jedi for five years. Jedi was a trained narcotics dog, certified in detecting the odor of marijuana, methamphetamine, cocaine, and heroin. Deputy Lambert, Jedi's trained handler, instructed Jedi to conduct an open-air sniff around Defendant's vehicle. Jedi alerted three times in a manner consistent with detection of an odor of narcotics. Deputy Lambert conducted a partial search of the inside of the vehicle, and he located what appeared to him to be methamphetamine.[1]

Defendant was arrested and a more thorough search of the vehicle was conducted. Deputies discovered an off-white crystalline substance in a large bag and several small bags individually wrapped; several unused syringes; one loaded syringe; a baggie of cotton balls; and a camouflage "safe" that contained plastic baggies and other drug paraphernalia. Deputies did not recover cash from Defendant or from inside the vehicle. No cutting agents, scales, or business ledgers were found. Deputies acknowledged that there was no evidence discovered on this occasion that would indicate that Defendant was a high-level actor in the drug trade. However, Defendant attempted to provide information on an individual wanted for drug trafficking, and he acknowledged that he was going to meet with this individual.

Lab analysis showed that the large bag contained 6.51 grams of methamphetamine. While the total weight of the methamphetamine and the crystalline substance recovered from the vehicle was 8.6 grams, the contents of the remaining baggies containing the crystalline substance were not tested pursuant to crime lab procedures.

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1. We use the terms methamphetamine and "crystalline substance" throughout the opinion. Methamphetamine refers to the substance found in a bag that was analyzed and determined to be 6.51 grams of methamphetamine. "Crystalline substance" refers to the separately packaged, untested quantities of what Deputy Lambert believed to be methamphetamine that was packaged similarly to the 6.51 grams of methamphetamine.

Defendant was indicted for possession with intent to sell or deliver methamphetamine, possession of methamphetamine, possession of marijuana, possession of marijuana paraphernalia, and attaining habitual felon status. Defendant's case came on for trial on January 9, 2018. The possession of marijuana paraphernalia charge was dismissed at the close of the State's evidence. Defendant also moved to dismiss the possession with intent to sell or deliver methamphetamine charge. He argued that the State did not prove Defendant had the intent to sell or deliver methamphetamine. Defendant specifically argued:

> [T]here was no cash, no guns, no evidence of a hand to hand transaction[,] . . . [n]o books, notes, ledgers, money orders, financial records, documents, . . . [and] nothing indicating that [Defendant] is a dealer as opposed to a possessor or user[.]

Defendant appeals the denial of his motion to dismiss.

Standard of Review

"We review the trial court's denial of a motion to dismiss *de novo*." *State v. Blakney*, 233 N.C. App. 516, 518, 756 S.E.2d 844, 846 (2014) (citation omitted).

> A motion to dismiss for insufficient evidence is properly denied if 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. All evidence, both competent and incompetent, and any reasonable inferences drawn therefrom, must be considered in the light most favorable to the State. Additionally, circumstantial evidence may be sufficient to withstand a motion to dismiss when a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is the jury's duty to determine if the defendant is actually guilty.

*Id.* 518, 756 S.E.2d at 846 (citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). In addition,

"we have held that in borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Coley*, ___ N.C. App. ___, ___, 810 S.E.2d 359, 365 (2018) (*purgandum*).

Analysis

"[I]t is unlawful for any person . . . [to] possess with intent to manufacture, sell or deliver, a controlled substance." N.C. Gen. Stat. § 90-95(a)(1) (2019). "The offense of possession with intent to sell or deliver has three elements: (1) possession; (2) of a controlled substance; with (3) the intent to sell or deliver that controlled substance." *Blakney*, 233 N.C. App. at 519, 756 S.E.2d at 846.

When direct evidence of a defendant's intent to sell or deliver contraband is lacking, intent "may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia." *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (2005) (citation omitted). Other relevant factors may be considered. *See*, *e.g.*, *State v. Thompson*, 188 N.C. App. 102, 106, 654 S.E.2d 814, 817 (2008). Because this inquiry is "fact-specific," courts must consider the "totality of the circumstances in each case . . . unless the quantity of drugs found is so substantial that this factor—by itself—supports an inference of possession with intent to sell or deliver." *Coley*, ___ N.C. App. at ___, 810 S.E.2d at 365.

When viewed in the light most favorable to the State, the evidence as a whole supported an inference that Defendant committed the offense of possession with intent to sell or deliver methamphetamine sufficient to overcome Defendant's motion to dismiss.

The quantity of a controlled substance alone will only "support the inference of an intent to transfer, sell, or deliver" if it is "substantial"—*i.e.*, more than would reasonably be carried for personal use. *Nettles*, 170 N.C. App. at 105, 612 S.E.2d at 176 (citations and quotation marks omitted). Here, the trial court determined that the State could not argue the 6.51 grams of methamphetamine in Defendant's possession was not for personal use. However, this does not negate the quantity seized by officers, or the inferences that the jury could reasonably draw therefrom. Defendant possessed at least 6.51 grams of methamphetamine, which is approximately 23% of the quantity necessary to sustain a conviction for trafficking in methamphetamine. This is not a small amount. *See State v. McNeil*, 165 N.C. App. 777, 783, 600 S.E.2d 31, 35 (2004) (finding that 5.5 grams of cocaine, which represents 19.64% of the trafficking amount, along with other relevant circumstances, was sufficient

for a charge of possession with intent to sell or deliver cocaine); *State v. Brennan*, 247 N.C. App. 399, 786 S.E.2d 433 (2016) (unpublished) (concluding that defendant's possession of 8.75 grams of methamphetamine, which represents 31.25% of the trafficking amount, along with various drug paraphernalia was sufficient evidence of the defendant's intent to sell or deliver methamphetamine).

In addition, the State presented evidence concerning the typical methamphetamine exchange between seller and consumer. Deputy Maxwell testified that, based on his training and experience, the typical transaction for methamphetamine was "anywhere from half a gram to one gram."

There was no evidence that the amount of methamphetamine in Defendant's possession was consistent with personal use. Defendant had more than six times, and up to 13 times, the amount of methamphetamine typically purchased. While it is possible that Defendant had 13 hits of methamphetamine solely for personal use, it is also possible that Defendant possessed that quantity of methamphetamine with the intent to sell or deliver the same. *See Brennan*, 247 N.C. App. 399, 786 S.E.2d 433 (2016) (unpublished) ("[I]f a half gram is considered an average user amount, the 8.75 grams of methamphetamine found in defendant's possession potentially represented 17.5 user amounts."). This issue is properly resolved by the jury.

Moreover, the evidence also tended to show that Defendant had just left a residence that had been under surveillance multiple times for drug-related complaints. Defendant also admitted that he had plans to visit an individual charged with trafficking drugs. While Defendant's actions may be wholly consistent with an individual obtaining drugs for personal use, the jury could also reasonably infer that he had the intent to sell or deliver methamphetamine because of the quantity of drugs, the other circumstantial evidence, and his admission.

In addition, the evidence tended to show that Defendant possessed "paraphernalia or equipment used in drug sales." *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 177 (*purgandum*). Officers seized plastic baggies commonly used for packaging and delivery of controlled substances, cotton balls used to filter liquid methamphetamine, and syringes used to deliver methamphetamine into the body. *See* N.C. Gen. Stat. § 90-113.21(a)(9), (a)(11) (2019). The baggies in Defendant's possession are paraphernalia or equipment used in methamphetamine transactions. The following exchange occurred between the State and Deputy Maxwell concerning packaging:

> Q. Deputy Maxwell, based on your approximately five years of drug investigations while you were on the enforcement team, *these plastic bags, based on your training and experience, is this consistent with your experience as to the dealing and transportation of methamphetamine?*
>
> A. It is.
>
> Q. What are the ways that you typically see methamphetamine packaged?
>
> A. Usually a seller will individually package the substance. Usually in anywhere from half a gram to one gram, depending on what the buyer is wanting. On occasion, they will weigh out and re-package it, and sell whatever the buyer is seeking.

Thus, the evidence presented to the jury tended to show the plastic bags in Defendant's possession were typically used in the transportation and distribution of methamphetamine. Standing alone, possession of the baggies may be innocent behavior. However, when viewed as a whole and in the light most favorable to the State, the jury could reasonably infer that baggies in Defendant's possession were used for the packaging and distribution of methamphetamine.

The question here is not whether evidence that does not exist entitles Defendant to a favorable ruling on his motion to dismiss. That there may be evidence in a typical drug transaction that is non-existent in another case is not dispositive on the issue of intent. Instead, the question is whether the totality of the circumstances, based on the competent and incompetent evidence presented, when viewed in the light most favorable to the State, permits a reasonable inference that Defendant possessed methamphetamine with the intent to sell or deliver.

In this type of case, where reasonable minds can differ, the weight of the evidence is more appropriately decided by a jury. *Coley*, ___ N.C. App. at ___, 810 S.E.2d at 365. Accordingly, the trial court did not err in denying the Defendant's motion to dismiss and submitting the case to the jury.

NO ERROR.

Chief Judge McGEE dissents by separate opinion.

Judge TYSON concurs.

McGEE, Chief Judge, dissenting.

The State had the burden of proving possession of methamphetamine *with the intent to sell or deliver* it ("PWISD"). I believe the record evidence in this case shows nothing more than "the normal or general conduct of people" who *use* methamphetamine; thus, the evidence, at most, "raises only a suspicion . . . that [D]efendant had the necessary intent to sell and deliver" methamphetamine. *State v. Turner*, 168 N.C. App. 152, 158–59, 607 S.E.2d 19, 24 (2005) (citation omitted). I therefore respectfully dissent.

In order to survive a motion to dismiss, the evidence must be substantial—such that "a reasonable inference of defendant's guilt may be drawn from the circumstances[.]" *State v. Barnes*, 334 N.C. 67, 75–76, 430 S.E.2d 914, 919 (1993). "[V]iew[ing] the evidence in the light most favorable to the State, [and] making all reasonable inferences from the evidence in favor of the State[,]" *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002) (citation omitted), the record evidence in this case, as I discuss in detail later in my dissent, was only sufficient to allow a reasonable inference of two relevant facts. First, a single bag containing 6.51 grams of methamphetamine was found in the vehicle (the "vehicle") Defendant was driving, but the 6.51 grams of methamphetamine was "not sufficient to raise an inference that [possession of] the [drug] was for the purpose of [sale or delivery]."[1] *State v. Wiggins*, 33 N.C. App. 291, 294–95, 235 S.E.2d 265, 268 (1977) (citation omitted). Second, an *undetermined* number of clear plastic bags were found in the lockbox recovered from the rear right floorboard of the vehicle. Due to the lack of record evidence concerning the number of empty plastic bags recovered from the vehicle, or introduced at trial, this Court cannot presume the existence of more than the smallest reasonable number of empty bags—the testimony only indicated plural, or more than one bag. Although the record evidence only indicates that more than one empty bag was recovered—therefore a minimum of two—I will assume, *arguendo*, the record evidence supported a reasonable inference that deputies recovered "a couple" or "a few" empty plastic bags from the vehicle. *State v. Mitchell*, 336 N.C. 22, 28-29, 442 S.E.2d 24, 27-28 (1994), *abrogated on other grounds as noted in State v. Rogers*, 371 N.C. 397, 817 S.E.2d 150 (2018) (emphasis added) ("The trial court found that the

1. We cannot consider "evidence" that was not admitted at trial and, as the trial court firmly warned the State, the State had not introduced any evidence that 6.51 grams was indicative of an intent to sell, or more than a simple drug user might reasonably possess for solely personal use. The trial court expressly forbade the State from making any inferences to the contrary at trial.

quantity of marijuana was sufficient to permit the jury reasonably to infer that it weighed more than one and one-half ounces; *but there is nothing in the record before us to support that finding.* The marijuana was not brought forward on appeal, and we have not been able to see it for ourselves."); *see also Kemmerlin*, 356 N.C. at 473, 573 S.E.2d at 889 (citation omitted) ("'We have defined substantial evidence as that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.' "). Based on the facts before us, any inference that more than a "few" empty plastic bags were found in the lockbox "would be based on mere speculation." *State v. Robbins*, 319 N.C. 465, 487, 356 S.E.2d 279, 292 (1987). I believe the trial court erred in denying Defendant's motion to dismiss when the record evidence demonstrated nothing more than possession of an amount of methamphetamine consistent with personal use, packaged in a single bag, and a few empty plastic bags recovered from the lockbox, which also contained personal items and paraphernalia only indicating drug use—including a "loaded" syringe.

## I. Analysis

### A. *Appellate Review*

The majority opinion argues that "[t]he question here is not whether evidence that does not exist entitles Defendant to a favorable ruling on his motion to dismiss. That there may be evidence in a typical drug transaction that is non-existent in another case is not dispositive on the issue of intent." While the absence of evidence typically found in the possession of drug dealers is not necessarily "dispositive," decades of precedent establish that, in many cases, the lack of such evidence is dispositive, and I believe that is the case in the matter before us. It is the State's burden to present substantial evidence supporting Defendant's intent to sell, and when the State fails to present sufficient evidence of an intent to sell, this Court must remand for entry of an order dismissing that charge:

> There was no testimony that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs. Defendant's actions were not similar to the actions of a drug dealer. . . . . A large amount of cash was not found. The police officers found four hundred and eleven dollars on defendant's person, which defendant stated was part of the money he received from his five hundred and forty-seven dollar social security check. . . . . Also, the officers did not discover any other money on the premises. The officers found four to five crack rocks in the

> parked car. Although the officers testified that a safety pin typically is utilized by crack users to clean a crack pipe, there were no other drugs or drug paraphernalia typically used in the sale of drugs found on the premises. *See State v. Rich*, 87 N.C. App. 380, 361 S.E.2d 321 (1987) (indicating an intent to sell or deliver drugs was established where twenty grams of cocaine was found along with a chemical used for diluting cocaine and one hundred small plastic bags in close proximity to the cocaine). Viewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller.

*State v. Nettles*, 170 N.C. App. 100, 107, 612 S.E.2d 172, 176–77 (2005). The *Nettles* Court relied in part on *State v. Turner*, in which this Court reasoned:

> The State points to no other evidence or circumstances [than an officer's opinion that the defendant was carrying more crack cocaine than a normal drug user would possess] that in any way suggest that defendant had an intent to sell or deliver the crack cocaine contained in the tube lying on the loveseat between defendant and Ishmar Smith.
>
> The State, for example, presented no evidence of statements by defendant relating to his intent, of any sums of money found on defendant, of any drug transactions at that location or elsewhere, of any paraphernalia or equipment used in drug sales, of any drug packaging indicative of an intent to sell the cocaine, or of any other behavior or circumstances associated with drug transactions. The State's entire case rests only on a deputy's opinion testimony about what people "normally" and "generally" do. The State has cited no authority and we have found none in which such testimony—without any other circumstantial evidence of a defendant's intent—was found sufficient to submit the issue of intent to sell and deliver to the jury.

*State v. Turner*, 168 N.C. App. 152, 158, 607 S.E.2d 19, 24 (2005) (citation omitted). Further:

> In *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265 (1977), defendant was found with less than one-half pound of marijuana in his possession. No weighing scales, rolling papers or other paraphernalia were found. The Court held

> that this small quantity of marijuana alone, without additional evidence, was insufficient to raise the inference that defendant intended to sell the substance.

*State v. King*, 42 N.C. App. 210, 213, 256 S.E.2d 247, 249 (1979); *see also State v. Battle*, 167 N.C. App. 730, 733, 606 S.E.2d 418, 421 (2005) (citation omitted) ("A relatively small drug quantity alone, 'without some additional evidence, is not sufficient to raise an inference' " that the drug was possessed for any reason other than "only for personal use[.]"). As in *Battle*, in this case the State did not introduce evidence that the amount of the drug found in the vehicle was more than an amount "only for personal use[.]" *Id.* In *Battle*:

> [T]he State presented little evidence supporting Defendant's alleged intent to sell cocaine. Only 1.9 grams of compressed powder cocaine—little enough, according to the State's own chemist, to have been only for personal use—was found. The investigators found no implement with which to cut the cocaine, no scales to weigh cocaine doses, no containers for selling cocaine doses. The investigators further searched Defendant's car and found neither drugs nor paraphernalia. The State's meager evidence of intent to sell cannot be considered "substantial evidence" supporting the charge of possession of cocaine with intent to sell.

*Id.* (citation omitted). Because the amount of methamphetamine in this case must be considered relatively minimal—as an amount regularly possessed by simple drug users, the State was required to introduce substantial additional evidence sufficient to allow a reasonable inference that Defendant intended to sell the drug—*i.e.*, items generally *associated with drug dealing*, testimony about Defendant's activities *suggesting drug selling*, and expert testimony *making the connection between the evidence presented and drug dealing*, when such a connection was outside the common knowledge of a typical juror.[2] The other "items" usually associated with drug dealing rather than drug use are those discussed in *Nettles* and its progeny, such as *large amounts of cash*, mostly in smaller denominations; *scales* to weigh and divide the drug into usual sales amounts; *tools* for "safely" dividing and packaging the drug with minimal loss of product; a *cutting agent* to mix in with

2. An obvious example of behavior suggestive of drug dealing would be if Defendant was observed in an area known for drug sales activity, remained in the same location for a long period of time, during which Defendant had multiple brief interactions with different people in which Defendant was observed exchanging small packages for cash.

the drug in order to dilute it and allow the dealer to sell more units; *numerous bags or other containers* to contain the weighed and divided drug, and promote efficient and discreet delivery; *numerous individual units of the drug already packaged in amounts typical for dealing*, and ready to sell. The State would also have to present *expert testimony explaining this evidence* and why it was indicative of drug sales and not just drug use. *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176; *see also Turner*, 168 N.C. App. at 158, 607 S.E.2d at 24; *Battle*, 167 N.C. App. at 733, 606 S.E.2d at 421; *King*, 42 N.C. App. at 213, 256 S.E.2d at 249. I would hold the State failed to meet its burden in this case.

B. *The Lack of Evidence*

In this case, the State's additional evidence consisted of a few empty plastic bags. The State presented no expert, or even lay, testimony linking these empty bags to an intent to sell, rather than use, the methamphetamine. "Viewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller." *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176–77. There was also no testimony that any of Defendant's *actions* after the stop, during the search, or during and after Defendant's arrest, were indicative of an intent to sell the methamphetamine recovered from the vehicle. The State contends in the fact section of its brief that Defendant "voluntarily told [the deputies] during the stop that 'he would give [them] Haywood's most wanted' in reference to 'a female who was wanted for trafficking heroin or something of that nature.' " While this is factually correct, Defendant's statements carry very little relevance, as is indicated by the State's decision not to reference them in the argument section of its brief. Deputy Maxwell testified: Defendant "advised me that he was supposed to meet her. He didn't elaborate on the reason to meet her[.] I can't remember the exact conversation at that point." Deputy Maxwell testified concerning Defendant's claim that he could provide information about an alleged drug dealer that it "was not unusual. I mean it's pretty common once you arrest somebody for possession of some sort of drugs, they want to try to help themselves." Deputy Maxwell had never heard of the woman Defendant was calling "Haywood's most wanted." He did not remember the specifics of Defendant's "offer" to help, and nothing in the record suggests Deputy Maxwell or anyone else thought Defendant's statements warranted any follow-up. Deputy Lambert testified that Defendant "was reaching out trying to figure out how he could assist himself with his bond or his charges that he may incur." There was no testimony that Defendant's attempt to get help "with his bond" "or [the] charges he may incur" in this matter was at all suggestive that Defendant

was a drug dealer instead of someone "arrest[ed] [] for possession of … drugs[.]"

Assuming, *arguendo*, that any empty plastic bags were properly introduced into evidence, based upon the record evidence, it was impermissible for either the trial court or the jury to infer that more than "a few" empty plastic bags were recovered, or that possession of *any* number of empty bags constituted evidence from which it could be inferred that Defendant was a drug dealer instead of a simple drug user. There is absolutely no record evidence from which we can infer that the jury, or the trial court, had any idea how many empty bags were found in the vehicle. We cannot assume the existence of facts not supported by the record, nor assume the State met its burden on an issue if *the record* does not support such a determination. *Mitchell*, 336 N.C. at 28-29, 442 S.E.2d at 27-28.

When, as in this case, direct evidence of a defendant's intent to sell or deliver a controlled substance is lacking, intent "may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia." *Nettles*, 170 N.C. App. at 106, 612 S.E.2d at 176 (citation omitted). Other relevant factors may be considered as well, *see*, *e.g.*, *State v. Thompson*, 188 N.C. App. 102, 106, 654 S.E.2d 814, 817 (2008), but "in ruling upon the sufficiency of evidence in cases involving the charge of possession with intent to sell or deliver, our courts have placed particular emphasis on *the amount* of drugs discovered, their *method of packaging*, and the presence of paraphernalia *typically used to package drugs for sale*." *State v. Coley*, 257 N.C. App. 780, 788, 810 S.E.2d 359, 365 (2018) (emphasis added); *see also Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176; *Turner*, 168 N.C. App. at 158, 607 S.E.2d at 24; *Battle*, 167 N.C. App. at 733, 606 S.E.2d at 421; *King*, 42 N.C. App. at 213, 256 S.E.2d at 249.

The only testimony concerning packaging of the drug was the following testimony by Deputy Maxwell given immediately after he had testified about the photographs entered into evidence showing the plastic bags with unknown substance(s) on the scale:

> Q. Deputy Maxwell, based on your approximately five years of drug investigations while you were on the enforcement team, these plastic bags, based on your training and experience, is this consistent with your experience as to the dealing … of methamphetamine?
>
> A. It is.

> Q. What are the ways that you typically see methamphetamine packaged?
>
> A. Usually a seller will individually package the substance. Usually in anywhere from half a gram to one gram, depending on what the buyer is wanting. On occasion, they will weigh out and re-package it, and sell whatever the buyer is seeking.

First, Deputy Maxwell's opinion testimony that the "plastic bags" he had just seen in photographs—the three plastic bags containing crystalline substance(s) being weighed—were "consistent with … the dealing … of methamphetamine[,]" was based on the improper assumption that all three bags contained methamphetamine. This constituted "only [on] a deputy's opinion testimony about what people 'normally' and 'generally' do"—the kind of testimony found insufficient, standing alone, "to submit the issue of intent to sell and deliver to the jury." *Turner*, 168 N.C. App. at 158, 607 S.E.2d at 24 (citation omitted). Second, the methamphetamine in this case was *packaged* in a single bag, in a quantity at least six times more than the one-half-ounce to one-ounce amounts Deputy Maxwell testified were standard amounts of methamphetamine when packaged for sale; the deputies recovered *no* one-half to one gram amounts of methamphetamine—packaged in a manner facilitating concealment and quick sale—whether in small plastic bags or any other type of container. According to the *record* evidence, the methamphetamine in this case was not packaged in a manner normally associated with an intent to sell the drug. *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176 ("There was no testimony that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs.").

"Defendant's actions were not similar to the actions of a drug dealer." *Id.* at 107, 612 S.E.2d at 176. Deputy Maxwell testified that he did not observe Defendant doing anything out of the ordinary prior to stopping him—no hand-to-hand transactions with another person, for example. "I did not witness any transaction." In fact, Defendant was not observed interacting with anyone. The only reason Deputy Maxwell's suspicions were raised is because the residence was under surveillance, Defendant drove there and spent approximately ten minutes inside, then drove away.[3] Deputy Maxwell testified he had never seen Defendant or his vehicle visit this residence before, and no evidence was produced

3. There is no *record* evidence that the residence was under surveillance due to suspected illegal drug activity. The trial court sustained Defendant's objection to Deputy Maxwell's testimony that he was watching the residence due to "complaints" concerning "suspected drug activity[,]" and there was no other testimony in evidence to that effect.

that anyone who lived in the residence, or anyone other than Defendant who had visited the residence, was *ever* involved in drug sales; but, most relevantly, prior to Defendant's arrest. As noted above, the *amount* of the drug in this case *must* be treated as an amount consistent with personal use, because, as the trial court clearly ruled, the State offered no evidence that would allow the jury to infer otherwise. *Id.* at 106, 612 S.E.2d at 176 ("it cannot be inferred that defendant had an intent to sell or distribute from such a[n] . . . amount alone").

