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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 30, 2021

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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

August 9 and 23

September 6 and 20

October 4 and 18

November 1, 15, and 29

December 13

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 JANUARY 2021)

IN RE B.W. 2021-NCCOA-1 No. 20-2	Buncombe (18JA343)	Affirmed.
IN RE N.A. 2021-NCCOA-2 No. 20-298	Cumberland (18JA287)	Vacated and Remanded.

IN RE K.M.

[276 N.C. App. 2, 2021-NCCOA-3]

IN THE MATTER OF K.M.

No. COA20-482

Filed 2 February 2021

Juveniles—delinquency—evidence of mental illness—referral to area mental health services director required

After a juvenile was adjudicated delinquent, the trial court erred by entering a disposition order committing the juvenile to a youth development center without referring the matter to the area mental health services director, as required by N.C.G.S. § 7B-2502(c), upon evidence that the juvenile continued to need mental health treatment and was not seriously engaging in the treatment provided. Although the juvenile was evaluated by a service provider to the local management entity contemplated by the statute and the evaluation was considered by the trial court, the court was mandated by statute to make the referral before determining a disposition.

Appeal by juvenile from order entered 19 February 2020 by Judge Cheri Siler-Mack in Cumberland County District Court. Heard in the Court of Appeals 12 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Melissa K. Walker, for the State.

Appellate Defendant Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for juvenile-appellant.

ARROWOOD, Judge.

¶ 1 K.M. appeals from a dispositional order entered committing him to a youth development center ("YDC"). K.M. contends that the trial court erred by entering a new dispositional order without first referring him to the area mental health services director pursuant to N.C. Gen. Stat. § 7B-2502(c). K.M. further argues that the trial court violated his due process rights by recommitting him to YDC without proper notice, and that K.M. received ineffective assistance of counsel due to the alleged lack of notice. We hold that the trial court erred in failing to refer K.M. to the area mental health services director, vacate the dispositional order, and remand for a new hearing and referral to the mental health services director.

I. Background

¶ 2 On 16 April 2018, a Cumberland County juvenile court counselor approved the filing of petitions against K.M. alleging that he committed two counts of first-degree statutory sex offense and two counts of second-degree forcible sex offense. The trial court adjudicated K.M. delinquent of all four offenses on 17 October 2018. On 3 December 2018, the trial court entered a "Juvenile Order for Mental Health Services," which included a finding of fact stating "[t]his case involves mental health issues and/or the need for mental health services," and ordered a "Sexual Offender Specific Evaluation" with a report to be provided to the court. On 28 March 2019, the trial court entered a Level III disposition and committed K.M. to a YDC and further ordered that if a Level III group home could be identified for K.M., he was to be brought back before the court for a hearing to consider adjusting his placement. A Cumberland County juvenile court counselor filed a motion for review on 29 April 2019 indicating a Level III placement had been identified for K.M. On 30 May 2019, the trial court approved a community commitment for K.M. at Level III group home Falcon Crest Residential Group Home ("Falcon Crest").

¶ 3 On 20 December 2019, a Cumberland County juvenile court counselor filed another motion for review "to review community commitment status." At a hearing on 27 January 2020, a representative from the Department of Juvenile Justice ("DJJ") testified that K.M. "started to have some issues" in early December 2019. These issues included an in school suspension "for being disrespectful, getting out of the classroom and walking out, because he didn't like something the teacher said[,]" and for being caught with an MP3 player on which K.M. had downloaded inappropriate sexual content; the DJJ representative expressed concern that K.M. had asked the group home manager "not to tell anyone" about the incident with the MP3 player. Additionally, staff members at the group home found a "vape" and "vaping liquid" in K.M.'s possession, and noted that K.M. was not present at a specified meeting spot after school on at least two occasions. Based on these incidents, the DJJ report recommended that K.M. be removed from his community commitment placement and returned to the YDC.

¶ 4 The trial court reviewed a Risk and Needs Assessment ("Assessment") completed by the court counselor on 5 December 2019. The Assessment noted that K.M. was rejected by pro-social peers, had received one short-term suspension from school, "[m]ay use sexual expression/behavior to attain power and control over others," had mental health needs that were being addressed, and experienced domestic discord resulting

in emotional or physical conflict. The Assessment assigned K.M. with a Risk Score of 12, which placed K.M. in the upper range of Risk Level 4 (out of five possible risk levels), and a Needs Score of 17, placing K.M. in the "Medium Needs" level.

¶ 5 The trial court also reviewed a report from Falcon Crest performed on 22 January 2020. The Falcon Crest report noted that K.M. had been participating in group therapy and weekly outpatient therapy for the purpose of assisting K.M. "with adjustment to daily routine and scheduled to decrease stress, anger, and promote independence, competence, and security." While the report described K.M. as showing "some progress with his impulsive behavior," K.M. "puts himself and others at risk by making poor choices." The report described K.M. as "quick to blame others or make excuses[,]" and as continuing to "be impulsive and does not think before acting." With regards to the long term goals for K.M.'s therapy, the report noted that K.M. "is still attempting to understand the relationship between positive behaviors, getting along with his peers, following staff/school official directives, [and] respecting authority figures," and occasionally "struggles with . . . processing that his past behaviors, manipulating, and compl[ying] with probation is still [a] very important part of his current situation." A therapist's addendum to the report stated that K.M. "continues to need supervision, structure, education, and role modeling to assist him with managing negative impulses and behaviors."

¶ 6 The trial court then reviewed a Rehabilitated Support Services report from an assessment performed on 21 January 2020. Falcon Crest had requested that Rehabilitative Support Services conduct the assessment shortly after the Motion for Review was filed. The report, which referred to K.M. by an incorrect first name, stated that K.M. was at very low risk for re-offending and still required intensive treatment individualized to address his specialized needs, and recommended that K.M. remain in the Level III group home. The trial court disregarded the report due to the incorrect name.

¶ 7 K.M.'s trial counsel argued that K.M. had not received adequate notice because the motion simply directed the trial court "to review Community Commitment status[,]" and because there was no violation report filed. The State's trial counsel asked that "whatever the Court's decision . . . [K.M.]'s current acts clearly show that . . . he can benefit there with further treatment whether that's back in YDC, if he's going to get that, or another program. But . . . really that he gets the best treatment to take care of these situations[.]"

¶ 8 The trial court heard additional testimony from Lakkiyah Sellers ("Ms. Sellers"), K.M.'s social worker, George Adam ("Mr. Adams"), a Falcon Crest staff member, and K.M.'s mother. Ms. Sellers expressed concern that K.M. was not adequately engaging in his monthly treatment team meetings, and that "he's always reporting that everything is going well, when it is not." Mr. Adam testified that K.M. was "a likeable young man[,]" but that at times "his maturity level is not understanding how the severity of what his charges are[,] [a]nd the decisions that he makes is not, you know, reality based, because . . . his mind is not set to understand it, these serious charges." K.M.'s mother testified that K.M. did not have many incidents before December 2019, and that "the things that are being said in the courtroom, are not being said in the meetings. And they're not addressing [K.M.] about any of that. This is the first that I've [heard] something, and we go to every meeting."

¶ 9 At the close of testimony and argument, the trial court revoked K.M.'s community commitment and ordered him to return to YDC over the objection of K.M.'s trial counsel. The trial court noted that "initially there was [a] smooth transition with [K.M.'s] placement" at Falcon Crest, but that in the past month K.M. had "spiral[ed]" out. The trial court also expressed concern with K.M.'s "increase of impulsivity[,]" and that K.M. was "not engaging seriously in his treatment." The trial court noted K.M.'s trial counsel's objection and K.M. orally appealed.

II. Analysis

¶ 10 K.M. contends that the trial court erred by entering a new dispositional order without first referring K.M. to the area mental health services director. We agree.

¶ 11 When a juvenile argues to this Court that the trial court failed to follow a statutory mandate, the error is preserved and is a question of law reviewed *de novo*. *In re G.C.*, 230 N.C. App. 511, 515-16, 750 S.E.2d 548, 551 (2013). Under the *de novo* standard, the Court considers the matter anew and freely substitutes its own judgment for that of the lower court. *In re A.M.*, 220 N.C. App. 136, 137, 724 S.E.2d 651, 653 (2012).

¶ 12 "Disposition of cases involving juveniles should '[p]rovide the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community.' " *In re E.M.*, 263 N.C. App. 476, 478, 823 S.E.2d 674, 676 (2019) (quoting N.C. Gen. Stat. § 7B-2500(3)). When a juvenile comes before a trial court, "the court *may* order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert *as may be needed* for the court to determine the needs

of the juvenile." N.C. Gen. Stat. § 7B-2502(a) (2019) (emphasis added). When evidence of mental health issues is presented to the trial court, the authority to order the evaluation of a juvenile by certain medical professionals is no longer discretionary, but is required:

> If the court believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court *shall* refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action. . . . The area mental health, developmental disabilities, and substance abuse director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs.

N.C. Gen. Stat. § 7B-2502(c) (emphasis added).

¶ 13 The use of the word "shall" indicates a statutory mandate that when the trial court is faced with any amount of evidence that a juvenile is mentally ill, the trial court must refer the juvenile to the area mental health services director for appropriate action, and failure to do so is error. *In re E.M.*, 263 N.C. App. at 478, 823 S.E.2d at 676 (citation omitted). This mandate requires the trial court to refer the juvenile to the area mental health services director regardless of whether the juvenile has already received mental health services prior to the disposition. *Id.* at 480, 823 S.E.2d at 677. This Court recently noted that the position of "area mental health services director" no longer exists as referenced in N.C. Gen. Stat. § 7B-2502(c) and is now identified as the "local management entity/managed care organization" found in N.C. Gen. Stat. § 122C-3(20b). *In re E.A.*, 267 N.C. App. 396, 400, n.3, 833 S.E.2d 630, 633, n.3 (2019). Because the General Assembly has not yet updated the language of N.C. Gen. Stat. § 7B-2502(c) to reflect this change, we will continue to refer to the position as the area mental health services director.

¶ 14 In this case, evidence was presented to the trial court establishing K.M.'s mental health issues. The trial court reviewed multiple reports that described K.M.'s continued need for mental health treatment, including the Risk and Needs Assessment that placed K.M. at Risk Level 4 and the "Medium Needs" level. The DJJ representative testified that K.M. had exhibited increasingly significant issues with impulse control and truthfulness in the months preceding the hearing, in addition to K.M.'s social worker expressing concern that K.M. was not seriously engaging in his mental health treatment. This evidence required the trial court to

refer K.M. to the area mental health services director, rather than revoke K.M.'s community status and order his return to YDC.

¶ 15 The State contends that this case is distinguishable from *In re E.M.* because prior to the hearing on the Motion for Review, K.M. was referred by Falcon Crest to Rehabilitated Support Services for evaluation. Rehabilitated Support Services is a provider for Alliance Health, the local management entity/managed care organization contemplated by the statute. The State argues that because the trial court considered the evaluation during the hearing, it was not required to refer K.M. to the area mental health services director. Additionally, the State argues that "[w]hile the statute envisions the area mental health services director's involvement in assisting the court with crafting a disposition . . ., nothing in [N.C. Gen. Stat. §] 7B-2502(c) allows the agency to usurp the court's discretionary authority in ultimately determining the appropriate disposition alternatives."

¶ 16 The State's argument incorrectly describes the trial court's statutory duty in this case. The text of N.C. Gen. Stat. § 7B-2502(c) plainly states that when there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the trial court "shall" refer the juvenile to the area mental health services director for appropriate action. The trial court does not have the discretionary authority to disregard this statute in favor of "appropriate disposition alternatives." The trial court's failure to make the statutorily mandated referral was error, and accordingly the trial court's order must be vacated.

¶ 17 Because we vacate the trial court's order for statutory error, we do not reach K.M.'s arguments regarding notice and due process.

III. Conclusion

¶ 18 For the foregoing reasons, we hold that the trial court erred in failing to refer K.M. to the area mental health services director, vacate the dispositional order, and remand for a new hearing and referral to the area mental health services director.

VACATED AND REMANDED.

Judges DILLON and INMAN concur.

SHEARIN v. BROWN

[276 N.C. App. 8, 2021-NCCOA-4]

HARLEY ELIZABETH SHEARIN, PETITIONER
v.
CORA B. BROWN, CURTIS JULIAN BLOCKER, SUE B. COMEAUX, PAUL C. BLOCKER, PATRICIA B. GILBERT, JOHN BLOCKER, JIMMY BLOCKER, BOBBY M. BLOCKER, SYLVIA B. LUCAS, ARTHUR CLEADES MULLIS, JR., DEBRA MULLIS HELMS, JAMES RAY SHEARIN, JEWEL LEE JAYNES, DONNIE SHEARIN, DAVID SHEARIN, WARREN LYNN SHEARIN, DANNY SHEARIN, FRANCES S. HUNT, HENRY D. SHEARIN, JR., INDIVIDUALLY AND IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF GEORGE WADE SHEARIN, AND BETSY S. JONES, RESPONDENTS

No. COA20-389

Filed 2 February 2021

Adoption—equitable adoption—of an adult—remedy unavailable

Declining to expand *Lankford v. Wright*, 347 N.C. 115 (1997), the Court of Appeals held that decedent's biological son, whom decedent gave up for adoption at age nine, was not later equitably adopted during his adult years by decedent, and therefore petitioner—the daughter of decedent's biological son, who died before decedent—was not an heir to decedent's estate under the intestacy statutes. No matter how much decedent treated his biological son as his own son, the alleged equitable adoption occurred during the biological son's adult years, rendering *Lankford* inapplicable.

Appeal by Petitioner from judgment entered 5 February 2020 by Judge Josephine K. Davis in Halifax County Superior Court. Heard in the Court of Appeals 12 January 2021.

Kirk, Kirk, Howell, Cutler & Thomas, L.L.P., by Candace M. Seagroves, for Petitioner-Appellant.

Ward and Smith, P.A., by Michael J. Parrish and E. Bradley Evans, for Respondents-Appellees Cora B. Brown, Julian Blocker, Sue B. Comeaux, Paul C. Blocker, John Blocker, Jimmy Blocker, Bobby M. Blocker, Sylvia B. Lucas, Arthur Cleades Mullis, Jr., Debra Mullis Helms, James Ray Shearin, Jewel Lee Jaynes, Donnie Shearin, David Shearin, Warren Lynn Shearin, Danny Shearin, Frances S. Hunt, Henry D. Shearin, Jr., Individually, and Betsy S. Jones.

No brief filed by Respondent-Appellee Patricia B. Gilbert.

No brief filed by Respondent-Appellee Henry D. Shearin, Jr., in his capacity as Administrator of the Estate of George Wade Shearin.

INMAN, Judge.

¶ 1 Harley Elizabeth Shearin ("Petitioner") appeals from an order dismissing her petition to be declared the sole heir to the Estate of George Wade Shearin ("Decedent") and granting judgment on the pleadings in favor of Decedent's other heirs ("Respondents"). Petitioner contends that her deceased father, Timothy Wade Shearin ("Timothy"), was equitably adopted by Decedent and that she is the sole heir to Decedent's Estate under North Carolina's intestacy statutes. After careful review, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The pleadings below, which we are required to review in a light most favorable to Petitioner, disclose the following:

¶ 3 Timothy, Decedent's only child, was born to Decedent and his then-wife, Vela Shearin, in 1967. While Timothy was a young child, Vela Shearin divorced Decedent and married Charles Verman Jenkins ("Mr. Jenkins") in Virginia. Mr. Jenkins legally adopted Timothy at age nine, and Timothy changed his last name from Shearin to Jenkins. Timothy lived with Mr. Jenkins until at least age 18 before moving back to North Carolina at age 21.

¶ 4 Timothy reconnected with his biological father upon his return to the state, with Decedent providing a cabin for Timothy on a tract in Halifax County owned by Decedent. Decedent paid for and helped build a workshop for Timothy behind the cabin, and he purchased a pontoon boat for Timothy's use. He also paid for Timothy's college tuition and hosted a party when Timothy graduated.

¶ 5 Timothy and Decedent also made their father-son relationship known in other, more public ways. A 1993 newspaper article about Timothy's mini stock car racing career listed Decedent as his father, and Timothy changed his last name back to Shearin in 1995. When Timothy got married two years later, Decedent paid for the rehearsal dinner, was identified as Timothy's father in the local paper's marriage announcement and the wedding program, served as Timothy's best man in the wedding ceremony, and witnessed the marriage certificate as Timothy's father. Timothy and his new wife continued to live in a home provided by Decedent, who later paid to survey and clear land on his property so that the newlyweds could build a larger home.

¶ 6 Petitioner was born to Timothy and his wife in May 1999, and the birth announcement acknowledged Decedent as her grandfather. In

December of that year, at age 32, Timothy died in a work-related accident. His death was reported in a newspaper article, which again identified Decedent as Timothy's father. Decedent received accidental death benefits as a beneficiary on Petitioner's policy and was listed as Timothy's father on the death certificate. A few months after Timothy's funeral, Decedent bought three burial plots surrounding Timothy's grave.

¶ 7 Petitioner and Decedent developed a close relationship following Timothy's death, and Decedent publicly expressed an intention that Petitioner receive Decedent's assets someday. Decedent died intestate in February 2019, nearly a decade after his son's death. Decedent's obituary identified Petitioner as Decedent's only grandchild.

¶ 8 Following Decedent's passing, Respondent Henry D. Shearin, Jr., applied for letters of administration for Decedent's estate. That application listed Respondents—not Petitioner—as the only heirs to Decedent's estate. Letters of Administration were subsequently issued to Henry D. Shearin, Jr.

¶ 9 Having been omitted from the list of heirs to Decedent's estate, Petitioner filed a petition to ascertain heirs, for declaratory judgment, and to revoke the letters of administration on the grounds that she was the sole heir under North Carolina's intestacy statutes by virtue of Decedent's alleged equitable adoption of her father. After the filing of their answers and the close of pleadings, Respondents filed a motion for judgment on the pleadings on the ground that "the facts alleged cannot sustain a finding of equitable adoption or that Petitioner is an heir of the Decedent as a matter of law." The trial court heard arguments on 13 January 2020, granted the motion, and entered judgment for Respondents on 5 February 2020. Petitioner filed timely notice of appeal.

II. ANALYSIS

¶ 10 Both parties agree that the disposition of this appeal is controlled by *Lankford v. Wright*, 347 N.C. 115, 489 S.E.2d 604 (1997), in which our Supreme Court applied the doctrine of equitable adoption for the first and only time. That decision, as the lone appellate decision employing the doctrine, delineates equitable adoption's necessary elements and expressly limits application of the doctrine to particular facts and circumstances. *Id.* at 118-20, 489 S.E.2d at 606-07. Petitioner acknowledges that *Lankford* was "narrowly focused on the case facts before it[,]" which concerned the equitable adoption of a minor by a foster parent, but requests this Court "expand the scope of . . . *Lankford* . . . to provide for the equitable adoption of an adult" so that she—rather than

the equitably adopted person, as in *Lankford*—can inherit the entirety of Decedent's estate under North Carolina's intestacy statutes. Because the circumstances presented here fall outside the operative facts of *Lankford* and this Court lacks any authority to redraw the boundaries of the doctrine as delineated in that decision, we hold that the trial court properly entered judgment for Respondents.

1. Standard of Review

¶ 11 We review a trial court's ruling on a motion for judgment on the pleadings *de novo*. *Barefoot v. Rule*, 265 N.C. App. 401, 403, 828 S.E.2d 685, 687 (2019) (citing *Samost v. Duke Univ.*, 226 N.C. App. 514, 517-18, 742 S.E.2d 257, 259-60 (2013)). Under this standard, the reviewing court:

> is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Samost, 226 N.C. App. at 517, 742 S.E.2d at 517 (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)). Judgment on the pleadings is proper when "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." *Id.* at 518, 742 S.E.2d at 260 (citation and quotation marks omitted).

2. **Lankford** *And Its Limits*

¶ 12 *Lankford* presented a single question to the Supreme Court: "whether North Carolina recognizes the doctrine of equitable adoption." 347 N.C. at 116, 489 S.E.2d at 605. In that case, a mother entered into an adoption agreement with her neighbors, the Newtons, for the care of her minor daughter. *Id.* at 117, 489 S.E.2d at 605. The daughter moved in with her new family, took Newton as her last name, and was known at school and in the community as the Newtons' daughter. *Id.* She was identified in Mr. Newton's obituary as his sole surviving daughter, referred to Mrs. Newton as "mother," and obtained a Social Security card under their shared last name. *Id.* She opened a bank account with Mrs. Newton and sent her foster mother a portion of her income while serv-

ing in the Navy. *Id.* When Mrs. Newton grew sick, her foster daughter took leaves of absence to provide care. *Id.*

¶ 13 Mrs. Newton passed away in 1994 without formally finalizing a legal adoption of her foster daughter. *Id.* Though she had prepared a will naming her foster daughter as co-executrix and making specific bequests to her, it could not be probated due to defacement of portions of the will by an unknown person. *Id.* Mrs. Newton was thus deemed to have died intestate, and her foster daughter filed a declaratory judgment action to determine whether she was a legal heir to her foster mother's estate. *Id.*

¶ 14 Our Supreme Court held that, based on the above facts, the plaintiff had been equitably adopted by the Newtons. *Id.* at 118, 489 S.E.2d at 606. Absent any precedent and tasked with establishing when and how the newly recognized doctrine could be applied, the Court stated that the remedy of equitable adoption is available "to protect the interest of a person who was supposed to have been adopted *as a child* but whose adoptive parents failed to undertake the legal steps necessary to formally accomplish the adoption." *Id.* (citation and quotation marks omitted) (emphasis added). It further explained that the doctrine "does not confer the incidents of formal statutory adoption; it merely confers rights of inheritance upon the foster child in the event of intestacy of the foster parents." *Id.* (footnote omitted).

¶ 15 The Supreme Court in *Lankford* noted that the new doctrine it recognized "is limited to facts comparable to those presented here. . . . A majority of the jurisdictions recognizing the doctrine have successfully limited its application to claims made by an equitably adopted child against the estate of the foster parent. By its own terms, equitable adoption applies only in limited circumstances." *Id.* at 119, 489 S.E.2d at 606 (citations omitted). The Court followed this statement by setting forth the doctrine's necessary elements:

> (1) an express or implied agreement to adopt the child,
>
> (2) reliance on that agreement,
>
> (3) performance by the natural parents of the child in giving up custody,
>
> (4) performance by the child in living in the home of the foster parents and acting as their child,
>
> (5) partial performance by the foster parents in taking the child into their home and treating the child as their own, and

(6) the intestacy of the foster parents.

Id. at 119, 489 S.E.2d at 606-07 (citing 2 Am.Jur.2d *Adoption* § 54 (1994)). The Supreme Court crafted these elements with an eye towards constraint, writing that:

> [t]hese elements . . . limit the circumstances under which the doctrine may be applied. Specifically, the doctrine acts only to recognize the inheritance rights of a child whose parents died intestate and failed to perform the formalities of a legal adoption, yet treated the child as their own for all intents and purposes. The doctrine is invoked for the sole benefit of the foster child . . . .

Id. at 119, 489 S.E.2d at 607-08 (citations omitted). It then applied the doctrine to the facts before it, concluding that they "fit squarely within the parameters of the doctrine of equitable adoption and are indicative of the dilemma the doctrine is intended to remedy." *Id.* at 120, 489 S.E.2d at 607.

3. This case is different from Lankford

¶ 16 The facts of this case differ materially from those present in *Lankford* and preclude application of the equitable adoption doctrine as delineated by our Supreme Court. We decline Petitioner's invitation to expand *Lankford*'s holding.