*No cash* was found on Defendant or in the vehicle. *See id.* at 107, 612 S.E.2d at 176-77 (Evidence was insufficient where: "A large amount of cash was not found. The police officers found four hundred and eleven dollars on defendant's person, which defendant stated was part of the money he received from his five hundred and forty-seven dollar social security check." "Also, the officers did not discover any other money on the premises."); *see also Wilkins*, 208 N.C. App. at 732, 703 S.E.2d at 810 (citation omitted) (the Court considered "the fact that defendant was carrying $1,264.00 in cash" in denominations of between $1.00 and $20.00 bills, but determined this evidence, considered with the State's other evidence, was not sufficient to support an intent to sell or deliver). Deputy Maxwell agreed, "based on [his] training and experience," that "drug dealers maintain on hand large amounts of U.S. currency" "so that they can maintain and finance their operation[.]" When asked to confirm that he "found zero money on" Defendant, Deputy Maxwell testified "I did not confiscate any currency from [Defendant]." Deputy Maxwell testified it was "common" for drug dealers to keep "ledgers" that "[u]sually [contain] names—and maybe not full names, but names, maybe money owed or—that's been my experience." He also testified "that drug dealers often maintain books . . . about their drug dealing[.]" However, no such books or ledgers were found in the vehicle.

Deputy Maxwell testified that methamphetamine is often packaged in plastic bags for sale—therefore plastic bags can be considered *paraphernalia* depending on the facts introduced at trial. In this case, although the State appears to believe it introduced testimony that possession of empty plastic bags was an indication of an intent to sell, there is *no* testimony to that effect in the record. Nor was there any testimony that it was unusual to find a few empty plastic bags—or a large number of empty plastic bags—in the vehicle of a simple drug user. Further, there was absolutely no evidence at trial that any of the other paraphernalia found in the vehicle—an unknown number of commonly available syringes in the original small, unopened store packaging; one "loaded" syringe; cotton balls; and one rubber band—was indicative of an intent to sell methamphetamine. This is likely because these items suggest

methamphetamine use, not an intent to sell the drug. Without appropriate testimony concerning these paraphernalia items, there was no evidence from which an intent to sell, rather than use, could be properly inferred from their presence in the vehicle. *Id.* at 107, 612 S.E.2d at 177 (citation omitted) (there was no "drug paraphernalia typically used in the sale of drugs found [on the defendant or] on the premises").

There was no evidence of other behaviors or items normally associated with drug sales. There was no *diluting or "cutting" agent* found, *id.*; Deputy Maxwell testified: "Drug dealers use [cutting agents] so when they get product, they can minimize it with rock salt and sell more"; and no *scales* to weigh and divide the drug into *usual* sales amounts were found, *King*, 42 N.C. App. at 213, 256 S.E.2d at 249. Deputy Maxwell testified that "in [his] training and experience, most drug dealers, they have scales so they know what they're selling;" and scales are "very important for a drug dealer so they don't get ripped off" but "[t]here were no scales in th[e] vehicle." There was no testimony that Defendant had *tools* for "safely" dividing and packaging the drug with minimal loss, *Battle*, 167 N.C. App. at 733, 606 S.E.2d at 421; that he had *numerous* bags or other containers to contain the weighed and divided drug and promote efficient and discreet delivery, *Nettles*, 170 N.C. App. at 106, 612 S.E.2d at 176; nor that he possessed *numerous individual units* of the drug already packaged in amounts typical for dealing, and ready to sell.

There was testimony that drug dealers often have *multiple cell phones* on which they conduct their business. A single cell phone was recovered from Defendant, taken into evidence, and forensically examined. No evidence supporting Defendant's involvement in the sale of drugs was recovered from Defendant's single cell phone. The State would also have to present *expert testimony explaining this evidence* and why it was indicative of drug sales and not just drug use. *Mitchell*, 336 N.C. at 29, 442 S.E.2d at 28 ("The jury may not find the existence of a fact based solely on its in-court observations where the jury does not possess the requisite knowledge or expertise necessary to infer the fact from the evidence as reflected in the record."); *Nettles*, 170 N.C. App. at 108, 612 S.E.2d at 177 ("the police officer did not testify that defendant possessed an amount that was more than a drug user normally would possess for personal use"); *Turner*, 168 N.C. App. at 158, 607 S.E.2d at 24 ("The State's entire case rests only on a deputy's opinion testimony about what people "normally" and "generally" do. The State has cited no authority and we have found none in which such testimony—without any other circumstantial evidence of a defendant's intent—was found sufficient to submit the issue of intent to sell and deliver to the jury.").

C. *The State's Arguments*

1. Arguments on Appeal

"'When the evidence is . . . sufficient only to raise a suspicion or conjecture as to . . . the commission of the offense . . ., the motion to dismiss must be allowed.' " *Id.* I assume, *arguendo*, the State is correct that Defendant possessed a few empty plastic bags "which can be used in order to divide drugs into smaller quantities for sale." However, the State is incorrect in its assertion that the record evidence shows that the empty bags were "numerous." The State introduced the plastic bags into evidence only generally—as part of the contents of the lockbox. There was no testimony concerning the number of empty bags, the size of the empty bags, a description of the empty bags, any potential relevance of the empty bags or, more specifically, how the presence of empty bags constituted evidence of methamphetamine dealing rather than use.

The remainder of the State's arguments are also either based on evidence not introduced at trial, or are not supported by any law, and should be summarily dismissed. No evidence supports the State's characterization of "[t]he amount of the drugs" recovered as "substantial[.]" There was no testimony that 6.51 grams of methamphetamine was a "substantial" amount, and the jury was not permitted to make that determination without expert testimony to that effect. There was no testimony comparing the 6.51 ounces of methamphetamine recovered to the amount required for a trafficking charge, 28 grams, nor any testimony explaining the relevance of any such comparison. The trial court properly prohibited the State from characterizing 6.51 grams of the drug as more than was consistent with personal use.

> When determining whether an element exists, the jury may rely on its common sense and the knowledge it has acquired through everyday experiences. Thus, the jury may, based on its observations of the defendant, assess whether the defendant is older than twelve. The jury's ability to determine the existence of a fact in issue based on its in-court observations, however, is not without limitation. The jury may not find the existence of a fact based solely on its in-court observations where the jury does not possess the requisite knowledge or expertise necessary to infer the fact from the evidence as reflected in the record.

*Mitchell*, 336 N.C. at 29, 442 S.E.2d at 28. The average juror does not have any personal familiarity with methamphetamine, its packaging,

the usual tools used to portion and package methamphetamine, or what amount of the drug would constitute a "substantial" amount. *Id.* at 30, 442 S.E.2d at 28 ("Unlike age, the weight of a given quantity of marijuana is not a matter of general knowledge and experience. …. Human characteristics associated with various ages are matters of common knowledge. The same cannot be said regarding the weight of various quantities of marijuana. This is a matter familiar only to those who regularly use or deal in the substance, who are engaged in enforcing the laws against it, or who have developed an acute ability to assess the weight of objects down to the ounce. The average juror does not fall into any of these categories.").

The State also makes an incorrect statement of fact and law where it asserts: "Defendant was in possession of a controlled substance, that was visually identified by law enforcement as methamphetamine. This was confirmed as methamphetamine by the testimony of [] Cha[]ncey[,] who performed scientific testing on the substances presented and confirmed that the substances were methamphetamine, as testified to by Detective Maxwell." As the trial court properly understood, a law enforcement officer's visual inspection of a crystalline substance *is not sufficient* to identify that substance as methamphetamine. "The North Carolina Supreme Court held in *Ward* that '[u]nless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required.' " *State v. Carter*, 255 N.C. App. 104, 106–07, 803 S.E.2d 464, 466 (2017) (citations omitted). For this reason, whenever the State's case included either deputy's opinion that the crystalline substance(s) were methamphetamine, the trial court instructed the jury to discount that testimony, and not consider it in any manner during their deliberations.

Further, Chancey did not perform "scientific testing on the substances" and "confirm[] that the substances were methamphetamine, as testified to by Deputy Maxwell." Only one bag, and thus only one "substance," was tested. Chancey did not *confirm* the deputies' opinions, which were not evidence, she conducted testing on a single bag containing a crystalline substance and determined, scientifically, that the single bag contained 6.51 grams of methamphetamine—with a trace amount of an unidentified substance. The additional crystalline substance(s) contained in the plastic bags recovered from the vehicle were never tested, and the trial court clearly instructed the State and the jury that no inferences concerning the contents of the additional substance-containing bags could be made: "Three of those bags there is no evidence that they are methamphetamine. You understand that?" Further, the State

incorrectly argues that Chancey "did not test the other items presented as the weight of [the bag containing 6.51 grams of methamphetamine] in and of itself met the statutory weight requirements for the charges presented." This statement is erroneous because there is no "statutory weight requirement" for the charge of PWISD. Therefore, there could not have been a decision by the trial court or the jury that 6.51 grams met any "statutory requirement."

The State further argues, "[m]ore importantly the other items found within [] Defendant's vehicle infer the intent to sell[.]" The State only mentions two "other items": "[N]umerous syringes which can be used to deliver drugs in the system of a purchaser. More importantly, there were numerous baggies, which can be used in order to divide drugs into smaller quantities for sale." As noted, the syringes could not serve as evidence of Defendant's intent to sell because there was no testimony or other evidence introduced at trial allowing such an inference. There is no evidence concerning the number of syringes found in the vehicle, so there is nothing from which one could determine the presence of "numerous" syringes. The State's argument on appeal does not demonstrate more than that Defendant was in possession of an amount of methamphetamine small enough "to have been only for personal use[,]" *Battle*, 167 N.C. App. at 733, 606 S.E.2d at 421, and a few empty plastic bags, the significance of which was not established at trial. *Mitchell*, 336 N.C. at 29, 442 S.E.2d at 28.

2. Arguments at Trial

The State's arguments at trial, made *after* the close of all the evidence, also mainly focused on the empty bags. As noted above, the only testimony concerning packaging of the drug was the opinion testimony of Deputy Maxwell, which only undercut the State's case by introducing evidence that the usual packaging of methamphetamine for sale was in separate one-half-ounce to one-ounce amounts—not a single bag containing 6.51 ounces. Further, no empty plastic bags had been introduced into evidence at this time, so Deputy Maxwell's testimony was limited to the several plastic bags containing crystalline substance(s) that were depicted in the photographs he had just been shown.

Deputy Maxwell's answer was sufficient to permit an inference that methamphetamine packaged for sale is "usually" "individually package[d]" "in anywhere from half a gram to one gram, depending on what the buyer is wanting." In this case, the deputies recovered a single bag containing 6.51 grams of methamphetamine—*i.e.*, an amount and method of packaging methamphetamine that was not, according to the testimony, "usual," if the intent was to sell. Deputy Maxwell also

testified there was a second, not "usual" packaging method, stating: "On occasion, they will weigh out and re-package it, and sell whatever the buyer is seeking." Taken together, this testimony is some evidence that occasionally methamphetamine dealers carry larger quantities of the drug in a single container and re-package it for sale only after the buyer specifies an amount, but the "usual" method is to prepackage one-half gram to one gram amounts and carry those for sale. Therefore, the single bag containing 6.51 grams of methamphetamine was not packaged the way a dealer would "usually" package the drug for sale, and the lack of common tools for dividing, weighing, and repackaging for sale suggests use, not dealing. The bags containing untested substance(s) could not be considered by the trial court or the jury as evidence of the *Nettles* factor of "*packaging*."[4]

There was no testimony that the "few" empty plastic bags found in the lockbox with the "loaded" syringe, used "blunts," Chapstick, a personal letter, a single rubber band, and cotton balls, were at all suggestive of an intent to sell any of the methamphetamine—which was recovered from the console. There was no testimony that it was uncommon for a drug user to have a "few" empty bags in his vehicle for personal use, whether related to methamphetamine or anything else.

The syringes *cannot* constitute evidence in this case supporting an intent to sell because there was no testimony, expert or otherwise, that could have possibly linked the syringes to any intent to sell. Neither the trial court nor the jury could infer such a connection without expert testimony because whether or not drug dealers also typically possess "loaded" or new syringes is not a fact of common knowledge. *Mitchell*, 336 N.C. at 29, 442 S.E.2d at 28 ("The jury may not find the existence of a fact based solely on its in-court observations where the jury does not possess the requisite knowledge or expertise necessary to infer the fact from the evidence as reflected in the record."). To a lay person, an unknown but small number of syringes would be at least as likely, if not more likely, to indicate drug *use* than an intent to sell. "Viewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller." *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176–77. As noted above, the forensic examination of Defendant's single cell phone turned up no evidence that Defendant was

4. The State asserts in its brief that "Chauncey [sic] … performed scientific testing on the substances … and confirmed that the substances were methamphetamine, as testified to by Detective [sic] Maxwell." This is simply incorrect. A single substance was tested from a single bag. As the trial court told the State: "Three of those bags there is no evidence that they are methamphetamine. You understand that?"

involved in the sale of methamphetamine or any other drug. Other than the "few" plastic bags, there was *no* paraphernalia found that was even arguably indicative of an intent to sell the methamphetamine.

In response to this lack of evidence, Defendant argued the PWISD charge should be dismissed because "there was no cash, no guns, no evidence of a hand to hand transaction. No evidence of people. No books, notes, ledgers, money orders, financial records, documents, guns. Nothing indicating that [Defendant] is a dealer as opposed to a possessor or user[.]" "They have to do something other than just say, hey, you had this. There has to be some testimony about something else, and we don't have any of that. No evidence of confederates, no evidence of conspiracy, no evidence of—again, a sale, hand to hand transaction. Nothing else in the car. Nothing."

Contrary to the State's argument to the trial court, there was no record evidence of the number of empty bags because the State did not have Detective Maxwell count any empty plastic bags during his testimony; instead, the State counted the bags itself while the jury was in the jury room awaiting closing arguments. If the trial court considered any of this non-evidence, it would constitute error.

The majority opinion generally appears to consider the empty plastic bags as the most important factor in support of the trial court's denial of Defendant's motion to dismiss, but it also discusses additional issues or alleged facts that it seems to find relevant. The majority notes that Deputy Maxwell "estimated that this was the fifth time he had participated in a stake out of [the] residence[,]" and surmises "the evidence … tend[s] to show that Defendant had just left a residence that had been under surveillance multiple times for drug-related complaints." As noted, the trial court sustained Defendant's objection to Deputy Maxwell's testimony that he was watching the residence due to "complaints" concerning "suspected drug activity"; there was no evidence presented at trial that the "residence" was "under surveillance multiple times for drug-related complaints." Deputy Maxwell also testified that he had never seen Defendant or the car Defendant was driving at the residence prior to the evening of 4 January 2017.

The majority opinion also states that "Deputy Lambert conducted a partial search of the inside of the vehicle, and he located what appeared to him to be methamphetamine." It further states that the untested "[c]rystalline substance" recovered from the vehicle and packaged separately from the tested bag containing 6.51 grams of methamphetamine was "what Deputy Lambert believed to be methamphetamine." Deputy Lambert did not testify at trial that the crystalline substance "appeared

to be methamphetamine" but testified that he located "the black container that had the white crystal substance in it." While on the scene, Deputy Lambert did tell Deputy Maxwell that he had found what he believed to be methamphetamine in the vehicle, and this statement was captured by both deputies' body cams. When this comment came up on the body cam footage, the trial court requested the video be paused and instructed the jury: "Now Ladies and Gentlemen, you will disregard that statement that it appears to be methamphetamine. You will not consider that for any purpose in this trial. Each of you understand that?" There was no evidence admitted at trial that either deputy believed any of the crystalline substance(s) were methamphetamine, and the fact that Deputy Lambert made such a statement to Deputy Maxwell during the course of the search of the vehicle is irrelevant to our review. The *only* evidence establishing the presence of methamphetamine in the vehicle was the testimony of Chancey, who testified that a single plastic bag recovered from the vehicle contained 6.51 grams of methamphetamine.

There is no record evidence of the "total weight" of the methamphetamine combined with the other crystalline substance(s) recovered from the vehicle. Although Chancey testified that she determined the "gross" weight of the non-tested substance(s), she did not provide those numbers at trial. The trial court cautioned the State that it could not use the untested bags as evidence of "the quantity of the substance [*i.e.* the methamphetamine]."

Any inference that the untested crystalline substance(s) were also methamphetamine, or any guess as to the weight of those substance(s), would not be based upon any evidence admitted at trial and, therefore, would be improper. On direct examination Deputy Maxwell testified concerning one of the State's exhibits: "That is a large bag of white crystal substance, what I believed to be methamphetamine." Defendant objected, and the trial court responded: "Sustained as to what he believes it to be. Ladies and Gentlemen, you'll disregard that. You will not consider it for any purpose in this trial." The trial court cautioned the State at trial: "What you're asking [the jury] to do is find [the untested substances in the other plastic bags are also] methamphetamine. The State cannot do it under the evidence in this case. Now if you want me to give an instruction to this jury that this Court instructs this jury that based upon the evidence they *cannot* find the items in [the additional bags] are methamphetamine, then I'll do that[.] But *they can't make that finding. There's no evidence.*" (Emphasis added). The trial court later stated: "I'm going to instruct the State that they are not to tell this jury that the jury can look at those four packages and make a determination by the

jury that the other three that were not tested are—is methamphetamine."[5] The untested substance(s) are not relevant.

No evidence was introduced that 6.51 grams of methamphetamine "is not a small amount[,]" and without testimony to that effect, it would have been an improper inference for the trial court or the jury to draw in this case. We are limited to the evidence of record, which is that Defendant possessed *exactly* 6.51 grams of methamphetamine. As the trial court noted, the State only presented evidence of 6.51 grams of methamphetamine recovered from the vehicle. We cannot infer the possibility that there was more than 6.51 grams of methamphetamine recovered when there is no record evidence that would allow such an assumption. The trial court cautioned the State it could not argue 6.51 grams of methamphetamine *was an amount greater than one would normally carry for personal use*. "Neither will you[, the State,] be able to argue to this jury that [the 6.51 grams] was more than [an amount normally carried for] personal use, *because there's no evidence of that*." (Emphasis added). *See Nettles*, 170 N.C. App. at 108, 612 S.E.2d at 177 ("[T]he police officer did not testify that defendant possessed an amount that was more than a drug user normally would possess for personal use."). In other words, the State could not argue the weight of the methamphetamine as a factor indicating Defendant had the intent to sell or deliver the drugs instead of the intent to consume all 6.51 grams himself. This meant the 6.51 grams of methamphetamine was sufficient to support the possession charge, but the State would have to rely almost entirely on *additional* evidence to meet its burden of proving the element of Defendant's intent to sell or deliver for the PWISD charge.

"Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." *Ward*, 364 N.C. at 147, 694 S.E.2d at 747. "[T]he expert witness testimony required to establish that the substances introduced here are in fact controlled substances must be based on a scientifically valid chemical analysis and not mere visual inspection." *Id.* at 142, 694 S.E.2d at 744.

There was no testimony concerning the amount of methamphetamine drug users typically "purchase." There was no evidence from

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5. It is not clear what the "fourth" package is in reference to. Only three bags containing crystalline substance(s) were introduced by Deputy Maxwell through the photographs contained in the record. However, a fourth bag of untested substance would add nothing to the State's case.

which it could be inferred that a drug user was unlikely to possess 6.51 grams of methamphetamine for personal use. There was no testimony concerning the amounts of methamphetamine generally purchased for personal use, so any attempt to make that determination is speculation. I do agree with the general concept that "[w]hile it is possible that [someone could possess 6.51 grams of] methamphetamine solely for personal use, it is also possible that [person] possessed that quantity of methamphetamine with the intent to sell or deliver the same." Both of these things are possible and deciding which one is correct requires speculation. *Robbins*, 319 N.C. at 487, 356 S.E.2d at 292. It is possible that a defendant in possession of any amount of methamphetamine, no matter how small, intends to sell it—that is why the law in this case required the State to prove sufficient evidence beyond mere possession to prove PWISD. Further, because there was no expert testimony attempting to estimate the number of "hits" 6.51 grams might constitute, or how many "hits" would be considered excessive for personal use, any determination of the number of "hits" by the trial court or jury would have been improper. Nor should this Court make this kind of fact-finding determinations on appeal when there was no expert testimony to support this determination at trial. Unlike in *Nettles*, there was no testimony as to the amount of methamphetamine normally consumed in a single dose, nor the monetary value of 6.51 grams of methamphetamine. Deputy Maxwell simply testified that generally "a seller will individually package the substance. Usually in anywhere from half a gram to one gram, depending on what the buyer is wanting."

*State v. Brennan*, cited by the majority opinion, is unpublished and I do not believe this Court should adopt its reasoning that *evidence not presented at trial* may be considered by this Court and used to affirm the trial court's denial of a motion to dismiss. *See State v. Brennan*, 247 N.C. App. 399, 786 S.E.2d 433, 2016 WL 1745101, *4 (2016) ("Detective Phillips testified that in Haywood County, methamphetamine is usually priced and sold in half grams at $50 and whole grams at $100. Thus, if a half gram is considered an average user amount, the 8.75 grams of methamphetamine found in defendant's possession potentially represented 17.5 user amounts."). In addition, there was substantially more incriminating evidence introduced at trial in *Brennan* than in this case. *Id.* at *3.

The majority opinion contends that Defendant possessed "paraphernalia" indicative of an intent to sell the methamphetamine in addition to the empty plastic bags, namely cotton balls and syringes. The majority opinion does not indicate how the cotton balls or syringes are indicative of an intent to sell and not simply the necessary tools of a user

whose method of ingesting methamphetamine is injection, and there was no record evidence to support any alternate inference. At trial, the State argued *State v. Carter*, 254 N.C. App. 611, 802 S.E.2d 917, 2017 WL 3027550 (2017) (unpublished). *Carter* hurts the State's case, as in *Carter* this Court held that "paraphernalia" is relevant to prove PWISD methamphetamine when it is "consistent with an intent to sell methamphetamine such as weighing scales, chemicals, or empty plastic baggies." *Id.* at *3 (citation omitted). This Court determined: "[T]he syringe found on [the d]efendant, like the safety pin in *Nettles*, indicates [the d]efendant possessed the methamphetamine for personal use" and not with an intent to sell. *Id.* (citation omitted). In this case, the cotton balls are certainly no more indicative of an intent to sell than the syringes. There was no expert or other testimony that cotton balls and syringes are commonly associated with drug dealers, so we cannot consider them as such in our *de novo* review. However, Deputy Maxwell testified that these items *are* used to prepare and inject methamphetamine by drug users, therefore, this Court, the trial court, and the jury could rely on their common sense to conclude these items are necessary for drug users to inject methamphetamine, and would naturally be found in the possession of drug *users*.

Further, Chancey testified that she only obtained the "gross" weights of the bags that were not tested,[6] but that she *would have* obtained exact weights, and tested each of the bags, if there had been enough of the crystalline substance(s) for the State to bring a trafficking charge against Defendant; explaining that because the total weight of the crystalline substance(s) wasn't close to the amount required for trafficking, "*the charge would be the same regardless of how many items I tested*[.]" (Emphasis added). The majority opinion mentions that the State did not test the additional crystalline substance(s) because it was the State "crime lab procedure[]" not to do so in cases like this one. This "procedure" is not justified because, although the amount of crystalline substance recovered from Defendant's vehicle was substantially less than the 28 grams required for a trafficking charge, Defendant was not only charged with the Class I felony of possession, he was *also charged with the Class H felony of PWISD*, and one of the factors considered for proof of the *essential element* of intent to sell is *the amount of the controlled substance* involved. If the State wanted to use the total

6. "I weighed with the packaging, so I gave a gross weight, but I did not get a net weight of the substance itself." Further, not even the gross weight of the additional bags is included in Chancey's report.

amount of the crystalline substance recovered against Defendant it could, and should, have tested it.[7]

PWISD might not carry sentences as severe as trafficking, but a conviction for PWISD carries a substantially greater punishment than a conviction for possession—even felony possession. In this case, based upon Defendant's prior record level and his habitual felon status, Defendant was sentenced to fifty to seventy-two months for his possession of methamphetamine conviction. For the PWISD conviction, Defendant was sentenced to 128 to 166 months imprisonment. The difference between the maximum ranges of Defendant's possession and PWISD convictions is ninety-four months, or 7.82 years. Defendant's conviction is based on speculation as to whether someone possessing an amount of methamphetamine consistent with personal use, who was also in possession of a few empty plastic bags, had the intent to sell any of that methamphetamine. There was no way to make that determination without simply guessing or relying on impermissible inferences from the trial and from the State's arguments, which are not evidence. It simply was not possible for the State to meet its burden of proof based upon the record evidence, and I would hold "that [D]efendant's conviction be reversed for [PWISD] and remanded for resentencing, on the lesser included … offense of possession[.]" *Nettles*, 170 N.C. App. at 108, 612 S.E.2d at 177 (citation omitted). Otherwise, Defendant could be imprisoned an additional 7.82 years because a few empty plastic bags were found in the vehicle along with an amount of methamphetamine consistent with personal use.

7. Because Defendant did not move to suppress the untested crystalline substance(s), or object to its introduction at trial, it was in evidence. However, even if the bags in which the untested substance(s) were contained had some minimal relevance, the untested substance(s) itself had none.

STATE OF NORTH CAROLINA
v.
BRADLEY W. BURGESS

No. COA19-685

Filed 5 May 2020

**1. Witnesses—competency to testify—impairment—motion to disqualify**

In a trial for drug offenses where the presiding judge suspected that a witness for the State was impaired during his testimony and the witness testified positive for amphetamines and methamphetamine after he left the stand, the trial court did not abuse its discretion in denying defendant's motions to disqualify the witness under Rule of Evidence 601(b) and to strike his testimony because the judge had ample opportunity to observe the witness, the witness was able to recall dates and events, other evidence presented entirely corroborated the witness's testimony, and evidence of the positive drug test was presented to the jury for impeachment purposes.

**2. Criminal Law—mistrial—impaired witness**

In a trial involving drug offenses where a witness for the State was under the influence of drugs when he testified, the trial court did not abuse its discretion in denying defendant's motion for a mistrial because the other evidence corroborated the witness's testimony, the court found the witness to be competent to testify, and the jury was informed of the witness's impairment so it could consider the credibility and weight to give to his testimony.

Appeal by defendant from judgment entered on or about 13 February 2019 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Court of Appeals 4 February 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas J. Campbell, for the State.*

*James R. Parish for defendant-appellant.*

STROUD, Judge.

Defendant appeals a judgment convicting him of three drug-related charges. Although the witness who participated in a controlled buy was

impaired by controlled substances during his testimony, the trial court conducted a proper investigation of his impairment, informed counsel, and gave counsel full opportunity to request remedial actions. The trial court did not abuse its discretion in determining a mistrial was not necessary to ensure a fair trial for defendant and that the witness was competent to testify, despite his impairment, where the witness was capable of expressing himself concerning the matter at issue and other evidence corroborated the veracity of his statements. We conclude there was no error.

## I. Background

The State's evidence tended to show that on 18 April 2017, the Onslow County Sheriff's Department set up a controlled buy between Mr. Asay and defendant in which defendant ultimately sold Mr. Asay a controlled substance, methamphetamine. Defendant was tried by a jury. During the State's case in chief, Detective Michael Noel testified as to the controlled buy. The actual controlled buy took place in a vehicle and Detective Noel testified to the circumstances of the buy, including searching Mr. Asay before he went to the vehicle for the buy and giving him money with which to purchase drugs. Detective Noel further testified he never lost sight of Mr. Asay, and when he returned from defendant he had controlled substances with him though he did not have them when he walked over to the vehicle.

Mr. Asay also testified about the drug purchase from defendant, but after Mr. Asay had given his testimony, the trial court raised a concern that he appeared to be under the influence of a controlled substance or alcohol. On the trial court's order, Mr. Asay was drug-tested by his probation officer and was positive for use of amphetamines and methamphetamine. Defendant moved for a mistrial and thereafter to disqualify Mr. Asay as a witness under Rule of Evidence 601(b) and strike his testimony because he was an incompetent witness, but the trial court denied both motions.

The jury ultimately convicted defendant of delivering methamphetamine; possession of drug paraphernalia; and possession with intent to sell and deliver methamphetamine. The trial court entered judgment. Defendant appeals.

## II. Mr. Asay's Testimony

Defendant makes two arguments on appeal. Both arguments are based upon Mr. Asay's competency to testify while impaired.

A. Rule of Evidence 601(b)

**[1]** Defendant argues the trial court should have allowed his motion to exclude and strike Mr. Asay's testimony based on Rule of Evidence 601(b) because Mr. Asay was an incompetent witness, and thus he could not receive a fair trial. "The competency of a witness is a matter which rests in the sound discretion of the trial judge. Absent a showing that the ruling as to competency could not have been the result of a reasoned decision, the ruling must stand on appeal." *State v. Ford*, 136 N.C. App. 634, 639, 525 S.E.2d 218, 221-22 (2000) (citations and quotation marks omitted).

The competency of a witness to testify is governed by North Carolina General Statute § 8C-1, Rule 601, which provides in pertinent part:

> (a) General rule.–Every person is competent to be a witness except as otherwise provided in these rules.
>
> (b) Disqualification of witness in general.--A person is disqualified to testify as a witness when the court determines that the person is (1) incapable of expressing himself or herself concerning the matter as to be understood, either directly or through interpretation by one who can understand him or her, or (2) incapable of understanding the duty of a witness to tell the truth.

N.C. Gen. Stat. § 8C-1, Rule 601 (2019).

This Court has previously noted that drug use alone will not make a witness incompetent to testify. *See State v. Edwards*, 37 N.C. App. 47, 49, 245 S.E.2d 527, 528 (1978). If the witness is able to express himself well enough to be understood and and is able to understand the obligation to testify truthfully, impairment by drugs does not render him incompetent, although he may be impeached with evidence of his impairment:

> [D]rug use does not per se render a witness incompetent to testify. Generally, evidence that the witness was using drugs, either when testifying or when the events to which he testified occurred, is properly admitted only for purposes of impeachment and only to the extent that such drug use may affect the ability of the witness to accurately observe or describe details of the events which he has seen.

*Id.* Here, defendant has not demonstrated that Mr. Asay was incapable of expressing himself or incapable of understanding his duties to tell

the truth. *See* N.C. Gen. Stat. § 8C-1, Rule 601(b). In addition, the other evidence, including the testimony of Detective Noel and a videotape, entirely corroborated Mr. Asay's testimony against defendant. Although Mr. Asay's testimony with other evidence does not directly show Mr. Asay's competence as a witness, it does indicate that he was able to recall dates and events in a manner consistent with the other evidence.

Defendant further argues it was error for the trial court not to conduct a *voir dire* of Mr. Asay to assess his competency to testify. However, defendant had the opportunity to request a *voir dire* and did not. After Mr. Asay began his testimony, the trial court *sua sponte* raised its concern regarding his potential impairment, had him tested, and brought his impairment to the attention of the parties. Out of the presence of the jury, the trial court discussed the matter with counsel and sought their suggestions in how to proceed. The State noted it would call Mr. Asay's probation officer to testify regarding the drug testing so this information would be in evidence. The trial court also noted that the State should not question the probation officer regarding who initiated the drug testing because "maybe the jury may consider that as my questioning credibility[,]" but the trial court did allow defendant's counsel to question the probation officer on this subject in front of the jury. Thus, defendant's counsel elicited the probation officer's testimony that the trial judge had called for the testing of Mr. Asay. Defendant's counsel did not object to the measures the trial court discussed with counsel to address Mr. Asay's impairment, and again, did not request *voir dire* of Mr. Asay. Instead, defendant opted to move for mistrial and for disqualification of Mr. Asay as a witness.

When defendant made his motions, the trial court already had ample opportunity to observe Mr. Asay during his testimony, and those observations raised the trial court's suspicions of impairment. Defendant does not explain how having Mr. Asay questioned further on *voir dire* would reveal any additional information which may have required a different procedure. In denying the motion for disqualification, the trial court noted,

> I heard the testimony. And I could understand -- what he was saying and the transcript will reflect that the Court Reporter probably could understand also what he was saying.[1] There are parts that he -- I thought he was slurring his words and required questions be repeated. The Court

1. The trial court was correct. The transcript does not reflect any problems with transcription of the testimony.

> was unaware whether this was the result of extensive drug use and he was suffering from some sort of damage that had been done to his language skills and mental faculties or not. But I think he was able to discuss the events of April 18, 2017, and was generally understandable by the jurors. The motion under Rule 601 -- or the motions raised by the Defense under 601 are denied.

Our Supreme Court has noted that the trial court's observations of the witness put the trial court in the best position to assess the competency of a witness:

> In addition, the trial court's determination that a witness is competent to testify is with good reason within the discretion of that court, which has the opportunity itself to observe the comportment of the witness. And where the effect of drug use is concerned, in particular, the question is more properly one of the witness's credibility, not his competence. As such, it is in the jury's province to weigh his evidence, not in the court's to bar it.

*State v. Fields*, 315 N.C. 191, 204, 337 S.E.2d 518, 526 (1985).

Defendant has not demonstrated any abuse of discretion by the trial court. Instead, the trial court initiated the investigation of Mr. Asay's impairment, advised counsel, solicited their arguments and suggestions on how to proceed, and gave a well-reasoned explanation of its rulings. Evidence of Mr. Asay's impairment was presented to the jury, and thus the jury was free to determine whether they found Mr. Asay's testimony credible. *See id.* Accordingly, this argument is overruled.

B. Motion for Mistrial

**[2]** Defendant also contends the trial court should have allowed his motion for a mistrial as "the single most important witness for the State testified while he was drug impaired." "[A] mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict. Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion." *State v. Jones*, 241 N.C. App. 132, 138, 772 S.E.2d 470, 475 (2015) (citation, quotation marks, ellipses, and brackets omitted).

Here, defendant has not alleged that Mr. Adam's testimony was incoherent or difficult to understand. Rather, defendant contends, without citing legal authority, that because Mr. Asay was under the influence of drugs when he testified, his testimony tainted his entire trial. In addition,

the other evidence, including the testimony of Detective Noel and the videotape, corroborated Mr. Asay's testimony. As discussed above, the trial court found Mr. Asay was competent to testify and the jury was informed about his impairment during his testimony, and thus could consider his credibility and the weight to give to his testimony. As Mr. Asay was competent to testify and the jury was informed of his impairment, we see no basis for defendant's claim it was "impossible to attain a fair and impartial verdict[,]" *id.*, and therefore we do not conclude that the trial court abused its discretion. This argument is overruled.

III. Conclusion

Therefore, we conclude there was no error.

NO ERROR.

Judges BERGER and COLLINS concur.

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STATE OF NORTH CAROLINA
v.
EDWARD BICKERTON LANE, JR.

No. COA19-877

Filed 5 May 2020

**1. Criminal Law—motion for appropriate relief—ineffective assistance of counsel—test distinguished from plain error review**

When denying defendant's motion for appropriate relief, after defendant's drug trafficking conviction was upheld on appeal because defendant failed to show plain error at trial where the jury was not instructed on the defense of possession pursuant to a valid prescription, the trial court erred in concluding that the prior holding of no plain error precluded a finding that defendant received ineffective assistance of counsel. Plain error review focuses on prejudice resulting from the trial court's errors rather than from counsel's errors and requires a stronger showing of prejudice than the test for finding ineffective assistance of counsel does. Nevertheless, the trial court properly denied defendant's motion for appropriate relief based on its separate analysis applying the test for ineffective assistance of counsel.

**2. Criminal Law—motion for appropriate relief—right to evidentiary hearing—non-frivolous claims**

When reviewing defendant's motion for appropriate relief raising an ineffective assistance of counsel claim, the trial court erred in concluding that defendant's motion was frivolous where defendant raised good faith arguments supporting a modification or reversal of existing law. Nevertheless, the trial court properly concluded that defendant was not entitled to an evidentiary hearing under N.C.G.S. § 15A-1420 because his motion presented only questions of law.

Appeal by defendant from orders entered 18 May 2018 and 11 January 2019 by Judge Michael D. Duncan in Alleghany County Superior Court. Heard in the Court of Appeals 31 March 2020.

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

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

ARROWOOD, Judge.

Edward Bickerton Lane, Jr. ("defendant") appeals from orders denying his motion for appropriate relief ("MAR") and motion for discovery. Defendant contends the trial court erred in concluding that a finding of no plain error precludes a finding of ineffective assistance of counsel and that defendant's MAR was frivolous. In the alternative, defendant contends the trial court erred in denying his motion for discovery and motion for post-conviction discovery where he was represented by counsel in a post-conviction proceeding pursuant to N.C. Gen. Stat. § 15A-1415(f). For the following reasons, we affirm the order of the trial court.

## I. Background

On 14 December 2016, defendant was convicted of trafficking in opium or heroin, resisting an officer, simple possession of marijuana, and possession of drug paraphernalia. At trial, the evidence tended to show the following.

Deputy Colt Kilby ("Deputy Kilby") testified that on 18 September 2014, he observed defendant driving above the speed limit, crossing the center line, and weaving within his lane. Deputy Kilby subsequently stopped defendant for the observed traffic violations. As he approached defendant's vehicle, Deputy Kilby detected the smell of both raw and

burnt marijuana. Deputy Kilby conducted a search of defendant's vehicle and retrieved several items, including: a smoking pipe containing burnt marijuana residue; small clear plastic bags of marijuana; and plastic straws that had been cut up into several short pieces, which are often used to inhale ground-up prescription pills.

Deputy Kilby also retrieved an orange bottle of pills labeled "doxycycline" that was prescribed to defendant. Upon opening the bottle, he noticed the pills did not match the label. Another deputy found a single pill inside a small black container. While Deputy Kilby was distracted, defendant tossed the pills in the orange bottle about 10 to 15 feet away from the vehicle and into a nearby grassy area. Deputy Kilby recovered nineteen pills and the prescription bottle and arrested defendant. The pills were later identified as hydrocodone.

Defendant testified that in June 2014, he broke his left hand while at work. He received treatment for his injury at the hospital, in the course of which doctors put his hand in a cast and initially prescribed him twenty "hydrocodone fives" to take as needed for pain. Several days later, a specialist prescribed defendant an additional forty-five hydrocodone 10mg, a stronger medication. Defendant took the pills as needed and often kept the medication in his car. Defendant estimated that by September 2014, he had approximately twenty hydrocodone 10mg pills left. He also had a prescription filled in August for doxycycline, an antibiotic that treats pneumonia. Defendant testified that he had the hydrocodone pills in the car the night Deputy Kilby stopped him, and he kept a single hydrocodone pill in a separate container that he took with him to work. He further testified that he tossed the pills out while Deputy Kilby was searching his car because he "was irritated, very irritated."

A Walgreens pharmacist testified that on 13 June 2014, she filled a prescription for twenty hydrocodone of 5mg strength. On 16 June 2014, she filled a second prescription of forty-five hydrocodone 10mg. The pills were marked "Watson" and stamped with the number "853." The pharmacist further testified that if defendant had taken the second prescription according to the doctor's instructions, it would have lasted seven days.

At the close of the State's case and at the close of all the evidence, trial counsel moved to dismiss the trafficking charge on the ground that defendant's possession of hydrocodone was pursuant to a valid prescription from a licensed physician. During the jury charge conference, trial counsel for defendant did not request any jury instruction on the definition of "unlawful" in the context of trafficking by possession, or

an instruction that possession pursuant to a valid prescription was a defense to trafficking by possession. However, on the charge of unlawfully and knowingly possessing with intent to use drug paraphernalia, the jury was instructed that opium is a controlled substance that is unlawful to possess without a valid prescription from a licensed physician. Defendant was found guilty of all charges and given a consolidated sentence of 70 to 93 months' imprisonment, in addition to a mandatory fine of $50,000.00. Defendant appealed the matter to this Court.

On 14 June 2017, defendant filed an MAR contemporaneously with his appellant brief. On 19 December 2017, this Court held the trial court did not commit plain error because defendant could not establish he was prejudiced by the trial court's failure to instruct the jury on the defense of possession pursuant to a valid prescription. *State v. Lane*, Nos. 14 CRS 50314-15, 2017 WL 6460045, *2 (N.C. App. Dec. 19, 2017). In addition, we dismissed defendant's MAR without prejudice to refile in the trial court. On 2 February 2018, the trial court appointed counsel to represent defendant on a potential MAR and gave defendant 120 days to file an MAR or file a written notice of intent not to file. On 14 March 2018, defendant filed a motion for discovery pursuant to N.C. Gen. Stat. § 15A-1415(f) and a proposed order. The trial court denied the motion on the grounds that there was no current post-conviction proceeding as defendant had not yet filed an MAR.

On 29 May 2018, defendant filed an MAR alleging the same ineffective assistance of counsel claim this Court previously dismissed without prejudice. Specifically, defendant argued he was denied his constitutional right to effective representation when his trial counsel failed to request a jury instruction that a valid prescription was a defense to trafficking in opium by possession. In the MAR, defendant also renewed his motion for discovery and requested an opportunity to amend his motion after receiving post-conviction discovery. On 11 January 2019, the trial court issued an order denying defendant's MAR. The trial court concluded that because this Court found defendant was not prejudiced under the plain error standard, defendant's ineffective assistance of counsel claim must also fail. On 7 June 2019, defendant filed a petition for *writ of certiorari* asking this Court to review the trial court's order denying defendant's MAR. Defendant also later filed a motion for initial *en banc* hearing. We granted *certiorari*, but denied the motion for an *en banc* hearing.

## II. Discussion

On appeal, defendant argues that the trial court erred in concluding that a finding of no plain error precludes a finding of ineffective

assistance of counsel and that his MAR was frivolous. In the alternative, defendant contends the trial court erred in denying his motion for discovery where he was represented by counsel in a post-conviction proceeding pursuant to N.C. Gen. Stat. § 15A-1415(f).

"Our review of a trial court's ruling on a defendant's MAR is 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Peterson*, 228 N.C. App. 339, 343, 744 S.E.2d 153, 157 (2013) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). " 'When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal.' " *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)).

1. Ineffective Assistance of Counsel

**[1]** Defendant first argues the trial court erred in concluding that a finding of no plain error requires a finding of no ineffective assistance of counsel. In support of his argument, defendant points to differences between the plain error standard and the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed.2d 674 (1984). We agree with defendant that the plain error standard and ineffective assistance of counsel test are not so similar that a finding of no plain error always precludes a finding of ineffective assistance of counsel.

The Sixth Amendment to the Constitution guarantees criminal defendants the right to counsel, which courts have recognized necessarily includes the right to effective assistance or representation by counsel. *Strickland*, 466 U.S. 668, 686, 80 L. Ed.2d at 692 (citing *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 25 L. Ed.2d 763, 773, n. 14 (1970)). Thus, ineffective assistance of counsel violates that right. In *Strickland*, the United States Supreme Court established the two-part test for ineffective assistance of counsel subsequently adopted by our Supreme Court years ago in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). Pursuant to *Strickland*, when bringing an ineffective assistance of counsel claim, a defendant must do the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made error so serious that counsel was not functioning

> as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error were [sic] so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

*Braswell*, 312 N.C. at 562, 324 S.E.2d at 248 (emphasis in original) (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed.2d at 693). The Supreme Court, further elaborating on the prejudice prong, explained that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed.2d at 698.

In comparison, under North Carolina's plain error standard:

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

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted). Thus, plain error should only be found where "the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial.' " *Id.* at 516-17, 723 S.E.2d at 333 (emphasis in original) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

Notably, both the ineffective assistance of counsel test and the plain error standard require a showing of prejudice. Under the former, a defendant must show a "reasonable probability" the result of the proceeding would have been different, while under the latter, they must show the error had a "probable impact" on the jury's finding of guilt. Given their similar language, the two prejudice inquiries initially appear to be the same. This Court has thus previously held that a finding of no prejudice under one also means the prejudice requirement of the other cannot be

met as well, particularly in the context of jury instructions. *See State v. Land*, 223 N.C. App. 305, 316, 733 S.E.2d 588, 595 (2012), *aff'd*, 366 N.C. 550, 742 S.E.2d 803 (2013) ("Since the trial court did not commit plain error when failing to give the [jury] instructions at issue, defendant cannot establish the necessary prejudice required to show ineffective assistance of counsel for failure to request the instructions."); *State v. Seagroves*, 78 N.C. App. 49, 54, 336 S.E.2d 684, 688 (1985) ("There being no 'plain error' in the jury instructions, defendant's assertion of ineffective assistance of counsel with respect thereto must also fail.").

However, a review of North Carolina appellate decisions on the matter reveals that there has been no thorough examination and comparison of the plain error standard and ineffective assistance of counsel test by this Court or our Supreme Court. We thus take the opportunity to do so here.

We first consider the differences in language used to articulate the two prejudice inquiries. Prejudice under plain error requires that the *trial court's* error have had a "probable impact" on the jury's finding of guilt. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. The plain error rule thus requires a defendant to show "[i]n other words, . . . that the error in question 'tilted the scales' and caused the jury to reach its verdict convicting the defendant." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citing *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 806-807 (1983)). In *State v. Juarez*, our Supreme Court emphasized that "[f]or plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict." 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016) (citing *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334). In *Lawrence*, that court illustrated the defendant's high burden of proof under plain error, explaining that "[i]n light of the overwhelming and uncontroverted evidence, defendant cannot show that, absent the error, the jury probably would have returned a different verdict. Thus, he cannot show the prejudicial effect necessary to establish that the error was a fundamental error." *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335.

In contrast, prejudice under the ineffective assistance of counsel test requires a showing of "reasonable probability" that, "but for *counsel's* unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed.2d at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Under the reasonable probability standard, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693, 80 L. Ed.2d at 697. However,

the defendant does need to demonstrate that "at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537, 156 L. Ed.2d 471, 495 (2003).

While under the reasonable probability standard "[t]he likelihood of a different result must be substantial, not just conceivable[,]" *Harrington v. Richter*, 562 U.S. 86, 112, 178 L. Ed.2d 624, 647 (2011), it is something less than that required under plain error. In *State v. Sanderson*, our Supreme Court noted that we adopted the ineffective assistance of counsel test in *Strickland* as our own standard because it mirrored the language of our statutorily enacted test for prejudice under N.C. Gen. Stat. § 15A-1443(a). 346 N.C. 669, 684, 488 S.E.2d 133, 141 (1997). Pursuant to N.C. Gen. Stat. § 15A-1443(a), criminal defendants alleging prejudice due to errors preserved for review on appeal must demonstrate "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (2019). Importantly, "the test for 'plain error' places a much heavier burden upon the defendant than that imposed by [N.C. Gen. Stat.] § 15A-1443 upon defendants who have preserved their rights by timely objection." *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. It follows, then, that the prejudice prong of the ineffective assistance of counsel test, which is almost identical to the prejudice inquiry under N.C. Gen. Stat. § 15A-1443(a), also imposes a lesser burden than that imposed by plain error.

This line of reasoning is further supported by the Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 362, 146 L. Ed.2d 389 (2000). In discussing the ways in which a state-court decision would be contrary to clearly established precedent in *Strickland*, the *Williams* court noted that:

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different.

*Williams*, 529 U.S. at 405-406, 146 L. Ed.2d at 425-26 (citing *Strickland*, 466 U.S. at 694, 80 L. Ed.2d at 698). Thus, the "reasonable probability" standard of the ineffective assistance of counsel test can be satisfied by

something less than the 51% certainty associated with the preponderance of the evidence standard. In contrast, the "probable impact" standard under plain error seems to require at least that much. *See Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (holding that plain error requires that "the error in question 'tilted the scales' and caused the jury to reach its verdict convicting the defendant.").

Moreover, other differences between the plain error standard and ineffective assistance of counsel test compel us to conclude that application of the two will not always necessarily lend the same results. On this point, we find the Fourth Circuit's reasoning in *United States v. Carthorne*, 878 F.3d 458 (4th Cir. 2017) persuasive. There, the *Carthorne* court also considered the issue of "whether application of the plain error standard and the ineffective assistance of counsel standard ordinarily requires equivalent outcomes." *Id.* at 464. Similar to defendant here, the defendant in *Carthorne* argued that the lower court erred "in concluding that the absence of plain error on direct appeal constituted a basis for denial of relief on collateral review for ineffective assistance of counsel." *Id.* at 463.

As the *Carthorne* court noted, the plain error standard and ineffective assistance of counsel test "serve different, yet complementary, purposes," with the former concerned with trial court errors and the latter with errors by counsel. *Id.* at 465. Though both require a showing of prejudice, they differ in several important respects.