¶ 17 This case does not involve a person who was: (1) taken in as a minor by foster parents; (2) raised by those foster parents from childhood as if he was their legally adopted son; and (3) effectively disinherited by his foster parents' failure to comply with adoption's legal formalities. Instead, it revolves around two biologically—but not legally—related adults who formed a personal relationship after both were over the age of majority. Timothy's age at the time he reconnected with Decedent alone precludes Petitioner from invoking the doctrine of equitable adoption, which, per our Supreme Court, "is a remedy to protect the interest of a person who was supposed to have been adopted *as a child*[.]" *Id.* at 118, 489 S.E.2d at 606 (citation and quotation marks omitted) (emphasis added). The Court later stated that "the doctrine is limited to facts comparable to those presented [in *Lankford*]," *id.* at 119, 489 S.E.2d at 606, and, in reciting the operative facts that established the necessary elements of equitable adoption, specifically relied on the fact that "the Newtons treated plaintiff as their child by taking her into their home, giving her their last name, and *raising* her as their child[.]" *Id.* at 120,

489 S.E.2d at 607 (emphasis added). We hold that the equitable adoption doctrine recognized in *Lankford* is unavailable to vindicate Petitioner's interests because this case involves a purported adoption of an adult.[1]

¶ 18 Though Timothy's age alone precludes application of the equitable adoption doctrine, other facts distinguish this case from *Lankford*. For example, Petitioner is not the adoptee in the equitable adoption she propounds. Our Supreme Court in *Lankford* observed that "[a] majority of the jurisdictions recognizing the doctrine have successfully limited its application to claims *made by an equitably adopted child* against the estate of the foster parent . . . for the *sole benefit of the foster child*[.]" *Id.* at 119, 489 S.E.2d at 606 (citation omitted) (emphasis added).[2]

¶ 19 We acknowledge Petitioner's argument that the policy concerns undergirding our intestacy statutes support extending equitable adoption beyond *Lankford*'s facts and its limited expression of the doctrine. However, "[w]e are an error-correcting body, not a policy-making or law-making one." *Connette v. Charlotte-Mecklenburg Hospital Authority*, 272 N.C. App. 1, 6, 845 S.E.2d 168, 172 (2020) (citation omitted). Furthermore, *Lankford* is a comprehensive opinion from our Supreme Court that we cannot modify, as "[o]nly the Supreme Court can do that." *Id.* So, while "it is the unique role of courts to fashion equitable remedies to protect and promote the principles of equity," *Lankford*, 347

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1. This prohibition against employing the doctrine to recognize an equitable adoption of an adult also "appears to be the substantially unanimous view of American courts." *Miller v. Paczier*, 591 So.2d 321, 322 (Fla. Dist. Ct. App. 1991); *see also Dampier v. Williams*, 493 S.W.3d 118, 124 (Tx. Ct. App. 2016) (noting "the refusal to allow an adult to be adopted by estoppel is in line with, what appears to be, the majority rule" and, "[a]s an intermediate appellate court, . . . declin[ing] . . . to broaden the doctrine to apply to adoption of adults" (citations omitted)). While Petitioner cites two decisions from other jurisdictions that touch on the issue of equitable adoption between adults, she acknowledges that they support only "a potential *extension* of the theory . . . to . . . the context of an adult adoption." (emphasis added). *See Matter of Mazzeo*, 95 A.D.2d 91, 93-94 (N.Y. S. Ct. 1983) (holding doctrine could be applied to an adult adoption to establish the adoptee as a creditor of an estate but not as an heir); *Herrera v. Clau*, 772 P.2d 682, 683 (Col. App. 1989) (resolving whether equitable adoption of two adult stepchildren gave them standing to bring a wrongful death action).

2. Petitioner points out that West Virginia allows the heir of an equitably adopted person to avail themselves of the doctrine to take from the adopter's estate by intestacy. *First Nat. Bank In Fairmont v. Phillips*, 344 S.E.2d 201 (W.Va. 1985). However, West Virginia, unlike North Carolina, does not follow the majority of states in its expression of the doctrine because it does not require a purported adoptee to show an implied or express adoption contract. *Id.* at 203. Also, West Virginia requires an adoptee "to prove by clear, cogent and convincing evidence that he has stood *from an age of tender years* in a position [e]xactly equivalent to a formally adopted child." *Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369, 373 (W.Va. 1978) (emphasis added).

N.C. at 120, 489 S.E.2d at 607, this Court, as an intermediate appellate court, cannot extend equitable adoption beyond the "limited circumstances" established by our Supreme Court. *Id.* at 119, 489 S.E.2d at 606.

III. CONCLUSION

¶ 20 For the foregoing reasons, we affirm the trial court's order granting judgment on the pleadings for Respondents.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
ELEANOR BLACK, DEFENDANT

No. COA19-1125

Filed 2 February 2021

1. Sentencing—prior record level—out-of-state convictions—comparison with N.C. offenses—required—cannot be waived

The trial court erred by counting defendant's ten out-of-state convictions toward her prior record points for sentencing without first comparing each out-of-state offense to the appropriate similar North Carolina offense. Defendant could not waive the issue by stipulating to the prior convictions and classifications on the sentencing worksheet furnished by the State. Because a misclassification of even one of the ten out-of-state convictions would alter defendant's prior record level, the matter was remanded for resentencing.

2. Attorney Fees—criminal case—civil judgment—notice and opportunity to be heard

A civil judgment for attorney fees entered after defendant pled guilty to attempted identity theft and possession of a stolen motor vehicle was vacated because the trial court did not offer defendant an opportunity to be heard regarding the attorney's number of hours worked or requested fees.

Appeal by Defendant from judgment entered 17 May 2019 by Judge Peter B. Knight in Buncombe County Superior Court. Heard in the Court of Appeals 12 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica V. Sutton, for the State.

Jarvis John Edgerton, IV, for Defendant-Appellant.

INMAN, Judge.

¶ 1 When enhancing a criminal defendant's sentence based on a prior criminal offense committed in another state, the trial court must consider the legal elements of the out-of-state offense to determine that it is substantially similar to a North Carolina offense. This is a legal issue that cannot be waived by a criminal defendant's stipulation.

¶ 2 Eleanor Black ("Defendant") contends that the trial court erred in calculating her prior record level for sentencing by finding that several out-of-state misdemeanor convictions were substantially similar to Class 1 or Class A1 misdemeanor offenses in North Carolina and by imposing a civil judgment for attorney's fees before offering Defendant the opportunity to be heard. After careful review, we hold the trial court erred in finding the out-of-state offenses were substantially similar to North Carolina misdemeanors without comparing the elements of each statute. We also hold that the trial court further erred in assigning attorney's fees without providing Defendant notice and the opportunity to be heard.

I. FACTUAL & PROCEDURAL HISTORY

¶ 3 Defendant pled guilty to attempted identity theft and possession of a stolen motor vehicle on 17 May 2019. Her plea agreement provided that the two Class H felony charges "will be consolidated into [one] judgment for supervised probation" but left open for the trial court to decide the remaining aspects of the sentence.

¶ 4 The sentencing worksheet prepared by the State indicated that Defendant had fourteen prior record points, based on ten out-of-state convictions, each assigned a corresponding number of points and calculated to fall within the range of a prior record level V for sentencing purposes. Four of the convictions were classified as Class I felonies, accounting for two points each and a total of eight of Defendant's prior record points. The remaining six out-of-state convictions were all classified as Class 1 misdemeanors; they were assigned one point each and accounted for the remaining six prior record points. Defendant and her counsel stipulated to these prior convictions and classifications by signing the sentencing worksheet under "Section III: Stipulation."

¶ 5 At the plea hearing, the State furnished the trial court with copies of each out-of-state misdemeanor statute as evidence that the offenses were "substantially similar" to a North Carolina offense to support their classification as Class 1 misdemeanors. The trial court accepted the copies of the statutes and, without further review, asked Defendant's counsel "whether you object my finding they're similar status in North Carolina." Defense counsel did not respond before the prosecutor addressed the return of Defendant's personal items. After that interruption, Defendant and her counsel ultimately agreed to "14 prior record points and a prior record level, therefore, of five for felony sentencing purposes."

¶ 6 Before sentencing, Defendant's counsel stated to the trial court, "I was appointed in this matter with 16 and a half hours at $990." The trial court did not ask Defendant about the attorney's hours or fees.

¶ 7 The trial court found a factual basis for the felony charges, accepted the signed plea agreement, and consolidated Defendant's felony convictions. The trial court found no aggravating or mitigating factors and sentenced Defendant within the presumptive range for a Class H felony and a prior record level V to a sentence of 15 to 27 months, suspended for 36 months of supervised probation. Defendant was also ordered to pay court costs and to reimburse the State $990 for her legal fees.

¶ 8 Defendant now appeals pursuant to N.C. Gen. Stat. § 15A-1444(a2)(1) (2019), which allows a defendant to appeal a guilty plea as a matter of right when his or her prior record level has been miscalculated.

II. ANALYSIS

A. Prior Record Level

¶ 9 **[1]** Defendant first contends that the trial court erred by improperly counting out-of-state misdemeanor convictions toward her prior sentencing points without considering whether each conviction was substantially similar to any North Carolina Class A1 or Class 1 misdemeanor.

¶ 10 "The trial court's determination of a defendant's prior record level is a conclusion of law, which this Court reviews *de novo* on appeal." *State v. Threadgill*, 227 N.C. App. 175, 178, 741 S.E.2d 677, 679-80 (2013) (citations omitted). Even so, "[w]hether a particular out-of-state comparison is substantially similar to a particular North Carolina offense is subject to harmless error review." *State v. Weldon*, 258 N.C. App. 150, 160, 811 S.E.2d 683, 691 (2018) (citing *State v. Riley*, 253 N.C. App. 819, 824, 802 S.E.2d 494, 498 (2017)). A miscalculation of the points is harmless where "deducting the improperly assessed points would not affect the

defendant['s] [prior] record levels." *State v. Lindsay*, 185 N.C. App. 314, 316, 647 S.E.2d 473, 474 (2007) (citing *State v. Bethea*, 173 N.C. App. 43, 61, 617 S.E.2d 687, 698 (2005); *State v. Smith*, 139 N.C. App. 209, 219-20, 533 S.E.2d 518, 524 (2000)).

¶ 11 A prior record level is determined by calculating the sum of the points assigned to each of the offender's prior convictions. N.C. Gen. Stat. § 15A-1340.14(a). When a prior misdemeanor conviction is for an offense not substantially similar to an offense defined by North Carolina law, the conviction is treated as a Class 3 misdemeanor and is not counted as a prior record point for sentencing purposes. *Id.* § 15A-1340.14(b)(5), (e). However,

> [i]f the *State proves by preponderance of the evidence* that an offense classified as a misdemeanor in the other jurisdiction is *substantially similar* to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

Id. § 15A-1340.14(e) (emphasis added). A Class A1 or Class 1 misdemeanor receives one prior record level point in sentencing calculation. *Id.* § 15A-1340.14(b)(5).

¶ 12 Certainly, a defendant may stipulate to a prior conviction, "admitting that certain past conduct constituted a stated criminal offense." *State v. Arrington*, 371 N.C. 518, 522, 819 S.E.2d 329, 332 (2018); N.C. Gen. Stat. § 15A-1340.14(f)(1). For an out-of-state conviction, a trial court "may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction" for sentencing purposes. *State v. Bohler*, 198 N.C. App. 631, 638, 681 S.E.2d 801, 806 (2009). But the trial court "may not accept a stipulation to the effect that a particular out-of-state conviction is 'substantially similar' to a particular North Carolina felony or misdemeanor." *Id.* at 637-38, 681 S.E.2d at 806; *see also State v. Glover*, 267 N.C. App. 315, 326, 833 S.E.2d 203, 211 (2019), *reversed on other grounds by State v. Glover*, __ N.C. __, __S.E.2d __, 2020 WL 7416450 (N.C. Dec. 18, 2020) (declining to interpret our Supreme Court's recent holding in *Arrington* "to overrule our longstanding precedent that the parties may not stipulate to the substantial similarity of an out-of-state conviction, nor its resulting North Carolina classification").

¶ 13 Instead, "whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010) (citing *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006)). Printed copies of the out-of-state statutes "*and comparison of their provisions to the criminal laws of North Carolina* [are] sufficient to prove by a preponderance of the evidence that the crimes of which defendant was convicted in those states were substantially similar to classified crimes in North Carolina." *State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (1998) (emphasis added); N.C. Gen. Stat. § 8-3(a).

¶ 14 In this case, the State presented the trial court with copies of each of the out-of-state criminal statutes underlying Defendant's prior convictions, but the prosecutor made no attempt to compare their provisions to the purportedly similar classified crimes in North Carolina. Further, there is no indication in the record that the trial court made any such comparison. *See Hanton*, 175 N.C. App. at 255, 623 S.E.2d at 604.