> The ineffective assistance inquiry focuses on a factor that is not considered in a plain error analysis, namely, the objective reasonableness of counsel's performance. In addition, plain error review requires that there be settled precedent before a defendant may be granted relief, while the ineffective assistance standard may require that counsel raise material issues even in the absence of decisive precedent.
>
> There is also a temporal distinction in the analysis performed under the two types of review. Claims of ineffective assistance are evaluated in light of the available authority at the time of counsel's allegedly deficient performance. But the plain error inquiry applies precedential authority existing at the time of appellate review. These differences, considered collectively, demonstrate why claims of ineffective assistance of counsel are not limited by an appellate court's analysis whether a trial court plainly erred.

*Id.* at 465-66 (internal citations omitted). In addition, because ineffective assistance of counsel claims focus on the reasonableness of counsel's performance, courts can consider the cumulative effect of alleged errors by counsel. *See Williams*, 529 U.S. at 395-99, 146 L. Ed.2d at 419-21 (holding that the lower court correctly considered the cumulative effect of failure to raise mitigation evidence in ruling upon an ineffective assistance of counsel claim); *State v. Thompson*, 359 N.C. 77, 121-22, 604 S.E.2d 850, 880-81 (2004) (recognizing cumulative argument but dismissing ineffective assistance of counsel claim on other grounds). In contrast, prejudice under plain error is not reviewed on a cumulative basis. *State v. Holbrook*, 137 N.C. App. 766, 769, 529 S.E.2d 510, 512 (2000). Moreover, error that was invited by the defendant is not reviewable under plain error, *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), but may still form the basis of a successful ineffective assistance of counsel claim if counsel had no reasonable strategy for making the error.

The different purposes and concerns of the two standards thus play a significant role in shaping the outcome of their application. As long as counsel's deficient performance created a fundamentally unfair trial whose results were unreliable, an ineffective assistance of counsel claim will be successful despite the absence of plain error. *See Kimmelman v. Morrison*, 477 U.S. 365, 374, 91 L. Ed.2d 305, 318-19 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."). Accordingly, there will be instances in which the trial court committed no plain error but counsel rendered ineffective assistance, and vice versa. *See United States v. Span*, 75 F.3d 1383, 1389-90 (9th Cir. 1996) (holding that counsel's failure to raise an objection to jury instructions was ineffective assistance, even though district court's instructions were not plainly erroneous). In addition, as discussed *supra*, the different thresholds of prejudice (i.e. "reasonable probability" versus "probable impact") also mean that a claim that fails the plain error test may still be a successful ineffective assistance of counsel claim. Thus, while an analysis of plain error may inform an analysis of prejudice under the ineffective assistance of counsel test, it should not be determinative.

Having determined that sufficient differences exist between the plain error and ineffective assistance of counsel standards such that separate and independent inquiries are required, we now address whether the trial court properly dismissed the claims raised in defendant's MAR.

In the present case, upon defendant's appeal of his criminal convictions to this Court, we previously held the trial court did not commit plain error when it failed to instruct the jury on the defense of possession pursuant to a valid prescription. *Lane*, Nos. 14 CRS 50314-15, 2017 WL 6460045, at *2. In reaching our holding, we noted that defendant could not satisfy the prejudice requirement under the plain error standard because, in light of the ample evidence from which the jury could deduce defendant did not possess the hydrocodone pills lawfully, it was very likely the jury would have reached the same conclusion even absent the trial court's alleged error. *Id.* Because we found no plain error, the trial court subsequently denied defendant's MAR alleging ineffective assistance of counsel, reasoning that it was compelled by this Court's precedent to deny defendant's ineffective assistance of counsel claim where there was no plain error.

In the alternative, the trial court, adopting our reasoning in *Lane*, concluded that, based on the evidence presented at trial, defendant failed to establish a reasonable probability that the result of the proceeding would have been different had trial counsel requested the valid prescription jury instruction. Because as analyzed above, a finding of no plain error does not preclude a finding of ineffective assistance of counsel, the trial court erred in dismissing defendant's claim on that basis. However, to the extent the trial court conducted a *Strickland* analysis of defendant's ineffective assistance of counsel claim in its alternative holding, we affirm on that ground.

As discussed *supra*, under *Strickland*, we apply a two-part test to determine whether a defendant was denied effective assistance of counsel. First, the defendant must show his counsel's performance was deficient, such that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 80 L. Ed.2d at 693. Second, the defendant must show counsel's alleged errors prejudiced him such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 80 L. Ed.2d at 698.

In the present case, defendant was charged and convicted of trafficking opium by possession. Lawful possession is a defense to Section 90-95 of the Controlled Substances Act, which "makes the possession, transportation[,] or delivery of a controlled substance a crime." *State v. Beam*, 201 N.C. App. 643, 649, 688 S.E.2d 40, 44 (2010). Pursuant to N.C. Gen. Stat. § 90-101(c)(3), an individual lawfully possesses a controlled substance if they are "[a]n ultimate user or a person in possession

of any controlled substance pursuant to a lawful order of a practitioner." N.C. Gen. Stat. § 90-101(c)(3) (2019). An "ultimate user" is "a person who lawfully possesses a controlled substance for his own use, or for the use of a member of his household." N.C. Gen. Stat. § 90-87(27) (2019).

Defendant's entire defense to trafficking opium by possession rested on his assertion he possessed the hydrocodone pills pursuant to a valid prescription. At trial, there was conflicting evidence on that issue. Though defendant at one point had a valid prescription for 45 pills of 10mg hydrocodone, that prescription was only supposed to last seven days and was filled three months prior to defendant's encounter with law enforcement. During the search of defendant's car, twenty hydrocodone pills were found in a prescription bottle labeled "doxycycline," and defendant attempted to get rid of the pills while the deputies searching his car were distracted. Deputies also found several cut up straws commonly used to inhale crushed pills. Despite evidence supporting a theory of illegal possession, however, there was also some evidence that defendant lawfully possessed the pills as well. While testimony by defendant's pharmacist indicated the pills prescribed to defendant would only last seven days if taken as prescribed, according to defendant, he only took them "as needed for pain." In addition, the pills recovered by law enforcement were marked "Watson 853," similar to the pills prescribed to defendant.

At the close of all the evidence, trial counsel for defense moved to dismiss the trafficking charge on the ground that defendant's possession of hydrocodone was pursuant to a valid prescription. However, trial counsel failed to request a jury instruction on the defense defendant lawfully possessed the hydrocodone pills. After the jury charge, trial counsel also failed to object to any of the instructions given. "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (citing *State v. Loftin*, 322 N.C. 375, 368 S.E.2d 613 (1988)). "All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *Loftin*, 322 N.C. at 381, 368 S.E.2d at 617 (citations omitted). Because defendant presented evidence he lawfully possessed the hydrocodone pills, he was entitled to a jury instruction on that defense. Though trial counsel argued throughout the trial that defendant possessed the pills pursuant to a valid prescription, " '[o]n matters of law, arguments of counsel do not effectively substitute for statements by the court.' " *State v. Locklear*, 363 N.C. 438, 466, 681 S.E.2d 293, 313 (2009) (quoting *State v. Spruill*, 338 N.C. 612, 654, 452 S.E.2d 279, 302 (1994)).

Whether trial counsel's performance was deficient because she failed to request a jury instruction on the lawful possession defense depends on whether her conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 80 L. Ed.2d at 693. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and to overcome this presumption defendant must show that the challenged action cannot be considered sound trial strategy. *Id*. at 689, 80 L. Ed.2d at 694-95. As the trial court noted, the burden of proof for proving an exemption to the Controlled Substances Act, including the "ultimate user" exemption, lies with the defendant. Thus, had trial counsel requested the valid prescription instruction, she could have risked highlighting this burden to the jury and possibly negating the value of the evidence that defendant lawfully possessed the pills.

Even assuming counsel's performance was deficient, however, "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 694, 80 L. Ed.2d at 698). Importantly, "*Strickland* asks whether it is 'reasonably likely' the result would have been different[,]" and "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 111-12, 178 L. Ed.2d. at 647 (citing *Strickland*, 466 U.S. at 693, 696, 80 L. Ed.2d at 697, 699). Though defendant argues it is possible that "at least one juror would have struck a different balance" if presented with the valid prescription defense, we think it more probable that the result of the proceeding would have been the same.

The jury was presented with evidence defendant possessed the pills pursuant to a valid prescription and also heard trial counsel argue defendant's lawful possession of the pills several times. In addition, on the charge of unlawfully and knowingly possessing with intent to use drug paraphernalia, the jury was instructed that opium is a controlled substance that is unlawful to possess without a valid prescription from a licensed physician. Under these facts, trial counsel's failure to request that the jury be instructed on the definition of "unlawful" and on the defense of possession pursuant to a valid prescription does not "undermine confidence" in the result and create a reasonable probability that the result of the proceeding would have been different. We therefore affirm the order of the trial court.

2. MAR not Frivolous

**[2]** Defendant next argues the trial court erred in finding that his MAR was frivolous and without merit pursuant to N.C. Gen. Stat. § 15A-1420 and thus not entitled to an evidentiary hearing. When considering a motion for appropriate relief, "[t]he judge assigned to the motion shall conduct an initial review of the motion. If the judge determines that all of the claims alleged in the motion are frivolous, the judge shall deny the motion." N.C. Gen. Stat. § 15A-1420(b1)(3) (2019). Furthermore "[a]ny party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit." N.C. Gen. Stat. § 15A-1420(c)(1). The term "frivolous" is not defined by statute. However, our case law has defined frivolous claims as those claims that have no merit. *See State v. Kinch*, 314 N.C. 99, 102, 331 S.E.2d 665, 666 (1985) (holding that a finding of no merit in assignments of error "is tantamount to a conclusion that the appeal is wholly frivolous."). Non-meritorious or frivolous claims are those that are "not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *Long v. Long*, 119 N.C. App. 500, 507, 459 S.E.2d 58, 63 (1995) (citing N.C.R. App. P. 34(a)(1)).

Here, the trial court denied defendant's MAR on the basis his ineffective assistance of counsel claim could not succeed given this Court already found no plain error occurred at trial. Relying on this Court's prior holdings, which did not address the differences between plain error and the ineffective assistance of counsel test, the trial court found that existing law did not support defendant's argument. However, to the extent that defendant argued in good faith for a modification or reversal of existing law, his MAR was not frivolous. Because defendant raised arguments not yet addressed by North Carolina appellate courts that support a modification or reversal of existing law, the trial court erred in finding his MAR to be frivolous and without merit. Nevertheless, because "[t]he court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law[,]" the trial court properly concluded defendant was not entitled to an evidentiary hearing. N.C. Gen. Stat. § 15A-1420(c)(3).

Defendant lastly contends that, in the alternative, the trial court erred in denying his motion for discovery and renewed motion for discovery in contravention of N.C. Gen. Stat. § 15A-1415(f). Because we hold defendant did not receive ineffective assistance of counsel, we decline to address his argument.

III. Conclusion

For the foregoing reasons, we affirm the order of the trial court.

AFFIRMED.

Judges BRYANT and DIETZ concur.

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STATE OF NORTH CAROLINA
v.
ROBERT PRINCE, DEFENDANT

No. COA19-338

Filed 5 May 2020

**Sentencing—assault with a deadly weapon with intent to kill inflicting serious injury—assault by strangulation—arising from same conduct**

The trial court erred in sentencing defendant for both assault with a deadly weapon with intent to kill inflicting serious injury and assault by strangulation where defendant beat the victim with his fists and strangled her and the evidence tended to show a single prolonged assaultive act with no distinct interruption between two assaults. Therefore, the Court of Appeals vacated the strangulation conviction and remanded for resentencing.

Judge BERGER dissenting.

Appeal by defendant from judgment entered 10 July 2018 by Judge Nathaniel J. Poovey in Gates County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Terence Steed, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.*

YOUNG, Judge.

Where defendant was sentenced for the offenses of assault with a deadly weapon with intent to kill inflicting serious injury and assault by strangulation arising from the same conduct, in violation of statutory mandate, the trial court erred in sentencing defendant on the latter charge. We vacate that conviction, and remand for resentencing.

## I. Factual and Procedural Background

On 30 July 2016, Linda Prince (Linda) went to visit her daughters. After she had been visiting for a short time, her husband, Robert Prince (defendant) arrived and demanded that Linda return home, which she did.

When they arrived, defendant began arguing with Linda at the kitchen table. He was drinking whiskey from a bottle and pointing guns at her. He forced her to call her father and tell him she was using drugs, called her father himself and insisted that Linda had taken an entire bottle of Xanax, and forced Linda at gunpoint to write a note saying goodbye to her loved ones. During this time, one of her daughters, Janita Thomason (Thomason), called Linda multiple times. One phone call was successful, and Linda confirmed that defendant was pointing a gun at her; no other attempts by Thomason to reach Linda were successful.

After she was unable to reach her mother again, Thomason rushed to the house with her son and boyfriend. She knocked, and defendant let her in. Defendant was sweaty and had blood on his clothes. She found Linda unconscious on the floor, with her face covered in blood and her clothing ripped. Thomason attempted to call emergency services, but defendant insisted that he did not want an ambulance or police at his home. Defendant picked Linda up and took her out to Thomason's car, depositing the body on top of Thomason's son in the backseat, and said, "carry the bitch and dump her in a ditch."

En route to the nearest hospital, Thomason encountered a State Highway Patrol Trooper, who provided emergency aid and called for an ambulance. Linda was ultimately taken to a hospital, where she spent three days in recovery. She suffered a bruises around her neck, brain bleed, multiple contusions, and burst blood vessels in her eyes. She could not bend over for six weeks due to concerns it would exacerbate her brain bleed.

Defendant was indicted by the Gates County Grand Jury for assault with a deadly weapon with intent to kill inflicting serious injury, assault by strangulation, and assault inflicting serious bodily injury. At the close of all the evidence, the State voluntarily dismissed the charge of assault inflicting serious bodily injury. The jury returned verdicts finding

defendant guilty of the remaining two charges. The trial court consolidated the two offenses for judgment, and sentenced defendant to a minimum of 73 and a maximum of 100 months in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

## II. Standard of Review

"[W]hen a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Jamison*, 234 N.C. App. 231, 237, 758 S.E.2d 666, 671 (2014) (citations and quotation marks omitted). "Issues of statutory construction are questions of law, reviewed de novo on appeal." *Id.* at 238, 758 S.E.2d at 671 (citation and quotation marks omitted).

## III. Statutory Compliance

In his sole argument on appeal, defendant contends that the trial court erred in entering judgment and conviction on the charge of assault by strangulation when defendant was also convicted on the greater charge of assault with a deadly weapon with intent to kill inflicting serious injury. We agree.

The two charges which proceeded to the jury were assault with a deadly weapon with intent to kill inflicting serious injury and assault by strangulation. The former is defined by statute as a Class C felony. N.C. Gen. Stat. § 14-32(a) (2019). The latter is defined by statute as a Class H felony. N.C. Gen. Stat. § 14-32.4(b) (2019). However, the statute on assault by strangulation contains a caveat: the statute applies "[u]nless the conduct is covered under some other provision of law providing greater punishment[.]" *Id.* On appeal, defendant contends that, because the conduct was covered under the statutory definition of assault with a deadly weapon with intent to kill inflicting serious injury – a Class C felony, and thus a greater punishment – it was error in violation of statutory mandate for the trial court to sentence defendant on assault by strangulation.

Defendant is correct in principle. This Court has held that, where the same conduct gave rise to charges of both assault with a deadly weapon with intent to kill inflicting serious injury and assault inflicting serious bodily injury – the latter of which contains the same "other provision of law" caveat – the trial court violated double jeopardy in sentencing the defendant on both charges. *State v. Ezell*, 159 N.C. App. 103, 110-11, 582 S.E.2d 679, 684-85 (2003). Indeed, this Court has long held that it is "improper to have two bills of indictment and two offenses growing

out of this one episode" of assault. *State v. Dilldine*, 22 N.C. App. 229, 231, 206 S.E.2d 364, 366 (1974). Rather, the evidence must show that "two separate and distinct assaults occurred" in order to support more than one charge. *State v. McCoy*, 174 N.C. App. 105, 116, 620 S.E.2d 863, 872 (2005), *writ denied*, *disc. review denied*, ___ N.C. ___, 628 S.E.2d 8 (2006).

The State contends that the charges against defendant did not arise from a single action. The indictment for assault with a deadly weapon with intent to kill inflicting serious injury alleged that defendant assaulted Linda "with a series of strikes with fists and hands, a deadly weapon, with the intent to kill, inflicting serious injury." In support of this charge, the State introduced evidence of Linda's bodily bruises, swollen black eyes, concussion, and brain injuries. By contrast, the indictment for assault by strangulation alleges that defendant assaulted Linda "and inflict[ed] serious injury, severe bruising to her neck and throat by strangulation with his hands." In support of this charge, the State introduced evidence of bruising, handprints and fingerprints around Linda's neck. Based upon this, the State contends that the jury could properly find two separate assaults – one bodily assault with fists, and one specific strangulation – to support two separate charges.

To establish that two assaults occurred, the State must demonstrate that a "distinct interruption" occurred between them. *State v. Brooks*, 138 N.C. App. 185, 189, 530 S.E.2d 849, 852 (2000). It is here that the State's argument fails. The record does not reveal that there was a "distinct interruption" between two assaults. Indeed, the State's evidence tends to suggest that Linda's injuries were the result of a single, if prolonged, assaultive act. Nor does the State cite any specific evidence of a distinct interruption, instead relying upon the different nature of Linda's injuries to suggest different acts which may have caused them.

Moreover, there is an abundance of case law to suggest that these two assaults were in fact one assault, a single transaction resulting in multiple, albeit horrific, injuries. For example, in *State v. Williams*, the evidence tended to show that the defendant struck the victim, pushed his knee into her pelvic bone and pressed against her throat, then put his foot on her neck and pressed down, while putting his other foot on her rib cage until it popped. 201 N.C. App. 161, 168, 689 S.E.2d 412, 415 (2009). The defendant was charged with assault inflicting serious bodily injury, a Class F felony, and assault by strangulation, a Class H felony. On appeal, the defendant contended that it was error to sentence him on both charges, due to the "other provision of law" caveat. We agreed, holding that the defendant should "only be sentenced for the

higher of the two offenses, assault inflicting serious bodily injury." *Id.* at 174, 689 S.E.2d at 419. We therefore vacated the judgment on the assault by strangulation charge, and remanded for resentencing.

Similarly, in *State v. McPhaul*, we held that the defendant's charges for assault with a deadly weapon with intent to kill inflicting serious injury and assault inflicting serious bodily injury arose from the same conduct, in that there was "no evidence of a 'distinct interruption' in the assault." ___ N.C. App. ___, ___, 808 S.E.2d 294, 306 (2017) (citation omitted), *disc. review improvidently allowed*, ___ N.C. ___, 818 S.E.2d 102 (2018). As a result, we held that the trial court erred in entering judgment on the lesser of the two offenses, and vacated that judgment. *Id.*

Our precedent is clear. In the absence of evidence that the assaults were in fact two separate actions – that is, in the absence of evidence of a "distinct interruption" in the assault – the evidence could only support a finding of a single course of conduct, a single assault. As such, the two charges – assault with a deadly weapon with intent to kill inflicting serious injury and assault by strangulation – arose from the same conduct. Because of the statutory language in the latter charge, we hold that it was error for the trial court to sentence defendant on both charges. We therefore vacate defendant's conviction for assault by strangulation. Because the two convictions were consolidated for judgment, we remand this matter to the trial court for resentencing.

VACATED AND REMANDED.

Judge ZACHARY concurs.

Judge BERGER dissents in separate opinion.

BERGER, Judge, dissenting in separate opinion.

Defendant argues that N.C. Gen. Stat. § 14-32.4(b) precludes conviction of assault with a deadly weapon with intent to kill inflicting serious injury and assault by strangulation.[1] However, because strangulation and striking the victim in the face with hands and fists is not the same "conduct," I respectfully dissent.

1. Defendant did not argue in the trial court, nor does he argue on appeal, that double jeopardy precludes his conviction and sentencing for assault by strangulation and assault with a deadly weapon inflicting serious injury.

The plain language of Section 14-32.4(b) demonstrates that the legislature was attempting to address a particular type of violent conduct inflicted upon a victim: strangulation inflicting serious injury. However, if a defendant's conduct in strangling the victim also constituted a higher-level assault for which greater punishment could be imposed, then Defendant could not be sentenced pursuant to Section 14-32.4(b) and the higher-level offense. Applying a plain reading of the statute to the facts of this case, Defendant's argument fails. Hitting someone with your fists is different conduct than strangling them.

Assault by strangulation inflicting serious injury is a Class H felony "[u]nless *the conduct* is covered under some other provision of law providing greater punishment." N.C. Gen. Stat. § 14-32.4(b) (2019) (emphasis added). This Court has held that the prefatory clause in that section "indicates legislative intent to punish certain offenses at a certain level, but that *if the same conduct* was punishable under a different statute carrying a higher penalty, defendant could only be sentenced for that higher offense." *State v. Lanford*, 225 N.C. App. 189, 197, 736 S.E.2d 619, 625 (2013) (emphasis in original) (citations and brackets omitted).

This Court recently addressed this issue in *State v. Dew*, No. COA19-737, 2020 WL 1264021 (N.C. Ct. App. Mar. 17, 2020). In that case, this Court set forth the law to be applied when analyzing issues of multiple assaults.

> "In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults." *State v. McCoy*, 174 N.C. App. 105, 115, 620 S.E.2d 863, 871 (2005) (citation and quotation marks omitted). To establish that multiple assaults occurred, there must be "a distinct interruption in the original assault followed by a second assault[,] so that the subsequent assault may be deemed separate and distinct from the first." *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (2003) (*purgandum*). To determine whether Defendant's conduct was distinct, we are to consider: (1) whether each action required defendant to employ a separate thought process; (2) whether each act was distinct in time; and (3) whether each act resulted in a different outcome. *State v. Rambert*, 341 N.C. 173, 176-77, 459 S.E.2d 510, 513 (1995).
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> In *State v. Wilkes*, 225 N.C. App. 233, 736 S.E.2d 582 (2013), the defendant initially punched the victim in the face, breaking her nose, causing bruising to her face, and damaging her teeth. The victim's son entered the room where the incident occurred with a baseball bat and hit

the defendant. *Id.* at 235, 736 S.E.2d at 585. The defendant was able to secure the baseball bat from the child, and he began striking the victim with it. *Id.* at 235, 736 S.E.2d at 585. The defendant's actions in the subsequent assault "crushed two of [the victim]'s fingers, broke[] bones in her forearms and her hands, and cracked her skull." *Id.* at 235, 736 S.E.2d at 585.

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

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

*Id.*

The majority acknowledges that there were two assaults, but concludes that Defendant's conduct in striking the victim with his fists and hands is the same conduct as strangling the victim.[2] However, the majority reaches this result without conducting a *Rambert* analysis, or discussing that decision from our Supreme Court. Instead, the majority relies on *State v. Williams*, 201 N.C. App. 161, 689 S.E.2d 412 (2009), which also failed to discuss *Rambert*, and *State v. McPhaul*, 256 N.C. App. 303, 808 S.E.2d 294 (2017), which involved a robbery with a baseball bat in which the victim was struck three times in succession.

In the present case, the victim was unable to recall many of the details due to the severity of her injuries that resulted from Defendant's conduct. However, the evidence at trial tended to show that Defendant severely beat the victim in the face using both of his fists. The State introduced the victim's "Prehospital Care Report" without objection. This exhibit, which was published to the jury, contained the following statement: an EMT "stepped out of the ambulance to talk to one of the daughters and they stated they had tried to call [the victim] for an hour and went over to [the victim's] house and found [Defendant] over top of her beating her with his *fists*." (Emphasis added). The victim suffered significant bruising and swelling to the left side of her face, among other injuries. The State also introduced into evidence several photographs which showed the victim's external injuries. State's Exhibits 5, 6, 7, and 8 showed bruising and swelling to the victim's left eye.

At some point, Defendant stopped punching the victim in the face with both hands, and he began to strangle her. State's Exhibits 5, 6, 9, and 10 showed a handprint, bruising, and abrasions to the left side of the victim's neck.

Based on this evidence, Defendant's conduct in assaulting the victim with both fists was different and distinct from his conduct in strangling the victim. First, the two actions required different thought processes. Defendant's decision to strike the victim repeatedly in the face required a different thought process from his decision to place his hand upon her throat and strangle her to the point of vomiting. In addition, these two assaults were distinct in time because Defendant had to cease punching the victim in the face with both fists in order to carry out the assault by strangulation. Finally, the injuries sustained by the victim were to different body parts. The injuries from the assault with a deadly weapon inflicting serious injury caused visible injury to the victim's face, especially her left eye, while her neck clearly showed a handprint and

2. Per the majority opinion, "these two assaults were in fact one assault."

bruising resulting from the assault by strangulation. Based on these factors, as established by *Rambert*, Defendant assaulted the victim multiple times.

In addition, the trial court instructed the jury on two assaults arising from Defendant's differing conduct. Defendant was indicted for assaulting the victim and "inflict[ing] serious injury, severe bruising to [the victim's] neck and throat[,] by strangulation with his hands." With regard to that offense, the trial court instructed the jury as follows:

> Defendant has also been charged with assault inflicting physical injury by strangulation. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt. First, that the defendant assaulted [the victim] *by intentionally strangling her*, *and*, *second*, *that the defendant inflicted physical injury upon [the victim]*. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally assaulted [the victim] inflicting physical injury by strangulation, it would be your duty to return a verdict of guilty to that charge. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty to that charge.

(Emphasis added).

Defendant was also indicted for assault with a deadly weapon inflicting serious injury pursuant to N.C. Gen. Stat. § 14-32 for assaulting the victim "with a series of strikes with fists and hands." The trial court instructed the jury that to find Defendant guilty of assault with a deadly weapon inflicting serious injury, the jury was required to find

> beyond a reasonable doubt that on or about the alleged date, the defendant intentionally struck [the victim] with his fists or hands and that the defendant's fists or hands were deadly weapons and that the defendant inflicted serious injury upon [the victim.]

Thus, there was no error because the conduct at issue here, an assault by intentionally strangling the victim, is not the same conduct as intentionally striking the victim with fists or hands.

STATE OF NORTH CAROLINA
v.
MATTHEW WILLIAM RAY

No. COA19-700

Filed 5 May 2020

**1. Appeal and Error—waiver—Fourth Amendment argument—fruits of unlawful search—no motion to suppress**

In a drug trafficking case, defendant waived any right to appellate review—including plain error review—of his argument that police illegally seized him before obtaining his consent to search his vehicle and that, therefore, the trial court erred by admitting into evidence hydrocodone tablets the officers found during the search. At no point before or during trial did defendant move to suppress the hydrocodone tablets, and therefore his Fourth Amendment argument was not appealable.

**2. Attorney Fees—criminal case—court-appointed attorney—notice and opportunity to be heard**

In a drug trafficking prosecution, the trial court's civil judgments imposing attorney fees and an attorney appointment fee were vacated and remanded where the court entered the judgments without first providing defendant with notice and an opportunity to be heard pursuant to N.C.G.S. § 7A-455, which requires a court to conduct a colloquy with a defendant—personally, not through counsel—regarding the imposition of attorney fees.

Appeal by defendant from judgments entered 28 November 2018 by Judge Athena F. Brooks in Haywood County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Steven Armstrong, for the State.*

*The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.*

ZACHARY, Judge.

Defendant Matthew William Ray appeals from judgments entered upon a jury's verdicts finding him guilty of trafficking in opium or heroin by possessing and transporting 28 grams or more. Defendant argues that

the trial court (1) committed plain error by allowing the State to introduce into evidence hydrocodone tablets collected by law enforcement officers during a search of Defendant's vehicle; and (2) erred by entering two civil judgments for fees without first providing Defendant with notice and an opportunity to be heard. After careful review, we hold that Defendant waived any right to appellate review of his claim of plain error, and dismiss this claim. Further, we vacate the trial court's civil monetary judgments, and remand for further proceedings on this issue.

**Background**

On 30 April 2018, Detectives Robert Skiver and Brad Miller of the Waynesville Police Department and Detective Mitch McAbee of the Haywood County Sheriff's Office sat in an unmarked surveillance van in a church's parking lot in Waynesville, North Carolina. The detectives were "not a routine patrol."

After a while, the detectives observed Defendant drive by in a white Ford Ranger with a "Century Appliance" sign on its side, traveling at a high rate of speed in a 35-mile-per-hour zone. Due to the vehicle's speed, the detectives immediately pulled out behind Defendant's truck and followed him for approximately two miles.[1] While following Defendant, they observed that one of the truck's taillights was broken. They also observed the truck drift over the double line and into the other lane of travel before ultimately turning—without signaling—into the parking lot of Defendant's workplace, Century Appliance, where he exited the truck. The detectives parked "caddy-corner [sic] to the left side of his vehicle" and approached Defendant "to talk to him about his driving."[2]

While speaking with Defendant, Detective Skiver noticed a firearm laying on the front seat of Defendant's truck, and he "retrieved the gun for safety purposes." Detective Skiver handed the gun to Detective McAbee, who "put it in a safe place" inside of the detectives' unmarked vehicle while Detectives Miller and McAbee continued to speak with Defendant. After securing the firearm, Detective Skiver requested Defendant's permission to search the vehicle. Defendant gave his consent.

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1. Detective McAbee testified that it is common practice for the "unit" to engage in such activity. Detective Skiver noted that the Waynesville Police Department is "very undermanned, very understaffed. [Routine patrols] were all busy with calls; could not get anyone to respond or get anyone there."

2. The detectives were wearing plain clothes when they approached Defendant. However, they properly displayed their badges and identified themselves as law enforcement officers before engaging with Defendant.

During his search of Defendant's vehicle, Detective Skiver discovered "a little baggie with some crystalized residue in it and a straw that was . . . consistent with a straw that's modified for snorting or ingesting a controlled substance." He also discovered a plastic bag containing 90 hydrocodone tablets, wrapped in a paper bag and placed in a cooler. He issued Defendant a warning citation for speeding, and arrested Defendant for transporting 28 grams or more of opiates. *See* N.C. Gen. Stat. § 90-95(H)(4)(c) (2019).

After his arrest, a Haywood County grand jury returned a true bill of indictment formally charging Defendant with trafficking in opium or heroin by possessing and transporting 28 grams or more.[3] On 27 November 2018, Defendant's case came on for a jury trial before the Honorable Athena F. Brooks in Haywood County Superior Court. At no point during the proceedings—neither prior to nor during trial—did Defendant move to suppress the 90 hydrocodone tablets discovered during Detective Skiver's search of Defendant's truck. At the conclusion of all of the evidence, the jury returned verdicts finding Defendant guilty of both charges.

On 28 November 2018, the trial court entered two judgments, sentencing Defendant to two consecutive terms of 225 to 282 months in the custody of the North Carolina Division of Adult Correction and imposing two fines of $500,000 each. The trial court also entered two civil judgments against Defendant, ordering him to pay $3,975 in attorney's fees and a $60 attorney-appointment fee.

Defendant gave oral notice of appeal from the trial court's judgments in open court. Defendant subsequently filed a petition for writ of certiorari with this Court, seeking review of the monetary civil judgments entered by the trial court. In our discretion, we allow Defendant's petition.

## Discussion

The dispositive issue in this case rests on Defendant's Fourth Amendment argument that he was "illegally seized by the police immediately prior to giving consent to search his vehicle," thereby invalidating his consent. Defendant contends that, as a result, the trial court committed plain error by allowing the State to introduce evidence of the 90 hydrocodone tablets discovered during Detective Skiver's search

3. A 9 July 2018 indictment erroneously charged Defendant with two counts of trafficking in opium or heroin by possessing 28 grams or more. The error was corrected in a superseding indictment issued on 10 September 2018.

of his vehicle. However, we dismiss this argument because we conclude that Defendant has waived appellate review of this issue.

I. Appellate Waiver

**[1]** "A motion to suppress evidence . . . is the exclusive method of challenging the admissibility of evidence" when a party seeks to suppress unlawfully obtained evidence. N.C. Gen. Stat. § 15A-979(d).

With limited exception, a criminal defendant "may move to suppress evidence only prior to trial[.]" *Id.* § 15A-975(a). In any case, "the governing statutory framework requires a defendant to move to suppress at *some* point during the proceedings of his criminal trial." *State v. Miller*, 371 N.C. 266, 269, 814 S.E.2d 81, 83 (2018). He certainly "cannot move to suppress for the first time *after* trial." *Id.* Yet, that is essentially what a defendant is doing when he raises Fourth Amendment arguments for the first time on appeal. *Id.*

"When a defendant files a motion to suppress before or at trial . . . that motion gives rise to a suppression hearing and hence to an evidentiary record pertaining to that defendant's suppression arguments." *Id.* Indeed, "[f]act-intensive Fourth Amendment claims . . . require an evidentiary record developed at a suppression hearing." *Id.* at 270, 814 S.E.2d at 83-84. "Without a fully developed record, an appellate court simply lacks the information necessary to assess the merits of a defendant's plain error arguments." *Id.* at 270, 814 S.E.2d at 83.

Here, Defendant argues that the trial court committed plain error in admitting evidence of the 90 hydrocodone tablets discovered during Detective Skiver's search of his vehicle. Specifically, Defendant contends that he was "illegally seized" when the detectives secured his firearm, and that this seizure invalidated his subsequent consent to search the truck, thereby rendering the hydrocodone tablets the fruit of an unlawful search. However, Defendant acknowledges that he failed to move to suppress the hydrocodone tablets' admission into evidence.

Defendant's argument is foreclosed by *State v. Miller*, 371 N.C. 266, 814 S.E.2d 81 (2018), in which our Supreme Court addressed, as a matter of first impression, "whether plain error review is available when a defendant has not moved to suppress." 371 N.C. at 269, 814 S.E.2d at 83. In *Miller*, the defendant was arrested after law enforcement officers searched his vehicle and found cocaine. *Id.* at 267, 814 S.E.2d at 82. The defendant did not move to suppress evidence of the cocaine at any point prior to or during his trial. *Id.* at 268, 814 S.E.2d at 82. On appeal to this Court, the defendant sought plain error review of the trial

court's admission of the cocaine, as well as testimony from the officer who discovered it, contending that "the seizure of the cocaine resulted from various Fourth Amendment violations." *Id.* In particular, the defendant asked our Court to determine whether he "voluntarily consented to a search that resulted in the discovery of incriminating evidence." *Id.* at 270, 814 S.E.2d at 83. We held that the officer unconstitutionally extended the traffic stop, and that, even if the officer had not done so, the "defendant's consent to the search of his person was not valid." *Id.* at 268, 814 S.E.2d at 82.

After allowing the State's petition for discretionary review, our Supreme Court reversed the decision of this Court. In doing so, our Supreme Court held that the "defendant's Fourth Amendment claims [we]re not reviewable on direct appeal, *even for plain error*, because he completely waived them by not moving to suppress evidence of the cocaine before or at trial." *Id.* at 267, 814 S.E.2d at 82 (emphasis added). The *Miller* Court further explained that, by failing to "file a motion to suppress evidence of the cocaine in question, [the defendant] deprived our appellate courts of the record needed to conduct plain error review. By doing so, he completely waived appellate review of his Fourth Amendment claims." *Id.* at 273, 814 S.E.2d at 85.

The *Miller* Court reasoned that "a defendant cannot move to suppress for the first time *after* trial[,]" which he does "[b]y raising his Fourth Amendment arguments for the first time on appeal[.]" *Id.* at 269, 814 S.E.2d at 83. Additionally,

> Defendant fail[ed] to distinguish between cases like his, on the one hand, and cases in which a defendant has moved to suppress and both sides have fully litigated the suppression issue at the trial court stage, on the other. When a case falls into the latter category but the suppression issue is not preserved for some other reason, our appellate courts may still conduct plain error review.

*Id.* at 272, 814 S.E.2d at 85. "But when a defendant, such as [the] defendant here, does *not* file a motion to suppress at the trial court stage, the evidentiary record pertaining to his suppression arguments has not been fully developed, and may not have been developed at all." *Id.* at 269, 814 S.E.2d at 83. "Without a fully developed record, an appellate court simply lacks the information necessary to assess the merits of a defendant's plain error arguments." *Id.* at 270, 814 S.E.2d at 83-84.

These same principles apply to the case at bar. Here, as in *Miller*, Defendant raises a fact-intensive Fourth Amendment issue for the first

time on appeal. Defendant was arrested after law enforcement officers searched the truck and found 90 hydrocodone tablets. Prior to executing the search, Detective Skiver requested—and Defendant provided—Defendant's consent to search the truck. Although Defendant now contends on appeal that the detectives' earlier retrieval of his firearm from the truck invalidated his consent, this question is not properly before us. Defendant did not move to suppress evidence of the hydrocodone tablets prior to or during his trial. Thus, the issue was not "fully litigated" by "both sides" at the trial court stage, and the appellate record is therefore insufficient to review his claim. *Id.* at 272, 814 S.E.2d at 85.

As *Miller* clearly reiterates, a motion to suppress was the "exclusive method" by which Defendant could contest the admissibility of such evidence on constitutional grounds. N.C. Gen. Stat. § 15A-979(d). Yet, as in *Miller*, Defendant impermissibly "move[s] to suppress for the first time after trial" by "raising his Fourth Amendment arguments for the first time on appeal." *Miller*, 371 N.C. at 269, 814 S.E.2d at 83 (emphasis omitted).

Because Defendant never moved to suppress evidence of the hydrocodone tablets, there was no suppression hearing, and we therefore lack the fully developed record necessary to conduct plain error review. Consequently, we conclude that Defendant has completely waived appellate review of his Fourth Amendment claim. *See id.* at 273, 814 S.E.2d at 85. Accordingly, we dismiss Defendant's challenge to the judgments entered upon his convictions for trafficking in opium or heroin by possessing and transporting 28 grams or more.

II. Civil Judgments

**[2]** On 10 September 2019, Defendant filed a petition for writ of certiorari, seeking review of the two civil judgments entered against Defendant by the trial court. Defendant maintains, and the State concedes, that the trial court improperly imposed attorney's fees and an attorney-appointment fee against Defendant without providing him with notice and an opportunity to be heard, as required by N.C. Gen. Stat. § 7A-455. We agree.

"A convicted defendant is entitled to notice and an opportunity to be heard before a valid judgment for costs can be entered." *State v. Webb*, 358 N.C. 92, 101, 591 S.E.2d 505, 513 (2004) (citation omitted). Prior to "entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455," trial courts must "ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *State v. Friend*,

257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018). If the trial court does not conduct a colloquy directly with the defendant on this issue, then "the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.*

"Accordingly, we vacate the civil judgment for attorney['s] fees under N.C. Gen. Stat. § 7A-455 and remand to the trial court for further proceedings on this issue." *Id.* "On remand, the State may apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that [D]efendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *State v. Jacobs*, 172 N.C. App. 220, 236, 616 S.E.2d 306, 317 (2005).

Further, "[b]ecause Defendant was not given notice of the appointment fee and an opportunity to object to the imposition of the fee at his sentencing hearing, the appointment fee is also vacated without prejudice to the State again seeking [an] appointment fee on remand." *State v. Harris*, 255 N.C. App. 653, 664, 805 S.E.2d 729, 737 (2017).

**Conclusion**

For the reasons stated herein, we hold that Defendant waived appellate review of his arguments concerning the hydrocodone tablets' allegedly erroneous admission into evidence. Furthermore, we vacate the civil judgments imposing attorney's fees and the attorney-appointment fee, and remand for further proceedings in accordance with this opinion.

DISMISSED IN PART; VACATED IN PART AND REMANDED.

Judges BERGER and YOUNG concur.

STATE OF NORTH CAROLINA
v.
DEVANTEE MARQUISE REAVES-SMITH, DEFENDANT

No. COA19-932

Filed 5 May 2020

**1. Identification of Defendants—out-of-court identification—pre-trial show-up—immediate display of suspect—Eyewitness Identification Reform Act—motion to suppress**

In an attempted robbery prosecution, the trial court did not err in denying defendant's motion to suppress an out-of-court identification where two men attempted to rob the victim and fired a gun, the victim gave a detailed description of the men to a policeman who was nearby and heard the gunshot, defendant was seen 800 feet from the crime scene seven minutes after the officer broadcast their descriptions and was apprehended shortly thereafter, and the victim identified him as one of the robbers and the person who fired the gun. The trial court's findings of fact and conclusions of law—supported by the evidence—showed that the immediate display of defendant, an armed and violent suspect, was required by the circumstances and the show-up complied with the Eyewitness Identification Reform Act.

**2. Identification of Defendants—out-of-court identification—pre-trial show-up—eyewitness confidence statement—victim's vision information—motion to suppress**

In an attempted armed robbery prosecution, the trial court did not err when, in denying defendant's motion to suppress an out-of-court identification, it failed to make findings regarding the police officer's failure to obtain a confidence statement from the victim and failure to obtain information about the victim's vision because they were not requirements for show-up identifications under N.C.G.S. § 15A-284.52(c1) (the Eyewitness Identification Reform Act).

**3. Identification of Defendants—out-of-court identification—pre-trial show-up—impermissibly suggestive—likelihood of misidentification—motion to suppress**

In an attempted robbery prosecution where the victim had the opportunity to view the defendant during the crime and provided detailed descriptions of the two suspects to police, within seven minutes the suspects were seen 800 feet from the crime scene, and

fourteen minutes after the attempted robbery the victim identified defendant as the person who shot at him, the pre-trial show-up identification of defendant was not impermissbly suggestive, it did not create a substantial likelihood of misidentification, and the trial court did not err in denying defendant's motion to suppress the out-of-court identification.

**4. Criminal Law—jury instructions—reliability of eyewitness identifications—non-compliance with Eyewitness Identification Reform Act**

In a prosecution for attempted robbery, the trial court's failure to instruct the jury that it could consider non-compliance with the Eyewitness Identification Reform Act in determining the reliability of the eyewitness identification was not plain error because the alleged non-compliance, the officer's failure to obtain an eyewitness confidence level statement, was not required by N.C.G.S. § 15A-284.52(c1).

Appeal by defendant from judgment entered 28 March 2019 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 April 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Michael E. Bulleri, for the State.*

*W. Michael Spivey for defendant-appellant.*

BERGER, Judge.

On March 28, 2019, a Mecklenburg County jury convicted Devantee Marquise Reaves-Smith ("Defendant") of attempted robbery with a dangerous weapon. Defendant appeals, arguing the trial court erred when it (1) denied his motion to suppress evidence of a show-up identification, and (2) failed to instruct the jury about purported noncompliance with the North Carolina Eyewitness Identification Reform Act (the "Act"). We disagree.

Factual and Procedural Background

On December 16, 2016, two men attempted to rob Francisco Alejandro Rodriguez-Baca (the "victim") in a McDonald's restaurant parking lot. The victim did not give the men any money, but instead offered to buy them something to eat. One of the suspects, armed with a revolver, fired a shot in the air, and the two perpetrators fled the scene

on foot. The victim ran to a nearby parking lot. There, he found Officer Jon Carroll ("Officer Carroll") and told him what had just occurred.

The victim described the man armed with the revolver as a "slim African-American male" who was wearing a grayish sweatshirt, a black mask, a backpack, and gold-rimmed glasses. The victim later identified Defendant as the individual armed with the revolver.

Officer Carroll testified that he had heard a gunshot just before the victim approached him. According to Officer Carroll, the victim described the suspects as: "two black males, approximately five-foot ten-inches in height . . . both had grayish colored hoodies, . . . had book bags, face mask[s] and gold-rimmed glasses." Officer Carroll relayed this description to law enforcement officers over the radio. The victim stayed with Officer Carroll while other officers searched for the suspects.

Approximately seven minutes later, Officer Rodrigo Pupo ("Officer Pupo") spotted "two black males . . . . One of them had a grey hoodie. The other one had a black hoodie . . . they were both wearing backpacks" leaving a Bojangles restaurant. Officer Pupo reported the sighting over the radio. As another officer arrived at the restaurant, Defendant fled the area on foot. Defendant was apprehended a short time later wearing a black ski mask, and he had 80 .22-caliber bullets inside his backpack. The other suspect was not apprehended at the time. Defendant later identified Koran Hicks as his accomplice.

Officer Carroll transported the victim to Defendant's location to conduct a show-up identification. Officer Jones testified that the show-up was conducted around dusk and the spotlights from Officer Carroll's vehicle were activated. The victim identified Defendant as the assailant with the gun. Officer Jones' body camera recorded the identification.

On January 3, 2017, Defendant was indicted for attempted robbery with a dangerous weapon. On October 2, 2018, Defendant filed a motion to suppress the in-court and out-of-court identifications by the victim. The trial court denied Defendant's motion regarding the out-of-court identification, and reserved ruling on the in-court identification for the trial judge. At trial, the jury found Defendant guilty of attempted robbery with a dangerous weapon.

Defendant appeals, alleging the trial court erred when it (1) denied his motion to suppress evidence of the show-up identification, and (2) failed to instruct the jury concerning purported noncompliance with the Act. We disagree.

Analysis

I. Motion to Suppress

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

A. Compliance with the Act

**[1]** A show-up is "[a] procedure in which an eyewitness is presented with a single live suspect for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime." N.C. Gen. Stat. § 15A-284.52(a)(8) (2019). The purpose of a show-up is to serve as "a much less restrictive means of determining, at the earliest stages of the investigation process, whether a suspect is indeed the perpetrator of a crime, allowing an innocent person to be released with little delay and with minimal involvement with the criminal justice system." *State v. Rawls*, 207 N.C. App. 415, 422, 700 S.E.2d 112, 117 (2010) (*purgandum*). A show-up is just one identification method that law enforcement may use "to help solve crime, convict the guilty, and exonerate the innocent." N.C. Gen. Stat. § 15A-284.51 (2019).

To comply with the requirements set forth by the General Assembly, a show-up must meet the following requirements:

> (1) A show-up may only be conducted when a suspect matching the description of the perpetrator is located in close proximity in time and place to the crime, or there is reasonable belief that the perpetrator has changed his or her appearance in close time to the crime, and only if there are circumstances that require the immediate display of a suspect to an eyewitness.
>
> (2) A show-up shall only be performed using a live suspect and shall not be conducted with a photograph.
>
> (3) Investigators shall photograph a suspect at the time and place of the show-up to preserve a record of the appearance of the suspect at the time of the show-up procedure.

N.C. Gen. Stat. § 15A-284.52(c1) (omitting requirements for juvenile offenders).

Defendant contends that "the trial court did not make any findings of circumstances that required an immediate display of [Defendant] to the witness." The trial court's findings of fact, which were each supported by competent evidence, are set forth below:

> 1. On December 16th, 2016 Charlotte Mecklenburg Police Department Officer J.J. Carroll heard a loud pop that be (*sic*) believed was a gun shot while he was sitting in his patrol vehicle.
>
> 2. Within a few moments, Mr. Francisco Rodriguez-Baca approached Officer Carroll and told him he was just robbed by two black males. Both males were about 5' 10", wearing grey colored hoodies, black masks, both had book bags, and both were wearing glasses.
>
> 3. Mr. Francisco Rodriguez-Baca had a brief conversation with the suspects. As such, the victim had an opportunity to view the suspects.
>
> 4. Mr. Francisco Rodriguez-Baca stated that one of the suspects fired a shot and then fled off on foot towards South Boulevard.
>
> 5. Officer Carroll put out a "be on the lookout" (BOLO) request over the radio, giving the description of the suspects.
>
> 6. Within seven minutes of the BOLO, two suspects were seen at a nearby Bo Jangles (*sic*) restaurant. The two suspects matched the description given by the victim in every way, except for the glasses.
>
> 7. Officers attempted to detain the suspects, but they fled on foot.
>
> 8. A nine minute foot chase ensued by officers. Sgt. Adam Jones of the Charlotte Mecklenburg Police Department was able to detain one of the suspects, later identified as the Defendant.
>
> 9. The Defendant was detained less than 1/2 of a mile from the site of the robbery.
>
> 10. Sgt. Jones placed the Defendant in handcuffs for the purposes of detention.
>
> 11. Ofc. Carroll drove Mr. Francisco Rodriguez-Baca to the Defendant's location in order to do a show-up.