¶ 15 If even one of the out-of-state misdemeanors Defendant had committed were *not* substantially similar to a North Carolina offense, the miscalculation would alter Defendant's prior record level, constituting legal error. *See Lindsay*, 185 N.C. App. at 316, 647 S.E.2d at 474 ("Even if the trial courts did miscalculate the points involved, this constituted harmless error, because deducting the improperly assessed points would not affect the defendants' record levels.") (citations omitted). For example, as Defendant asserts, the Florida misdemeanor offense of petit theft is different on its face than the North Carolina misdemeanor larceny statute. Florida's petit theft statute, unlike North Carolina's misdemeanor larceny statute, does not require evidence of intent to permanently deprive the possessor of the stolen property's use—a temporary deprivation will suffice. *Compare* Fla. Stat. § 812.014(1), *with* N.C. Gen. Stat. § 14-72; *see also State v. Davis*, 226 N.C. App. 96, 100, 738 S.E.2d 417, 420 (2013) (holding that Georgia's theft by taking statute was not substantially similar to the North Carolina misdemeanor larceny statute because the Georgia statute provided that deprivation could be permanent or temporary). In other words, a person could be guilty of petit theft in Florida but not guilty of larceny in North Carolina if that person lacks the requisite intent to permanently deprive another of property as required by our state's criminal provisions. If the two offenses are not substantially similar, Defendant's Florida petit theft conviction would default to a Class 3 misdemeanor and it would not count toward Defendant's prior record points. As a result, Defendant would

lose one prior record point—from fourteen to thirteen total points—moving her into a prior record level IV where the highest end of the presumptive range is between 11 and 23 months—below the 15 to 27-month term imposed.

¶ 16 If the trial court determined that none of the five challenged out-of-state misdemeanors is substantially similar to a North Carolina offense, Defendant's point calculation would fall within a prior record level III, reducing Defendant's permissible sentence even further to 10 to 21 months.

¶ 17 Because the record does not indicate that the trial court compared the elements of each out-of-state statute to a purportedly similar North Carolina offense and any error in miscalculation of prior record points was not harmless, we remand the case for resentencing.

B. Attorney's Fees

¶ 18 **[2]** Defendant next argues, and the State concedes, that the trial court erred in entering a civil judgment for attorney's fees because the trial court did not properly allow Defendant to be heard on the issue.

¶ 19 Before entering civil judgments against indigent defendants for fees imposed by their court-appointed attorneys, *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005), "[a] convicted defendant is entitled to notice and an opportunity to be heard." *State v. Webb*, 358 N.C. 92, 101, 591 S.E.2d 505, 513 (2004) (citation omitted). Specifically, "trial courts should 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).

¶ 20 Here, prior to sentencing, Defendant's counsel informed the court that he was appointed, claimed he had completed 16 and a half hours of work on the matter at $990, and presented the trial court with a fee application.

¶ 21 Because the trial court did not offer Defendant an opportunity to be heard regarding the total number of hours worked or the total amount of fees requested by her attorney, we vacate the imposed civil judgment as to the attorney's fees without prejudice to the State's right to apply for a judgment after due notice to Defendant and a hearing. *Jacobs*, 172 N.C. App. at 236-37, 616 S.E.2d at 317; *see also Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

III. CONCLUSION

¶ 22 For the above-mentioned reasons, we hold the trial court erred in concluding the out-of-state offenses were substantially similar to certain North Carolina crimes for sentencing purposes absent comparison of the elements of each statute, and it erred by imposing attorney's fees without providing Defendant the opportunity to be heard. Accordingly, we remand the case for resentencing and vacate the imposed civil judgment of attorney's fees.

VACATED AND REMANDED.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
MARQUES D. GRAYS

No. COA19-1140

Filed 2 February 2021

Constitutional Law—double jeopardy—State's motion for mistrial—newly discovered evidence—no manifest necessity

Defendant's right to be free from double jeopardy was violated where, after the jury had been impaneled in his trial for a jailhouse murder, the trial court declared a mistrial because the State had just received new allegedly corroborative evidence from the prison—bloody clothing belonging to defendant—and defendant was subsequently tried for the same charges in a new trial. There was no manifest necessity justifying a mistrial in the first trial because the State's "newly discovered" evidence was in the State's own possession the whole time and defendant objected to the mistrial.

Appeal by Defendant from an Order entered 21 May 2019 and Judgment entered 30 May 2019 by Judge Marvin K. Blount, III, in Bertie County Superior Court. Heard in the Court of Appeals 17 November 2020.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Marques D. Grays (Defendant) appeals from a Judgment entered upon a jury verdict convicting him of Felony Possession of a Weapon by a Prisoner in Bertie County file number 16 CRS 120. In addition, Defendant appeals from an Order denying his Motion to Dismiss a charge of First-Degree Murder in 16 CRS 50352 on which the jury deadlocked, resulting in the trial court ordering a mistrial. On 19 February 2020, this Court granted Defendant's Petition for Writ of Certiorari to review the Order entered in 16 CRS 50352. This Court also consolidated the two appeals and issued a writ of supersedeas to stay any further trial proceedings pending appeal. Both appeals involve the same question of whether each of Defendant's trials violated his rights under the State and Federal Constitutions to be free from double jeopardy. The Record before us reflects the following:

¶ 2 On 1 August 2016, a Bertie County Grand Jury indicted Defendant on charges of First-Degree Murder (16 CRS 50352) and Possession of a Weapon by a Prisoner (16 CRS 120). Defendant's case first came for trial on 6 August 2018 in Bertie County Superior Court, Judge Cy A. Grant presiding. A jury was selected and impaneled on that day. During opening statements, the State explained the evidence would show on 10 June 2016, Defendant—a prisoner at the Bertie Correctional Institution—approached Joleski Floyd (Floyd) who was "hanging out with friends" watching television in a prison common area. Then, according to the State, the two men "exchanged words" and fought in a "back cell." Defendant walked out of the cell "bloody and visibly injured" a few moments later. According to the State, Defendant went to his cell and returned to the common area two hours later. Defendant then struck Floyd "twice in the head with an ice pick shaped weapon." Correctional officers apprehended Defendant. Floyd later died of his wounds.

¶ 3 The State began its case-in-chief by calling Demetrius Clark (Clark), the prison's assistant superintendent. After Clark testified, court was adjourned for the day. The next morning, the State announced it had received "evidence that had not been turned over from the prison." The State moved for a mistrial asserting this new evidence was "vital information that need[ed] to be tested." The State continued it "had no indication . . . about this evidence" and only learned of its existence when

Clark mentioned it while discussing his testimony with the prosecutor after court had adjourned the day prior. When Judge Grant asked what the evidence was, the prosecutor replied: "It is the bloody clothes that came from the defendant." Judge Grant then asked: "[W]hen was this discovered?" The prosecutor responded: "Yeah. Well, Your Honor, I -- what I can say for certain is that it was collected at the prison, it was kept at the prison."

¶ 4 The State described how law enforcement went to the prison to collect "whatever evidence" the prison had from the incident. According to the State, prison officials gave law enforcement "two shanks" but "never notified" law enforcement about the clothing. Judge Grant asked: "Why wasn't this stuff turned over? It just seems so obvious." Judge Grant continued: "I'm going to tell you Mr. Superintendent there, it's ridiculous. You know, it borders on incompetence . . . that this wasn't turned over to law enforcement." The prosecutor stated: "I want to put on the evidence to protect the integrity of the case as well as the State[.]"

¶ 5 Defense counsel objected "to a mistrial being granted in this case." Defense counsel further questioned whether the evidence was what the State said it was and expressed concern the evidence was not "maintained or kept in a manner that would be appropriate for purposes of trial or for evidence."

¶ 6 The prosecutor responded stating: "Your Honor, and frankly, that is part of the reason that we need a mistrial. We have no -- I don't know if this evidence is inculpatory, exculpatory, or irrelevant." Judge Grant expressed concern in granting a mistrial "once the jury has been impaneled" and when "there is newly discovered evidence by the State and the State asked for the mistrial[.]" Judge Grant added, "I mean, I would have no problems if [Defense Counsel] asked for a mistrial based upon this. But you have the State asking for a mistrial because they discovered new evidence that is helpful to their case." Judge Grant recessed court asking the parties to research "the law with regard to granting a mistrial for newly discovered evidence based on a motion for a mistrial by the State[.]"

¶ 7 When the trial resumed, the State again moved for a mistrial "under [N.C. Gen. Stat. §] 15A-1063" because it was "impossible for the State -- for the trial to proceed in conformity of the law" and there was "no reasonable probability of the jury's agreement upon a verdict." Defendant renewed his objection to a mistrial.

¶ 8 Judge Grant asked the State why it would be unfair to proceed with the trial. The State responded Defendant would have an ineffective assistance of counsel (IAC) claim on appeal if Defendant was found guilty

without testing this evidence. Defense counsel addressed the potential IAC claim stating: "no matter what . . . comes back" from testing, the results would be "beneficial to the State." Defense counsel continued "[the prosecutor has] not indicated that if it does turn out it's not Joleski Floyd's blood, then she will get rid of the case." Judge Grant agreed saying, "I don't put much stock in [the State's] argument on behalf of the defendant . . . common sense dictates" the State wanted the clothes tested because it would help the State's case against Defendant. Judge Grant ordered a hearing including testimony from Clark and two law enforcement officers regarding the discovery of the clothes at the prison and why the evidence was not disclosed before trial.

¶ 9 After the hearing, Judge Grant again asked the State why a mistrial was necessary. The State argued the evidence was "very significant" because, if DNA testing confirmed the alleged blood on the clothing was Defendant's, the evidence would corroborate witnesses who would testify they saw Defendant come "out of his room bleeding[.]" Judge Grant clarified this evidence, if admitted, would only corroborate witness testimony as to what witnesses saw during the first alleged fight between Defendant and Floyd. Defense counsel argued the discovery of the evidence did not justify a mistrial and that the putative evidence be excluded and the trial proceed.

¶ 10 As to the evidence's potentially exculpatory nature, Judge Grant again stated: "I have a really hard time thinking that you're making this argument thinking about what might be exculpatory for the defendant. . . .[Defendant's] own lawyers are not making that argument." Moreover, Judge Grant noted the evidence "wouldn't be exculpatory because you wouldn't even know when the blood got up there. . . . Even if it comes in, there's no indication when the blood got on the defendant's clothes."

¶ 11 After considering the testimony and arguments—and expressing disbelief at the prison's inability to notify law enforcement of the clothing and law enforcement's inability to ask for any clothing based on their own investigatory experience—Judge Grant concluded: "All right. . . . I'll grant the mistrial. I'll have to find some facts to support the conclusion." In his written Order granting a mistrial, Judge Grant made the following relevant Findings of Fact:

> 6. Mr. Clark testified at the hearing on August 7, 2018 that on Monday evening after the court recessed that he informed the prosecutor and the lead SBI agent Mr. Steven Stile that there were articles of clothing belonging to the defendant and the victim Joleski

Floyd at the prison which had not been collected by law enforcement officers.

7. Mr. Clark was directed by SBI Agent Steven Stile to go to the prison and locate the clothing.

8. Mr. Clark went to the prison and located articles of clothing belonging to the defendant and the victim.

9. The articles of clothing belonging to the defendant were found in a contraband locker inside a paper bag.

10. The paper bag had the defendant's name hand-written on the bag identifying the clothing as belonging to the defendant.

11. At the hearing[,] the bag of clothing purportedly belonging to the defendant was introduced as Defendant's Exhibit Number 2.

12. A pair of pants and a T-shirt[,] among other items of clothing[,] were removed from Defendant's Exhibit Number 2, which appeared to have bloodstains.

13. Mr. Clark testified he believes that the clothing in Defendant's Exhibit Number 2 were clothes found in the defendant's prison cell after an alleged second altercation between the defendant and the victim.

14. Mr. Clark testified that it is his belief that defendant was not permitted to return to his prison cell following the second altercation.

15. Mr. Clark testified that in his opinion the clothing found in the defendant's prison cell was not clothing worn by the defendant at the time of the alleged second altercation with the victim.

16. The prosecutor argues to the Court that the State would call as a witness, an inmate, who would testify that there was an altercation between the defendant and the victim, which occurred approximately two hours before the altercation which resulted in the victim's death.

17. And that the prison inmate would testify that he saw the defendant immediately following the first alleged altercation bleeding from his head area and

> he saw the defendant wipe blood from his wound into his clothing.
>
> 18. The prosecutor further argues that the stain seen on the defendant's clothing on Defendant's Exhibit Number 2 should be sent to the state's crime lab for testing to determine, one, if the stains are, in fact, blood, and, two, whose blood is it.
>
> 19. The prosecution further argues that if it is determined to be the defendant's blood[,] that fact would corroborate the prison inmate's testimony that the defendant wiped blood from his wound onto his clothing following the first altercation.
>
> 20. The prosecutor also argues that if the stains on the clothing are determined to be blood belonging to someone other than the defendant or the victim[,] it could be exculpatory to the defense.

Based on these Findings, Judge Grant concluded "as a Matter of Law that it is in the public's interest in a fair trial to enter an order of mistrial and have this trial continued to allow time for the State Bureau of Investigation to test" the clothing.

¶ 12 Defendant's case came on for a second trial on 20 May 2019, Judge Marvin K. Blount, III, presiding. Before jury selection, Judge Blount considered Defendant's pretrial Motion in Limine seeking to exclude the evidence on which the previous trial court based its Order for mistrial. The State consented to Defendant's Motion in Limine because the State was "not intending on introducing that evidence." Judge Blount also considered Defendant's pretrial Motion to Dismiss both charges on double jeopardy grounds. On 21 May 2019, after hearing arguments from the parties, Judge Blount orally denied Defendant's Motion to Dismiss and this order was entered. *See State v. Miller*, 368 N.C. 729, 738, 783 S.E.2d 194, 200 (2016) ("a trial court has entered a judgment or order in a criminal case in the event that it announces its ruling in open court and the courtroom clerk makes a notation of its ruling in the minutes being kept for that session."). Defendant objected to Judge Blount's ruling and gave oral Notice of Appeal in open court.

¶ 13 The second trial continued. At the close of the State's evidence and, again, at the close of all the evidence, Defendant renewed his Motion to Dismiss—Judge Blount denied each Motion. The second jury convicted Defendant of Possession of a Weapon by a Prisoner but deadlocked

on the First-Degree Murder charge. As a result of the hung jury, Judge Blount declared another mistrial on the First-Degree Murder charge and retained the case for a third trial. After Judge Blount entered Judgment on the charge of Possession of a Weapon by a Prisoner, Defendant gave oral Notice of Appeal.

¶ 14 As Defendant's First-Degree Murder charge remained pending for a third trial—rendering his appeal of Judge Blount's denial of his Motion to Dismiss interlocutory—Defendant filed a Petition for a Writ of Certiorari to review the denial and a Petition for a Writ of Supersedeas and Motion for a Stay of Proceedings in the third First-Degree Murder trial. In a 19 February 2019 Order, we granted Defendant's Petitions and Motions, and consolidated that appeal with Defendant's direct appeal of the Judgment upon his conviction of Possession of a Weapon by a Prisoner.

Issue

¶ 15 The dispositive issue in both appeals is whether the trial court erred in denying Defendant's Motion to Dismiss on the grounds double jeopardy barred Defendant's second trial after the trial court granted a mistrial in the first trial on the basis of the allegedly corroborative evidence belatedly found by the State.

Standard of Review

¶ 16 We review double jeopardy issues de novo. *State v. Sparks*, 362 N.C. 181, 185-86, 657 S.E.2d 655, 658 (2008); *see State v. Newman*, 186 N.C. App. 382, 386, 651 S.E.2d 584, 587 (2007) ("The standard of review for [double jeopardy issues] is de novo, as the trial court made a legal conclusion regarding the defendant's exposure to double jeopardy." (citation 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 quotation marks omitted).

Analysis

¶ 17 "It is a fundamental principle of the common law, guaranteed by our Federal and State Constitutions, that no person may be twice put in jeopardy of life or limb for the same offense." *State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977) (citations omitted); *see* U.S. Const. amend. V; N.C. Const. art. I, § 19. Under the Double Jeopardy Clause of the Fifth Amendment, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may [not] be tried . . . a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 154 L. Ed. 2d 588, 595

(2003) (citation omitted). "In a criminal prosecution, jeopardy attaches when a jury is impaneled to try a defendant on a valid bill of indictment." *State v. Schalow*, 251 N.C. App. 334, 343, 795 S.E.2d 567, 574 (citations omitted).

¶ 18 Ordinarily, "an order of mistrial in a criminal case will not support a plea of former jeopardy." *State v. Battle*, 279 N.C. 484, 486, 183 S.E.2d 641, 643 (1971) (citation omitted). However, "where the order of mistrial has been improperly entered over a defendant's objection, defendant's motion for dismissal at a subsequent trial on the same charges *must* be granted." *State v. Odom*, 316 N.C. 306, 310, 341 S.E.2d 332, 334 (emphasis added) (citations omitted).

¶ 19 "There must be a showing of 'manifest necessity' for an order of mistrial over defendant's objection to be proper." *Id.* (citation omitted); *see State v. Chriscoe*, 87 N.C. App. 404, 407-08, 360 S.E.2d 812, 814 (1987) (analyzing a trial court's declaration of mistrial under N.C. Gen. Stat. § 15A-1063(1)—which allows a trial court to declare a mistrial "if it is impossible for the trial to proceed in conformity with the law"—according to our "manifest necessity" principles). "Although this requirement does not describe a standard that can be applied mechanically, it does establish that the prosecutor's burden is a heavy one." *Chriscoe*, 87 N.C. App. at 407, 360 S.E.2d at 814 (alteration, citation, and quotation marks omitted); *see State v. Cooley*, 47 N.C. App. 376, 384, 268 S.E.2d 87, 92 (1980) ("[W]hen the prosecution seeks a mistrial, it has the burden of showing a high degree of necessity[.]" (citation omitted)).

¶ 20 In turn, "[w]hether a grant of a mistrial is manifestly necessary is a question that turns on the facts presented to the trial court." *Schalow*, 251 N.C. App. at 347, 795 S.E.2d at 576 (citation and quotations omitted). Moreover:

> Since a declaration of a mistrial inevitably affects a constitutionally protected interest, the trial court must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.

Id. (citation and quotation marks omitted). "As such, the trial court's discretion in determining whether manifest necessity exists is limited." *Id.* at 348, 795 S.E.2d at 576 (citations omitted).

¶ 21 "Our courts have set forth two types of manifest necessity: physical necessity and the necessity of doing justice." *Id.* (citation omitted). "For example, physical necessity occurs in situations where a juror suddenly takes ill in such a manner that wholly disqualifies him from proceeding with the trial." *Id.* (citation omitted). "Whereas the necessity of doing justice arises from the duty of the [trial] court to guard the administration of justice from fraudulent practices and includes the occurrence of some incident of a nature that would render *impossible* a fair and impartial trial under the law." *Id.* at 348, 795 S.E.2d at 576-77 (emphasis added) (citation and quotation marks omitted); *see also Chriscoe*, 87 N.C. App. at 408, 360 S.E.2d at 814 (listing examples of manifest necessity under N.C. Gen. Stat. § 15A-1063(1), such as "some incapacity of either a member of the court, a juror or an attorney, or evidence of jury tampering" (citations omitted)).

¶ 22 Here, the first mistrial was not based on physical necessity; nor is there any allegation of fraudulent practices or misconduct by any party. Rather, the matter centers on whether manifest necessity justified a mistrial in Defendant's first trial over Defendant's objection where, during trial, the State belatedly uncovered evidence it claims was either corroborative of its case or potentially exculpatory to Defendant. The State contends manifest necessity existed to support the grant of mistrial based on the trial court's conclusion "it is in the public's interest in a fair trial to enter an order of mistrial . . . to allow time for the State Bureau of Investigation to test the items of clothing which were discovered in the prison's contraband locker." The State further argues the trial court's decision to grant the mistrial must be afforded great deference because Judge Grant carefully considered his decision. Indeed, Judge Grant's close and careful deliberation of this novel matter is abundantly clear on the Record.

¶ 23 However, the Supreme Court of the United States has indicated the amount of deference due to a trial court's mistrial decision operates on a spectrum. *See Arizona v. Washington*, 434 U.S. 497, 510, 54 L. Ed. 2d 717, 731 (1978). "At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence." *Id.* at 507, 54 L. Ed. 2d at 729. "At the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial." *Id.* at 509, 54 L. Ed. 2d at 730. At the latter extreme, "there are especially compelling reasons for allowing the trial judge to exercise broad discretion" in making a determination of manifest necessity and, thus, "[t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is

therefore accorded great deference by a reviewing court." *Id.* at 509-10, 54 L. Ed. 2d at 730-31. However, at the former extreme, when "the basis for the mistrial is the unavailability of critical prosecution evidence," "the strictest scrutiny" applies to the question of manifest necessity. *Id.* at 508, 54 L. Ed. 2d at 730. Here, Defendant argues the State sought a mistrial for purposes of testing the newly discovered evidence in hopes it would corroborate witness testimony thereby buttressing its case against Defendant. However, two of Judge Grant's findings of fact that are unchallenged on appeal by Defendant state:

> 19. The prosecution further argues that if it is determined to be the defendant's blood[,] that fact would corroborate the prison inmate's testimony that the defendant wiped blood from his wound onto his clothing following the first altercation.
>
> 20. The prosecutor also argues that if the stains on the clothing are determined to be blood belonging to someone other than the defendant or the victim[,] it could be exculpatory to the defense.

¶ 24 "[A]s a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Id.* at 505, 54 L. Ed. 2d at 727-28. "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches." *Downum v. United States*, 372 U.S. 734, 736, 10 L. Ed. 2d 100, 102-03 (1963). Indeed, in discussing the application of the "manifest necessity" standard, the Supreme Court of North Carolina has recognized the State controls prosecutions:

> The State has dominant control of criminal cases. It has at its command law enforcement officers to fully investigate alleged offenses and report the results of the investigation. From the information obtained it decides what, if any, the criminal charge shall be. It determines when it is ready for trial and fixes the time for the trial to begin. It has full opportunity to confer with its witnesses before the trial commences.

State v. Birckhead, 256 N.C. 494, 507, 124 S.E.2d 838, 848 (1962). Thus, the Court asked and answered:

> If [the State's] preparation has been faulty, is it thereby entitled to more than one full opportunity

> to make preparation and gain a conviction, when there has been no fraud or interference on the part of defendant or from any other source? On the other hand, if the prosecuting witness is uncertain of the details of the occurrence until testimony is being given on the trial in the court of competent jurisdiction, does justice require such stringent action based on the belated revelation? We think not.

Id.

¶ 25 More recently, in *State v. Resendiz-Merlos*, our Court held there was no manifest necessity to grant a mistrial where the State elected to empanel the jury and proceed with trial without ascertaining whether its witnesses were present. 268 N.C. App. 109, 119, 834 S.E.2d 442, 449 (2019). Relying, in part, on *Downum*, this Court acknowledged in such a case, the State "takes a chance" in proceeding to trial. *Id.* We noted, "[u]nder these circumstances, [according to the *Downum* Court] . . . the State has 'entered upon the trial of the case without sufficient evidence to convict[,]' thereby assuming the risk of jeopardy attaching and barring a later prosecution." *Id.*

¶ 26 In this case, the newly found evidence was in the possession, custody, and sole control of the State, but the State had simply failed to uncover it. Neither party offers any suggestion of fraud or misconduct, nor do they offer a reasoned justification for its belated discovery other than faulty preparation. Indeed, Judge Grant was incredulous at the fact prison officials, law enforcement officials, and the prosecutor never specifically asked for nor delivered clothes from the incident when collecting the evidence. Following the reasoning of the decisions from the Supreme Court of the United States and the Supreme Court of North Carolina, and this Court, when the State undertook to try Defendant without ascertaining whether it had found or tested all the evidence in its possession, the State took a chance. Therefore, "[u]nder these circumstances . . . the State has entered upon the trial of the case . . . assuming the risk of jeopardy attaching and barring a later prosecution." *Resendiz-Merlos*, 268 N.C. App. at 119, 834 S.E.2d at 449. Thus, the first mistrial was not justified by manifest necessity.

¶ 27 The State, however, argues and cites *Baum v. Rushton*, 572 F.3d 198 (4th Cir. 2009), as an instance where evidence discovered by the State mid-trial constituted a manifest necessity for a mistrial where the new evidence had the potential to either be exculpatory or inculpatory. It first bears mentioning the United States Court of Appeals for

the Fourth Circuit's (Fourth Circuit) decision was in the context of a *habeas corpus* review as to whether the underlying grant of a mistrial by a South Carolina state court was contrary to, or an unreasonable application of, Supreme Court of the United States' precedent. *Id.* at 212. Moreover, the facts of *Baum*, and particularly the circumstances of the newly discovered evidence, are markedly different than in this case. In *Baum*, the defendant had been indicted on murder charges and the trial began without law enforcement finding the victim's body. *Id.* at 202. On the second day of the trial, the prosecution notified all parties that law enforcement had found the body in a neighboring state, and the state trial court—upheld by the state court of appeals—granted a mistrial to review the new evidence. *Id.* at 202-04. In the context of its review, the Fourth Circuit concluded "Although we might consider manifest necessity a closer call than the state court of appeals apparently did, we cannot say that its determination was objectively unreasonable." *Id.* at 215. The Court based its conclusion on the state court's findings "the belated discovery of Pinion's body 'was in no way a result of any act, omission, negligence, bad faith, or lack of effort on the part of the State,' and that the potential evidentiary value of the body—not only as a source of exculpatory evidence for Baum, but also relevant evidence 'imperative' to a just judgment by the jury—was 'too great' to ignore." *Id.* (citation omitted).

¶ 28 However, *Baum* is inapposite here. First, the bloody clothes, merely alleged to be Defendant's and not worn during the alleged murder were offered purely as corroborative evidence, unlike the existence of a dead body which is almost literally direct evidence of the *corpus delicti*. Moreover, in *Baum*, the body was found in a different state and the prosecution had no idea where it was. Here, although the prosecution was apparently not aware of the bloody clothes, the State always had possession and control of the evidence and the ability to test it, but simply failed to even inquire from prison officials about the existence of such evidence.

¶ 29 Rather, we find the Fourth Circuit's decision in *United States v. Shafer*, 987 F.2d 1054 (4th Cir. 1993), to be instructive. In *Shafer*, the defendant was charged with arson and mail fraud after his manufacturing business burned down. *Id.* at 1055. At trial, the government, in an effort to establish a motive, called two witnesses to testify about circumstances suggesting the defendant was in financial distress. *Id.* at 1055-56. One week after the trial began, a state law enforcement officer brought in a cart of financial records recovered from the burned-down business, which had never been turned over to investigators. *Id.* at 1056. The evidence had been in local law enforcement's possession for six years. *Id.*

The records refuted the government's witnesses' claims, and the government stipulated the evidence was exculpatory to the defendant. *Id.*

¶ 30 The trial court ruled the government had failed to produce the evidence, after the defendant had requested all exculpatory evidence, and that failure was the government's fault because law enforcement should have known of its existence. *Id.* The defendant moved to dismiss the case; but, the trial court denied the dismissal, considered allowing a continuance for the defendant to inspect the evidence, and ultimately decided to declare a mistrial—over the defendant's objection—because the proceedings had been "tainted." *Id.*

¶ 31 On appeal, the Fourth Circuit held the mistrial violated the Double Jeopardy Clause because the trial court "ignored available alternatives" and because the "motivation for declaring the mistrial was partially to rescue" the government's case. *Id.* at 1059. The court explained, "the critical inquiry is whether less drastic alternatives were available." *Id.* at 1057 (citation omitted). Thus, the court reasoned, the trial court could have: ordered a brief continuance to study the material; inquired into the defendant's willingness to waive any prejudice suffered from the late disclosure and continue the trial; recalled the government's witnesses for additional cross-examination; and allowed the defendant to use the evidence in his case-in-chief. *Id.* at 1058.

¶ 32 As to the "improper motives" for the mistrial, the court reasoned: "The Double Jeopardy Clause strictly forbids the district court from granting a mistrial to allow the prosecution to strengthen its case." *Id.* (citation and quotation marks omitted). The trial court had stated these discovery violations hurt the government's case. However, the Fourth Circuit held "this self-inflicted injury cannot be used to afford the government a second chance to prosecute so that it may argue a recast theory of the case better supported by the evidence." *Id.* at 1059. Moreover, as to the contention the mistrial was partially motivated by concerns of prejudice to the defendant, the court stated: "we must put aside" such statements and "note that such reservations were not shared by [the defendant], who wanted the trial to continue." *Id.* at 1058. Accordingly, the Fourth Circuit reversed the defendant's conviction. *Id.* at 1059.

¶ 33 Here, the trial court could have ordered a brief continuance to establish the admissibility of the evidence. The trial court could have also held a colloquy with Defendant to see if he was willing to waive any prejudice resulting from the evidence being excluded—as in *Shafer*, the Record is "replete with indications" Defendant was willing to do so. *Id.* at 1058. Further, the evidence the State wanted to test, and possibly in-

troduce at a later trial, was evidence the State bore the risk of not having at the time the State decided to move forward with the first trial.

¶ 34 In fact, the State had possession of the clothing, whether it knew it or not, the entire time. As in *Shafer*, it was the State's failure to discover, request, or collect potentially relevant evidence it had in its possession leading to the late discovery of the evidence. As such, the State could not obtain a mistrial to gain another opportunity to try Defendant. Moreover, even if the new evidence in this case was potentially exculpatory, we "must put aside" those concerns as they "were not shared by" Defendant. *Id*.

¶ 35 Thus, on the facts of this case, the State bore the risk of proceeding to trial and jeopardy attaching based on an incomplete investigation of the evidence in its possession and was not entitled to a second prosecution of Defendant in an effort to buttress its case. Therefore, there was no manifest necessity justifying the mistrial in the first trial. Consequently, jeopardy attached in the first trial and the State was barred from further prosecuting Defendant. Accordingly, the trial court in the second trial erred in denying Defendant's Motion to Dismiss on grounds of former jeopardy. *Odom*, 316 N.C. at 310, 341 S.E.2d at 334 (citation omitted).

Conclusion

¶ 36 For the foregoing reasons, we vacate the Judgment entered against Defendant in 16 CRS 120 and reverse the trial court's denial of Defendant's Motion to Dismiss. We remand this matter to the trial court with instructions to grant Defendant's Motion to Dismiss in both 16 CRS 50352 and 120.

VACATED AND REMANDED FOR DISMISSAL.

Chief Judge STROUD and Judge TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 2 February 2021)

GASPER v. BRADY TRANE SERV., INC. 2021-NCCOA-7 No. 20-280	Wake (19CVS5393)	Reversed in part, affirmed in part, and remanded.
IN RE A.S. 2021-NCCOA-8 No. 20-77	Cabarrus (18JA172) (18JA173) (18JA174)	Vacated and Remanded
IN RE J.J. 2021-NCCOA-9 No. 20-264	Greene (19JA8) (19JA9)	Affirmed in part, Vacated in part and Remanded
EST. OF SEYMOUR v. ORANGE CNTY. BD. OF EDUC. 2021-NCCOA-10 No. 19-334-2	Orange (18CVS1029)	Reversed
STATE v. AVERY 2021-NCCOA-11 No. 19-992	Mecklenburg (09CRS240639)	Affirmed
STATE v. CHAMBERS 2021-NCCOA-12 No. 20-196	Union (19CRS50564) (19CRS50565) (19CRS620)	No Error in Part; Vacated in Part and Remanded for Resentencing
STATE v. EVANS 2021-NCCOA-13 No. 19-1121	Davidson (18CRS57083)	Dismissed
STATE v. KOEHN 2021-NCCOA-14 No. 20-33	Clay (17CRS42-43)	No Error
STATE v. MURRELL 2021-NCCOA-15 No. 20-314	Jones (17CRS50292)	New Trial
STATE v. SWINO 2021-NCCOA-16 No. 20-302	Lincoln (18CRS52064) (18CRS939)	No Error

JOHN WAYNE KING, JR. AND LESLIE LYLES KING, PLAINTIFFS
v.
DUKE ENERGY PROGRESS, LLC AND CAROLINA TREE EQUIPMENT, INC. D/B/A CAROLINA TREE CARE, DEFENDANTS

No. COA20-292

Filed 16 February 2021

Trespass—to timber—ornamental trees—real estate for personal use—diminution of value—replacement cost of trees

In a lawsuit arising from Duke Energy's illegal removal of ornamental Japanese Maple trees from plaintiffs' property, where the trees had little or no commercial value after they were cut down and plaintiffs owned their property for personal use, diminution of value was the appropriate measure of damages, and the replacement cost of the trees was sufficient evidence to bring the question of damages before the jury.

Appeal by Plaintiffs from judgment entered 6 January 2020 by Judge Gale Adams in Scotland County Superior Court. Heard in the Court of Appeals 27 January 2021.

Nichols & Crampton, P.A., by Adam M. Gottsegen, for the Plaintiffs-Appellants.

Robinson Elliott & Smith, by William C. Robinson and Dorothy M. Gooding, for the Defendants-Appellees.

JACKSON, Judge.

¶ 1 John Wayne King, Jr., and Leslie Lyles King ("Plaintiffs") appeal from the trial court's judgment granting a directed verdict in favor of Duke Energy Progress, LLC ("Duke Energy") and Carolina Tree Equipment, Inc. d/b/a/ Carolina Tree ("Carolina Tree") (collectively, "Defendants") and awarding Plaintiffs nominal damages. We reverse the judgment of the trial court because the cost of replacing the ornamental trees was competent evidence of the diminution in value of Plaintiffs' property, where the property was owned for personal use. Plaintiffs are entitled to a new trial.

I. Background

¶ 2 Plaintiffs live in Laurinburg, North Carolina, where they own real property on which several large Japanese Maple trees once stood. Plaintiffs purchased the property in March of 2013, and planned to raise a family there and one day, retire.

¶ 3 On 4 August 2016, while engaged by Duke Energy, Carolina Tree removed two large Japanese Maple trees from the property and severely damaged a third. Carolina Tree also damaged some landscape lighting that day. Before the trees were removed, they obscured the view of power lines on and near Plaintiffs' property. These power lines are now visible from Plaintiffs' sunset deck, which is above their master bedroom.

¶ 4 Plaintiffs initiated the present action on 6 September 2017. In their complaint, Plaintiffs alleged causes of action for violation of N.C. Gen. Stat. § 1-539.1, trespass to chattel, trespass, and negligence, and requested declaratory relief. Duke Energy answered on 12 December 2017 and Carolina Tree answered on 3 January 2018. On 21 November 2018, counsel for Carolina Tree substituted for Duke Energy's prior counsel, and thereafter represented both of Defendants.

¶ 5 The matter came on for trial on 13 November 2019 before the Honorable Gail M. Adams in Scotland County Superior Court. Judge Adams presided over a two-day jury trial. Defendants moved for a directed verdict at the close of Plaintiffs' evidence. After hearing argument on the motion for directed verdict, the trial court indicated that it was inclined to grant the motion, and released the jury. On 6 January 2020, the trial court entered a judgment directing a verdict in favor of Defendants and awarding Plaintiffs only nominal damages. Plaintiffs entered timely notice of appeal from the trial court's judgment.[1]

II. Standard of Review

> Under Rule 50 of the North Carolina Rules of Civil Procedure, a party may move for a directed verdict at the close of the evidence offered by the opponent and at the close of all of the evidence. The motion is only proper in a jury trial. It tests the sufficiency of the evidence to go to the jury and to support a verdict for the non-moving party. Thus, a motion for a directed

1. Plaintiffs also noticed appeal from the trial court's order denying their partial motion for summary judgment. We do not reach the trial court's denial of Plaintiffs' partial motion for summary judgment because we reverse the trial court's judgment in favor of Defendants and remand this case for a new trial.

> verdict presents the same question for both trial and appellate courts: Whether the evidence, taken in the light most favorable to the nonmovant, is sufficient for submission to the jury.

Berke v. Fidelity Brokerage Servs., 841 S.E.2d 592, 595 (N.C. Ct. App. 2020) (internal marks and citation omitted).

III. Analysis

¶ 6 There are two questions presented by this appeal: first, the correct measure of damages in an action for trespass to timber where the trees are ornamental and therefore have little or no commercial value after they are cut; and second, whether evidence of the replacement cost of ornamental trees, by itself, is sufficient to demonstrate the diminution in value of real property owned for personal use from which said trees are removed. We address each issue in turn.

A. Damages for Trespass to Timber

¶ 7 Our Supreme Court has recognized two different, albeit similar measures of damages for the tort of trespass to timber. *Jenkins v. Montgomery Lumber Co.*, 154 N.C. 355, 358, 70 S.E. 633, 634 (1911). In some cases it has been held that the correct measure is the "value of the timber as a chattel[,] . . . as soon as it [is] severed from the land—at the stump[,]" *Bennett v. Thompson*, 13 Ired. 146, 148 (1851), whereas in others, the Supreme Court has held that the correct measure is "the difference in the value of the land before and after cutting," *Jenkins*, 154 N.C. at 358, 70 S.E. at 634. However, the Supreme Court has observed that, "[a]s to ornamental or fruit trees, the authorities are practically unanimous that the measure of damage is the difference in the value of the land before and after cutting." *Williams v. Elm City Lumber Co.*, 154 N.C. 306, 309, 70 S.E. 631, 632 (1911). *See also Bennett*, 13 Ired. at 149 (noting that the rule valuing the timber at the time of cutting is inapplicable to ornamental trees).

¶ 8 North Carolina General Statute § 1-539.1 provides a statutory cause of action for trespass to timber. Under N.C. Gen. Stat. § 1-539.1(a),

> [a]ny person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land

> for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

N.C. Gen. Stat. § 1-539.1(a) (2019). The statute thus authorizes awards of enhanced damages. *See id.* It has also been construed to impose strict liability. *Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 109-10, 264 S.E.2d 395, 398 (1980). However, under the statutory cause of action, only the commercial value of the timber at the time of cutting is recoverable. *Barnard v. Rowland*, 132 N.C. App. 416, 424, 512 S.E.2d 458, 464 (1999). Thus,

> [t]wo alternative measures of damages are available in a suit claiming unlawful cutting of timber:
>
> [o]ne gives the landowner the difference in the value of his property immediately before and immediately after the cutting. The other gives [the] plaintiff the value of the timber itself. This latter value is then doubled by reason of N.C.G.S. 1-539.1(a)[,] which allows [the] plaintiff to recover double the value of timber cut or removed.

Id. Accordingly, as a practical matter, for trees without commercial value after they are cut, enhanced damages under N.C. Gen. Stat. § 1-539.1 will be unavailable.

B. Replacement Costs as Evidence of Diminution in Value

¶ 9 This Court has held that the replacement cost of trees can be used to establish the diminution in value of real property from which they are removed where the property is owned for personal use. *Huberth v. Holly*, 120 N.C. App. 348, 354, 462 S.E.2d 239, 243 (1995). In *Harper v. Morris*, 89 N.C. App. 145, 147, 365 S.E.2d 176, 178 (1988), the first time our Court considered the question, we rejected the argument that the aesthetic value of the trees was inappropriate for the jury to consider when determining the extent to which the value of the real estate had been diminished. Instead, we held that the diminished value of the real estate could be determined by reference to the aesthetic value of the trees, as measured by "the cost of replacing or restoring the trees . . . as is reasonably practicable." *Id.* Likewise, in *Lee v. Bir*, 116 N.C. App. 584, 590-91, 449 S.E.2d 34, 38-39 (1994), we rejected the argument that the aesthetic value of the trees and the replacement cost of the trees, including the type of replacement trees used, were improper for the jury to consider when determining the landowner's damages. Thus, in an action for trespass to timber where the trees have little or no commercial

value after they are cut, we hold that evidence of the cost of reasonable remedial measures, such as replacement and restoration, constitutes competent evidence of the diminution in value of the real property, provided it is owned for personal use.

¶ 10 We have previously cited portions of the Second Restatement of Torts in this context, *see Huberth*, 120 N.C. App. at 354, 462 S.E.2d at 243, and note that it is consistent with our holding above. Comment b to § 929(1)(a) of the Restatement is illustrative:

> [I]f a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building. So, when a garden has been maintained in a city in connection with a dwelling house, the owner is entitled to recover the expense of putting the garden in its original condition even though the market value of the premises has not been decreased by the defendant's invasion.

Restatement 2d of Torts § 929, cmt. b (1979). Like the gardener in the Restatement, landowners injured by a trespass to ornamental trees on their property are entitled to recover the "difference in the value of the land before and after cutting." *Williams*, 154 N.C. at 309, 70 S.E. at 632. And they may demonstrate the extent of the diminution in value of their property by presenting evidence of "the cost of replacing or restoring the trees . . . as is reasonably practicable." *Harper*, 89 N.C. App. at 147, 365 S.E.2d at 178.

C. The Motion for Directed Verdict

¶ 11 Viewing the evidence in the light most favorable to Plaintiffs, as we must, *Berke*, 841 S.E.2d at 595, we hold that the trial court erred in directing a verdict in favor of Defendants because the replacement cost of the trees was competent evidence of the diminution in value of the real property from which they were removed, *Harper*, 89 N.C. App. at 147, 365 S.E.2d at 178. "[T]o survive a motion for directed verdict . . . , the plaintiff's evidence . . . does not have to be either strong, convincing, consistent, or even credible to anyone except the jury[.]" *Millikan v. Guilford Mills, Inc.*, 70 N.C. App. 705, 709-10, 320 S.E.2d 909, 913 (1984). Instead, "[i]f there is more than a scintilla of evidence supporting each element of the non-moving party's claim, the motion for a directed verdict should be denied." *Bradley Woodcraft, Inc. v. Bodden*, 251 N.C.

App. 27, 31, 795 S.E.2d 253, 257 (2016) (citation omitted). Defendants admitted to cutting down the trees illegally and the only fact question for the jury to consider was damages. Accordingly, the evidence of Plaintiffs' damages in the form of the replacement cost of the trees was sufficient "to go to the jury and to support a verdict[.]" *Berke*, 841 S.E.2d at 595.

IV. Conclusion

¶ 12 We reverse the judgment of the trial court granting Defendants' motion for directed verdict because the cost of remediating the damage to the ornamental trees at Plaintiffs' home was competent evidence of the diminution in value of the real property where the trees once grew. Accordingly, we remand this case for a new trial.

REVERSED AND REMANDED.

Judges ARROWOOD and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
SHAWN DUPREE CORPENING, DEFENDANT

No. COA19-1063

Filed 16 February 2021

1. Appeal and Error—designation of order or judgment—failure—petition for writ of certiorari—allowed

Where a pro se criminal defendant failed to designate the judgment from which he appealed, in violation of Appellate Procedure Rule 3—instead appealing "in the above captioned case" and not distinguishing between the civil and criminal judgments against him—the Court of Appeals allowed the State's motion to dismiss. However, the court also allowed defendant's petition for writ of certiorari to review the civil judgment because defendant was diligent in pursuing the appeal and his argument on the substantive issue of attorney fees was meritorious.

2. Attorney Fees—criminal case—civil judgment—notice and opportunity to be heard

The civil judgment imposing attorney fees upon an indigent criminal defendant was vacated and remanded where the trial court

failed to provide defendant with notice and the opportunity to be heard regarding the attorney's fees and hours worked.

Appeal by Defendant from judgment entered 14 May 2019 by Judge Joseph N. Crosswhite in Burke County Superior Court. Heard in the Court of Appeals 27 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott K. Beaver, for the State.

Guy J. Loranger for Defendant-Appellant.

INMAN, Judge.

¶ 1 Shawn DuPree Corpening ("Defendant") seeks review of a civil judgment entered against him for attorney's fees. We allow the state's motion to dismiss Defendant's appeal but grant Defendant's petition for writ of certiorari and vacate and remand the judgment of attorney's fees.

I. FACTUAL & PROCEDURAL HISTORY

¶ 2 Defendant pled guilty to possession of cocaine and possession of methamphetamine on 14 May 2019. As part of a plea arrangement, the State refrained from indicting Defendant as a habitual felon and dismissed all other charges against him. At the plea hearing, the trial court conducted a plea colloquy and then addressed defense counsel asking, "How much time do you have in this?" Counsel replied "9.5 hours." The trial court accepted Defendant's plea and sentenced Defendant to two consecutive active terms of seven to 18 months each. In addition, the trial court ordered Defendant to pay $570 in attorney's fees and a $60 appointment fee.

¶ 3 Defendant, acting *pro se*, filed written notice of appeal on 22 May 2019. His handwritten notice read: "Shawn D. Corpening hereby gives notice of appeal in the *above captioned case t*o the North Carolina Court of Appeals. This the 22nd day of May, 2019." (emphasis added). Though Defendant did not designate the specific order or judgment from which he appealed, he only intended to appeal the *civil* judgment against him for attorney's fees.[1] Defendant, concurrently with his brief, filed a petition for writ of certiorari seeking review under North Carolina Rule of

1. Defendant does not appeal the *criminal* judgments entered against him on 14 May 2019 nor the orders denying his writ of habeas corpus or motion to dismiss, entered 6 June 2019 and 18 June 2019, respectively.

Appellate Procedure 21 in the event his notice of appeal does not comply with the jurisdictional mandates of North Carolina Rule of Appellate Procedure 3(d). The State moved to dismiss Defendant's appeal for jurisdictional defect on 10 August 2020.

II. ANALYSIS

A. State's Motion to Dismiss

¶ 4 **[1]** Civil judgments for attorney's fees require a defendant to comply with Rule 3 of the North Carolina Rules of Appellate Procedure. *See State v. Smith*, 188 N.C. App. 842, 845-46, 656 S.E.2d 695, 697 (2008) (citing *State v. Jacobs*, 361 N.C. 565, 566, 648 S.E.2d 841, 842 (2007)). Rule 3(d) provides, in relevant part, "[t]he notice of appeal . . . *shall designate the judgment or order* from which appeal is taken." N.C. R. App. P. 3(d) (2021) (emphasis added). Failure to designate the order or judgment from which appeal is taken constitutes a jurisdictional defect that cannot be waived. *In re A.V.*, 188 N.C. App. 317, 321, 654 S.E.2d 811, 814 (2008) (dismissing an appeal of a juvenile's disposition order for failure to comply with Rule 3(d) because the notice of appeal only designated error in the adjudication order, not in the disposition order) (citing *Johnson & Laughlin, Inc. v. Hostetler*, 101 N.C. App. 543, 546, 400 S.E.2d 80, 82 (1991)).

¶ 5 Here, Defendant appeals only from the civil judgment of attorney's fees, but his handwritten notice of appeal refers broadly to "the above captioned case" and does not distinguish between the civil and criminal judgments against him, in violation of Rule 3(d). In his petition, Defendant also concedes "the notice fails to state whether [Defendant] appealed from the criminal and/or civil judgments entered against him." Therefore, we allow the State's motion to dismiss and now consider Defendant's petition for writ of certiorari.

B. Defendant's Petition for Writ of Certiorari

¶ 6 "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1). Though the State contends that Defendant did not have a statutory right to appeal the civil judgment, N.C. Gen. Stat. § 7A-27(b)(1) provides a defendant the right to appeal "from *any* final judgment of a superior court, other than one based on a plea of guilty or nolo contendere." (emphasis added). "A criminal defendant may file a petition for a writ of certiorari to appeal a civil judgment for attorney's fees and costs." *State v. Mayo*, 263 N.C.

App. 546, 549, 823 S.E.2d 656, 659 (2019) (citing *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018)).

¶ 7 Defendant indeed had a statutory right to appeal the civil judgment against him. Although he lost that right because his notice of appeal was defective, we are satisfied that Defendant was "diligent in prosecuting the appeal" by providing his written notice. *State v. Moore*, 210 N.C. 686, 691, 188 S.E. 421, 424 (1936) (requiring "diligence in prosecuting the appeal" and "merit, or that probable error was committed below" on an application for certiorari) (citation omitted). Also, as explained below, Defendant's argument on the issue of attorney's fees is meritorious. In our discretion, we allow the petition and issue the writ of certiorari to review the civil judgment of attorney's fees.

C. Attorney's Fees

¶ 8 **[2]** We now address Defendant's sole argument on appeal—that the trial court erred by failing to provide him notice and the opportunity to be heard regarding the fees and hours worked by his attorney. The State's brief does not address the merits of this issue.

¶ 9 "[A] trial court may enter a civil judgment against a convicted indigent defendant for the amount of fees incurred by the defendant's court-appointed attorney." *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005). However, a defendant is entitled to notice and the opportunity to be heard before costs—including an attorney's fee—can be entered. *State v. Webb*, 358 N.C. 92, 101, 591 S.E.2d 505, 513 (2004). "[T]rial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

¶ 10 Here, the record reveals that the trial court did not provide Defendant notice of the fees to be paid for his counsel or an opportunity to be heard on the issue, such as the number of hours counsel worked or the appointment fee. We vacate the imposed civil judgment of attorney's fees and remand for further proceedings. *Jacobs*, 172 N.C. App. at 236-37, 616 S.E.2d at 317; *see also Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

III. CONCLUSION

¶ 11 We vacate the trial court's order of attorney's fees and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges COLLINS and GRIFFIN concur.

STATE v. EDWARDS

[276 N.C. App. 45, 2021-NCCOA-19]

STATE OF NORTH CAROLINA
v.
MAJOR EARL EDWARDS, JR.

No. COA19-615

Filed 16 February 2021

Criminal Law—jury instructions—lack of flight—actions after defendant left crime scene

In a trial for first-degree felony murder, defendant was not entitled to an instruction on lack of flight—requested on defendant's belief that his cooperation when law enforcement came to his home to question him indicated lack of guilt—because defendant left the scene of the crime after shooting a cab driver to death and robbing him. Even if the instruction was warranted, any error was harmless given the overwhelming evidence of defendant's guilt, including witness testimony, surveillance footage, and forensic evidence.

Judge MURPHY concurring in part and concurring in result only in part with separate opinion.

Appeal by defendant from judgment entered 15 May 2018 by Judge Michael O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 22 September 2020.

Attorney General Joshua H. Stein, by Deputy General Counsel Blake W. Thomas, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant.

DIETZ, Judge.

¶ 1 Defendant Major Earl Edwards, Jr. appeals his conviction for first degree felony murder. Edwards argues that the trial court erred by declining his request for an instruction on lack of flight.

¶ 2 As explained below, the trial court properly declined to give that instruction based on the evidence at trial. Moreover, even assuming the trial court erred, the overwhelming evidence of Edwards's guilt rendered that error harmless. We therefore find no error in the trial court's judgment.

Facts and Procedural History

¶ 3 In 2016, Amigo Taxi cab driver Jose Dominguez responded to a call for a taxi at an apartment complex in Raleigh. A man got into the cab, shot Dominguez in the head, dragged him out of the cab, and then robbed him as he lay dead on the ground.

¶ 4 In the days leading up to the murder of Jose Dominguez, Defendant Major Earl Edwards, Jr. texted with another man, Conrad Patterson, and described obtaining a handgun. Edwards later texted Patterson explaining that "I got to make a move to keep my lights or they going to be cut off tomorrow at 10:00."

¶ 5 Cell tower location data showed that Edwards and Patterson traveled from Edwards's hometown of Louisburg to Raleigh on the night of the murder. Late that night, at 12:56 a.m., Edwards's phone was used to look up the webpage for Amigo Taxi. At 1:04 a.m., Edwards's phone made a 31-second call to Amigo Taxi. At 1:05 a.m., Amigo Taxi dispatched Jose Dominguez to respond to that call at the pick-up location, a Raleigh apartment complex. One of Edwards's relatives also lived at that apartment complex.

¶ 6 During the time period when the cab was on its way to the apartments, Edwards and Patterson again exchanged text messages. At 1:14 a.m., Edwards texted Patterson that he was "at the building to your right." At 1:16 a.m., Patterson texted Edwards telling him to "delete all the messages out your phone that you sent to me, your girl, or anybody just in case."

¶ 7 Surveillance footage showed Dominguez's taxicab reach the apartment complex shortly after. As the cab slowly drove through the complex, Dominguez called Edwards's cell phone in a call that lasted 36 seconds.

¶ 8 Several witnesses saw the next series of events. First, Ray Jackson, who was visiting his girlfriend's residence at the apartment complex, heard a gunshot and saw a flash from within the passenger area of the taxicab. Jackson then saw the shooter get out of the back seat of the car and fire into the front of the cab. The shooter also reached into the cab, took off Dominguez's seat belt, and dragged him out of the car.

¶ 9 Around the same time, another witness, Eric Garrett, drove into the apartment complex and saw an "altercation" happening at the taxicab. Both witnesses saw the shooter rummaging through Dominguez's pockets as he lay on the ground with gunshot wounds. The shooter then saw Garrett and fired three times at Garrett but missed. Garrett and Jackson

saw the shooter run to a white car and get in. Surveillance video from this same time period showed a white, four-door car leaving the apartment complex.

¶ 10 Law enforcement and emergency personnel responded, but Dominguez already had died of his wounds at the scene, which included two gunshot wounds to the head. Investigating officers found a sweatshirt on the rear left floorboard of the taxicab. The sweatshirt had a cell phone in it. It was the prepaid cell phone that Edwards used to communicate with Patterson. The phone also had photos connecting it to Edwards, including photos of Edwards, his State-issued identification card, and his electric bill. The phone also had a fingerprint on it that matched Edwards's prints.

¶ 11 Officers went to Edwards's home and found Edwards, Patterson, and another man near a white, four-door car resembling the one in the surveillance footage from the crime scene. The officers asked the men if they were willing to come to the station for questioning. The men agreed and drove the white car to the police station themselves.

¶ 12 The white car belonged to Patterson's girlfriend, and she gave law enforcement officers consent to search it. The search uncovered blood matching Dominguez's DNA on the front passenger armrest and shards of broken glass that matched the glass from Dominguez's taxicab window. Investigators also found bloody clothes in a trash bin near Edwards's home. The blood on those clothes was consistent with Dominguez's blood sample. The bloody clothes included a gray sweater resembling one Edwards was seen wearing in surveillance footage on the day of the murder.

¶ 13 Edwards was indicted for first degree murder. The State presented the evidence described above. Edwards offered no evidence at the trial. Before the jury charge, Edwards requested an instruction on flight that permitted the jury to infer "innocence or a lack of guilt" from Edwards's decision not to flee when investigators approached him at his home. The trial court declined to provide the requested instruction. The jury found Edwards guilty of first degree felony murder. The trial court sentenced Edwards to life in prison without parole. Edwards appealed.

Analysis

¶ 14 Edwards argues that the trial court erred by rejecting his proposed jury instruction addressing lack of flight. Ordinarily, when a defendant requests specific jury instructions, the trial court "must give the instructions requested, at least in substance, if they are proper and supported

by the evidence." *State v. Edwards*, 239 N.C. App. 391, 392, 768 S.E.2d 619, 620 (2015). On appeal, we review *de novo* whether the evidence supported the requested instruction. *Id.* at 393, 768 S.E.2d at 621.

¶ 15 Here, Edwards requested the following jury instruction concerning flight:

> **Proposed Jury Instruction—Lack of Flight**
>
> The evidence shows that the defendant did not flee. Evidence of flight may be considered to show a consciousness of guilt. Evidence of lack of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to a showing of innocence or a lack of guilt.

The trial court declined to give this requested instruction.

¶ 16 There are several fatal flaws in Edwards's argument with respect to this proposed instruction. As an initial matter, the instruction is not directed at Edwards's actions at the crime scene. To the contrary, uncontested evidence indicates that the shooter—a man the State alleged was Edwards—fled the scene in a white car after murdering Dominguez. It was only later, when investigators identified Edwards as a suspect, that they went to his home to question him and, at that time, he did not flee but instead cooperated with the investigation.

¶ 17 There are a number of cases from our Supreme Court indicating that, in this context, an instruction on lack of flight is inappropriate because it would permit defendants "to make evidence for themselves by their subsequent acts." *State v. Burr*, 341 N.C. 263, 297, 461 S.E.2d 602, 620 (1995). Thus, the "general rule is that the defendant in a criminal case is not, for the purpose of showing his innocence, allowed to prove that he refused to take to flight before his arrest or to escape from jail after his arrest." *Id.* Accordingly, the trial court did not err by declining to provide the requested instruction.

¶ 18 In any event, even assuming the trial court erred by refusing to give the requested instruction, that error was harmless. An error at trial is harmless "unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." *State v. Babich*, 252 N.C. App. 165, 172, 797 S.E.2d 359, 364 (2017). As explained in the recitation of facts above, the State had overwhelming evidence showing Edwards murdered Dominguez in a botched robbery, including witness testimony; surveillance footage;

DNA, blood, and fingerprint analysis; and Edwards's own statements in text messages on the cell phone he left at the crime scene. In light of all this evidence, there is no reasonable possibility that, had the court given the requested instruction on lack of flight, the jury would have reached a different result. *Id.* Accordingly, even if the trial court's failure to instruct on lack of flight was error, that error was harmless and could not result in reversal of the trial court's judgment.

Conclusion

¶ 19 We find no error in the trial court's judgment.

NO ERROR.

Judge TYSON concurs.

Judge MURPHY concurs in part and concurs in result only in part with separate opinion.

MURPHY, Judge, concurring in part and concurring in result only in part.

¶ 20 I concur in the portion of the Majority which properly summarizes the current status of the law that an instruction on lack of flight is unavailable to Defendant.[1] However, in writing separately, and of little solace to Defendant, I agree that if we are going to continue to instruct jurors on flight, the opposite instruction must also be available to a defendant who does not flee. *See State v. Thorne*, No. COA19-159, 267 N.C. App. 692, 833 S.E.2d 254, 2019 WL 4803677, *2 n.1 (2019) (unpublished), *review denied*, 373 N.C. 590, 837 S.E.2d 896 (2020); *State v. Ellis*, No. COA19-820, 848 S.E.2d 756, 2020 WL 6140639, (N.C. Ct. App. 2020) (unpublished).

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1. Note that the law as correctly stated by the Majority in its citation to *Burr*, *supra* at ¶ 17, traces back to an 1868 decision by our Supreme Court, which begins:

> It is no ground to quash an indictment, that it was found by a grand jury drawn from a *venire* in which there were no colored freeholders-- the jury list, as constituted by the county court in accordance with the law in force at the time of its constitution, not contai[ni]ng the names of such colored freeholders.

State v. Taylor, 61 N.C. 508, 508 (1868). To suggest it is time for our Supreme Court to revisit the application of and reference to such an outdated case and one-sided application of jury instructions is self-evident.

¶ 21 As Defendant accurately observes in his brief, whether appropriate or not in our secular system, the principles underlying the flight instruction derive from Proverbs, "[t]he wicked flee when no one pursues, but the righteous are bold as a lion." Proverbs 28:1 (English Standard Version); *See State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977); *State v. Dickerson*, 189 N.C. 327, 331, 127 S.E. 256, 258 (1925). Flight is either important for the jury's consideration of the evidence of Defendant's guilt, or it is not.[2]

¶ 22 As we are bound by caselaw to reject Defendant's argument as to the availability of his requested instruction, I concur in the analysis and result reached by the Majority. However, I do not join in the Majority's harmless error analysis as I would find such consideration to be moot.

2. I would also point out that the availability of an instruction that helps carry the burden of only one party in a criminal prosecution is itself constitutionally questionable. However, no such arguments have been raised at any point in this action and are not before us in this appeal.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 FEBRUARY 2021)

BRESNAHAN v. KIRK 2021-NCCOA-20 No. 20-207	Henderson (16CVS2354)	Dismissed
IN RE S.P-H. 2021-NCCOA-21 No. 20-229	Granville (19SPC152) (19SPC50)	Affirmed
KLAVER v. KLAVER 2021-NCCOA-22 No. 19-860	Iredell (18CVD54)	Affirmed
POULOS v. POULOS 2021-NCCOA-23 No. 20-365	Cumberland (18CVS4955)	Dismissed
STATE v. BRIDGES 2021-NCCOA-24 No. 19-838	Cleveland (16CRS199-201) (16CRS50361)	No Prejudicial Error.
STATE v. DiPIETRO 2021-NCCOA-25 No. 20-8	Rowan (19CRS50489) (19CRS756)	No Error.
STATE v. EAKES 2021-NCCOA-26 No. 19-745	Cleveland (17CRS1461-62) (17CRS51240)	No Error
STATE v. GADDY 2021-NCCOA-27 No. 20-286	Buncombe (15CRS88399)	Vacated
STATE v. HARRIS 2021-NCCOA-28 No. 20-62	Wilson (18CRS51062-64)	No error; Remanded for Correction of Clerical Error.
STATE v. HOWIE 2021-NCCOA-29 No. 20-284	Mecklenburg (17CRS33194) (17CRS33195)	Reversed
STATE v. JONES 2021-NCCOA-30 No. 20-281	Pamlico (17CRS50369) (19CRS68)	No prejudicial error.
STATE v. LINDSEY 2021-NCCOA-31 No. 20-91	Guilford (18CRS70242) (19CRS25204)	No Plain Error

STATE v. McSPADDEN 2021-NCCOA-32 No. 20-109	Davidson (19CRS51462-63)	No Error
STATE v. SILVERNALE 2021-NCCOA-33 No. 20-55	McDowell (18CRS51493)	Dismissed
STATE v. TABB 2021-NCCOA-34 No. 20-131	Forsyth (17CRS61652)	AFFIRMED IN PART AND REMANDED.
WILMINGTON SAV. FUND SOC'Y, FSB v. HALL 2021-NCCOA-35 No. 20-176	Durham (18CVS1208)	Affirmed.

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