> 12. Mr. Francisco Rodriguez-Baca was inside a police vehicle with Officer Carroll, while Sgt. Jones escorted the defendant in front of the police vehicle. It was dark out when the show-up was conducted, however the vehicles headlights were used for illumination.
>
> 13. The Defendant was approximately 15 yards from the front of the vehicle. The Defendant was in handcuffs, being held by the arm of a uniformed police officer, and standing in front of a marked police cruiser.
>
> 14. Mr. Francisco Rodriguez-Baca identified the Defendant as one of the suspects, and indicated he was the shooter. He did not say how confident he was in his identification.
>
> 15. The show-up identification procedure was recorded on body-worn camera (BWC) by Sgt. Adam Jones.
>
> 16. The show-up identification procedure was done close in time to the robbery and was no more than 30 minutes after it occurred.
>
> 17. As a result of the identification the Defendant was charged with attempted robbery with a dangerous weapon, conspiracy, assault with a deadly weapon, resisting a public officer, possession of a schedule IV controlled substance, and possession of marijuana paraphernalia.

These findings established that Defendant and an accomplice were suspected of a violent crime that included the discharge of a firearm. Defendant matched the description provided by the victim, and he fled when officers attempted to detain him. Defendant's actions forced officers to pursue him on foot for more than nine minutes. As the trial court noted, "given the nature of the crime, [and] the efforts on the part of [Defendant] to flee[,]" the circumstances required immediate display of Defendant. Because an armed suspect, who is not detained, poses an imminent threat to the public, the trial court's findings supported immediate display of Defendant to the victim. *See*, *e.g.*, *State v. Guy*, ___ N.C. App. ___, ___, 822 S.E.2d 66, 72 (2018) ("Even though the suspects had already fled [the crime scene], there was still an ongoing emergency that posed danger to the public."). Moreover, had the victim determined that Defendant was not the perpetrator, officers could have immediately released Defendant and continued their search for the suspects. Thus, the officers' actions in conducting the show-up identification

were consistent with the purpose of the Act, *i.e.*, "solve crime, convict the guilty, and exonerate the innocent." N.C. Gen. Stat. § 15A-284.51.

Based on the findings of fact set forth above, the trial court made the following conclusions of law:

> 1. The show-up conducted in this case complied with the North Carolina Eyewitness Identification Reform Act, G.S. 284.52.
>
> 2. The Defendant matched the description given by the victim . . . .
>
> 3. The Defendant was located in close in time and proximity to the robbery.
>
> 4. The show-up was done with a live suspect.

Although conclusions 2, 3, and 4 contain mixed findings of fact and conclusions of law, "we do not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion." *State v. Johnson*, 246 N.C. App. 677, 683, 783 S.E.2d 753, 758 (2016) (citation omitted). Here, the trial court's conclusion of law that the officers complied with the Act is supported by competent evidence. Defendant matched the victim's description. Defendant was located at a Bojangles restaurant less than 800 feet away from the McDonalds restaurant parking lot within a few minutes of a BOLO being issued. The show-up identification was conducted with a live person which was recorded on the officers' body cameras. In addition, the nature and circumstances surrounding apprehending an armed, violent suspect required officers to immediately display Defendant. Thus, the trial court's findings of fact support its conclusion of law. Accordingly, the show up conducted here satisfied the requirements of the Act.

B. Eyewitness Confidence Statement

**[2]** Defendant also argues that the trial court failed to make findings of fact about Officer Carroll's failure to obtain a confidence statement and information related to the victim's vision pursuant to N.C. Gen. Stat. Section 15A-284.52(c2)(2).

"[T]his Court's duty is to carry out the intent of the legislature. As a cardinal principle of statutory interpretation, if the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *State v. Crooms*, 261 N.C. App. 230, 234, 819 S.E.2d 405, 407 (2018) (citation and quotation marks omitted).

Section 15A-284.52(c2) states that

> The North Carolina Criminal Justice Education and Training Standards Commission shall develop a policy regarding standard procedures for the conduct of show-ups in accordance with this section. The policy shall apply to all law enforcement agencies and shall address all of the following, in addition to the provisions of this section:
>
> (1) Standard instructions for eyewitnesses.
>
> (2) Confidence statements by the eyewitness, including information related to the eyewitness' vision, the circumstances of the events witnessed, and communications with other eyewitnesses, if any.
>
> (3) Training of law enforcement officers specific to conducting show-ups.
>
> (4) Any other matters deemed appropriate by the Commission.

N.C. Gen. Stat. § 15A-284.52(c2).

In North Carolina, policies established by State agencies are "*nonbinding* interpretive statement[s] . . . used purely to assist a person to comply with the law, such as a guidance document." N.C. Gen. Stat. § 150B-2(7a) (2019) (emphasis added). "When a term has long-standing legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary." *State v. Fletcher*, 370 N.C. 313, 329, 807 S.E.2d 528, 540 (2017) (citation and quotation marks omitted). There is no indication that the legislature's use of the term "policy" in Section 15A-284.52(c2) was intended to have any other significance or meaning. In fact, the delegation of authority to establish other policies the agency deemed appropriate is a clear indication that the guidelines established pursuant to Section 15A-284.52(c2) were just that: guidelines.

Statutes are binding acts of the General Assembly. By definition, policies from State agencies are nonbinding guidelines. The plain language of the statute shows that the legislature delegated authority to the North Carolina Criminal Justice Education and Training Standards Commission to establish nonbinding guidelines to assist law enforcement. Because the language of Section 15A-284.52(c2) does not place additional statutory requirements on law enforcement, but rather requires the North Carolina Criminal Justice Education and

Training Standards Commission to develop nonbinding guidelines, only Section 15A-284.52(c1) sets forth the requirements for show-up identification compliance.

C. Impermissibly Suggestive or Likelihood of Misidentification

**[3]** Next, Defendant claims that the trial court's findings of fact did not support its conclusion of law that the show-up was not "impermissibly suggestive or created a substantial likelihood of misidentification."

Our Courts have previously held that show-up identifications "may be inherently suggestive for the reason that witnesses would be likely to assume that the police presented for their view persons who were suspected of being guilty of the offense under investigation." *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982) (citations omitted). However, "[p]retrial show-up identifications . . . , even though suggestive and unnecessary, are not *per se* violative of a defendant's due process rights. The primary evil sought to be avoided is the substantial likelihood of irreparable misidentification." *Id.* at 364, 289 S.E.2d at 373 (citations omitted).

This Court applies a two-step process to determine "whether identification procedures violate due process." *State v. Malone*, 256 N.C. App. 275, 290, 807 S.E.2d 639, 650 (2017) (citation and quotation marks omitted), *aff'd in part*, *rev'd in part*, 373 N.C. 134, 833 S.E.2d 779 (2019). First, we must determine "whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification." *Id.* at 290, 807 S.E.2d at 650 (citation omitted). Second, if we determine that the identification procedures were impermissibly suggestive, we must then determine "whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification." *Id.* at 290, 807 S.E.2d at 650 (citation omitted). This inquiry "depends upon whether under the totality of circumstances surrounding the crime itself the identification possesses sufficient aspects of reliability." *State v. Richardson*, 328 N.C. 505, 510, 402 S.E.2d 401, 404 (1991) (citation and quotation marks omitted). The central question is whether under the totality of the circumstances the identification was reliable even if the confrontation procedure was suggestive. *State v. Oliver*, 302 N.C. 28, 45-46, 274 S.E.2d 183, 195 (1981).

To determine the reliability of a pre-trial identification, this Court considers the following factors:

> (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention;

> (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

*State v. Gamble*, 243 N.C. App. 414, 420, 777 S.E.2d 158, 163 (2015) (citations omitted).

The show-up identification proceeding at issue here did not violate Defendant's due process rights as it was not impermissibly suggestive, nor did it create a substantial likelihood of misidentification.

The evidence presented at the motion to suppress hearing satisfies the reliability factors in *Gamble*. The victim had the opportunity to view Defendant during the robbery and provided a detailed description of the suspects to Officer Carroll as two black males "approximately five-ten in height wearing gray-colored hoodies" with "book bags, a black-colored mask or some type of covering over their face" and "both were wearing glasses."

The description enabled officers to identify the two suspects "seven minutes later" about "800 feet" from the original crime scene. The victim immediately recognized Defendant as "one of the suspects" and that he was the "guy who shot at him." Finally, the victim identified Defendant as the individual with the revolver approximately "fourteen minutes" from the time he heard the gunshot to the time of the show-up identification.

Therefore, the trial court did not err in concluding that the show-up was not "impermissibly suggestive or [that it] created a substantial likelihood of misidentification."

II. Jury Instructions

**[4]** Defendant concedes that he failed to object to the jury instructions and that he did not request an instruction concerning compliance or noncompliance with the Act. However, Defendant argues that the trial court committed plain error by not instructing the jury that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications. We disagree.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's

> finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

*State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 334 (2012) (*purgandum*).

"In instructing the jury, it is well settled that the trial court has the duty to declare and explain the law arising on the evidence relating to each substantial feature of the case." *State v. Scaturro*, 253 N.C. App. 828, 835, 802 S.E.2d 500, 506 (2017) *(purgandum*).

Section 15A-284.52(d) provides various remedies "as consequences of compliance or noncompliance with the requirements of" Section 15A-284.52. N.C. Gen. Stat. § 15A-284.52(d). Section 15A-284.52(d)(3) provides that "[w]hen evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications." N.C. Gen. Stat. § 15A-284.52(d)(3).

Defendant argues that he was entitled to jury instructions under Section 15A-284.52(d)(3) because Officer Carroll did not obtain an eyewitness confidence level under Section 15A-284.52(c2)(2). However, Section 15A-284.52(d)(3) specifically limits remedies for "compliance or noncompliance *with the requirements of this section*." N.C. Gen. Stat. § 15A-284.52(d)(3) (emphasis added). As set forth above, Section 15A-284.52(c2) concerns policies and guidelines established by the North Carolina Criminal Justice and Training Standards Commission, it does not establish the requirements for show-up identifications. Those requirements are specifically enumerated in subsection (c1). Thus, because officers complied with the show-up procedures in Section 15A-284.52(c1), Defendant was not entitled to a jury instruction on noncompliance with the Act.

Conclusion

For the reasons stated herein, Defendant received a fair trial free of error.

NO ERROR.

Judges TYSON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
JOHNATHAN RICKS, DEFENDANT

No. COA19-836

Filed 5 May 2020

**1. Criminal Law—prosecutor's closing arguments—not prejudicial—overwhelming evidence of guilt**

On appeal from convictions for statutory rape and other sexual offenses against children, where defendant challenged multiple statements the prosecutor made during closing arguments and where each statement was subject to different standards of appellate review (depending on whether defendant objected to the statement at trial and whether the statement potentially infringed upon his constitutional rights), the Court of Appeals held that none of the prosecutor's remarks prejudiced defendant—regardless of the applicable standard of review—in light of the overwhelming evidence of his guilt, including the victims' testimony, corroborative testimony by the victims' family members, and DNA evidence linking defendant to the crimes.

**2. Appeal and Error—satellite-based monitoring order—no objection—Rule 2—consideration of factors**

Where defendant failed to preserve for appellate review his constitutional challenge to an order imposing lifetime satellite-based monitoring (SBM) upon his release from prison, the Court of Appeals allowed his petition for certiorari and invoked Appellate Rule 2 to reach the merits of his argument after weighing the factors described in *State v. Bursell*, 372 N.C. 196 (2019), including the substantial right implicated by the imposition of SBM (defendant's Fourth Amendment rights), the factual bases underlying the charges against defendant (he was convicted of statutory rape and other sexual offenses for having sex with two twelve-year-old girls when he was twenty-one years old), and the trial court's decision to impose SBM without receiving any argument from the parties or evidence from the State.

**3. Satellite-Based Monitoring—lifetime monitoring—constitutionality as applied—reasonable search—hearing required**

After defendant's convictions for statutory rape and other sexual offenses against children, the trial court erred during sentencing by imposing lifetime satellite-based monitoring (SBM) upon

defendant's release from prison, where the court failed to conduct a hearing—as required by *State v. Grady* 372 N.C. 509 (2019)—to determine whether lifetime SBM constituted a reasonable search under the Fourth Amendment of the federal and state constitutions. Thus, the order imposing lifetime SBM was unconstitutional as applied to defendant and was vacated without prejudice to the State's ability to file a new SBM application.

Judge TYSON concurring in the result in part and dissenting in part.

Appeal by Defendant from judgment and order entered 17 January 2019 by Judge Claire V. Hill in Harnett County Superior Court. Heard in the Court of Appeals 1 April 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth J. Weese, for the State.*

*Kimberly P. Hoppin for Defendant.*

BROOK, Judge.

Johnathan Ricks ("Defendant") appeals from judgment entered upon jury verdicts finding him guilty of three counts of statutory rape of a child, two counts of statutory sex offense with a child, and three counts of taking indecent liberties with a child. Defendant also petitions for a writ of certiorari to review the trial court's order imposing lifetime satellite-based monitoring ("SBM") upon his release from prison. He argues that the trial court's imposition of SBM violates his rights under the Fourth Amendment to the United States Constitution and the North Carolina Constitution.

## I. Background

### A. Factual Background

N.M. and her cousin J.C. both turned 12 years old in February of 2016. Also in February of 2016, N.M. and J.C. met Defendant while attending a sleepover with their cousins at J.C.'s sister's house. Defendant and N.M.'s sister had gone to school together; N.M.'s sister was 21 years old. Defendant drove to N.M.'s sister's house and told N.M. and J.C. via Kik, a texting app, to come outside. Around 2:00 or 3:00 a.m. on some day in February 2016, N.M. and J.C. went outside, got into Defendant's car, and then N.M. and Defendant had oral and vaginal sex in the car while J.C. stood outside. Then J.C. got in the car and had vaginal sex with

Defendant in the back seat while N.M. sat in the front seat. Defendant had vaginal sex with N.M. again, and then J.C. and N.M. both performed oral sex on Defendant. Defendant drove the cousins back to N.M.'s sister's house and they went to sleep.

N.M. and Defendant continued communicating via Kik until August of 2016. Around midnight on 14 August 2016, Defendant told N.M. via Kik to go outside of her house; she did. Defendant was driving a gray Chevrolet Malibu, and N.M. got into the car and went with him to his house down the road. Defendant asked her to perform oral sex on him, which she did, and then they had vaginal sex in the car. They then went inside his house and had vaginal sex in his bedroom. Defendant drove N.M. home, and, when she got out of his car around 3:30 a.m., her brother was standing in the yard. N.M's brother had known Defendant for about five years and recognized Defendant's car, although he did not see Defendant in the car. N.M.'s brother went inside, woke up their mother, and walked down to Defendant's house to confront him. N.M.'s mother called the police, who arrived about 20 minutes later.

N.M.'s mother took N.M. to the hospital where hospital personnel collected a rape kit, her clothing, vaginal swabs, and pubic hair combings. A sexual assault nurse examiner also interviewed N.M. J.C.'s mother also spoke with law enforcement and a doctor after learning of Defendant's sexual activity with N.M. and J.C. J.C. told her mother that the sexual activity with Defendant had been occurring since February of 2016.

Defendant met voluntarily with law enforcement and provided a DNA sample. He also confirmed that he was born in 1995. Microscopic examinations of N.M.'s vaginal swabs revealed the presence of sperm, and DNA analysis of the swabs revealed that the sperm fraction matched the profile obtained from Defendant.

B. Procedural History

Defendant was indicted by a Harnett County grand jury for three counts of statutory rape of a child by an adult, three counts of statutory sex offense with a child by an adult, three counts of first-degree kidnapping, and three counts of taking indecent liberties with a child. He was tried before a jury during the 14 January 2019 session of criminal Superior Court of Harnett County before Judge Hill. Both juvenile victims testified regarding the sexual encounters with Defendant. J.C.'s mother and N.M.'s brother also testified, corroborating the victims' testimony. The State also presented testimony from a state forensic scientist, who had compared Defendant's DNA sample with the DNA collected

from N.M.'s rape kit. She testified that Defendant's DNA matched the DNA sample, and that the probability of a random match "is approximately . . . one in 9.42 nonillion in the African-American population." Defendant did not testify.

At the close of the State's evidence, Defendant moved to dismiss the three kidnapping charges, and the trial court granted the motion. The jury returned verdicts of guilty to three counts of statutory rape of a child by an adult, two counts of statutory sex offense with a child, and three counts of indecent liberties with a child. The trial court consolidated the offenses and entered judgment on 17 January 2019, sentencing Defendant to a mandatory term of 300 to 420 months of active imprisonment.

The trial court then ordered Defendant to register as a sex offender for his natural life and enroll in SBM for his natural life based on the convictions for statutory rape and sex offense with a child. Based on the convictions for indecent liberties with a child, the trial court ordered Defendant to register as a sex offender for 30 years and ordered that the Division of Adult Corrections perform a risk assessment for a determination of SBM.

Defendant entered notice of appeal in open court on 17 January 2019.

## II. Jurisdiction

Appeal from a final judgment of a superior court lies of right with this Court. N.C. Gen. Stat. § 7A-27(b)(1) (2019); *id.* § 15A-1444(a) (2019).

Defendant failed to properly notice appeal from the imposition of SBM under North Carolina Rules of Appellate Procedure, Rule 3. *See State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010) (requiring written notice of appeal filed under N.C. R. App. P. 3 for review of SBM orders). Defendant filed a petition for a writ of certiorari contemporaneously with his appellate brief, seeking review of the order imposing lifetime enrollment in SBM. We consider his petition *infra* part III.B.

## III. Analysis

Defendant contends that the State made improper closing arguments that unfairly and unconstitutionally prejudiced him. Defendant further contends that the trial court erred in imposing lifetime SBM because the State failed to establish that SBM constitutes a reasonable search under the Fourth Amendment. We review each argument in turn.

A. Closing Arguments

i. Standard of Review

Our standard of review of an allegedly improper closing argument depends on whether a defendant timely objected to such remarks.

Generally, where a defendant objects to improper remarks, we review "whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). "In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling could not have been the result of a reasoned decision." *Id.* (internal marks and citation omitted). Even if this is the case, a defendant only receives relief if the challenged "remarks were of such a magnitude that their inclusion prejudiced defendant[.]" *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003) (citation omitted).

Where a defendant has failed to object to an allegedly improper remark, we review "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107.

> In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

*Id.* To establish that a remark merited intervention ex mero motu, a "defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Grooms*, 353 N.C. 50, 81, 540 S.E.2d 713, 732 (2000) (citation omitted).

Our review differs, however, where an improper remark infringes on a criminal defendant's constitutional rights. *State v. Kemmerlin*, 356 N.C. 446, 482, 573 S.E.2d 870, 894 (2002). In such circumstances, the State must show that the error was harmless beyond a reasonable doubt. *Id.* (reviewing for harmless error a prosecutor's comment on a criminal defendant's Sixth Amendment right to a jury trial).

ii. Merits

**[1]** Defendant takes issue with several remarks made by the prosecutor; we review each claim in turn.

Defendant first claims that the prosecutor improperly commented on Defendant's exercise of his Fifth Amendment right to not incriminate himself. The prosecutor stated: "If [defense counsel] had some evidence that would present a defense for his client, have no doubt he would have presented that to you." Defense counsel objected to this statement, and the trial court sustained the objection, struck the statement from the record, and instructed the jury to disregard it. Immediately thereafter, the prosecutor said, "Put it this way. If they had a witness or a piece of evidence that contradicted what you heard[,]" and defense counsel objected. The trial court sustained the objection. The prosecutor then said, "You cannot consider what you did not hear." Defense counsel objected, and the trial court overruled the objection. The prosecutor went on to say,

> You cannot speculate about what people that did not come into court and did not put their hand on the Bible and did not swear to tell you the truth might have said. The evidence you're to consider is what the people on the witness stand said or did not say and what the evidence you heard was, and that's it. That's the evidence that you are to consider in this case. I cannot satisfy an unreasonable doubt.

Defense counsel did not object to these statements.

"A criminal defendant may not be compelled to testify, and any reference by the State regarding his failure to testify is violative of his constitutional right to remain silent." *State v. Larry*, 345 N.C. 497, 524, 481 S.E.2d 907, 922-23 (1997), *cert. denied*, 522 U.S. 917, 118 S. Ct. 304, 139 L. Ed. 2d 234 (1997) (citation omitted). "[A] prosecutor violates this rule if the language used was manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be, a comment on the failure of the accused to testify." *State v. Barrett*, 343 N.C. 164, 178, 469 S.E.2d 888, 896 (1996) (internal marks and citation omitted). We look at "the argument in the context in which it was given and in light of the overall factual circumstances to which it refers." *Id.* at 179, 469 S.E.2d at 896. "The error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness." *State v. McCall*, 286 N.C. 472, 487, 212 S.E.2d 132, 141 (1975). "[T]he sustaining of [an] objection advise[s] the jurors

that they should not consider the statement." *Larry*, 345 N.C. at 527, 481 S.E.2d at 924. "The trial court's failure to give a curative instruction after the State's comment on an accused's failure to testify does not call for an automatic reversal[] but requires this Court to determine if the error is harmless beyond a reasonable doubt." *Id.* at 524, 481 S.E.2d at 923.

However,

> [i]t is well established that although the defendant's failure to take the stand and deny the charges against him may not be the subject of comment, the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument.

*State v. Taylor*, 337 N.C. 597, 613, 447 S.E.2d 360, 370 (1994). Pointing out to the jury that a defendant has not exercised his or her rights to call witnesses or produce evidence to refute the state's case, for example, does not amount to gross impropriety. *State v. Mason*, 315 N.C. 724, 733, 340 S.E.2d 430, 436 (1986).

Assuming without deciding that they referred to Defendant's exercise of his Fifth Amendment right not to testify, we conclude that the prosecutor's arguments to the jury that they "cannot consider what they did not hear" and could not "speculate about what people that did not come into court and did not put their hand on the Bible and did not swear to tell you the truth might have said" was harmless beyond a reasonable doubt given the overwhelming evidence presented of Defendant's guilt.

Defendant next contests the portion of the prosecutor's closing argument wherein he said, in reference to the juvenile victims' testimony, the following: "Adults have to bring them into court and ask them to tell a roomful of strangers about these sexual acts to try and prevent them from occurring in the future to others." The trial court overruled Defendant's objection to this comment. Defendant contends that this comment impermissibly (1) criticizes Defendant's exercising his right to a jury trial instead of pleading guilty, and (2) suggests that the juvenile victims had to testify to prevent Defendant from committing further crimes in the future.

"[A] criminal defendant has a constitutional right to plead not guilty and be tried by a jury. Reference by the State to a defendant's failure to plead guilty violates his constitutional right to a jury trial." *Larry*, 345 N.C. at 524, 481 S.E.2d at 923 (internal citations omitted). Assuming without deciding that the prosecutor's comment obliquely refers to Defendant's right to plead not guilty and be tried by a jury, and in light of

the overwhelming evidence of guilt presented by the State, we conclude that this error was harmless beyond a reasonable doubt. *Id.* at 526, 481 S.E.2d at 924.

In regard to Defendant's assertion that this comment improperly appealed to the jury's sympathy and prejudice, our Supreme Court has held that specific deterrence arguments in closing argument are not improper. *State v. Syriani*, 333 N.C. 350, 397, 428 S.E.2d 118, 144 (1993) (concluding prosecutor's comment, "He's killed now. The only way to insure he won't kill again is the death penalty[,]" was not improper). We conclude that the trial court did not abuse its discretion in overruling Defendant's objection to this comment.

Defendant further takes issue with the following line of argument from the prosecutor:

> you can find him guilty of those offenses or you can acquit him like the lawyer's going to ask you to do after I'm done talking. If you do that, you will tell these girls, I didn't believe you. I think you came into court and made these things up.

The trial court sustained Defendant's objection to the above comment. The prosecutor then said, "You will be telling them, I think you falsely accused an innocent man of heinous crimes." The trial court sustained Defendant's objection and instructed the jury not to consider that portion of the argument. The prosecutor then said, "You will be telling them it was their fault." Defendant did not object to this statement; we therefore review it to determine whether the trial court erred in failing to intervene ex mero motu.

Defendant contends that this statement "improperly focused the jury's attention on how N.M. and J.C. would interpret a verdict of not guilty rather than more properly focusing the jury's attention on determining whether the State had sufficiently proven the case against Defendant."

Our Supreme Court "has stressed that a jury's decision must be based solely on the evidence presented at trial and the law with respect thereto, and not upon the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in general." *State v. Brown*, 320 N.C. 179, 195-96, 358 S.E.2d 1, 13 (1987). In *Brown*, the prosecutor said:

> Please remember something when you go back in the jury room. The 5th of May, 1984, was the most important day in the life of [the victim]'s family, as well as the most

> important day for [the defendant]. . . . The family of the victim has no one to turn to but you. You are the triers of the facts. You are justice today. You are justice.

*Id.* at 195, 358 S.E.2d at 13 (second and third alterations in original). Our Supreme Court admonished the prosecutor, observing that "the remarks in question veer toward a disregard of" the general rule against arguments that cloud "the jury's focus . . . upon guilt or innocence," *id.* at 196, 358 S.E.2d at 13 (internal marks and citation omitted), but concluded that "the prosecutor's remark reminding the jury of the victim's family's need for justice" was not so grossly improper as to justify a new trial, *id.*

The prosecutor's statement here—"You will be telling them it was their fault"—"veer[s] toward a disregard of" the general rule against arguments that cloud "the jury's focus . . . upon guilt or innocence[.]" *Id.* (internal marks and citation omitted). However, given the evidence of guilt presented at trial, and as our Supreme Court concluded in *Brown*, we conclude that the prosecutor's statement was not so grossly improper as to justify a new trial.

Defendant next alleges that the prosecutor presented an argument that was "calculated to mislead or prejudice the jury[,]" by telling the jury, "If you saw that statistical number [one in 9.42 nonillion] and thought there was still a chance that's not the defendant's DNA found in [N.M.], that's an unreasonable doubt." Defendant did not object; we therefore review this statement to determine whether the trial court erred in failing to intervene ex mero motu.

Defendant contends that in making this statement, the prosecutor fell into "the prosecutor's fallacy—that the probability that the DNA at the crime scene came from someone other than the defendant is virtually impossible based on the random match probability." Defendant cites *McDaniel v. Brown*, 558 U.S. 120, 128, 130 S. Ct. 665, 670, 175 L. Ed. 2d 582, 588 (2010), for the definition of the prosecutor's fallacy:

> The prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample. . . . In other words, if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor's fallacy. It is further error to

> equate source probability with probability of guilt, unless there is no explanation other than guilt for a person to be the source of crime-scene DNA. This faulty reasoning may result in an erroneous statement that, based on a random match probability of 1 in 10,000, there is a 0.01% chance the defendant is innocent or a 99.99% chance the defendant is guilty.

Defendant contends that the prosecutor's statement encouraged the jury to succumb to the prosecutor's fallacy and therefore was "calculated to mislead" the jury.

At trial, one of the State's testifying forensic scientists testified that DNA collected from N.M.'s rape kit "matches the profile obtained from Jo[h]nathan Ricks." She further testified that the probability of randomly selecting someone from the general population who matched the DNA profile "is approximately . . . one in 9.42 nonillion in the African-American population[.]" Assuming without deciding that the prosecutor's statement improperly conflates "the chance that's not the defendant's DNA found in [N.M.]" with "that statistical number"—the one in 9.42 nonillion chance of a random match—we cannot conclude that the statement "so infected the trial with unfairness that [it] rendered the conviction fundamentally unfair." *Grooms*, 353 N.C. at 81, 540 S.E.2d at 732 (citation omitted).

Finally, Defendant argues that the trial court erred in failing to intervene ex mero motu when the prosecutor said, "The DNA tells the truth. The girls told the truth." Defendant contends that this statement was a "prohibited expression[] of [the prosecutor's] personal opinion about the veracity of evidence and witness credibility."

While "[d]uring a closing argument to the jury an attorney may not . . . express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant," N.C. Gen. Stat. § 15A-1230(a) (2019), "prosecutors are allowed to argue that the State's witnesses are credible[,]" *State v. Augustine*, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005), *cert. denied*, 548 U.S. 925, 126 S. Ct. 2980, 165 L. Ed. 2d 988 (2006). Considering the record as a whole, "we cannot conclude that this comment rises to the level of fundamental unfairness given the evidence presented at trial." *State v. Anderson*, 175 N.C. App. 444, 454, 624 S.E.2d 393, 401 (2006).

The State presented the testimony of both juvenile victims, the testimony of the victims' family members that corroborated their testimony, and the testimony of forensic experts that showed that Defendant's DNA matched the sperm collected from N.M.'s rape kit. In light of this

overwhelming evidence of guilt, we cannot say that the prosecutor's comments prejudiced Defendant regardless of the applicable standard of review.

B. SBM

Defendant filed a petition for a writ of certiorari contemporaneously with his appellate brief, seeking review of the order imposing lifetime enrollment in SBM. In order for this Court to exercise its discretion to allow a writ, "[a] petition for [a] writ [of certiorari] must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). For the reasons discussed below, we conclude that Defendant has shown merit, and we allow Defendant's petition to review his claim.

Defendant asserts that the trial court erred in ordering that Defendant enroll in lifetime SBM upon his release from prison because the State failed to meet its burden of proving the imposition of lifetime SBM is a reasonable search under the Fourth Amendment. *See Grady v. North Carolina* ("*Grady I*"), 575 U.S. 306, 310, 135 S. Ct. 1368, 1371, 191 L. Ed. 2d 459, 463 (2015) (per curiam) ("The State's [SBM] program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search."). There was no hearing regarding the constitutionality of lifetime SBM here; the trial court imposed lifetime SBM without any argument from the parties or evidence from the State. Defendant did not raise any constitutional challenge or otherwise preserve this constitutional claim at any point during his sentencing hearing. He therefore requests that this Court exercise its discretion to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to reach the merits.

For the reasons discussed below, we invoke Rule 2 and vacate the trial court's imposition of lifetime SBM.

i. Rule 2

**[2]** Our appellate rules require that "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2019). Defendant concedes that he did not preserve an objection to the constitutionality of the imposition of lifetime SBM. As a general matter, this failure bars appellate review. *See State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003).

However, in order

> [t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2 (2019). "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis in original) (citation omitted).

"[A] decision to invoke Rule 2 and suspend the appellate rules is always a discretionary determination." *State v. Bursell* ("*Bursell II*"), 372 N.C. 196, 201, 827 S.E.2d 302, 306 (2019) (internal marks and citation omitted). "A court should consider whether invoking Rule 2 is appropriate in light of the specific circumstances of individual cases and parties, such as whether substantial rights of an appellant are affected." *Id.* at 200, 827 S.E.2d at 305 (internal marks and citation omitted). Because of its discretionary and fact-specific nature, Rule 2 is not applied mechanically. *Campbell*, 369 N.C. at 603, 799 S.E.2d at 603 ("[P]recedent cannot create an automatic right to review via Rule 2.").

That being said, Justice Newby's opinion in *Bursell II* is instructive in our exercise of discretion here. *Bursell II* affirmed our Court's invocation of Rule 2 in *State v. Bursell* ("*Bursell I*"), 258 N.C. App. 527, 813 S.E.2d 463 (2018), *aff'd in part*, *rev'd in part*, 372 N.C. 196, 827 S.E.2d 302 (2019), noting the panel's examination of "the specific circumstances of the individual case and parties." *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306 (internal marks and citation omitted). Specifically, *Bursell I* considered whether the case involved a substantial right as well as "[the] defendant's [] age, the particular factual bases underlying [the charge or charges], and the nature of those offenses, combined with the State's and the trial court's failures to follow well-established precedent in applying for and imposing SBM, and the State's concession of reversible *Grady* error." *Id.* (quoting *Bursell I*, 258 N.C. App. at 533, 813 S.E.2d at 467). Though they are not determinative in the exercise of our discretion, we consider these factors below and conclude that invoking Rule 2 to consider Defendant's constitutional claim is appropriate here.

First, as Justice Newby noted, "the Fourth Amendment right implicated [by the imposition of SBM] is a substantial right." *Id.*

Second, these cases bear many factual similarities. In *Bursell I*, the 20-year-old defendant pleaded guilty to statutory rape and indecent liberties with a child after having sex with a 13-year-old girl. 258 N.C. App. at 528, 813 S.E.2d at 464. Defendant here was convicted of three counts of statutory rape of a child, two counts of committing a statutory sex offense with a child, and three counts of taking indecent liberties with a child when he, at 21 years old, had sex with two 12-year-old girls. In both *Bursell I* and the case sub judice, the trial court found the defendants had committed aggravated offenses. *Id.* at 529, 813 S.E.2d at 465. Therefore, Defendant's age, the factual bases underlying the charges, and the nature of the offenses are all comparable to those in *Bursell*.

In *Bursell I*, our Court considered that the trial court and the State had the benefit of our Court's precedent in *State v. Blue*, 246 N.C. App. 259, 783 S.E.2d 524 (2016), and *State v. Morris*, 246 N.C. App. 349, 783 S.E.2d 528 (2016), which "made clear that a case for SBM is the State's to make[.]" *Bursell I*, 258 N.C. App. at 533, 813 S.E.2d at 467 (internal marks and citation omitted). The trial court there "erred by not analyzing the totality of circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations before imposing SBM." *Id.* (internal marks and citation omitted). The trial court found at sentencing that the "defendant had committed an aggravating offense under the registration and SBM statutes, [and] it summarily concluded that defendant require[d] the highest possible level of supervision and monitoring and ordered that he enroll in lifetime registration and be subject to lifetime SBM." *Id.* at 529, 813 S.E.2d at 465 (internal marks omitted).

Here, the trial court similarly summarily concluded that SBM should be imposed, without making any findings regarding the reasonableness of the search and without any evidence from the State. However, the State and the trial court here had the benefit of even more guidance regarding the State's burden than in *Bursell*. Indeed, *State v. Greene*, 255 N.C. App. 780, 806 S.E.2d 343 (2017), *State v. Grady* ("*Grady II*"), 259 N.C. App. 664, 817 S.E.2d 18 (2018), *aff'd as modified*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"), *State v. Griffin*, 260 N.C. App. 629, 818 S.E.2d 336 (2018), and *State v. Gordon* ("*Gordon I*"), 261 N.C. App. 247, 820 S.E.2d 339 (2018), all were published prior to Defendant's sentencing hearing. These cases make clear that the trial court must conduct a hearing to determine the constitutionality of ordering a defendant to enroll in the SBM program, and that the State bears the burden of proving the

reasonableness of the search. *Greene*, 255 N.C. App. at 782, 806 S.E.2d at 345; *Grady II*, 259 N.C. App. at 676, 817 S.E.2d at 28; *Griffin*, 260 N.C. App. at 635, 818 S.E.2d at 341; *Gordon I*, 261 N.C. App. at 253-54, 820 S.E.2d at 344. By the time the trial court imposed SBM here, there were two and a half years' more precedent beyond that which existed at the time of our decision in *Bursell I*, further underlining the appropriate procedure and the State's burden.

The State here has not, as it did in *Bursell I*, conceded that the trial court's failure to conduct a hearing to determine the reasonableness of the search before imposing SBM constitutes error. *See Bursell I*, 258 N.C. App. at 533, 813 S.E.2d at 467. Instead, the State argues that our Supreme Court's decision in *Grady III* does not apply to this case because Defendant does not fall within the category of defendants at issue in *Grady III*: recidivists who have completed their sentence and are not under State supervision. But our Court explicitly rejected the State's argument that *Grady III*'s analysis carries no water with regard to defendants who fall outside of that category in *State v. Griffin* ("*Griffin II*"), ___ N.C. App. ___, ___ S.E.2d ___, 2020 WL 769356 (2020):

> Defendant's circumstances place him outside of the facial aspect of *Grady III*'s holding; he is not an unsupervised recidivist subject to mandatory lifetime SBM[.] . . . Plainly, then, *Grady III*'s holding does not directly determine the outcome of this appeal.
>
> Although *Grady III* does not compel the result we must reach in this case, its reasonableness analysis does provide us with a roadmap to get there. . . . *Grady III* offers guidance as to what factors to consider in determining whether SBM is reasonable under the totality of the circumstances. We thus resolve this appeal by reviewing Defendant's privacy interests and the nature of SBM's intrusion into them before balancing those factors against the State's interests in monitoring Defendant and the effectiveness of SBM in addressing those concerns.

2020 WL 769356, at *5-6; *see also State v. Gordon* ("*Gordon II*"), ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2020 WL 1263993, at *5-6 (2020) (utilizing *Grady III* similarly in its analysis). In exercising our discretion, we are not swayed by an argument we have already rejected.

With due consideration of these *Bursell* factors, we invoke Rule 2 and reach the merits of Defendant's appeal.

ii. Merits

**[3]** After determining that a criminal defendant falls into one of the statutory categories that requires the imposition of SBM, *see* N.C. Gen. Stat. § 14-208.40(a)(1)-(3) (2019), "the trial court must conduct a hearing in order to determine the constitutionality of ordering the targeted individual to enroll in the [SBM] program[,]" *Gordon II*, 2020 WL 1263993, at *1. That determination "depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady I*, 575 U.S. at 310, 135 S. Ct. at 1371. The trial court must weigh the State's "interest in solving crimes that have been committed, preventing the commission of sex crimes, [and] protecting the public[,]" *Grady III*, 372 N.C. at 545, 831 S.E.2d at 568, against SBM's "deep . . . intrusion upon [an] individual's protected Fourth Amendment interests[,]" *id.* at 538, 831 S.E.2d at 564. The State bears the burden of "showing . . . that the [SBM] program furthers [the State's] interest[s.]" *Id.* at 545, 831 S.E.2d at 568. And where, as here, it seeks the imposition of future SBM following a defendant's serving a prison sentence, the State also must "demonstrat[e] what [a d]efendant's threat of reoffending will be after having been incarcerated for" the duration of his sentence with some "individualized measure of [the d]efendant's threat of reoffending." *Gordon II*, 2020 WL 1263993, at *6 (concluding that the State did not meet its burden of proving the reasonableness of "a search of this magnitude approximately fifteen to twenty years in the future").

Here, after the jury rendered its verdicts, the trial court sentenced Defendant to 300 to 420 months of active imprisonment. The trial court then ordered SBM as follows:

> Turning to form 615, the defendant having been convicted of a reportable conviction, Court finds this is a sexually violent offense. Court finds the defendant has not been classified as a sexually violent predator. The Court finds that the defendant is not a recidivist. . . . [T]hese findings are applicable for the statutory rape of a child by an adult and statutory sex offense of a child by an adult, not to taking indecent liberties with a child. The Court finds that the offense of—the convictions of statutory rape and sex offense of a child by an adult is an aggravated offense or are aggravating offenses and that this did involve the sexual abuse of a minor. Pursuant to these findings, the Court hereby orders that the defendant shall register as a sex offender for his natural life, and the Court further

> orders that he shall enroll in satellite-based monitoring for his natural life upon his release.
>
> Turning to the form 615 for the taking indecent liberties with a child, Court finds that the defendant has been convicted of a reportable conviction, this being a sexually violent offense. Defendant has not been classified as a sexually violent predator. The defendant is not a recidivist. That the offense or conviction is not an aggravated offense. That the offense did involve the sexual abuse of a minor. The Court hereby orders that the defendant shall register as a sex offender for the taking indecent liberties with a child for a period of 30 years, and based on marking Block 2C on the satellite-based monitoring, pursuant to finding 5A, the Court orders that the Division of Adult Corrections shall perform a risk assessment of the defendant and report the results to the Court, and then he will be ordered to appear before the Court at a session later to be determined—for determination for satellite-based monitoring for these offenses, and specifically for taking indecent liberties with a child, those three counts.

In sum, the trial court determined that the offenses of which Defendant was convicted were reportable convictions pursuant to N.C. Gen. Stat. § 14-208.6(4) and that Defendant's convictions of statutory rape of a child by an adult and statutory sex offense are sexually violent offenses and aggravated offenses involving the sexual abuse of a minor. Section 14-208.40A(c) requires that defendants convicted of sexually violent offenses or aggravated offenses be subject to SBM. N.C. Gen. Stat. § 14-208.40A(c) (2019).

However, the above was the entirety of the trial court's SBM consideration. The State presented no evidence or testimony at the sentencing hearing regarding the reasonableness of the search entailed by SBM in general or in this instance. And the trial court made no findings regarding the reasonableness of the search, let alone its reasonableness when Defendant is released in 25 to 35 years. Such consideration is constitutionally obligatory. *See*, *e.g.*, *Gordon II*, 2020 WL 1263993, at *6.

We therefore hold that the trial court order imposing SBM pursuant to N.C. Gen. Stat. § 14-208.40(a) is unconstitutional as applied to Defendant and must be vacated. *See Bursell I*, 258 N.C. App. at 534, 813 S.E.2d at 468 ("Because no *Grady* hearing was held before the trial court imposed SBM, we vacate its order without prejudice to the State's ability

to file a subsequent SBM application."); *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306 (affirming this Court's decision in *Bursell I* to vacate the trial court's SBM order without prejudice).

IV. Conclusion

Because we conclude that Defendant was not prejudiced by any remarks made by the prosecutor in closing argument given the evidence of guilt presented by the State, we conclude that Defendant received a trial free from prejudicial error. However, because the trial court failed to hold a *Grady* hearing to determine the reasonableness of lifetime SBM for Defendant, we vacate the imposition of lifetime SBM without prejudice to the State's ability to file a subsequent SBM application.

NO ERROR IN PART; VACATED IN PART.

Judge ZACHARY concurs.

Judge TYSON concurs in the result in part and dissents in part by separate opinion.

TYSON, Judge, concurring in the result in part and dissenting in part.

Defendant failed to preserve or to carry his burden on appeal to show reversible error occurred in the State's closing argument. I concur in the result with the portion of the majority's opinion finding no error in Defendant's convictions and sentence.

I. No Jurisdiction Invoked

Defendant failed to file a notice of appeal from the imposition of SBM as is required under North Carolina Rule of Appellate Procedure 3 to invoke appellate jurisdiction and review. N.C. R. App. P. 3; *see State v. Brooks*, 204 N.C. App. 193, 693 S.E.2d 204 (2010) (requiring written notice of appeal filed under N.C. R. App. P. 3 for review of SBM orders). As such, his appeal of the imposition of SBM is properly dismissed. I respectfully dissent from the majority opinion's review or analysis of the SBM order.

Recognizing appellate review of this claim is otherwise barred, Defendant filed a petition for writ of certiorari to invoke this Court's jurisdiction and seek appellate review of the civil order imposing his lifetime enrollment in SBM. To trigger this Court's discretion to allow

the petition and issue the writ, Defendant's "petition for this writ [of certiorari] must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted).

II. No Preservation of Constitutional Error

Appellate Rule 10 mandates that in order for Defendant "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1).

Defendant failed to raise any constitutional challenge or otherwise preserve this constitutional claim in violation of Appellate Rule 10 at any point during his sentencing hearing. *See id.* Asserted constitutional errors that were not raised, argued and ruled upon before the trial court cannot be raised for the first time on appeal. *State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017).

III. Rule 2

Defendant concedes he had failed to challenge or preserve any objection to the constitutionality of the imposition of lifetime SBM. His failure to preserve the issue bars appellate review. *State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003) ("The failure to raise a constitutional issue before the trial court bars appellate review. N.C. R. App. P. 10(b)(1); *State v. Wiley*, 355 N.C. 592, 624, 565 S.E.2d 22, 44-45 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003); *State v. Golphin*, 352 N.C. 364, 411, 533 S.E.2d 168, 202 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Based upon our long-established law, defendant has waived this issue, and he is barred from raising it on appellate review before this Court. This assignment of error is dismissed."). He requests this Court to exercise its discretion to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to reach the merits of his claims. N.C. R. App. P. 2.

"Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis original) (citation omitted). This Court's invocation of the Rule is wholly discretionary and "precedent cannot create an automatic right of review via Rule 2." 369 N.C. at 603, 799 S.E.2d at 603.

The facts in this case mirror those in *State v. Bishop*, wherein the defendant was convicted of taking indecent liberties with a child and the trial court had imposed SBM for a term of thirty years. 255 N.C. App. at 768, 805 S.E.2d at 368. The defendant had not raised any constitutional issue before the trial court, could not raise it for the first time on appeal, and had waived this argument on appeal. *Id.* at 770, 805 S.E.2d at 370.

As here, the defendant in *Bishop* requested this Court invoke Rule 2 of the North Carolina Rules of Appellate Procedure to hear his arguments and review his constitutional challenge. *Id.* This Court held the defendant was "no different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest injustice if we decline to invoke Rule 2, we do not believe this case is an appropriate use of that extraordinary step." *Id.* Defendant has failed to demonstrate any reason why this Court should treat his challenge any differently from what it did in *Bishop*. *Id.*; *see In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

In *State v. Hart*, our Supreme Court warned of unwanted implications of our State's courts not uniformly applying the Rules of Appellate Procedure:

> Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority. Furthermore, inconsistent application of the Rules may detract from the deference which federal habeas courts will accord to their application. Although a petitioner's failure to observe a state procedural rule may constitute an adequate and independent state ground[] barring federal habeas review. a state procedural bar is not adequate unless it has been consistently or regularly applied. Thus, if the Rules [of Appellate Procedure] are not applied consistently and uniformly, federal habeas tribunals could potentially conclude that the Rules are not an adequate and independent state ground barring review. Therefore, it follows that our appellate courts must enforce the Rules of Appellate Procedure uniformly.

*State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007) (internal citations and quotations omitted).

IV. No Showing of Merit

Defendant's status does not fall within the category of defendants at issue in *Grady III*, that is, recidivists who have completed their sentence and are no longer under any State supervision. *See Grady v. North Carolina*, 575 U.S. 306, 191 L. Ed. 2d 459 (2015); *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*").

The trial court must weigh the State's legitimate and compelling "interest in solving crimes that have been committed, preventing the commission of sex crimes, [and] protecting the public[,]" particularly, as here, where there are multiple young minor victims. *Grady III*, 372 N.C. at 545, 831 S.E.2d at 568.

By striking the entire order, the majority's opinion improperly extends *State v. Griffin*, ___ N.C. App. ___, ___ S.E.2d ___, 2020 WL 769356 (2020). In *Griffin*, the defendant did not challenge the imposition of SBM during his post-release supervision. *Id.* at *6. *Griffin* properly recognizes SBM as a special needs search during this period. *Id.*

Here, the trial court properly found the offenses the jury unanimously convicted Defendant of committing were reportable convictions pursuant to N.C. Gen. Stat. § 14-208.6. Defendant's convictions of statutory rape of a child by an adult and statutory sex offense are sexually violent and aggravated offenses involving the sexual abuse of a minor.

Our General Assembly enacted N.C. Gen. Stat. § 14-208.40A(c), which mandates defendants convicted of sexually violent offenses or aggravated offenses to be subject to Satellite Based Monitoring. N.C. Gen. Stat. § 14-208.40A(c) (2019). This legislative choice has withstood and survived constitutional scrutiny. *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L. Ed. 2d 459; *Grady III*, 372 N.C. 509, 831 S.E.2d 542.

To meet the statutory mandate and without any argument or objection from Defendant, the trial court, in open court and in the presence of the Defendant and his counsel, made the following findings of fact under the statute:

> Turning to form 615, the defendant having been convicted of a reportable conviction, Court finds this is a sexually violent offense. Court finds the defendant has not been classified as a sexually violent predator. The Court finds that the defendant is not a recidivist. . . . these findings are applicable for the statutory rape of a child by an adult and statutory sex offense of a child by an adult, not to taking indecent liberties with a child. The Court finds

> that the offense of—the convictions of statutory rape and sex offense of a child by an adult is an aggravated offense or are aggravating offenses and that this did involve the sexual abuse of a minor. Pursuant to these findings, the Court hereby orders that the defendant shall register as a sex offender for his natural life, and the Court further orders that he shall enroll in satellite-based monitoring for his natural life upon his release.
>
> Turning to the form 615 for the taking indecent liberties with a child, Court finds that the defendant has been convicted of a reportable conviction, this being a sexually violent offense. Defendant has not been classified as a sexually violent predator. The defendant is not a recidivist. That the offense or conviction is not an aggravated offense. That the offense did involve the sexual abuse of a minor. The Court hereby orders that the defendant shall register as a sex offender for the taking indecent liberties with a child for a period of 30 years, and based on marking Block 2C on the satellite-based monitoring, pursuant to finding 5A, the Court orders that the Division of Adult Corrections shall perform a risk assessment of the defendant and report the results to the Court, and then he will be ordered to appear before the Court at a session later to be determined—for determination for satellite-based monitoring for these offenses, and specifically for taking indecent liberties with a child, those three counts.

Having failed to object at his sentencing hearing, Defendant unlawfully attempts to raise a constitutional violation for the first time on appeal. *Bishop*, 255 N.C. App. at 770, 805 S.E.2d at 370. Defendant has not demonstrated any prejudice to merit issuance of the writ. *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9.

Even if we were to agree the trial court failed to hold an extended *Grady* hearing to make further reasonableness findings of lifetime SBM for Defendant *ex mero moto*, that decision is not fatal to vacate the SBM order. In the absence of any demand or objection from Defendant or showing of merit, both his petition for writ of certiorari to invoke jurisdiction to remediate his failure to comply with Appellate Rule 3, or to invoke Appellate Rule 2 to excuse Defendant's failure to comply with Appellate Rule 10 are both properly denied. *See Bishop*, 255 N.C. App. at 770, 805 S.E.2d at 370; *Campbell*, 369 N.C. at 603, 799 S.E.2d at 602.

The entirety of Defendant's arguments on appeal, to excuse his lack of notice of appeal and failure to present and preserve his constitutional challenge, is to assert his notion of a proper role of the trial court and for this Court is to sit as a "second chair" to his defense counsel, or for both courts to act on our own motions solely for his benefit. This notion is not the proper role of either the trial or appellate divisions of the Judicial Branch. "[I]t's [the judge's] job to call balls and strikes and not to pitch or bat." Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary United States Senate, 109 Cong. 56 (Statement of John G. Roberts, Jr.). "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

Defendant cannot raise a constitutional argument for the first time on appeal. *Bishop*, 255 N.C. App. at 770, 805 S.E.2d at 370. Defendant's petition for writ of certiorari is without merit and is properly denied. *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9. His argument for this Court to exercise our discretion to invoke Rule 2 to overcome his failure to comply with Rule 10 is without merit. C*ampbell*, 369 N.C. at 603, 799 S.E.2d at 602.

## V. Conclusion

Defendant's convictions and sentence are all properly affirmed as he has failed to preserve or demonstrate either error or prejudice. I concur in the result to find no error in his jury's convictions or in the sentence entered thereon.

Defendant's failure to appeal from or to preserve his purported challenge to his SBM order on constitutional grounds mandates dismissal. His constitutional challenge was neither presented, preserved, and nor ruled upon by the trial court. Defendant is barred from raising these issues for the first time on appeal. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
CLINTON D. RUCKER

No. COA19-418

Filed 5 May 2020

**Probation and Parole—probation revocation—absconding—willfulness**

In a probation violation hearing, the evidence was sufficient to show defendant willfully absconded where, over a period of months, defendant did not maintain regular contact with his probation officer, never met with any probation officer prior to the filing of a violation report, was not present at any of the home visits made by officers (and the people living at the residence said he no longer lived there), failed to keep the probation officer apprised of his whereabouts, and declined the offer of an ankle monitor.

Appeal by defendant from judgment entered 1 November 2018 by Judge Forrest D. Bridges in Gaston County Superior Court. Heard in the Court of Appeals 4 December 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Carole Biggers, for the State.*

*Gilda C. Rodriguez for defendant-appellant.*

BRYANT, Judge.

Where the trial court properly found that defendant willfully absconded, the trial court did not abuse its discretion in revoking defendant's supervised probation. Where there exists a clerical error on the judgment form, we remand the case to the trial court to correct the clerical error.

On 5 July 2017, defendant Clinton D. Rucker appeared before Gaston County Superior Court and pled guilty to one count of possession of methamphetamine and two counts of possession of drug paraphernalia. The trial court accepted defendant's plea, suspended his active term of imprisonment, and ordered supervised probation for 24 months. Defendant was ordered to report to the Gaston County Probation Office, and Officer Jones was assigned to be his probation officer. Over the course of Officer Jones's supervision of defendant,

she filed two violation reports: one on 14 September 2017 and one on 14 June 2018. On 1 November 2018, defendant's probation violation hearing was held for both reports. The State's evidence, offered through the testimony of Officer Jones, tended to show the following.

On 5 July 2017, defendant was placed on probation and arrived at the Gaston County Probation Office to meet with an intake officer. During intake, defendant provided his contact information—a phone number and residential address at 1837 Amy Drive, Lincolnton, North Carolina, located in Lincoln County (hereinafter "Amy Drive address"). A courtesy transfer was submitted to Lincoln County, at defendant's request, to oversee defendant's supervision based on the address he provided. Defendant was told to report to Officer Jones until the transfer request was approved by Lincoln County. Defendant did not report back.

About two weeks later, a Lincoln County probation officer performed a home visit at the Amy Drive address to verify that defendant was living in Lincoln County. Defendant was not at the address. A friend of defendant's fiancée answered the door and informed the officer that defendant was not staying at the residence because he had been arrested following an altercation with his fiancée. The officer called the Lincoln County jail and confirmed that defendant was in custody for assault on a female. Defendant's transfer request was not accepted by Lincoln County.

On 31 July 2017, more than three weeks after defendant was placed on probation, defendant contacted Officer Jones by telephone. This was the first time defendant had spoken to Officer Jones. Defendant told her that he was appealing the assault charge and that he was back living at the Amy Drive address in Lincoln County. Defendant indicated that he had a valid lease agreement showing proof of residence. A second transfer request was submitted to Lincoln County. Officer Jones instructed defendant that the request would take up to ten days but, in the meantime, to communicate with her. Officer Jones told defendant to call her on 3 August 2017 to discuss reporting instructions. Instead, defendant called Officer Jones the day before their scheduled phone call and left a voicemail.

Thereafter, five additional home visits were made by Lincoln County probation officers to verify defendant's residence at the Amy Drive address. Prior to a scheduled home visit, on 4 August 2017, Officer Jones spoke with defendant and notified him that a home visit would take place that morning. Officers went to the residence and no one answered the door. A door tag was left for defendant to call. The officers returned

to the address four more times during August; each time was unsuccessful, as defendant was not present at the home. At the last home visit, an officer spoke with a man who stated that he was at the residence to help defendant move to another residence. Defendant's second transfer request to Lincoln County was denied due to the inability of officers to verify that defendant lived at the Amy Drive address.

On 24 August 2017, Officer Jones called defendant to inform him that his transfer request to Lincoln County had been denied. Defendant was asked to provide his current address and, if he could not provide one, he would be deemed homeless. Defendant stated to Officer Jones that the information she had received regarding his living arrangements was inaccurate. Subsequently, Officer Jones offered to put an ankle monitor on defendant, but defendant declined and ended the call. Defendant did not report to Officer Jones's office that afternoon as instructed.

About a week later, Officer Jones attempted to contact defendant at two separate phone numbers that had been provided for him. Of the numbers provided, one was no longer in service. Officer Jones left a message at the other number. Defendant did not call back. Probation officers could not locate defendant or verify his address. Consequently, on 14 September 2017, Officer Jones filed a probation violation report alleging that defendant had willfully violated the following conditions of his probation:

1. Regular Condition of Probation: "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, ON OR ABOUT 08/24/17 AND AFTER NUMEROUS ATTEMPTS TO CONTACT THE DEFENDANT, INCLUDING AT THE LAST KNOWN ADDRESS OF 1837 AMY DRIVE LINCOLNTON, NC 28092, THE SAID DEFENDANT HAS REFUSED TO MAKE HIMSELF AVAILABLE FOR SUPERVISION AS INSTRUCTED BY THE PROBATION OFFICER, THEREBY ABSCONDING SUPERVISION.

2. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places. . ." in that, ON OR ABOUT 07/05/17, THE DEFENDANT FAILED TO REPORT TO SUPERVISING OFFICER AS INSTRUCTED BY THE COURTS AFTER INTAKE. ON OR ABOUT 08/24/17, THE DEFEND[AN]T FAILED TO REPORT TO SUPERVISING OFFICER AS INSTRUCTED.

3. Condition of Probation: "The defendant shall pay to the Clerk of Superior Court the 'Total Amount Due' as directed by the Court or probation Officer" in that, AS OF THE DATE OF THIS REPORT, THE DEFENDANT HAS PAID $00.00 ON A TOTAL AMOUNT DUE OF $492.50 COURT INDEBTEDNESS. THE DEFENDANT HAS PAID $00.00 OF A TOTAL AMOUNT DUE OF $80.00 PSF. THE DEFENDANT HAS AN OUTSTANDING BALANCE OF $592.50 CI AND PSF.

4. General statute 15A-1343 (b)(1) "Commit no criminal offense in jurisdiction" in that, ON OR ABOUT 09/06/17, THE DEFENDANT WAS CHARGED WITH: FAILURE TO REDUCE SPEED, LINCOLN CO. CASE NO. 17CR704082, DWLR-NOT IMPAIRED REVOCATION, LINCOLN CO. CASE NO. 17CR704082, POSS/DISP/ALT/FIC REVD DR LIC, LINCOLN CO. CASE NO.17CR704083 THE DEFENDANT DID VIOLATE REGULAR CONDITIONS OF PROBATION G.S. 15A-1343(b)(1) IN THAT HE IS NOT TO COMMIT A CRIME IN ANY JURISDICITON.[1]

A warrant was later issued for defendant's arrest. On 6 October 2017, defendant was arrested based on the probation violation report filed by Officer Jones. A preliminary hearing on the violations was held on 23 October 2017. Defendant posted bond and was released from custody on 28 October 2017. While defendant was advised to report to Officer Jones within 24 hours of his release from custody, defendant failed to report as instructed.

On 1 November 2017, an unidentified woman contacted Officer Jones and told her defendant was trying to reach her. The woman provided Officer Jones with a phone number for defendant. Officer Jones contacted defendant and instructed him to report to her office. Soon thereafter, defendant met with Officer Jones for their first in-person meeting. Defendant told Officer Jones that he would be living with his father-in-law in Gaston County.

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1. On this record, defendant denied the first two violations at the probation violation hearing but admitted to the third violation in the original report. The State struck the fourth violation from the original report because the charges were unresolved. Thus, we consider and address only the first two allegations in the original report upon which defendant's probation could be revoked.

On 10 January 2018, Officer Jones attempted to conduct a home visit at the father-in-law's residence in Gaston County but defendant was not present. Two weeks later, Officer Jones conducted another home visit. Although defendant was present in the home, there appeared to be no personal items in the home that belonged to defendant.

On 29 January 2018, defendant sent Officer Jones a copy of a lease agreement for a new address in Lincoln County. Officer Jones submitted a third transfer request from Gaston to Lincoln County. A home visit was conducted, and defendant was present. On 15 March 2018, the transfer request was accepted in Lincoln County, and defendant's case was reassigned to Lincoln County for supervision. Defendant provided a new phone number and reported to his scheduled appointments as directed.

On 6 May 2018, a Lincoln County probation officer attempted a home visit. Defendant was not home. The officer left a door tag instructing him to report to the office the following day. Defendant failed to report as instructed. The Lincoln County Probation Office conducted another home visit on 22 May 2018. Defendant was not home, but an eviction notice dated 18 May 2018 was attached to the door. Defendant did not notify the officer that he was getting evicted. The officer attempted to contact defendant using the numbers he had provided; however, those numbers were not in service.

On 31 May 2018, the officer returned to the home and left a door tag instructing him to report to the office next day. After defendant missed his appointment, his case was transferred back to Gaston County. On 14 June 2018, Officer Jones filed an addendum to the probation violation report alleging additional violations:

> 1. Regular Condition of Probation: General Statute 15A-1343(b)(3a) "Not to abscond, by willfully avoiding supervision willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, ON OR ABOUT 5/22/2018, THE DEFENDANT LEFT HIS PLACE OF RESIDENCE AT 1655 KNOLL DRIVE, VALE, NC 28168 WITHOUT PRIOR APPROVAL OR KNOWLEDGE OF HIS PROBATION OFFICER AND FAILED TO MAKE HIS WHEREABOUTS KNOWN, MAKING HIMSELF UNAVAILABLE FOR SUPERVISION AND THEREBY ABSCONDING SUPERVISION. AS OF THE DATE OF THIS REPORT, THE DEFENDANT'S WHEREABOUTS ARE UNKNOWN AND ALL EFFORTS TO LOCATE HIM HAVE BEEN UNSUCCESSFULL.

2. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places" in that, ON 5/7/18 AND 6/1/18, THE DEFENDANT FAILED TO REPORT TO SUPERVISING OFFICER AS INSTRUCTED.[2]

A warrant was issued for defendant's arrest based on the new violations. Defendant turned himself in on 9 August 2018.

At the close of the hearing, the trial court found that defendant violated his probation by absconding and ordered revocation of his probation. A Judgment and Commitment Upon Revocation of Probation Order was entered and defendant's sentence of imprisonment was activated. Defendant appeals.

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On appeal, defendant raises two issues: I) the trial court abused its discretion by revoking defendant's probation after finding that defendant absconded supervision, and II) judgment upon revocation should be remanded to correct a clerical error.

*I*

First, defendant argues the trial court erred in revoking his probation based on its finding that he willfully absconded from supervision. We disagree.

A trial court's decision to revoke a defendant's probation is reviewed for an abuse of discretion. *See State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) ("[T]he evidence [must] be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." (citation and quotation marks omitted)).

Pursuant to N.C. Gen. Stat. § 15A-1343 ("Conditions of probation"), regular conditions are placed on a defendant's probationary sentence, which requires, *inter alia*, that a defendant must "[n]ot abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." N.C. Gen. Stat. § 15A-1343(b)(3a) (2019). By definition, a defendant "absconds" if he makes willful attempts

2. At the hearing, defendant denied both allegations in the addendum report.

to conceal his whereabouts, and the probation officer is unable to contact the defendant as a result. *Id.* Upon notification that a defendant has willfully absconded, the trial court is authorized to revoke probation and impose a period of imprisonment in response to the violation. *See id.* § 15A-1344(a) ("The court may only revoke probation for a violation of a condition of probation under . . . G.S. 15A-1343(b)(3a) [stating that a defendant must not willfully abscond from supervision]").

In the instant case, the trial court, after considering all the evidence, found that defendant had absconded in violation of N.C.G.S. § 15A-1343(b)(3a). Defendant argues there was insufficient evidence that his actions were willful to constitute absconding as he neither avoided supervision nor made his whereabouts unknown to probation officers. In support of his argument, defendant cites to *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015), and *State v. Krider*, 258 N.C. App. 111, 810 S.E.2d 828, *writ allowed*, 371 N.C. 114, 813 S.E.2d 248 (2018), *aff'd as modified*, 371 N.C. 466, 818 S.E.2d 102 (2018). However, *Williams* and *Krider* are inapposite to the facts in the instant case.

In *Williams*, this Court closely examined the statutory interpretation of "absconding" to revoke probation which, prior to the enactment of the Justice Reinvestment Act of 2011 ("JRA"), had not been defined by statute. 243 N.C. App. at 198, 776 S.E.2d at 741. The defendant was found to be an absconder after his probation officer discovered that the defendant had been traveling out-of-state without permission. *Id.* at 198–99, 776 S.E.2d at 742. In addition, the defendant had missed his scheduled appointments with the probation officer. This Court reasoned that while the evidence established that the defendant violated regular conditions of his probation, the evidence could not satisfy N.C.G.S. § 15A-1343(b)(3a) for absconding because the officer was privy to the unauthorized trips. *Id.* at 204–05, 776 S.E.2d at 745–46. The officer could contact the defendant and did, in fact, communicate with him several times by phone. *Id.* Therefore, under the statute, defendant's whereabouts were known to the probation officer and this Court reversed the revocation of the defendant's probation.

Similarly, in *State v. Krider*, this Court found that the defendant's actions did not rise to the level of absconding as required to revoke probation. In *Krider*, a probation officer made an unscheduled visit to an address provided by the defendant. 258 N.C. App. at 112, 810 S.E.2d at 829. The defendant was not present at the home, and the officer was advised by an unidentified woman that the defendant "didn't live there." Id. The officer made no further attempts to contact the defendant and seven days later, filed a report alleging that the defendant had willfully

absconded probation because his "whereabouts were unknown for two months." *Id.* This Court found that the State failed to demonstrate that the defendant's conduct was willful, where the probation officer filed a violation report after making only one visit to the defendant's listed residence and "there was no evidence that [the] defendant was even aware of [the] unannounced visit until after his arrest." *Id.* at 117, 810 S.E.2d at 832. Additionally, following his arrest, the defendant met with the probation officer at the residence, maintained regular contact until the expiration of his probation period, and satisfied all other conditions of his probation. *Id.* at 116, 810 S.E.2d at 831. Therefore, this Court vacated the revocation of the defendant's probation.

Here, on these facts, it is significant that defendant's conduct was willful as he avoided probation officers for several months. From 5 July 2017 to 14 September 2017—the date of the first violation report—approximately six home visits were attempted by multiple probation officers to verify defendant's residence at the address he provided. Defendant was not present for any of the home visits. On two of those home visits, contrary to *Krider*, individuals who *knew* defendant informed the officers that defendant no longer lived at the residence or that he had plans to move from the residence. A door tag was left notifying defendant that the officers were attempting to locate him and even instructed defendant to report to the office. Defendant did not comply.

Despite being on notice to maintain regular contact with probation officers, neither Officer Jones nor any probation officer in Lincoln County had ever met defendant in person after his initial intake, prior to the filing of his first violation report. In fact, Officer Jones testified that she only spoke to defendant on three occasions: 31 July, 4 August, and 24 August. Of the few times that defendant could be reached by phone, he was notified of a scheduled visit before they arrived. Not only was defendant absent from the home, but he also failed to keep Officer Jones apprised of his whereabouts. Due to difficulties ascertaining defendant's whereabouts, Officer Jones offered defendant an ankle monitor. Defendant declined just before abruptly ending the phone call, and thereafter, failing to report.

Unlike in *Williams* and *Krider*, we believe that defendant was properly found to have absconded because his whereabouts were truly unknown to probation officers. *See generally State v. Newsome*, ___ N.C. App. ___, 828 S.E.2d 495 (2019); *see also State v. Trent*, 254 N.C. App. 809, 803 S.E.2d 224 (2017) (finding there was sufficient evidence that the defendant had willfully absconded, and thereby, made his whereabouts unknown, as the probation officer had "absolutely no means"

of contacting the defendant; the defendant did not wear a monitoring device; the defendant was not present during two unannounced visits at the reported address; and the defendant knew the probation officer had visited the residence while he was away but did not contact the officer when he returned).

Even after defendant was released from custody for parole violations relating to absconding, the record reveals that he was advised to report to Officer Jones within 24 hours. Defendant was on notice that he was considered to be an absconder and that officers were attempting to actively monitor his whereabouts. *See Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 499. Notwithstanding defendant's responsibility to comply with his probation terms, defendant failed to report to Officer Jones within the specified time as instructed. Additionally, when defendant's case was finally transferred to Lincoln County and he was instructed to report to that office, officers still had difficulty contacting him. Defendant also failed to notify officers upon getting evicted from his listed residence.

We find the State's allegations and supporting evidence—reflecting defendant's continuous, willful pattern of avoiding supervision and making his whereabouts unknown—sufficient to support the trial court's exercise of discretion in revoking defendant's probation for absconding. Moreover, "once the State presented competent evidence establishing defendant's failure to comply with the terms of his probation, the burden [is then] on defendant to demonstrate through competent evidence his inability to comply with those terms." *Trent*, 254 N.C. App. at 819, 803 S.E.2d at 231. While defendant contends that his employment—as a "self-employed" carpenter—affected his ability to comply with his probation supervision, we remain unpersuaded by his argument as defendant did not inform Officer Jones or any officer of his work commitments. Defendant even admitted at the hearing that he was "pretty much homeless" at one point; further supporting that he was aware that he could have obtained an ankle monitor but willfully avoided it.

Therefore, defendant's argument is overruled.

*II*

Also, defendant argues, and the State concedes, that his case should be remanded back to the trial court to correct a clerical error in the judgment. We agree.

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court

for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted).

Here, a review of the record reveals that defendant was present for his probation hearing and testified as a witness. Defendant denied the first two allegations listed in the original report and all the allegations in the addendum report. However, on the judgment form, the trial court checked the box stating: "the defendant waived a violation hearing and admitted that he/she violated each of the conditions of his/her probation as set forth below." Thus, it is clear the trial court committed a clerical error when it checked the box indicating otherwise.

Accordingly, we remand to allow the trial court to correct a clerical error as noted herein.

AFFIRMED IN PART; REMANDED IN PART.

Judges COLLINS and HAMPSON concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 MAY 2020)

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| HILL v. KENNEDY<br>No. 19-171 | Cabarrus<br>(15CVD2731) | Reversed and Remanded |
| IN RE A.G.B.<br>No. 19-298 | Surry<br>(15JA48) | Affirmed |
| IN RE FORECLOSURE OF FOSTER<br>No. 19-1034 | Durham<br>(16SP307) | Dismissed |
| IN RE WHITAKER<br>No. 19-1002 | N.C. Utilities Commission<br>(E-7)<br>(SUB1159) | Affirmed |
| LEQUIRE v. SE. CONSTR. & EQUIP. CO., INC.<br>No. 19-603-2 | N.C. Industrial Commission<br>(16-744994) | Affirmed |
| MEJIA v. MEJIA<br>No. 19-438 | Mecklenburg<br>(17CVD13888) | Affirmed |
| PRIVETTE v. N.C. BD. OF DENTAL EXAM'RS<br>No. 19-1048 | Wake<br>(18CVS12775) | Affirmed |
| SCROGGS v. TRACTORS ON THE CREEK, LLC<br>No. 19-828 | Buncombe<br>(17CVD5275) | Dismissed |
| SMITH v. SMITH<br>No. 19-1049 | Mecklenburg<br>(15CVD23619) | Vacated and Remanded |
| SPENCER v. AUGHTRY<br>No. 19-956 | Henderson<br>(17CVS1449) | Affirmed in Part, Reversed and Remanded |
| STATE v. BERNICKI<br>No. 19-649 | New Hanover<br>(17CRS53352) | No Error |
| STATE v. BYNUM<br>No. 19-933 | Onslow<br>(17CRS57416) | Reversed and Remanded |
| STATE v. DIOP<br>No. 19-200 | Wake<br>(16CRS206790-91) | No Error |
| STATE v. FAULK<br>No. 19-693 | Columbus<br>(15CRS50062)<br>(16CRS918) | No Error in Part; No Prejudicial Error in Part |

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| STATE v. GREEN<br>No. 19-272 | Alamance<br>(17CRS50194) | No Error |
| STATE v. GREENE<br>No. 19-688 | Watauga<br>(17CRS50918) | No Error |
| STATE v. HIGGINBOTHAM<br>No. 19-989 | Wake<br>(17CRS212577) | Affirmed |
| STATE v. HOLT<br>No. 19-477 | Bladen<br>(16CRS50689) | No plain error in part;<br>Dismissed without prejudice in part. |
| STATE v. McCLURE<br>No. 19-562 | Clay<br>(17CRS53-54) | No Error |
| STATE v. McCULLEN<br>No. 19-319 | Cleveland<br>(18CRS1218) | No Error |
| STATE v. McLYMORE<br>No. 19-428 | Cumberland<br>(14CRS54278-80) | No Error |
| STATE v. MOORE<br>No. 19-417 | McDowell<br>(17CRS204) | No Error |
| STATE v. MURRAY<br>No. 19-516 | Wake<br>(17CRS201843) | Dismissed |
| STATE v. PITTS<br>No. 19-362 | Forsyth<br>(17CRS1397)<br>(17CRS53401-02) | No Error |
| STATE v. RIVERA<br>No. 19-426 | Wake<br>(16CRS219028-29) | No Error |
| STATE v. SILVER<br>No. 19-978 | Nash<br>(17CRS50290)<br>(17CRS50291) | Dismissed |
| STATE v. TAYLOR<br>No. 19-893 | Mecklenburg<br>(16CRS238053)<br>(17CRS21825) | No Error |
| STATE v. WILLIAMS<br>No. 19-188 | Richmond<br>(16CRS1374)<br>(16CRS52466)<br>(16CRS52468-69) | No Error |
| STATE v. WILLIS<br>No. 18-507 | Lenoir<br>(14CRS51470) | Reversed |

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| STATE v. ZACHARY<br>No. 19-915 | Beaufort<br>(16CRS51041-42) | Vacated and Remanded |
| WALKER v. SURLES<br>No. 19-880 | Pitt<br>(06CVD3540) | Dismissed |
| WILLIAMS v. WILLIAMS<br>No. 19-484 | Guilford<br>(15CVD8816) | Affirmed in Part,<br>Dismissed in Part |

**COMMERCIAL PRINTING COMPANY**
**PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS**