276 N.C. App.—No. 2 Pages 53-147

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 18, 2021

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

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

DONNA S. STROUD

Judges

CHRIS DILLON
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
HUNTER MURPHY
JOHN S. ARROWOOD

ALLEGRA K. COLLINS
TOBIAS S. HAMPSON
JEFFERY K. CARPENTER
APRIL C. WOOD
W. FRED GORE
JEFFERSON G. GRIFFIN
DARREN JACKSON

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN
LINDA M. McGEE

Former Judges

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

ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS
J. DOUGLAS McCULLOUGH
WENDY M. ENOCHS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER, JR.
WANDA G. BRYANT
PHIL BERGER, JR.
REUBEN F. YOUNG
CHRISTOPHER BROOK

Clerk

DANIEL M. HORNE, JR.[1]

EUGENE H. SOAR[2]

Assistant Clerk

Shelley Lucas Edwards

OFFICE OF APPELLATE DIVISION STAFF

Director

Jaye E. Bingham-Hinch

Assistant Director

David Alan Lagos

Staff Attorneys

Bryan A. Meer

Michael W. Rodgers

Lauren M. Tierney

Caroline Koo Lindsey

Ross D. Wilfley

Hannah R. Murphy

J. Eric James

ADMINISTRATIVE OFFICE OF THE COURTS

Director

Andrew Heath

Assistant Director

David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen

Jennifer C. Peterson

Niccolle C. Hernandez

[1]Retired 30 June 2021. [2]Sworn in 1 July 2021.

COURT OF APPEALS

CASES REPORTED

FILED 2 MARCH 2021

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Interlocutory orders and appeals—sanctions—attorney fees—substantial sum immediately payable—An interlocutory order for sanctions requiring defendant to pay more than $48,000 in attorney fees to plaintiff affected a substantial right because the sum was significant and due immediately, so interlocutory review was appropriate. **Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc., 95.**

Preservation of issues—closing courtroom to public—constitutional argument—Where defendant failed to present a constitutional argument to the trial court that its decision to close the courtroom to the public before a verdict was rendered violated defendant's right to have a public trial (for taking indecent liberties with a child), the Court of Appeals declined to invoke Appellate Rule 2 to review the matter on appeal. The trial court's actions appeared to be within its statutory and inherent authority to control the orderliness of courtroom proceedings. **State v. Perdomo, 136.**

ASSAULT

With a deadly weapon inflicting serious injury—general intent crime—voluntary intoxication defense unavailable—Voluntary intoxication, a defense only for specific intent crimes, could not serve as a defense to assault with a deadly weapon inflicting serious injury, a general intent crime. **State v. Arnett, 106.**

(*Hyatt III*), where defendant university did not explicitly waive its sovereign immunity (including by registering its local recruiting office as a foreign nonprofit corporation) and *Hyatt III* required retroactive application. Plaintiff's alternative state constitutional claim could not trump the doctrine of interstate sovereign immunity, and the claims against the individual defendants in their official capacities were properly dismissed because the individual defendants were also protected by Alabama's interstate sovereign immunity. **Farmer v. Troy Univ., 53.**

DISCOVERY

Sanctions—Rule 37—conclusion supported by unchallenged findings—no abuse of discretion—Defendant failed to show that the trial court abused its discretion by granting plaintiff's Civil Procedure Rule 37 motion for sanctions where the trial court's unchallenged findings supported the conclusion that defendant violated the court's discovery order. **Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc., 95.**

DRUGS

Indictment—delivery of a controlled substance—sufficiency—"believed/told to be Adderall"—A juvenile petition failed to properly allege the crime of delivering a controlled substance under N.C.G.S. § 90-95(a)(1) where it did not sufficiently allege the "controlled substance" element of the crime by describing delivery of "1 orange pill believed/told to be Adderall." **In re J.S.G., 89.**

EVIDENCE

Husband and wife as witnesses—in criminal actions—communications made during assault—not confidential marital communications—In a prosecution for defendant's attempted murder of his wife, the trial court did not err by compelling the wife to testify as to statements that defendant made while he was stabbing her with a knife and while she was attempting to escape. Under N.C.G.S. § 8-57, these statements—including defendant's demands for sex, confessions of suicidal thoughts, and admissions of guilt—were not confidential marital communications because they were made during the assault and not induced by the affection, confidence, and loyalty borne out of the marital relationship. Even assuming error, defendant could not demonstrate prejudice where the wife's testimony as to defendant's actions and the evidence of her injuries were before the jury. **State v. Harris, 128.**

Indecent liberties—credibility of child victim—vouching—medical opinion—No error, much less plain error, occurred in a trial for taking indecent liberties with a child by the admission of testimony from the doctor who examined the victim who stated that the victim's statements to a social worker were "consistent with" sexual abuse. The testimony did not constitute improper vouching of the victim's credibility in the absence of physical evidence because it did not consist of a definitive diagnosis of abuse, but presented an opinion based on medical expertise. **State v. Perdomo, 136.**

NEGLIGENCE

Breach—constructive notice—dangerous condition—roads—In a negligence action against the Department of Transportation (NCDOT) arising from an automobile

accident caused by black ice from runoff out of nearby burst pipes, plaintiffs presented sufficient evidence that NCDOT breached its duty to properly maintain a lateral drainage ditch—which had become completely filled with dirt and debris—to submit the issue to the jury. Plaintiff's evidence tended to show that the ditch had been filled beyond fifty percent, in violation of NCDOT guidelines, for at least six months before the automobile accident and that NCDOT would have discovered the defective condition if it had exercised due care. **Hicks v. KMD Inv. Sols., LLC, 78.**

SEXUAL OFFENSES

First-degree forcible sexual offense—jury instructions—lesser-included offense—no contradictory evidence—In defendant's trial for first-degree forcible sexual offense, arising from defendant forcing the victim to perform fellatio on him while his cousin watched and waited to rape her, the trial court did not err by denying defendant's request for a jury instruction on the lesser-included offense of second-degree forcible sexual offense. The State's evidence supported all the elements of the first-degree offense, and defendant failed on appeal to show that any contradictory evidence was presented as to the element of defendant being aided and abetted by another person where his cousin knew of defendant's unlawful purposes and helped to facilitate the crime, with no evidence supporting the notion that the cousin was merely a bystander. **State v. Carpenter, 120.**

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.

FARMER v. TROY UNIV.

[276 N.C. App. 53, 2021-NCCOA-36]

SHARELL FARMER, Plaintiff
v.
TROY UNIVERSITY, PAMELA GAINEY, AND KAREN TILLERY, Defendants

No. COA19-1015

Filed 2 March 2021

Constitutional Law—interstate sovereign immunity—out-of-state public university—local recruiting office

The trial court properly dismissed plaintiff's claims against his former employer—a public university incorporated and primarily located in Alabama—and two former co-workers on the grounds of interstate sovereign immunity pursuant to *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019) (*Hyatt III*), where defendant university did not explicitly waive its sovereign immunity (including by registering its local recruiting office as a foreign non-profit corporation) and *Hyatt III* required retroactive application. Plaintiff's alternative state constitutional claim could not trump the doctrine of interstate sovereign immunity, and the claims against the individual defendants in their official capacities were properly dismissed because the individual defendants were also protected by Alabama's interstate sovereign immunity.

Appeal by plaintiff from order entered 1 July 2019 by Judge Andrew T. Heath in Cumberland County Superior Court. Heard in the Court of Appeals 20 October 2020.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Ford & Harrison LLP, by Julie K. Adams, and Wesley C. Redmond, pro hac vice, for defendants-appellees.

ZACHARY, Judge.

¶ 1 Plaintiff Sharell Farmer appeals from an order granting Defendants' motion to dismiss pursuant to Rules 12(b)(2) and (6) of the North Carolina Rules of Civil Procedure, on the grounds of interstate sovereign immunity. After careful review, we affirm the trial court's order.

Background

¶ 2 From May 2014 until 9 September 2015, Plaintiff was employed as a college recruiter for Defendant Troy University. Troy University is

a public university, incorporated and primarily located in the State of Alabama. However, Troy University has a recruiting office in Fayetteville, North Carolina, out of which Plaintiff was based, and where Plaintiff worked with Defendants Pamela Gainey and Karen Tillery (the "individual Defendants").

¶ 3 Plaintiff alleges that, while he was employed by Troy University, the individual Defendants committed several acts of "sexual harassment and fraudulent conduct" against him, and that such conduct began "his first day on the job" and continued "throughout his employment," with the individual Defendants making "frequent sexually suggestive remarks to" him. Plaintiff reported the individual Defendants' actions to "the appropriate officials" at Troy University, but following his complaint, Defendant Gainey "immediately retaliated" and suspended him from work for two days for poor performance. On 9 September 2015, Defendant Gainey terminated Plaintiff's employment with Troy University.

¶ 4 On 24 July 2018, Plaintiff filed suit against Troy University and the individual Defendants. Plaintiff asserted claims against Troy University for (1) wrongful discharge from employment, in violation of public policy; and (2) negligent retention and/or supervision of an employee. Plaintiff asserted claims against all Defendants for (1) intentional infliction of mental and emotional distress; and (2) tortious interference with contractual rights. In the event that the trial court determined that his claims were barred by the doctrine of sovereign immunity, Plaintiff also asserted an alternative claim against all Defendants, alleging a violation of his rights under the North Carolina Constitution.

¶ 5 On 3 October 2018, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim, which the trial court denied by order entered on 9 November 2018. On 6 December 2018, Defendants filed their answer to Plaintiff's complaint, generally denying Plaintiff's claims and asserting several defenses, including the defense of sovereign immunity.

¶ 6 On 13 May 2019, the Supreme Court of the United States filed its opinion in *Franchise Tax Board of California v. Hyatt* ("*Hyatt III*"), holding that "States retain their sovereign immunity from private suits brought in the courts of other States." ___ U.S. ___, ___, 203 L. Ed. 2d 768, 774 (2019). On 15 May 2019, citing *Hyatt III*, Defendants filed another motion to dismiss on the grounds of interstate sovereign immunity, pursuant to Rules 12(b)(2) (lack of personal jurisdiction) and (6) (failure to state a claim). In the alternative, Defendants moved for judgment on the pleadings, pursuant to Rule 12(c). On 24 May 2019, Defendants

filed an amended motion to dismiss, or in the alternative, for judgment on the pleadings. On 3 June 2019, Plaintiff filed his response.

¶ 7 On 1 July 2019, the trial court entered its order granting Defendants' motion to dismiss pursuant to Rules 12(b)(2) and (6), citing *Hyatt III* in support of its ruling. Plaintiff timely filed his notice of appeal.

Discussion

¶ 8 Plaintiff asserts that the trial court erred in granting Defendants' motion to dismiss. Specifically, Plaintiff argues that (1) the doctrine of interstate sovereign immunity does not apply in this case; (2) Defendants waived sovereign immunity when Troy University registered in North Carolina as a nonprofit corporation; (3) *Hyatt III* must be construed prospectively, not retroactively; (4) Plaintiff's claim under the North Carolina Constitution survives, regardless of whether Defendants' sovereign immunity defense succeeds; and (5) the trial court committed reversible error in dismissing the individual Defendants from the lawsuit. After careful review, we affirm the trial court's order.

I. Standard of Review

¶ 9 When a trial court grants a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), we must review the record to determine whether there is evidence that would support the trial court's determination that exercising its jurisdiction would be inappropriate. *See Martinez v. Univ. of N.C.*, 223 N.C. App. 428, 430, 741 S.E.2d 330, 332 (2012).

¶ 10 On appeal from a trial court's order on a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), this Court conducts de novo review to determine "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted." *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) (citation and internal quotation marks omitted).

II. Sovereign Immunity

¶ 11 Plaintiff first argues that Defendants cannot avail themselves of the doctrine of interstate sovereign immunity, in that the Supreme Court's holding in *Hyatt III* is inapplicable to the present case. We begin with a brief overview of *Hyatt III*.

A. Hyatt III

¶ 12 Hyatt claimed to have moved from California to Nevada, a state that "collects no personal income tax," after obtaining a patent that Hyatt an-

ticipated would yield him millions of dollars in royalties. *Hyatt III*, ___ U.S. at ___, 203 L. Ed. 2d at 772. However, the "Franchise Tax Board of California (Board), the state agency responsible for assessing personal income tax, suspected that Hyatt's move was a sham," and it accused Hyatt of misrepresenting his residency in order to avoid paying income taxes in California. *Id.* The Board audited Hyatt, who later "sued the Board in Nevada state court for torts he alleged the agency committed during the audit." *Id.* at ___, 203 L. Ed. 2d at 773. The Board invoked the State of California's sovereign immunity as a defense. *Id.*

¶ 13 Applying Nevada immunity law, "[t]he Nevada Supreme Court rejected [the Board's sovereign immunity] argument and held that, under general principles of comity, the Board was entitled to the same immunity that Nevada law afforded Nevada agencies[.]" *Id.* And pursuant to then-existing Supreme Court precedent, "each State [was permitted] to decide whether to grant or deny its sister States sovereign immunity" as a matter of comity. *Id.* at ___, 203 L. Ed. 2d at 783 (Breyer, J., dissenting) (citing *Nevada v. Hall*, 440 U.S. 410, 59 L. Ed. 2d 416 (1979)).

¶ 14 In *Hyatt III*, however, the United States Supreme Court explicitly overruled *Hall*, holding that "States retain their sovereign immunity from private suits brought in the courts of other States." *Id.* at ___, 203 L. Ed. 2d at 774 (majority opinion). "The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design." *Id.* at ___, 203 L. Ed. 2d at 780.

B. Application

¶ 15 Plaintiff first attempts to distinguish the facts of the instant case from the facts of *Hyatt III*, in the hopes of defeating the application of interstate sovereign immunity. Plaintiff argues that in *Hyatt III*, "the legal dispute had its genesis in the State of California. The state taxes owed to California were based on business activities that occurred within the [S]tate of California. The [S]tate of California was involved solely in governmental activity, i.e., collecting state taxes." By contrast, Plaintiff asserts that here, "all the tortious conduct occurred within the sovereign boundaries of North Carolina. The individual tort feasors [sic] were residents in North Carolina." This argument is without merit.

¶ 16 It is evident that for purposes of interstate sovereign immunity, the state in which the allegedly tortious conduct was committed is not a distinguishing fact of any relevance; the dispositive issue is whether one state has been "haled involuntarily" into the courts of another state. *Id.* at ___, 203 L. Ed. 2d at 776. The approach to interstate sovereign im-

munity laid out in *Hyatt III* is "absolute." *Id.* at ___, 203 L. Ed. 2d at 783 (Breyer, J., dissenting). Regardless, in both the present case and in *Hyatt III*, the tortious conduct occurred in the state in which the plaintiff filed suit. Here, Plaintiff alleges that he was injured by Defendants in North Carolina, where he filed suit; in *Hyatt III*, "[t]he Franchise Tax Board sent its California employees into the state of Nevada[,]" where the employees allegedly committed the torts for which Hyatt sought compensation in the Nevada courts. *Id.* at ___, 203 L. Ed. 2d at 772–73 (majority opinion). Thus, Plaintiff's first argument is inapt.

¶ 17 Plaintiff further contends that allowing the doctrine of sovereign immunity to bar his suit against Defendants erroneously extends the scope of the Alabama Constitution to embrace illegal conduct by North Carolina residents in North Carolina, rather than properly limiting the Alabama Constitution's application to "conduct within the sovereign boundaries of Alabama." Plaintiff then proclaims that

> [t]he sovereignty of North Carolina controls conduct within this state. . . . The sovereignty of North Carolina is sacrosanct. It is absolute. For this Court to apply Alabama sovereign immunity under Article I, § 14 of the Alabama Constitution to conduct which occurred exclusively within the sovereign boundaries of North Carolina would constitute an intrusion on the sovereignty of this State.

¶ 18 However, the United States Supreme Court succinctly foreclosed this argument in *Hyatt III*:

> The problem with [Plaintiff's] argument is that the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns. Each State's equal dignity and sovereignty under the Constitution implies certain constitutional limitations on the sovereignty of all of its sister States. One such limitation is the inability of one State to hale another into its courts without the latter's consent.

Id. at ___, 203 L. Ed. 2d at 779–80 (citation and internal quotation marks omitted). Under *Hyatt III*, it is clear that the "intrusion"—if any—upon the sovereignty of North Carolina occurred upon the ratification of the United States Constitution, and not upon the trial court's dismissal of Plaintiff's claims on the grounds of interstate sovereign immunity.

¶ 19 Plaintiff next argues that the doctrine of interstate sovereign immunity does not apply in this instance because Troy University was not exercising a governmental function, but rather "came into North Carolina and leased office space in Fayetteville *for a business and commercial venture*." (Emphasis added). This argument is similarly unavailing.

¶ 20 To begin, Alabama courts consider the State's universities, including Troy University, to be arms of the State of Alabama entitled to the sovereign immunity enjoyed by the State. *See*, *e.g.*, *Ex parte Troy Univ.*, 961 So. 2d 105, 109–10 (Ala. 2006); *Stark v. Troy State Univ.*, 514 So. 2d 46, 50 (Ala. 1987). Like North Carolina, Alabama does not recognize a "business and commercial ventures" exception to its sovereign immunity. *Ex parte Troy Univ.*, 961 So. 2d at 109–10.

¶ 21 In addition, although the *Hyatt III* Court did not address the governmental and proprietary function distinction, the United States Supreme Court has previously made clear that a state's waiver of its sovereign immunity must be explicit; as will be more thoroughly explained below, states cannot implicitly waive sovereign immunity. *See Sossamon v. Texas*, 563 U.S. 277, 284, 179 L. Ed. 2d 700, 709 (2011); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682, 144 L. Ed. 2d 605, 620 (1999).

¶ 22 Finally, we note that in advancing this argument, Plaintiff conflates our jurisprudence regarding the doctrines of sovereign immunity and governmental immunity.

> Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity. Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity. These immunities do not apply uniformly. *The State's sovereign immunity applies to both its governmental and proprietary functions*, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions.

Evans v. Hous. Auth., 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (emphasis added) (citation and internal quotation marks omitted).

¶ 23 As an arm of the State of Alabama,[1] Troy University is immune from suit under the doctrine of sovereign immunity, not governmental immunity. This immunity applies to both its proprietary and governmental functions, *see id.*, unless that immunity is explicitly waived, *see Sossamon*, 563 U.S. at 284, 179 L. Ed. 2d at 709.

¶ 24 Accordingly, Plaintiff's argument that interstate sovereign immunity does not apply in this case lacks merit. Having so concluded, we address Plaintiff's argument that Troy University waived sovereign immunity.

III. Waiver of Sovereign Immunity

¶ 25 Plaintiff next argues that the trial court erred in granting Defendants' motion to dismiss because Troy University waived its sovereign immunity by registering with the North Carolina Secretary of State as a nonprofit corporation, thus enabling it to sue and be sued in its corporate name. We disagree.

¶ 26 As an Alabama nonprofit corporation, Troy University applied for and received a certificate of authority to conduct its affairs in North Carolina as a foreign nonprofit corporation, pursuant to Article 15 of the Nonprofit Corporation Act. *See* N.C. Gen. Stat. § 55A-15-03 (2019). The Nonprofit Corporation Act states, in pertinent part:

> (a) Unless its articles of incorporation or this Chapter provides otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including without limitation, power:
>
> (1) *To sue and be sued, complain and defend in its corporate name*[.]

Id. § 55A-3-02(a)(1) (emphasis added).[2]

---

1. *See* Ala. Code § 16-56-1 (2018).

2. Article 15 of the Nonprofit Corporation Act further states:

> Except as otherwise provided by this Chapter, a foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

N.C. Gen. Stat. § 55A-15-05(b).

¶ 27 The United States Supreme Court has held that a state's waiver of its sovereign immunity cannot be implied; it must be explicitly expressed. *Sossamon*, 563 U.S. at 284, 179 L. Ed. 2d at 708–09. "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Coll. Sav. Bank*, 527 U.S. at 682, 144 L. Ed. 2d at 620 (citation and internal quotation marks omitted).

¶ 28 The *Hyatt III* Court held that one state may not be "haled involuntarily" into the courts of a sister state without its consent. *See* ___ U.S. at ___, 203 L. Ed. 2d at 780. Here, Alabama has explicitly *not* consented to be sued:

> The wall of immunity erected by [Ala. Const. 1901] § 14 is nearly impregnable. This immunity may not be waived. This means not only that the state itself may not be sued, but that this cannot be *indirectly* accomplished by suing its officers or agents in their official capacity, when a result favorable to plaintiff would be directly to *affect the financial status of the state treasury*.

Patterson v. Gladwin Corp., 835 So. 2d 137, 142 (Ala. 2002) (citations omitted).

¶ 29 Our Supreme Court has similarly held that "[w]aiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38, 299 S.E.2d 618, 627 (1983). "Statutory authority to 'sue or be sued' is not always construed as an express waiver of sovereign immunity and is not dispositive of the immunity defense when suit is brought against an agency of the State." *Id.* at 538, 299 S.E.2d at 627.

¶ 30 In *Guthrie*, our Supreme Court determined that an enabling statute that "vests the Ports Authority with the authority to 'sue or be sued,' " when read together with the provisions of the State Torts Claims Act, N.C. Gen. Stat. § 143-291 *et seq.*, did not constitute "consent for the Ports Authority to be sued in the courts of the State[,]" *Guthrie*, 307 N.C. at 538, 299 S.E.2d at 627. Rather, the Court concluded that the statutes evince "a legislative intent that the Authority be authorized to sue as [a] plaintiff in its own name in the courts of the State but contemplates that all tort claims against the Authority for money damages will be pursued under the State Tort Claims Act." *Id.*

¶ 31 Plaintiff's argument in the case at bar is no more successful than that considered and rejected by our Supreme Court in *Guthrie*. Assertions

of statutory waivers of state sovereign immunity are subject to strict construction. *Id.* at 537–38, 299 S.E.2d at 627. Unlike *Guthrie*, which concerned a suit against an agency of the State of North Carolina upon which the enabling legislation explicitly bestowed the authority to "sue or be sued," *id.*, Plaintiff here has not shown any similarly explicit waiver of state sovereign immunity, either in the Alabama statutes authorizing Troy University's activities or in our General Statutes.

¶ 32 In that interstate sovereign immunity is a fundamental right "embed[ded] . . . within the constitutional design," *Hyatt III*, ___ U.S. at ___, 203 L. Ed. 2d at 780, we must "indulge every reasonable presumption against [its] waiver," *Coll. Sav. Bank*, 527 U.S. at 682, 144 L. Ed. 2d at 620. Accordingly, we will not read into the Nonprofit Corporation Act a blanket waiver of interstate sovereign immunity for an arm of another state that registers as a nonprofit corporation in the State of North Carolina, absent clear and express statutory authority to do so.

¶ 33 Troy University has not waived its interstate sovereign immunity by registering with the North Carolina Secretary of State as a nonprofit corporation. We therefore proceed to Plaintiff's next issue presented: whether the Supreme Court's decision in *Hyatt III* may be applied retroactively.

IV. Retroactive Application of Hyatt III

¶ 34 Plaintiff next asserts that *Hyatt III* "must be construed prospectively such that it only applies to causes of action that accrue after May 13, 2019, the date of the Supreme Court Opinion," and consequently, the decision cannot affect his case, because his "legal rights vested on September 9, 2015," the date Defendant Gainey terminated Plaintiff's employment with Troy University. We disagree.

¶ 35 To support this contention, Plaintiff cites the landmark case of *Smith v. State*, in which our Supreme Court held that when the State enters into a valid contract, it implicitly waives its sovereign immunity with regard to claims for breach of that contract. 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976). In *Smith*, the Court also denied retroactive application of its holding, stating that "in this case, and in causes of action on contract arising after the filing date of this opinion, . . . the doctrine of sovereign immunity will not be a defense to the State." *Id.*

¶ 36 Our Supreme Court's decision in *Smith* is clearly distinguishable from *Hyatt III* and the case before us. *Smith* addressed the sovereign immunity of the State of North Carolina, in its own courts, from suits arising out of contracts into which the State entered voluntarily. *See id.* at 309–11, 222 S.E.2d at 417–18. Interpreting such questions of

intrastate sovereign immunity is a matter of state law. *See id.* at 313–20, 222 S.E.2d at 419–23.

¶ 37 Conversely, *Hyatt III* concerns the federal constitutional implications of *interstate* sovereign immunity, in which one state is haled into the courts of another state without its consent. ___ U.S. at ___, 203 L. Ed. 2d at 774. As the Supreme Court explained, "although the [federal] Constitution assumes that the States retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity." *Id.* at ___, 203 L. Ed. 2d at 775. Stated another way, "[i]nterstate immunity . . . is implied as an essential component of federalism." *Id.* at ___, 203 L. Ed. 2d at 781 (citation and internal quotation marks omitted). Accordingly, in that *Smith* addressed *intrastate* sovereign immunity—a matter of state law—and not *interstate* sovereign immunity with its attendant federal constitutional concerns, *Smith* is not persuasive on the issue of whether *Hyatt III* applies retroactively, or merely prospectively, as Plaintiff contends.

¶ 38 Furthermore, *Smith* stands as a clear exception to our appellate courts' traditional adherence to the "Blackstonian Doctrine":

> Under a long-established North Carolina law, a decision of a court of supreme jurisdiction overruling a former decision is, as a general rule, retrospective in its operation. This rule is based on the so-called "Blackstonian Doctrine" of judicial decision-making: courts merely discover and announce law; they do not create it; and the act of overruling is a confession that the prior ruling was erroneous and was never the law.

Cox v. Haworth, 304 N.C. 571, 573, 284 S.E.2d 322, 324 (1981) (citations omitted). The presumption of retrospectivity "is one of judicial policy, and should be determined by a consideration of such factors as reliance on the prior decision, the degree to which the purpose behind the new decision can be achieved solely through prospective application, and the effect of retroactive application on the administration of justice." *Id.*

¶ 39 *Hyatt III* appears to portend its own retroactive application. In considering the effect of overruling *Nevada v. Hall*, the Supreme Court "acknowledge[d] that some plaintiffs, such as Hyatt," had demonstrated reliance upon *Hall* "by suing sovereign States." *Hyatt III*, ___ U.S. at ___, 203 L. Ed. 2d at 782. Yet, despite this recognition, the Court noted the unfortunate reality that "in virtually every case that overrules a controlling

precedent, the party relying on that precedent will incur the loss of litigation expenses and a favorable decision below." *Id.* "Those case-specific costs are not among the reliance interests that would persuade . . . an incorrect resolution of an important constitutional question." *Id.*

¶ 40 Moreover, the Court was quite clear that its prior holding in *Hall* was "irreconcilable with our constitutional structure and with the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts." *Id.*

¶ 41 After careful consideration of the Supreme Court's opinion in *Hyatt III*, and in light of our courts' presumption that the decision of a higher court generally operates retroactively, *Cox*, 304 N.C. at 573, 284 S.E.2d at 324, we conclude that retroactive application of *Hyatt III* is required to achieve the purpose of the Court's holding. In so concluding, this Court simply recognizes the interstate sovereign immunity—an implicit and "essential component of federalism[,]" *Hyatt III*, ___ U.S. at ___, 203 L. Ed. 2d at 781—which the State of Alabama never waived.

¶ 42 We find additional support for our conclusion in the opinions of other states that have already decided this issue. "In the absence of persuasive and binding North Carolina cases, we examine the law of other states." *Russell v. Donaldson*, 222 N.C. App. 702, 706, 731 S.E.2d 535, 538 (2012).

¶ 43 Several other states have applied *Hyatt III* retroactively. The Supreme Court of Kentucky applied *Hyatt III* retroactively, reversing the denial of the State of Ohio's motion to dismiss claims against it in a lawsuit filed in Kentucky before *Hyatt III* was decided. *Ohio v. Great Lakes Minerals, LLC*, 597 S.W.3d 169, 171–73 (Ky. 2019), *cert. denied*, ___ U.S. ___, 208 L. Ed. 2d 87 (2020). The Appellate Court of Connecticut similarly applied *Hyatt III* retroactively, affirming the dismissal of a suit filed in 2018 by one of its citizens against the State of Rhode Island, one of its agencies, and several of its agents. *Reale v. State*, 218 A.3d 723, 726–27 (Conn. App. Ct. 2019). And the Supreme Court of New York, Appellate Division, applied *Hyatt III* retroactively in affirming a New York trial court's pre-*Hyatt III* grants of motions to dismiss made by an agency of the State of Arizona and one of its employees. *Trepel v. Hodgins*, 121 N.Y.S.3d 605, 606 (N.Y. App. Div. 2020).

¶ 44 Recognizing that "sovereign immunity is a jurisdictional issue[,]" *M Series Rebuild, LLC v. Town of Mount Pleasant, N.C.*, 222 N.C. App. 59, 62, 730 S.E.2d 254, 257, *disc. review denied*, 366 N.C. 413, 735 S.E.2d 190 (2012), and consonant with *Hyatt III*'s analysis of interstate sovereign

immunity as a "fundamental aspect" of each state's sovereignty, ___ U.S. at ___, 203 L. Ed. 2d at 775, as well as our courts' presumption of retrospectivity, *see Cox*, 304 N.C. at 573, 284 S.E.2d at 324, we conclude that *Hyatt III* is appropriately applied retroactively, and that Plaintiff's argument to the contrary must fail.

V. North Carolina Constitutional Claim

¶ 45 Plaintiff also contends that the trial court erred in granting Defendants' motion to dismiss his claim under Article 1, Section 19 of the North Carolina Constitution alleging "a violation of equal protection of the law," which he asserted in the event that the trial court determined that his other claims were barred by sovereign immunity. Citing our Supreme Court's decision in *Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992), Plaintiff maintains that his "alternative state constitutional claim . . . trump[s] the doctrine of sovereign immunity." We disagree.

¶ 46 It is well established that a plaintiff may not proceed with a claim directly under the North Carolina Constitution when an adequate alternative remedy is available. *Corum*, 330 N.C. at 784, 413 S.E.2d at 291. In *Corum*, a North Carolina resident complaining of injury resulting from the actions of an arm of the State of North Carolina asserted a direct constitutional claim, which the State contended was barred by the doctrine of sovereign immunity. *Id.* at 766, 413 S.E.2d at 280. Our Supreme Court determined that "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights" of our State Constitution. *Id.* at 785–86, 413 S.E.2d at 291. "[W]hen there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292. Thus, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under [the North Carolina] Constitution." *Id.* at 782, 413 S.E.2d at 289.

¶ 47 Nonetheless, *Corum*, like *Smith* discussed above, involved issues of *intrastate* sovereign immunity, and is therefore similarly inapplicable to the case at bar. Again, the instant case raises an issue of *interstate* sovereign immunity, in that Plaintiff has asserted claims against an arm of the State of Alabama and its agents, the individual Defendants. While the Declaration of Rights in the North Carolina Constitution may indeed trump our State's *intrastate* sovereign immunity, in the *interstate* context, the federal Constitution protects the several states' sovereign immunity vis-à-vis one another; indeed, it is "embed[ded] . . . within

the [federal] constitutional design." *Hyatt III*, ___ U.S. at ___, 203 L. Ed. 2d at 780.

> Interstate sovereign immunity is . . . integral to the structure of the Constitution. Like a dispute over borders or water rights, a State's assertion of compulsory judicial process over another State involves a direct conflict between sovereigns. *The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity*, just as it denies them the power to resolve border disputes by political means. Interstate immunity, in other words, is implied as an essential component of federalism.

Id. at ___, 203 L. Ed. 2d at 781 (emphasis added) (citation and internal quotation marks omitted).

¶ 48 Accordingly, Plaintiff's Corum claim is without merit. The trial court did not err in granting Defendants' motion to dismiss this claim.

VI. The Individual Defendants

¶ 49 Lastly, Plaintiff argues that the trial court committed reversible error by granting Defendants' motion to dismiss with respect to the individual Defendants as well as Troy University. Two of Plaintiff's assertions on this issue sound from his prior arguments: (1) that Troy University is not entitled to sovereign immunity, so "the individual Defendants, who are residents and citizens of North Carolina, cannot legitimately raise the issue of sovereign immunity"; and (2) the individual Defendants committed intentional torts as "employees of a non-profit corporation doing business in North Carolina" and "should be treated like any other employees of a non-profit corporation in this state." These arguments lack merit.

¶ 50 "A suit against a public official in [her] official capacity is a suit against the State." *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (citation and internal quotation marks omitted). Our Supreme Court has held that "when the complaint does not specify the capacity in which a public official is being sued for actions taken in the course and scope of [her] employment, we will presume that the public official is being sued only in [her] official capacity." *Id.* at 360–61, 736 S.E.2d at 167.

¶ 51 In his complaint, Plaintiff avers that the individual Defendants were "agent[s] and employee[s]" of Troy University. At no point in his com-

plaint, however, does Plaintiff specify that he is suing either individual Defendant in her personal capacity. Accordingly, we must presume that he sued the individual Defendants in their official capacities. *Id.* As such, his claims against the individual Defendants are as much against the State of Alabama as are his claims against Troy University, *see id.* at 363, 736 S.E.2d at 168, and his argument to the contrary is without merit. Thus, the individual Defendants are protected by the sovereign immunity afforded to Troy University, and the trial court did not err in dismissing Plaintiff's claims against the individual Defendants.

Conclusion

¶ 52 For the foregoing reasons, Plaintiff has not shown that the trial court erred in granting Defendants' motion to dismiss. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges MURPHY and COLLINS concur.

CHERYL HALTERMAN, PLAINTIFF
v.
BRADEN HALTERMAN, DEFENDANT

No. COA19-912

Filed 2 March 2021

Child Custody and Support—petition to register—foreign child support order—substance and form

Where the father moved to Virginia and the mother moved to North Carolina with the children, the trial court did not err by dismissing the mother's petition to register a foreign child support order for failure to state a claim and for lack of subject matter jurisdiction where the petition was, in form and in substance, a petition to register a foreign custody order under N.C.G.S. § 50A-305.

Appeal by plaintiff from order entered 27 June 2019 by Judge Warren McSweeney in District Court, Moore County. Heard in the Court of Appeals 28 April 2020.

Chris Kremer, for plaintiff-appellant.

Foyles Law Firm, PLLC, by Jody Stuart Foyles, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Mother appeals the trial court's order granting Father's Motion under North Carolina Rules of Civil Procedure 12(b)(1) and (6) to dismiss her Petition to Register a foreign child support order. Because Mother's Petition to Register was in substance and in form a petition to register a foreign *custody* order under North Carolina General Statute § 50A-305, not a petition to register a foreign child support order under North Carolina General Statute § 52C-6-602, the trial court did not err by granting Father's Motion to Dismiss.

I. Procedural and Factual Background

¶ 2 Mother and Father had two children during their marriage. In 2008, the parties were divorced in Broward County, Florida. In their Florida divorce proceedings, the parties entered into a Marital Settlement Agreement which was later adopted by the court as a court order. The 2008 Marital Settlement Agreement ("2008 Order") resolved all of the parties' claims related to their marriage, including child custody, child support, alimony, and equitable distribution. In 2009, the Florida court entered an "Agreed Final Order on Former Husband's Supplemental Petition for Modification of Final Judgment" ("2009 Order") which modified Father's child support obligation and provided that "should [Father] become incarcerated in Federal Prison, the child support award shall be abated until he has been released." In 2012, the Florida court entered an "Agreed Final Order on the Former Wife's Supplemental Petition to Permit Relocation with Minor Children" ("2012 Order") which allowed Mother to "relocate on a permanent basis" to North Carolina and "defers on the issues of child support and timesharing until such time as [Father] is released from [incarceration]."

¶ 3 On 20 August 2015, Father filed a "Complaint, Motion to Register A Foreign Order and Motion to Modify Child Custody," which included a motion to register the two Florida orders regarding custody, the 2008 Order and the 2012 Order, in North Carolina, and a motion to modify child custody. The motion to modify child custody alleged that Father had been released from incarceration and the parties had been unable to agree on a new visitation schedule. The Complaint alleged grounds to register the 2008 and 2012 custody orders under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). The Complaint also included allegations regarding North Carolina's modification juris-

diction under the UCCJEA. The Complaint alleged that Father is a citizen and resident of the Commonwealth of Virginia, while Mother and the children reside in North Carolina.

¶ 4 Four days later, Mother filed a "Petition to Register Foreign Child Custody and Support Order" ("Petition to Register"). The Petition to Register stated it was filed under "N.C.G.S. 50A-305(a), petitioning this Court to register a foreign custody Order." Mother's Petition to Register included all three Florida orders, including the 2009 Order. The allegations of the Petition to Register track the requirements of North Carolina General Statute § 50A-305(a), including that Father was a citizen and resident of Virginia; Mother and the children were residents of North Carolina; details regarding the Florida orders entered in 2008, 2009, and 2012; and that the custody provisions of those orders had not been changed. Certified copies of the orders were attached, and her Petition to Register was verified. She requested only to register the "attached foreign orders" but did not assert any requests for modification or enforcement. Mother also filed a "Notice to Register of Foreign Child Custody and Support Orders." The Notice states that Mother "gives Notice that the Registration of the Foreign Custody Order entered the 14 October 2008, in the County of Broward, State of Florida" and cites North Carolina General Statute § 50A-305 as statutory authority. The Notice tracks the statutory language required for registration of a foreign child *custody* order under the UCCJEA.

¶ 5 On 8 September 2015, Father filed a "Motion to Dismiss [Mother's] Claim to Register the Foreign Child Support Order" ("Motion to Dismiss"). Father moved to dismiss the Petition to Register under Rules 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a cause of action upon which relief may be granted, and for failure to meet the requirements of North Carolina General Statute § 52C-6-602. Father alleged that he is a resident of Virginia, and he has never resided in North Carolina. He alleged that North Carolina General Statute § 52C-6-602(a) "requires the registration of a Support Order to be in the county where the obligor resides" and the Petition to Register failed to meet other requirements of North Carolina General Statute § 52C-6-602.

¶ 6 On 22 September 2015, the trial court entered an "Order Registering a Foreign Child Custody Order" ("Registration Order"). The Registration Order was entered by agreement of the parties and was based upon the UCCJEA. The Registration Order finds that the 2012 Order "anticipated the minor children moving to North Carolina and releasing jurisdiction to North Carolina" and Mother and minor children had been residing

in North Carolina more than six months preceding Father's motion for modification of custody.

¶ 7 On 18 February 2016, the parties entered into a Child Custody Order by consent ("2016 Consent Order"), granting the parties joint custody, with primary custody to Mother and setting out a detailed visitation schedule for Father. The 2016 Consent Order also included a provision that "This Order fully resolves all pending matters in Moore County File Numbers: 15 CVD 1078 and 15 CVD 1090." But the trial court did not address Father's Motion to Dismiss Mother's claim to register a foreign child support order.

¶ 8 On 2 January 2019, Father filed a motion to activate the case and a Rule 60 Motion requesting the trial court strike the language in the 2016 Consent Order stating that "this resolves all pending issues" in the case, since his Motion to Dismiss had not been resolved. Mother did not oppose Father's Rule 60 Motion and the trial court entered an order allowing the motion and striking the language regarding full resolution of all claims, as Father's Motion to Dismiss had never been addressed.

¶ 9 On 21 May 2019, the trial court heard Father's Motion to Dismiss. On 27 June 2019, the trial court entered an order allowing Father's Motion to Dismiss based upon "Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure and NCGS 52(c)-6-602." Specifically, the trial court concluded, "The pleading is insufficient to register a foreign Child Support Order. This Court lacks subject matter jurisdiction and said petition fails to state a cause of action upon which relief can be granted." Mother timely filed notice of appeal from the 27 June 2019 Order allowing Father's Motion to Dismiss.

II. Standard of Review

¶ 10 This Court reviews an order allowing a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted *de novo*. *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 510, 714 S.E.2d 806, 809 (2011) (noting the standard of review for lack of subject matter jurisdiction); *Birtha v. Stonemor, N.C., LLC*, 220 N.C. App. 286, 291, 727 S.E.2d 1, 6 (2012) (providing the standard of review for failure to state a claim upon which relief can be granted).

III. Registration of Foreign Order

¶ 11 The arguments of both parties conflate the statutory requirements for registration of a foreign support order and the jurisdictional issues arising from modification or enforcement of a foreign support order.

Normally, when a support order is registered, the obligee or a child support enforcement agency is seeking to enforce the order, or a party is seeking modification of the order. *See* N.C. Gen. Stat. § 52C-6-609. Here, Mother sought only to register the three Florida orders. No issue as to modification or enforcement was raised by either party. Father's Motion to Dismiss raised a defense based on the failure of Mother's Petition to Register to meet the requirements of North Carolina General Statute § 52C-6-602 for registration of a foreign support order. Thus, we first address the issue of whether Mother's Petition to Register Foreign Child Custody and Support Order substantially complied with North Carolina General Statute § 52C-6-602.

¶ 12 North Carolina General Statute § 52C-6-602 sets out the requirements for registration of a foreign support order in North Carolina:

> (a) Except as otherwise provided in G.S. 52C-7-706, a support order or income-withholding order of another state or a foreign support order may be registered in this State by sending the following records to the appropriate tribunal in this State:
>
> (1) A letter of transmittal to the tribunal requesting registration and enforcement;
>
> (2) Two copies, including one certified copy, of the order to be registered, including any modification of the order;
>
> (3) A sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage;
>
> (4) The name of the obligor and, if known:
>
> a. The obligor's address and social security number;
>
> b. The name and address of the obligor's employer and any other source of income of the obligor; and
>
> c. A description and the location of property of the obligor in this State not exempt from execution; and
>
> (5) Except as otherwise provided in G.S. 52C-3-311, the name and address of the obligee and, if applicable, the person to whom support payments are to be remitted.

> (b) On receipt of a request for registration, the registering tribunal shall cause the order to be filed as an order of another state or a foreign support order, together with one copy of the documents and information, regardless of their form.
>
> (c) A petition or comparable pleading seeking a remedy that must be affirmatively sought under other law of this State may be filed at the same time as the request for registration or later. The pleading must specify the grounds for the remedy sought.
>
> (d) If two or more orders are in effect, the person requesting registration shall do each of the following:
>
> > (1) Furnish to the tribunal a copy of every support order asserted to be in effect in addition to the documents specified in this section.
> >
> > (2) Specify the order alleged to be the controlling order, if any.
> >
> > (3) Specify the amount of consolidated arrears, if any.
>
> (e) A request for a determination of which is the controlling order may be filed separately or with a request for registration and enforcement or for registration and modification. The person requesting registration shall give notice of the request to each party whose rights may be affected by the determination.

N.C. Gen. Stat. § 52C-6-602 (2019).

¶ 13 Here, the Petition to Register was filed directly by Mother and was not initiated by the Florida court. Direct registration is allowed under North Carolina General Statute § 52C-3-301:

> An individual petitioner or a support enforcement agency may initiate a proceeding authorized under this Chapter by filing a petition in an initiating tribunal for forwarding to a responding tribunal or by filing a petition or a comparable pleading directly in a tribunal of another state or a foreign country which has or can obtain personal jurisdiction over the respondent.

N.C. Gen. Stat. § 52C-3-301(c) (2019). North Carolina General Statute § 52C-6-605 also requires that the "nonregistering party," here Father, be notified of the registration and of his right to contest it:

> (a) When a support order or income-withholding order issued in another state or a foreign support order is registered, the registering tribunal of this State *shall* notify the nonregistering party. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.
>
> (b) A notice *must* inform the nonregistering party:
>
> (1) That a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of this State.
>
> (2) That a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after notice, unless the registered order is under G.S. 52C-7-707;
>
> (3) That failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages; and
>
> (4) Of the amount of any alleged arrearages.

N.C. Gen. Stat. § 52C-6-605 (2019) (emphasis added).

¶ 14 Mother does not attempt to argue that her Petition to Register, which was in both form and substance a petition for registration of a child *custody* order under the UCCJEA, was fully compliant with the requirements of North Carolina General Statute § 52C-6-602. Nor was Father provided with the notice required by North Carolina General Statute § 52C-6-605. Mother contends that "a fair examination" of the Petition to Register "under the *Twaddell* substantial compliance standard" supports her argument that she met the requirements of North Carolina General Statute § 52C-6-602 to register the Florida orders as child support orders.

¶ 15 In *Twaddell v. Anderson*, the mother resided in California and sought to enforce a California child support order against the father, who resided in North Carolina. 136 N.C. App. 56, 58, 523 S.E.2d 710, 713 (1999). After a complex procedural history of the mother's efforts to enforce the order in North Carolina through the child support enforcement agency, the father was held in contempt for non-payment, and he challenged the registration of the California order based upon technical deficiencies in the information transmitted from California. *Id*. at 58-59,

523 S.E.2d at 713. The trial court granted his motion to dismiss, and this Court reversed, finding substantial compliance with the requirements for registration of the California order under North Carolina General Statute § 52C-6-602:

> Plaintiff contends she was in substantial compliance with the statute. The provisions in dispute are section 52C-6-602(a)(1), which requires that a registration request include a "letter of transmittal to the tribunal requesting registration and enforcement," and section 52C-6-602(a)(5), which requires that the registration request include the "name and address of the obligee and, if applicable, the agency or person to whom support payments are to be remitted." The record indicates that plaintiff submitted a "Registration Statement," which contained the case number, date, and county of the California order; the parties to the action and their respective addresses and employers; and the support amount, date of last payment, and total amount of arrears. The Statement was signed by the Records Custodian in California and notarized, then forwarded to the Craven County Clerk of Court. We hold that this material is sufficient to satisfy section 52C-6-602(a)(1). Plaintiff's packet also included the name and address of the California agency to which support payments were to be remitted. Although this information may be found only upon a close reading of plaintiff's submitted material, we hold that plaintiff also substantially complied with section 52C-6-602(a)(5). Accordingly, the trial court erred in finding that plaintiff had not met the registration requirements of UIFSA.

Id. at 60, 523 S.E.2d at 714.

¶ 16 But a "fair examination" of Mother's Petition to Register here reveals that it is both in substance and in form a petition to register a foreign custody order under North Carolina General Statute § 50A-305, not a petition to register a foreign child support order under North Carolina General Statute § 52C-6-602. The requirements of these two statutes differ, and for the orders to be registered under the Uniform Interstate Family Support Act ("UIFSA"), the petition must at least substantially comply with North Carolina General Statute § 52C-6-602. Mother's Petition to Register did not request "registration and enforcement" or

contain "[a] sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage[.]" N.C. Gen. Stat. § 52C-6-602(a)(1), (3). Therefore, the trial court did not err by granting Father's Motion to Dismiss for failing to state a claim upon which relief can be granted.

IV. Subject Matter Jurisdiction

¶ 17 Mother also argues that Father submitted to the jurisdiction of the North Carolina court by filing his own petition to register the 2008 Order and the 2012 Order, which included provisions regarding both child custody and support. She contends Father made a "general appearance" in the action and thus cannot challenge jurisdiction.

¶ 18 Here, Mother presents the issue on appeal as personal jurisdiction over Father regarding child support enforcement. Father is a citizen and resident of Virginia, and Mother does not argue there would be any basis for North Carolina to assert personal jurisdiction over him unless he had submitted to the jurisdiction of the court by a general appearance. If personal jurisdiction were the issue and Father had made a general appearance, Mother would be correct: a general appearance would have waived any objection to personal jurisdiction. *Lynch v. Lynch*, 303 N.C. 367, 373, 279 S.E.2d 840, 845 (1981) (making a general appearance before challenging personal jurisdiction waives the right to challenge personal jurisdiction).

¶ 19 But Father did not make a general appearance, and his actions cannot confer subject matter jurisdiction upon the court. His petition specifically sought to register the orders under the UCCJEA and to modify custody in North Carolina. The trial court has subject matter jurisdiction under the UCCJEA since Mother and the children reside in North Carolina. And Father promptly filed a Motion to Dismiss Mother's Petition to Register, raising his jurisdictional defenses, both personal and subject matter. The issue here is subject matter jurisdiction, which cannot be created by the actions of the parties. *See In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) ("'Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties.' Subject matter jurisdiction 'cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to . . . object to the jurisdiction is immaterial.'" (alterations in original) (citations omitted)).

¶ 20 Mother last cites to *Marshall v. Marshall*, 233 N.C. App. 238, 757 S.E.2d 319 (2014) (unpublished), which she contends "shoots down the notion of selective subject matter jurisdiction." She argues that because

the Florida orders address both child custody and child support in the same document, North Carolina must have subject matter jurisdiction over the entire matter and cannot have subject matter jurisdiction to enforce or modify just a portion of the order as to child custody. But *Marshall* is inapposite to this case, as it raised no issue of whether the registration of the support order was done properly and no issues regarding enforcement or modification of a child custody order under the UCCJEA. *See Marshall*, 233 N.C. App. 238, 757 S.E.2d 319.

¶ 21 In *Marshall*, the husband and wife had entered into a marital dissolution agreement, which was adopted as a court order in Tennessee. *Id.* at 238, 757 S.E.2d at 321. The husband then engaged in an extended pattern of harassment against the wife and her former romantic partner and her husband which this Court described as "among the most shocking and extreme that the members of this panel have witnessed in the many divorce—related cases they have reviewed." *Id.* at 238, 757 S.E.2d at 323. The wife obtained domestic violence protective orders against the husband in North Carolina and registered the Tennessee order in North Carolina under UIFSA, and with no objection from the husband, it was registered pursuant to North Carolina General Statute § 52C-6-601, 606 (2013). *Marshall*, 233 N.C. App. 238, 757 S.E.2d at 322.

¶ 22 Here, the issue is whether Mother's Petition to Register the three Florida orders under UIFSA was proper; this case presents no issue of modification or enforcement of the Florida orders, just registration. In addition, *Marshall* did not address any issues of child custody or child support; the support obligations the wife sought to enforce involved "monetary support" the husband was ordered to pay to the wife under the properly registered Tennessee order. *Id.* at 238, 757 S.E.2d at 324-25.

¶ 23 Mother's argument focuses on two sentences, taken out of context, from *Marshall*:

> Defendant cites no authority for the startling proposition that a court might have subject matter jurisdiction over certain paragraphs and provisions of a foreign support order which has been properly registered and confirmed under UIFSA, but lack jurisdiction over other paragraphs and provisions. Nothing in UIFSA even suggests that a properly registered and confirmed foreign support order may only be enforced *in part* by our State's district courts.

Id. at 238, 757 S.E.2d at 324.

¶ 24 In *Marshall*, the Court had already noted that the Tennessee order had been properly registered under North Carolina General Statute § 52C-6-606 when the husband failed to contest registration. *Id*. at 238, 757 S.E.2d at 324. In context, the Court was noting that North Carolina had jurisdiction to enforce all of the "monetary support" provisions of the foreign support order after it was properly registered. *Id*. at 238, 757 S.E.2d at 324. There was no issue in *Marshall* involving registration or modification of a child custody order.

¶ 25 Here, Mother's arguments overlook the essential differences in registration of foreign orders under the UCCJEA and UIFSA. For purposes of child custody, the focus is on the residence of the children, and personal jurisdiction over a parent is not required. *See* N.C. Gen. Stat. § 50A-305. For purposes of child support modification and enforcement, the focus is on the residence of the obligor, since the obligee who is seeking enforcement normally registers the order in the state of the obligor's residence so the court will have personal jurisdiction over the obligor. *See* N.C. Gen. Stat. § 52C-6-611 (2019). The Comments to North Carolina General Statute § 52C-6-611 specifically address this relationship between the UCCJEA and the UIFSA:

> **UIFSA Relationship to UCCJEA**. Jurisdiction for modification of child support under subsections (a)(1) and (a)(2) is distinct from modification of custody under the federal Parental Kidnapping Prevention Act (PKPA), 42 U.S.C. § 1738A, and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) §§ 201-202. These acts provide that the court of exclusive, continuing jurisdiction may "decline jurisdiction." Declining jurisdiction, thereby creating a potential vacuum, is not authorized under UIFSA. Once a controlling child-support order is established under UIFSA, at all times thereafter there is an existing order in effect to be enforced. Even if the issuing tribunal no longer has continuing, exclusive jurisdiction, its order remains fully enforceable until a tribunal with modification jurisdiction issues a new order in conformance with this article.
>
> UIFSA and UCCJEA seek a world in which there is but one order at a time for child support and custody and visitation. Both have similar restrictions on the ability of a tribunal to modify the existing order. The major difference between the two acts is that

> the basic jurisdictional nexus of each is founded on different considerations. UIFSA has its focus on the personal jurisdiction necessary to bind the obligor to payment of a child-support order. UCCJEA places its focus on the factual circumstances of the child, primarily the "home state" of the child; personal jurisdiction to bind a party to the custody decree is not required. An example of the disparate consequences of this difference is the fact that a return to the decree state does not reestablish continuing, exclusive jurisdiction under the UCCJEA. *See* UCCJEA § 202. Under similar facts UIFSA grants the issuing tribunal continuing, exclusive jurisdiction to modify its child-support order if, at the time the proceeding is filed, the issuing tribunal "is the residence" of one of the individual parties or the child. *See* Section 205.

N.C. Gen. Stat. § 52C-6-611 Official Comment.

¶ 26 Here, Mother's Petition to Register the three Florida orders was in both form and substance a petition for registration under the UCCJEA. Even if we assume Mother also sought registration of the orders under UIFSA, the Petition to Register did not substantially comply with the requirements of North Carolina General Statute § 52C-6-602, and Father promptly filed a Motion to Dismiss with respect to claims under UIFSA. The trial court correctly concluded that Mother's Petition to Register the orders under UIFSA for purposes of child support modification or enforcement must be dismissed under North Carolina General Statute § 52C-6-602 and Rules 12(b)(1) for lack of subject matter jurisdiction. *See In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) ("Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." (quoting *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982))).

V. Conclusion

¶ 27 Because Mother's Petition to Register was in substance and in form a petition to register a foreign custody order under North Carolina General Statute § 50A-305, not a petition to register a foreign child support order, the trial court did not err by granting Father's Motion to Dismiss as to child support for failing to state a claim upon which relief

can be granted and for lack of subject matter jurisdiction. N.C. R. Civ. P. 12(b)(1), (6). However, the trial court noted the dismissal of Mother's Petition to Register was without prejudice, and this opinion does not impair her right to file a new petition for registration and enforcement of the Florida child support orders in the appropriate jurisdiction.

AFFIRMED.

Judges INMAN and COLLINS concur.

MATTIE HICKS AND BARBARA SIGLER, PLAINTIFFS
v.
KMD INVESTMENT SOLUTIONS, LLC, WENDY'S REAL ESTATE SOLUTIONS, LLC, AND NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANTS

KMD INVESTMENT SOLUTIONS, LLC, THIRD-PARTY PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, THIRD-PARTY DEFENDANT

No. COA20-71

Filed 2 March 2021

Negligence—breach—constructive notice—dangerous condition—roads

In a negligence action against the Department of Transportation (NCDOT) arising from an automobile accident caused by black ice from runoff out of nearby burst pipes, plaintiffs presented sufficient evidence that NCDOT breached its duty to properly maintain a lateral drainage ditch—which had become completely filled with dirt and debris—to submit the issue to the jury. Plaintiff's evidence tended to show that the ditch had been filled beyond fifty percent, in violation of NCDOT guidelines, for at least six months before the automobile accident and that NCDOT would have discovered the defective condition if it had exercised due care.

Appeal by Third-Party Defendant from Judgment entered 13 August 2019 and order entered 26 August 2019 by Judge Cy A. Grant, Sr., in Halifax County Superior Court. Heard in the Court of Appeals 20 October 2020.

Sanford Thompson, P.L.L.C., by Sanford W. Thompson, IV, and Perry, Perry & Perry, P.A., by Robert T. Perry and Alexander S. Perry, for plaintiffs-appellees.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alexander G. Walton, for third-party defendant-appellant.

MURPHY, Judge.

¶ 1 In this negligence case, in the light most favorable to Plaintiffs, there was sufficient circumstantial evidence to show the North Carolina Department of Transportation ("NCDOT") had constructive notice of a defective condition and failed to exercise due diligence to discover and remedy the defective condition, and thus breached its duty to maintain Highway 56 prior to the accident at issue. Accordingly, the trial court did not err by denying NCDOT's motions for directed verdict and judgment notwithstanding the verdict ("JNOV").

BACKGROUND

¶ 2 On the night of 8 January 2014, Barbara Sigler was driving, with Mattie Hicks (collectively "Plaintiffs") as her passenger, on Highway 56, a two-lane highway. The temperature was below freezing and there had been no precipitation that day. As Plaintiffs drove through a curve, another driver, Candice Morgan, approaching in the other lane hit black ice and spun out of control into Plaintiffs, causing them significant injuries.

¶ 3 The lack of precipitation that day prompted responding emergency services to investigate the source of the frozen water. Uphill from the highway, it was discovered the pipes of a nearby well had burst, resulting in water running off the property into a lateral ditch[1] adjacent to a road off Highway 56. One section of the ditch had become filled in with dirt and debris, such that this spot was flat with the surrounding land rather than below the surrounding land. Instead of running freely through this ditch and avoiding the road, the water ran downhill into the ditch, reached the filled in spot, and was pushed out onto the road. This water eventually flowed downhill, as it does, onto Highway 56, where it froze and ultimately formed the black ice that caused the accident in question.

---

1. "Lateral ditches are trough-shaped channels oriented parallel to the roadway. Located along the roadside and in the medians, these ditches are constructed to collect and disperse surface water in a controlled manner. . . . [A] lateral ditch would be like the ditch [at issue in this case.]"

¶ 4 Following the accident, Plaintiffs sued KMD Investment Solutions, LLC ("KMD"), the property owners of the land where the well is located. KMD in turn sued NCDOT as a third-party defendant, after which Plaintiffs joined NCDOT in their primary suit and filed a claim directly against NCDOT. At trial, the following testimony was presented regarding the visibility of the filled lateral ditch and the time it would have taken to fill in:

¶ 5 Plaintiffs presented the testimony of Edward Shane Mitchell, a volunteer fireman who responded to the scene of the accident. His testimony was presented through a videotaped deposition that was to be given "the same consideration and [was] to be judged as to credibility and weight and otherwise considered by [the jury], . . . as if the witness were present and gave from the witness stand the same answers as were given by the witness when the deposition was taken." Plaintiffs elicited the following testimony:

> [PLAINTIFFS:] Well I think you testified that you observed that there was what you called a flat spot in the ditch that goes along the north side of Highway 56.
>
> [MITCHELL:] Right.
>
> [PLAINTIFFS:] And when you say "flat spot," you mean that the ditch was filled in so it wasn't – it wasn't deep and it didn't have the slopes you would expect?
>
> [MITCHELL:] Right.
>
> [PLAINTIFFS:] And that was something you could observe just by looking at it, right?
>
> [MITCHELL:] Well, that night, yes.
>
> [PLAINTIFFS:] And – and during the day you could see if the ditch didn't have the – the "V" shape and it – it was filled up in the bottom; you could see that, couldn't you?
>
> [MITCHELL:] You – are you referring to as me just riding by there, looking, or –
>
> [PLAINTIFFS:] Well, if you had walked down the shoulder of that road, you could have seen if it wasn't raining that there was – that the ditch was filled in partway, couldn't you?

> [MITCHELL:] Someone could. I wouldn't say that I would.
>
> . . .
>
> [PLAINTIFFS:] Someone who was looking at the condition of that ditch would have been able to see that it was filled in; is that right?
>
> [MITCHELL:] I would suppose so.

¶ 6 Plaintiffs also called Jonathan Tyndall, who worked for NCDOT as County Maintenance Engineer in Franklin County, meaning he was "responsible for all of the maintenance and some construction on all state-maintained roads in that county" at the time of the accident. On direct examination, Plaintiffs elicited the following testimony:

> [PLAINTIFFS:] And you testified before that when you went out there, that you believed that the DOT ditch, the lateral ditch, was in your words substandard when you examined it right after this happened, didn't you?
>
> [TYNDALL:] It was at a point where it needed to be noted for maintenance.

¶ 7 Later, Plaintiffs called Vernon Hicks, who was a combat engineer in the Marine Corps and at the time of the accident worked for NCDOT in the Bridge Management Unit. On direct examination, Plaintiffs elicited the following testimony:

> [HICKS:] . . . . And so I looked down the road and walked down the ditchbank, and there's a flat spot in there. I guess it's maybe 50 or 100 feet or something like that down the road from the driveway. And I am trying to figure out how did the water get to this point where the sand was, down the road down there, looking at it from a drainage point of view, you know. Anyway --
>
> [PLAINTIFFS:] Let me ask you this. You said you saw a flat spot in the ditch?
>
> [HICKS:] Yes.
>
> [PLAINTIFFS:] The ditch that is parallel to Highway 56?
>
> [HICKS:] Yes, sir, on the north side of the road.

> [PLAINTIFFS:] Now, was the flat spot that you saw in the ditch, was that flat spot clearly visible?
>
> [HICKS:] Yes.
>
> [PLAINTIFFS:] Did you have to be a trained engineer in order to see a flat spot?
>
> [HICKS:] I don't think so, no, sir.

¶ 8 Plaintiffs also called Matt Sams, a civil engineer working for Accident Research Specialists, who testified as an expert in the field of forensic engineering, which "look[s] at the cause, nature, and effect of something that has gone wrong" in the areas of "transportation, roadways, hydrology, stormwater runoff[,] . . . buildings, bridges, structures, things of that nature, [and] also water treatment plants and things like that." On direct examination, Plaintiffs elicited the following testimony:

> [PLAINTIFFS:] Does this filling up of the ditch take place over a period of time?
>
> [SAMS:] Sure.
>
> [PLAINTIFFS:] Why is that?
>
> [SAMS:] It just -- you know, one clipping, one trip with the mower may not be enough to really, you know, put a significant amount of debris in there. But several trips over the years certainly do. If there is some soil erosion or something like that, that takes time as well.

¶ 9 KMD called Howard Rigsby, an engineer at a forensic engineering firm, to testify as an expert "in the fields of hydrology, drainage engineering, and accident reconstruction." On cross-examination, Plaintiffs elicited the following testimony:

> [PLAINTIFFS:] And it takes a while for that to happen, doesn't it?
>
> . . .
>
> [RIGSBY:] If you're talking about erosion, yes, that takes a while to fill in this kind of ditch.
>
> [PLAINTIFFS:] It takes a lot of grass clippings and a lot of dirt coming off the slopes to fill in a ditch, doesn't it?

> [RIGSBY:] Yes.
>
> [PLAINTIFFS:] And that would happen over a long period of time, wouldn't it?
>
> [RIGSBY:] Yes.
>
> [PLAINTIFFS:] And if somebody would look at it, they would know that it was filled in, wouldn't they?
>
> [RIGSBY:] Yes.
>
> . . .
>
> [PLAINTIFFS:] Mr. Rigsby, in your opinion, for a ditch to completely fill up, like a ditch that has got 45 degree angles and two feet deep like the ditches out here, do you think it would take a period of years for that to fill up through natural erosion?
>
> [RIGSBY:] I would say over a year. I am from the mountains of North Carolina, so they can fill up pretty quick up there. But here in Franklinton, that flat topography, I would think over a year.

¶ 10 After Plaintiffs rested, NCDOT made a motion for directed verdict. The trial court reserved its ruling on the motion for directed verdict and NCDOT renewed its motion at the close of all evidence, which was denied. The jury found only NCDOT liable for negligence. Following entry of judgment, NCDOT made a motion for judgment notwithstanding the verdict, which the trial court denied.

¶ 11 NCDOT appeals the trial court's denial of its motions for directed verdict and judgment notwithstanding the verdict.[2] Specifically, NCDOT contends Plaintiffs failed to prove each essential element of their negligence claim by failing to adequately prove breach based upon a lack of actual or constructive notice of the dangerous condition. NCDOT challenges no other element of negligence.

---

2. Plaintiffs attempt to cross-appeal for the first time in their appellee brief, contending the trial court erred in denying statutory interest on the compensatory damages NCDOT was ordered to pay. However, they did not file a notice of appeal and did not file a cross-appeal. We lack jurisdiction over this issue and dismiss it. *See Bd. of Dirs. of Queens Towers Homeowners' Ass'n, Inc. v. Rosenstadt*, 214 N.C. App. 162, 168-69, 714 S.E.2d 765, 770 (2011).

ANALYSIS

¶ 12 "On appeal the standard of review for a [judgment notwithstanding the verdict] is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000).

> When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence. Any conflicts and inconsistencies in the evidence must be resolved in favor of the non-moving party. If 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. . . . Because the trial court's ruling on a motion for a directed verdict addressing the sufficiency of the evidence presents a question of law, it is reviewed *de novo.*

Maxwell v. Michael P. Doyle, Inc., 164 N.C. App. 319, 322-23, 595 S.E.2d 759, 761 (2004) (citations omitted). "Evidence which does no more than raise a possibility or conjecture of a fact is not sufficient to withstand a motion by [a] defendant for a directed verdict." *Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 259, 181 S.E.2d 173, 176 (1971); *Bruegge v. Mastertemp, Inc.*, 83 N.C. App. 508, 510, 350 S.E.2d 918, 919 (1986). "To hold that evidence that a defendant *could have been* negligent is sufficient to go to a jury, in the absence of evidence, direct or circumstantial, that such a defendant *actually was* negligent, is to allow the jury to indulge in speculation and guess work." *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 444, 186 S.E.2d 198, 203 (1972).

¶ 13 "It is seldom appropriate to direct a verdict in a negligence action." *Stanfield v. Tilghman*, 342 N.C. 389, 394, 464 S.E.2d 294, 297 (1995).

> In order for [a] plaintiff to survive a motion for a directed verdict or a JNOV, he must first show a *prima facie* case of negligence. . . . Therefore, [the] plaintiff must establish that (1) [the] defendant owed [the] plaintiff a duty of care; (2) [the] defendant's actions or failure to act breached that duty; (3) [the] defendant's breach was the actual and proximate

> cause of [the] plaintiff's injury; and (4) [the] plaintiff suffered damages as a result of such breach.

Smith v. Wal-Mart Stores, Inc., 128 N.C. App. 282, 286, 495 S.E.2d 149, 152 (1998) (internal citations omitted). Since NCDOT only challenges the denial of its motions for directed verdict and judgment notwithstanding the verdict based on insufficient evidence of breach, we do not address any other element. N.C. R. App. P. 28 (2021) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

> Liability arises only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of a defect in the street or sidewalk and the injury: he must also show that the officers of the town or city knew, or by ordinary diligence, might have known of the defect, and the character of the defect was such that injuries to travelers using its street or sidewalk in a proper manner might reasonably be foreseen. Actual notice is not required. Notice of a dangerous condition in a street or sidewalk will be imputed to the town or city, if its officers should have discovered it in the exercise of due care.

Smith v. Hickory, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960).

> [N]otice may be either actual, which brings the knowledge of a fact directly home to the party, or constructive, which is defined as information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it.

Phillips ex rel. Bates v. N.C. Dep't of Transp., 200 N.C. App. 550, 558, 684 S.E.2d 725, 731 (2009) (quoting *State v. Poteat*, 163 N.C. App. 741, 746, 594 S.E.2d 253, 255-56 (2004)). "Constructive knowledge of a dangerous condition can be established in two ways: the plaintiff can present direct evidence of the duration of the dangerous condition, or the plaintiff can present circumstantial evidence from which the fact finder could infer that the dangerous condition existed for some time." *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000). Our Supreme Court has held:

> On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required, and it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, its material, the time it has been in existence and use, the nature of the defect, its placing, etc.

Fitzgerald v. City of Concord, 140 N.C. 110, 52 S.E. 309, 309-10 (1905) (holding the trial court erred in granting a nonsuit because it was for the jury to determine if there was constructive notice where the evidence showed that a culvert on a road with a 16 to 18 inch hole in it had been in this condition for several weeks).

¶ 14 NCDOT contends it did not breach its duty under a theory of constructive notice because it exercised proper diligence and there was no evidence of how long the condition existed.[3] We disagree. Here, there was more than a scintilla of evidence to support finding NCDOT breached its duty. There was circumstantial evidence, viewed in the light most favorable to the Plaintiffs, from which the jury could infer the ditch had been filled in for enough time that the condition would have been discovered had NCDOT exercised due diligence.

¶ 15 "In general, evidence of a defendant violating its own voluntary safety standards constitutes some evidence of negligence." *Thompson*, 138 N.C. App. at 656, 547 S.E.2d at 51. Here, according to NCDOT's internal guidelines, maintenance was required when ditches became 50% filled in to ensure they could effectively collect and disperse surface water. Further, the purpose and policy of NCDOT, including in Franklin County, was to prioritize safety. As a result, these guidelines were effectively safety guidelines for the roads of North Carolina, and violation of these guidelines constituted some evidence of breach of duty. Plaintiffs presented more than a scintilla of evidence of a violation of these guidelines, and therefore some evidence of breach, as there were multiple witnesses who testified to seeing the ditch completely filled in shortly after the accident.

¶ 16 There was also circumstantial evidence, viewed in the light most favorable to Plaintiffs, from which the finder of fact could infer the dan-

---

3. While issues related to actual notice and creation of the condition have been raised by the parties, we do not address these issues and express no opinion as to them because the trial court rightly denied NCDOT's motions for directed verdict and judgment notwithstanding the verdict on the theory of constructive notice.

gerous condition existed for some time, satisfying constructive notice, including evidence showing it would take "over a year" for "a ditch that has got 45 degree angles and two feet deep like the ditch [in question], . . . to fill up through natural erosion," and the ditch was completely filled in requiring maintenance at the time of the accident. In the light most favorable to the Plaintiffs, this evidence shows the ditch took longer than a year to completely fill in, and it would have been at least halfway filled in for at least six months.[4] Read together with NCDOT's guidelines requiring it to note any ditch more than 50% filled in for maintenance, and viewed in the light most favorable to Plaintiffs, this evidence shows the ditch was in violation of NCDOT guidelines for at least six months. Since the inquiry into whether constructive notice has been established by the time period a deficient condition has existed is a fact sensitive inquiry for the jury, the six month frame here was sufficient to satisfy the Plaintiffs' burden on a motion for directed verdict and was properly submitted to the jury.

¶ 17 Additionally, the evidence, viewed in the light most favorable to the Plaintiffs, showed NCDOT had at least six months to discover the ditch filling-in beyond 50%, which was conspicuous at the time it was completely filled in,[5] through its employees or contractors mowing the area, its employees inspecting roads in the county, and its employees driving the county outside of work, all of whom had a duty or expectation to report such a problem according to their supervisor. The alleged failure to discover the deficiency in this ditch over the course of those six months constitutes more than a scintilla of evidence NCDOT did not exercise due diligence.

¶ 18 Altogether, as set out above, there was more than a scintilla of evidence NCDOT breached its duty by failing to maintain the completely

---

4. The jury could reasonably infer it would take at least six months for the ditch to become 50% filled in from the expert testimony that it would take over one year for the ditch to become 100% filled in. *See Maxwell*, 164 N.C. App. at 322, 595 S.E.2d at 761 ("When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence.").

5. We note that although there is no testimony indicating the process of the ditch filling in would have been conspicuous, if the completely filled in ditch was conspicuous, viewing the evidence in the light most favorable to the Plaintiffs and giving them every reasonable inference, the process of the ditch going from 50% filled in to completely filled in was conspicuous. *See Maxwell*, 164 N.C. App. at 322, 595 S.E.2d at 761 ("When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence.").

filled ditch, which had been at least half filled, in violation of NCDOT guidelines, for at least six months, and, had NCDOT exercised due diligence, it would have discovered the "clearly visible" deficient ditch through its review of Highway 56 and the surrounding areas.

¶ 19 Furthermore, the cases on which NCDOT relies to assert otherwise are not controlling here. The cases cited focus on the length of time required to show constructive notice in cases regarding defective sidewalks, in which we found three and four years was not sufficient to establish constructive notice. *See Desmond v. City of Charlotte*, 142 N.C. App. 590, 544 S.E.2d 269 (2001) (relating to a 0.5 inch elevation difference between sidewalk concrete slabs for 1-2 years prior to the incident, and at the time the difference was 1.6 inches); *Willis*, 137 N.C. App. 762, 529 S.E.2d 691 (2000) (relating to a 1.25 inch elevation difference between sidewalk concrete slabs). In the specific circumstance of these cases, the defect was minor and difficult to observe. However, here, there was evidence from multiple witnesses showing that the defect in the ditch was "clearly visible"; after "[taking] a look at [the road with the ditch]" the ditch "was at a point where it needed to be noted for maintenance"; and "[the filled in ditch] was something you could observe just by looking at it[.]" Thus, this case is distinct from *Willis* and *Desmond*.

CONCLUSION

¶ 20 There was more than a scintilla of evidence to support the jury finding NCDOT had constructive notice of the deficient condition and breached its duty. Viewing the evidence in the light most favorable to the Plaintiffs, the filling in of the ditch beyond 50%, in violation of NCDOT guidelines, would have been conspicuous for at least six months prior to Plaintiffs' accident. NCDOT's motions for directed verdict and judgment notwithstanding the verdict were properly denied.

AFFIRMED.

Judges ZACHARY and COLLINS concur.

IN RE J.S.G.

[276 N.C. App. 89, 2021-NCCOA-40]

IN THE MATTER OF J.S.G.

No. COA20-82

Filed 2 March 2021

Drugs—indictment—delivery of a controlled substance—sufficiency—"believed/told to be Adderall"

A juvenile petition failed to properly allege the crime of delivering a controlled substance under N.C.G.S. § 90-95(a)(1) where it did not sufficiently allege the "controlled substance" element of the crime by describing delivery of "1 orange pill believed/told to be Adderall."

Appeal by defendant from orders entered 14 August 2019 by Judge Marion M. Boone and 6 September 2019 by Judge Thomas B. Langan in District Court, Surry County. Heard in the Court of Appeals 25 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Sarah G. Zambon, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Juvenile appeals adjudication and disposition orders adjudicating him delinquent and ordering him to 12 months of probation. Where the juvenile petition alleged that the juvenile had delivered a "pill believed/told to be Adderall," the petition failed to identify the pill as a controlled substance under North Carolina General Statute § 90-95(a)(1). The juvenile petition was therefore insufficient to confer jurisdiction to the district court, and we vacate the orders.

I. Background

¶ 2 The State's evidence tended to show that on 8 February 2019, Doug,[1] a middle school student, was acting "different than normal" at school: "He was very jittery, legs shaking, very talkative, out of his seat." Doug's teacher called the school resource officer ("SRO") who questioned him about whether he had taken anything. Doug stated that another middle

1. Pseudonyms are used.

school student, Kevin, had given him Adderall, and he "had beg[u]n to be nervous about what he had done to his body." Doug went home.[2]

¶ 3 Kevin was called into the principal's office. The principal asked Kevin if he had given Doug anything. Kevin said he gave him ibuprofen because Doug had been "bugging him" about giving him some Adderall – Kevin has a prescription for Adderall to address his diagnosis of ADHD – so he "handed him a ibuprofen, and said here, here's you an Adderall." Kevin described the pill as an orange ibuprofen.

¶ 4 On 10 April 2019, a juvenile petition was filed alleging Kevin was delinquent and charging him with possession of a controlled substance with intent to deliver under North Carolina General Statute § 90-95(a)(1). The petition stated that Kevin had delivered "1 pill[,]" namely "1 orange pill believed/told to be Adderall[.]" During Kevin's hearing his attorney made a motion to dismiss, one of the basis was that "the petition is defective, and therefore this matter needs to be dismissed." Kevin's motion to dismiss was denied.

¶ 5 On 14 August 2019, Kevin was adjudicated delinquent for possession with intent to manufacture, sale, or deliver a controlled substance under North Carolina General Statute § 90-95(a)(1). On 6 September 2019, a juvenile level 1 disposition order was entered, and Kevin was placed on 12 months of probation, ordered to attend multiple treatment programs, and to perform community service. Kevin appeals.

II. Juvenile Petition

¶ 6 Kevin contends that "the trial court lacked subject matter jurisdiction where the petition failed to adequately allege a crime when it described delivery of '1 orange pill believed/told to be Adderall.'" (Original in all caps.) "In a juvenile delinquency action, the juvenile petition serves essentially the same function as an indictment in a felony prosecution and is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity that the accused is clearly apprised of the conduct for which he is being charged." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006). "This Court reviews challenges to the sufficiency of an indictment using a *de novo* standard of review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal."

---

2. No medical evidence was offered indicating whether Doug's "different" behavior was due to taking Adderall, his own nervousness about what he may have taken, or some other cause.

State v. Mayo, 256 N.C. App. 298, 300, 807 S.E.2d 654, 656 (2017) (citation and quotation marks omitted).

¶ 7 When reviewing a juvenile delinquency petition,

> it is well established that fatal defects in an indictment or a juvenile petition are jurisdictional, and thus may be raised at any time. Therefore, we review the juvenile's argument on this issue to determine if the juvenile petition was in fact fatally defective.
>
> . . . When a petition is fatally deficient, it is inoperative and fails to evoke the jurisdiction of the court. Because juvenile petitions are generally held to the standards of a criminal indictment, we consider the requirements of the indictments of the offenses at issue.
>
> Although an indictment must give a defendant notice of every element of the crime charged, the indictment need not track the precise language of the statute. An indictment which avers facts which constitute every element of an offense does not have to be couched in the language of the statute. An indictment need not even state every element of a charge so long as it states facts supporting every element of the crime charged. North Carolina General Statutes, section 15A–924(a)(5) (2005) requires that a criminal pleading set forth a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

S.R.S., 180 N.C. App. at 153, 636 S.E.2d at 279—80 (citation and quotation marks omitted).

¶ 8 Kevin's juvenile delinquency petition alleged the offense as possession of a controlled substance with intent to manufacture, sell, or deliver under North Carolina § 90-95(a)(1): "The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) *the substance must be a controlled substance*; (3) there must be intent to sell or distribute the controlled substance."

State v. Carr, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001); *see* N.C. Gen. Stat. § 90-95(a)(1) (2019) (emphasis added).[3]

¶ 9 We find Kevin's argument well-reasoned, and thus repeat it here:

> From the day this incident occurred, [the SRO] and the State have not known whether the pill given to [Doug] was Adderall or merely ibuprofen. This lack of knowledge is illustrated by the way it chose to word the petition: equivocally. According to the petition, the pill may have been Adderall, or it may have been ibuprofen as [Kevin] told [the SRO] and [principal]. Although this allegation is accurate – [the SRO] could only say what [Doug] was told or believed – the petition fails to charge a crime because it both (1) does not allege the controlled substance element and (2) appears to charge two separate crimes.[4] Juveniles, like adults have "the right to be charged by a lucid prosecutive statement which factually particularizes the essential elements of the specified offense." *State v. Sturdivant*, 304 N.C. 293, 309, 283 S.E.2d 719, 730 (1981). That did not happen here. Accordingly, [Kevin's] adjudication and disposition orders must be vacated.

¶ 10 The State counters by noting that neither the exact language of the charging statute nor any other magic words are required in a juvenile petition and that "whether the pill was Adderall is an evidentiary issue for the trial court to decide[.]" But the State fails to address Kevin's actual argument – since the indictment stated only that the substance was "believed" to be Adderall, the State failed to allege an essential element of the crime. *See generally Carr*, 145 N.C. App. at 341, 549 S.E.2d at 901; *see* N.C. Gen. Stat. § 90-95(a)(1). Although a "controlled substance may be identified an official name, common or usual name, chemical name, or trade name[,]" the indictment must identify it as a controlled substance, since "the identity of the controlled substance is an essential element of the crime of possession of a controlled substance with the intent to

---

3. North Carolina General Statute § 90-95 has since been amended; the amendment is not relevant to this case. *See* N.C. Gen. Stat. § 90-95 (2020).

4. Kevin argues along with violation of North Carolina General Statute § 90-95(a)(1) the petition "appears to charge" under North Carolina General Statute § "90-95(a)(2), sale or delivery of a counterfeit controlled substance[.]"

sell or deliver." *State v. Stith*, 246 N.C. App. 714, 717, 787 S.E.2d 40, 43 (2016) (citation, quotation marks, brackets and footnote omitted), *aff'd per curiam*, 369 N.C. 516, 796 S.E.2d 784 (2017).

¶ 11 The State fails to direct us to any case law indicating that an indictment is sufficient if it identifies a controlled substance based upon what someone "believed" it was or was "told" it was. No one other than Kevin and Doug saw the pill. While distribution of a controlled substance in a school is a serious problem, the law does not allow a juvenile petition to be based upon conjecture regarding the actual substance distributed. While the State contends the petition "alleges that the Juvenile delivered the substance[;]" it actually does not. The indictment alleges only "that the Juvenile delivered" what someone *believed* and what the State was *told* was a controlled substance.

¶ 12 The State compares this case to *S.R.S.*, where, according to the State, "an indictment was found to be sufficient for communicating threats when . . . 'the totality of the circumstances demonstrate that the juvenile had notice of the precise statutory provision as well as the precise conduct that was alleged to be a violation[.]'" In *S.R.S.*, the juvenile challenged the petition as fatality defective as it alleged he threatened "to injur[e] the person *and* property" of another whereas the specific threat alleged to did not refer to property. *S.R.S.*, 180 N.C. App. at 155, 636 S.E.2d at 281 (emphasis in original). However, *S.R.S.*, is inapposite to the challenge here. *S.R.S.* would be analogous only had that petition alleged the State "believed" or was "told" the juvenile made a threat but not that he actually made a threat. In other words, if the State had included language which indicated the entire threat, regardless of the specifics, may not have even happened. *See generally id.* In addition, threats are quite different from controlled substances. The identification of the controlled substance is a crucial element of the crime of distribution of a controlled substance, and the crime charged depends upon the exact controlled substance involved. *See State v. Ward*, 364 N.C. 133, 143, 694 S.E.2d 738, 744 (2010) ("First and foremost is the obvious point that throughout the lists of Schedule I through VI controlled substances found in sections 90–89 through 90–94, care is taken to provide very technical and specific chemical designations for the materials referenced therein. These scientific definitions imply the necessity of performing a chemical analysis to accurately identify controlled substances before the criminal penalties in N.C.G.S. § 90–95 are imposed." (citation, quotation marks, and brackets omitted)). Ultimately, this indictment fails to "set forth a plain and concise factual statement . . . with sufficient precision clearly to apprise the defendant . . . of the conduct

which is the subject of the accusation" as it is unclear whether a controlled substance was involved at all. *Id.* at 153, 636 S.E.2d at 280. Accordingly, we vacate Kevin's adjudication and disposition orders.

¶ 13 We also note that Kevin made other arguments on appeal which we need not address since we are vacating the orders. Some of the additional arguments on appeal are related to the evidence of the identification of the pill. For example, Kevin raised arguments regarding the denial his of motion to dismiss based on the sufficiency of the evidence and the admission of lay testimony from the SRO regarding identification of the pill. We note that the SRO never saw the pill, so his lay testimony of visual identification was based only upon Doug's description of the pill he took. This testimony would not be competent evidence to identify the controlled substance, as the Supreme Court has determined that expert witness testimony is required to establish that a pill is in fact a controlled substance because this evidence "must be based on a scientifically valid chemical analysis and not mere visual inspection." *Ward*, 364 N.C. at 142, 694 S.E.2d at 744 (footnote omitted).

> The *Ward* and *Llamas-Hernandez* decisions result in two general rules. First, the State is required to present either a scientifically valid chemical analysis of the substance in question or some other sufficiently reliable method of identification. Second, testimony identifying a controlled substance based on visual inspection—whether presented as expert or lay opinion—is inadmissible.

State v. Carter, 255 N.C. App. 104, 107–08, 803 S.E.2d 464, 466–67 (2017) (citations omitted).

III. Conclusion

¶ 14 Because the juvenile petition failed to properly allege the crime of delivering a controlled substance, we vacate the adjudication and disposition orders.

VACATED.

Judges DIETZ and ZACHARY concur.

PORTERS NECK LTD., LLC v. PORTERS NECK COUNTRY CLUB, INC.

[276 N.C. App. 95, 2021-NCCOA-41]

PORTERS NECK LIMITED, LLC, Plaintiff
v.
PORTERS NECK COUNTRY CLUB, INC., Defendant

No. COA19-537

Filed 2 March 2021

1. Appeal and Error—interlocutory orders and appeals—sanctions—attorney fees—substantial sum immediately payable

An interlocutory order for sanctions requiring defendant to pay more than $48,000 in attorney fees to plaintiff affected a substantial right because the sum was significant and due immediately, so interlocutory review was appropriate.

2. Discovery—sanctions—Rule 37—conclusion supported by unchallenged findings—no abuse of discretion

Defendant failed to show that the trial court abused its discretion by granting plaintiff's Civil Procedure Rule 37 motion for sanctions where the trial court's unchallenged findings supported the conclusion that defendant violated the court's discovery order.

3. Attorney Fees—sufficiency of findings—customary fee for like work—counsel's affidavit

Where the trial court's order granting attorney fees as a sanction for defendant's discovery violations was not supported by evidence showing the "customary fee for like work" by others in the legal market—rather, the only evidence on the matter was the conclusory affidavit of plaintiff's counsel—the order was vacated with respect to the amount of attorney fees awarded and remanded for further proceedings.

Appeal by defendant from order entered 11 December 2018 by Judge Andrew T. Heath in New Hanover County Superior Court. Heard in the Court of Appeals 10 February 2021.

Randolph M. James, P.C., by Randolph M. James and Kyle Martin, and Wall Babcock LLP, by Kelly A. Cameron for plaintiff-appellee.

Gordon Rees Scully Mansukhani, LLP, by Robin K. Vinson and Thomas B. Quinn, pro hac vice, and Ward and Smith, P.A., by Alexander C. Dale, for defendant-appellants.

TYSON, Judge.

¶ 1 Porters Neck Country Club, Inc. ("Defendant") appeals from order of the trial court awarding attorney's fees. We affirm in part, vacate in part, and remand.

I. Background

¶ 2 Defendant was formed on 24 June 1991 to operate Porters Neck Country Club near Wilmington. Porters Neck Limited, LLC ("Plaintiff"), successor-in-interest to Porters Neck Limited Partnership, was formed on 4 October 1991 to own, develop, and sell real property located within the Porters Neck Plantation residential community. Plaintiff is owned by Porters Neck Company, Inc. Plaintiff and Defendant entered into a Subscription Agreement on 6 September 1991. The Subscription Agreement provided for the transfer of management and control of the Defendant entity from Plaintiff to Defendant's shareholders and members upon the occurrence of stated terms and conditions.

¶ 3 Plaintiff developed the country club and maintained control of Defendant until 12 March 2004, when all parties entered the Porters Neck Country Club Turnover Agreement ("Turnover Agreement"). The Turnover Agreement conveyed ownership of the club to Defendant's shareholders and control thereof was transferred to its membership, provided minimum sale prices for various categories of memberships, were maintained and Defendant made payments from sales of memberships to Plaintiff.

¶ 4 On 26 October 2005, Plaintiff and Defendant entered into a Memorandum of Understanding ("MOU"), which increased membership fees and payments to Plaintiff from sales of memberships. Plaintiff alleged the increases in amounts payable to Defendant under the MOU have expired, but the membership rate increase had not.

¶ 5 On 7 September 2007, Plaintiff and Defendant entered into an Amendment to the Turnover Agreement ("Amendment") that temporally permitted the sale of memberships at prices below those required in the Turnover Agreement. The Amendment also contained a proportional decrease in the payments due Plaintiff from the sale of the memberships. Plaintiff alleged this agreement has expired.

¶ 6 Plaintiff alleged Defendant continued to sell memberships at the reduced prices and making the reduced payments to Plaintiff under the expired Amendment. Plaintiff further alleged they have not received any payments from Defendant since 13 August 2014.

¶ 7 Plaintiff filed an action alleging breach of contract, unfair and deceptive trade practices, and tortious interference with contract, and sought an accounting, an injunction against continued breach, and asserted punitive damages on 4 August 2014. Plaintiff and Defendant have been involved in discovery since then. By Order Dismissing Appeal filed 6 December 2017, Plaintiff's only remaining claim is for breach of contract.

¶ 8 During discovery, Plaintiff filed a motion to compel discovery of email correspondence and meeting minutes. The trial court granted Plaintiff's motion to compel in part on 30 November 2016. Defendant did not file an appeal nor request for the denied motion to be calendared. On 12 December 2016, Defendant filed a motion for reconsideration pursuant to North Carolina Rule of Civil Procedure 59, which was denied at hearing. *See* N.C. Gen. Stat. § 1A-1, Rule 59 (2019).

¶ 9 Plaintiff's counsel sent Defendant's counsel a letter outlining alleged discovery deficiencies and its non-compliance on 12 April 2018 and moved for sanctions on 9 May 2018.

¶ 10 The parties and the trial court held a status conference, wherein Plaintiff's counsel brought the court's attention to the ongoing discovery disputes, and alleged Defendant was not in compliance with the 30 November 2016 order to compel. Defendant's counsel represented to the trial court the discovery Defendant had produced and asserted Plaintiff had accepted the documents.

¶ 11 The parties reconvened for trial on 30 July 2018, the trial court held pretrial hearings on motions *in limine* and Plaintiff's motion to compel. During this hearing, while the jury pool waited in the courthouse, Defendant produced approximately 200 pages designated as "Club's Response to Developer's Verified Motion." The response was dated 11 June 2018, but that date was crossed out and the date 30 July 2018 was handwritten over it. The certificate of service was asserted service by hand or by first class mail to Plaintiff on 11 June 2018. The trial court released the jury pool and continued the case to allow Plaintiff time to review the documents.

¶ 12 On 8 October 2018, the trial court granted Plaintiff's motion for sanctions pursuant to North Carolina Rules of Civil Procedure 11 and 37 for Defendant's failure to comply with the 30 November 2016 production order. *See* N.C. Gen. Stat. § 1A-1, Rules 11 & 37 (2019). The trial court ordered Defendant to pay the reasonable costs and expenses, including attorney's fees, related to its failure to comply and for the existing delay.

¶ 13 The trial court did not set the amount of fees and expenses at the time and required additional evidence to determine the amount due. On 5 November 2018, Defendant filed a notice of appeal of the order.

¶ 14 On 8 November 2018, the trial court heard arguments and awarded Plaintiff $15,120.50 in attorneys' fees and expenses under Rule 37 and $33,570.00 under Rule 11 on 28 December 2018. Defendant filed another appeal on 2 January 2019. On 30 September 2020, Plaintiff filed a motion to dismiss both of Defendant's appeals to this Court, which was referred to this panel for review by order entered 3 November 2020.

II. Jurisdiction

A. Interlocutory Order and Appeal

¶ 15 **[1]** Based upon Plaintiff's referred motion to dismiss, we first address whether Defendant's appeal is properly before this Court. Defendant concedes its appeal is interlocutory and asserts the trial court was divested of jurisdiction based on its 5 November 2018 notice of appeal.

¶ 16 "Where a party appeals from a *non*appealable interlocutory order, however, such appeal does not deprive the trial court of jurisdiction, and thus the court may properly proceed with the case." *RPR & Associates, Inc. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 514 (2002) (citations omitted).

¶ 17 By ordered entered 19 February 2019, our Court dismissed Defendant's appeal of the initial 8 October 2018 order as interlocutory. "[A]n order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial right which would be lost if the ruling is not reviewed before final judgment. *Benfield v. Benfield*, 89 N.C. App. 415, 418, 366 S.E.2d 500, 502 (1988) (citations omitted).

¶ 18 The trial court retained jurisdiction to enter the 28 December 2018 sanctions order.

B. Substantial Right

¶ 19 Defendant further contends its appeal affects a substantial right. Our Supreme Court has defined "[a]n interlocutory order [as] one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted).

¶ 20 This Court has added: "As a general proposition, only final judgments, as opposed to interlocutory orders, may be appealed to the appellate courts." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 188 (2011) (citations omitted). "Appeals from interlocutory orders are only available in exceptional circumstances." *Id.* (citation and internal quotation marks omitted). The reason for "[t]he rule against interlocutory appeals seeks to prevent fragmentary, premature and unnecessary appeals by allowing the trial court to bring a case to final judgment before its presentation to the appellate courts." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (citation omitted).

¶ 21 "No hard and fast rules exist for determining which appeals affect a substantial right. Rather, such decisions usually require consideration of the facts of the particular case." *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984) (citations and quotation marks omitted). "Whether a substantial right is affected usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from." *Id.* at 642, 321 S.E.2d at 250.

Turning to the order before us, generally "[t]he order granting attorney fees is interlocutory, as it does not finally determine the action nor affect a substantial right which might be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *Cochran v. Cochran*, 93 N.C. App. 574, 577, 378 S.E.2d 580, 582 (1989).

C. Sanctions

¶ 22 An order for sanctions may be immediately appealed if it affects a substantial right under N.C. Gen. Stat. §§ 1-277 or 7A-27(b)(3)(a) (2019). A substantial right is invoked when the sanction ordered is a substantial sum and is immediately payable. *See Estate of Redden ex rel. Morely v. Redden*, 179 N.C. App. 113, 116-17, 632 S.E.2d 794, 798 (2006) ("The Order appealed affects a substantial right of [the] Defendant . . . by ordering her to make immediate payment of a significant amount of money; therefore this Court has jurisdiction over the Defendant's appeal pursuant to N.C. Gen. Stat. § 1-277 and N.C. Gen. Stat. § 7A-27(d) [2005]." (citations omitted)), *remanded on other grounds*, 361 N.C. 352, 649 S.E.2d 638 (2007); N.C. Gen. Stat. § 7A-27(b).

¶ 23 The trial court ordered Defendant to immediately pay attorneys fees as sanctions to Plaintiff totaling in excess of $48,000. Defendant has sufficiently established the order affects a substantial right and that interlocutory review is appropriate. Plaintiff's motion to dismiss Defendant's appeal is denied.

¶ 24 Additionally, Defendant has also filed a conditional petition for writ of certiorari requesting we review not only the 28 December 2018 sanctions order but also the 30 November 2016 order compelling production and the 8 October 2018 order, which found Defendant in violation of the 30 November 2016 order. As we have determined Defendant has shown a substantial right to immediately appeal the 28 December 2018 order, we dismiss that part of the petition as moot. As Defendant raises no arguments in briefing to this Court challenging the two prior orders, we deny Defendant's petition seeking review of those two orders. *See* N.C. R. App. P. 28(a). Defendant's conditional petition for writ of certiorari is dismissed as moot in part and denied in part.

III. Issue

¶ 25 Defendant argues the trial court erred in awarding sanctions pursuant to North Carolina Rules of Civil Procedure 11 and 37. N.C. Gen. Stat. § 1A-1, Rules 11 and 37.

IV. Rule 37 Sanctions

¶ 26 **[2]** In this appeal, as noted above, Defendant does not raise arguments challenging either the 30 November 2016 order compelling production or the 8 October 2018 order in which the trial court made the initial determination to impose sanctions. Rather, in this appeal, Defendant argues the trial court erred in awarding $15,120.50 in attorney fees pursuant to North Carolina Rule of Civil Procedure 37 in the 28 December 2018 order.

A. Standard of Review

¶ 27 The imposition of sanctions under North Carolina Rule of Civil Procedure 37 for a party failing to comply with discovery requests and the trial court's decisions "is a matter within the sound discretion of the trial court and cannot be overturned on appeal absent a showing of abuse of discretion." *Burns v. Kingdom Impact Glob. Ministries, Inc.*, 251 N.C. App. 724, 729, 797 S.E.2d 21, 25 (2017) (citing *Bumgarner v. Reneau*, 332 N.C. 624, 631, 422 S.E.2d 686, 690 (1992).

¶ 28 "An abuse of discretion may arise if there is no record evidence which indicates that [a] defendant acted improperly, or if the law will not support the conclusion that a discovery violation has occurred." *Butler v. Speedway Motorsports, Inc.*, 173 N.C. App. 254, 264, 618 S.E.2d 796, 803 (2005) (citations omitted).

B. Analysis

¶ 29 North Carolina Rule of Civil Procedure 37(b)(2) provides:

> **Sanctions by Court in Which Action is Pending**. —If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f) a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2019).

¶ 30 "[A] broad discretion must be given to the trial judge with regard to sanctions." *Batlle v. Sabates*, 198 N.C. App. 407, 417, 681 S.E.2d 788, 795 (2009) (citations and internal quotation marks omitted). This Court further stated, "[a] trial court does not abuse its discretion by imposing a severe sanction so long as that sanction is among those expressly authorized by statute and there is no specific evidence of injustice." *Id.* at 417, 681 S.E.2d at 795 (citations and internal quotation marks omitted).

¶ 31 On appellate review, "where the record on appeal permits the inference that the trial court considered less severe sanctions, this Court may not overturn the decision of the trial court unless it appears so arbitrary that it could not be the result of a reasoned decision." *Badillo v. Cunningham*, 177 N.C. App. 732, 734, 629 S.E.2d 909, 911, *aff'd per curiam*, 361 N.C. 112, 637 S.E.2d 538 (2006).

¶ 32 The trial court made the following unchallenged findings of fact in its 8 October 2018 sanctions order:

1. During the course of this matter, discovery disputes arose between the parties. After multiple hearings and conference calls regarding those disputes, [the trial court] entered an Order dated 26 November 2016 and entered 30 November 2016[.]

. . .

14. On 12 April 2018, counsel for Plaintiff corresponded with counsel for Defendant outlining ongoing discovery issues and Defendant's non-compliance with [the trial court's] Order.

15. On 17 April 2018, counsel for Plaintiff again corresponded with counsel for Defendant outlining discovery issues, Defendant's non-compliance with the [the trial court's] Order, and a sense of urgency given the upcoming trial date.

16. On 9 May 2018, Plaintiff filed their Motion to Compel alleging that [Defendant] had failed to comply with [the trial court's] November 2016 Order, among other things.

. . .

19. During the 24 July 2018 status conference, Counsel for Plaintiff directed the Court's attention to the ongoing discovery disputes, Plaintiff's Motion to Compel, and contended that the Defendant was not in compliance with [the trial court]'s Order because Defendant had failed to produce items the Order compelled them to produce.

20. During the 24 July 2018 status conference, Counsel for Defendant took an opposite position and represented to the court that Defendant had produced, and Plaintiff had accepted, the items that Plaintiff contended Defendant had failed to produce. Defendant further represented to the Court that they would be prepared for trial as scheduled. Specifically, Counsel for Defendant stated, "I take issue with these discovery issues. I'm going to hand up to you when we have that hearing, the [d]ate-stamped number where the documents that they claim we haven't produced to them, I've got the [d]ate-stamped number

> where they accepted it, they just don't know they had it or they haven't looked. And so it's not flippant that I haven't gone out of my way to educate people on that, I don't need to I don't believe. So when we convene next week, I would hope that those issues might be able to get resolved before Monday, that would be good. But if not, I guess we tee that up and then a jury would come in probably Tuesday afternoon or Wednesday, something like that.
>
> . . .
>
> 24. Contrary to counsel for Defendant's statements to the Court on 24 July 2018 that Defendant would provide [d]ate-stamped copies showing Plaintiff's receipt of all documents, the responsive pleading included a section entitled "Documents Subject to Motion for Reconsideration" which outlined the Defendant's basis for refusing to produce[.]
>
> . . .
>
> 26. The undersigned finds that the certificate of service for Defendant's responsive pleading was originally dated June 11, 2018 (the previously scheduled trial date), but over the top of the June 11 date is written July 30, 2018 (amending the certificate of service to reflect the most recent trial date). The undersigned finds that Defendant purposefully delayed tendering responsive documents and the responsive pleading such that it would cause surprise and delay. The Court finds that this tactic did cause surprise and did delay the trial in this matter.

¶ 33 The trial court further found the 26 November 2016 order remained valid, Defendant continues to willfully withhold the documents despite being compelled, and Defendant had the ability to comply with the order. Defendant does not challenge these findings, which are binding upon appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

¶ 34 The trial court's findings of fact support the conclusion that Defendant continued to violate the 30 November 2016 discovery order. Defendant has failed to show the trial court abused its discretion by granting Plaintiff's motion for sanctions. That portion of the trial court's order is affirmed.

V. Rule 37 Award of Attorney's Fees

¶ 35 **[3]** Defendant further argues the trial court lacked evidence to award fees and costs. North Carolina follows the "American Rule" with regards to awards of attorney's fees against an opposing party. *Ehrenhaus v. Baker*, 243 N.C. App. 17, 23-25, 776 S.E.2d 699, 704-05 (2015). Applying the "American Rule", our Supreme Court held each litigant is required to pay its own attorney's fees, unless a statute or agreement between the parties provides otherwise. *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972).

¶ 36 Over thirty years ago, this Court held: "Rule 37(a)(4) requires the award or expenses to be reasonable, [and] the record must contain findings of fact to support the award of any expenses, including attorney's fees. The findings should be consistent with the purpose of the subsection, which is not to punish the noncomplying party, but to reimburse the successful movant for his expenses." *Benfield*, 89 N.C. App. at 422, 366 S.E.2d at 504 (citations omitted).

¶ 37 The following year after deciding *Benfield*, this Court listed the required findings, "in order for the appellate court to determine if the statutory award of attorneys' fees is reasonable the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989).

¶ 38 The trial court found in its order awarding attorney's fees:

> 4. Based on the submissions of the parties, Plaintiff's counsel's stated billable hourly rates are reasonable and are in keeping with the usual and customary fees charged by other attorneys of similar experience, skills and practice areas in the New Hanover County legal community.
>
> 5. Based on the submissions of the parties as well as the time expended by the Court during the court's consideration of Plaintiff's motion to compel, [trial court]'s Order and Plaintiff's motion for sanctions, the court finds that the time and labor expended and expense incurred by Plaintiff addressing Defendant's deficient discovery and the necessary interventions of this Court were reasonable and necessary to prosecute Plaintiff's claims.

> 6. After reviewing the submissions of the parties, the court finds that the amount of $15,120.5 . . . reflects the amount of the reasonable expenses incurred, including reasonable attorney' (sic) fees because of the Defendant's sanctionable conduct under Rule 37 as set forth in the Court's 8 October 2018 Order.

¶ 39 The trial court found that counsel's rates were set forth in an affidavit; those rates were comparable and reasonable for the work done by others in the legal market; the subject matter of the case, and the experience of the attorneys; the specific work done by counsel was reasonable and necessary; and the costs incurred by Plaintiffs were reasonable and necessary. Defendant challenges and argues these findings are not supported by evidence in the record because the court relied only upon Plaintiff's counsel's self-serving affidavits and conclusory statements.

¶ 40 In *WFC Lynwood I LLC v. Lee of Raleigh, Inc.*, 259 N.C. App. 925, 935, 817 S.E.2d 437, 444 (2018), this Court vacated and remanded an attorney's fee award based on an affidavit that offered no statement on comparable rates in the field of practice and did not offer comparable rates of attorney's fees at the hearing.

¶ 41 Here, the affidavit does not state a comparable rate by other attorneys in the area with similar skills for like work, and it contains a conclusory assertion: "The rates charged by our lawyers and staff are customary rates and are reasonable and ordinary for professionals of similar skill and experience practicing in North Carolina's state courts, and are the same rates charged to other clients of the firm for similar services."

¶ 42 Plaintiff submitted insufficient evidence of a comparable fee rate to the trial court to show "the customary fee for like work" by others in the legal market to support a finding on that point, and to award attorney's fees. The trial court erred by making a finding with respect to "the customary fee for like work" absent evidence to support such a finding. *See id.*

¶ 43 We vacate the order with respect to the amount awarded and remand to the trial court. "On remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion." *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999).

VI. Rule 11 Attorney's Fees

¶ 44 Defendant asserts the trial court abused its discretion when it awarded sanctions pursuant to North Carolina Rule of Civil Procedure 11. In light of this Court's holding to vacate with respect to the amount awarded and remand for further proceedings and findings, the trial court's award of attorney's fees pursuant to North Carolina Rule of Civil Procedure 11 is also vacated and remanded.

VII. Conclusion

¶ 45 Defendants interlocutory appeal is properly before us on the award and amount of sanctions. We affirm the trial court's conclusion to award attorney fees for Defendant's discovery violations. We vacate the trial court's finding of "the customary fee for like work" absent comparable evidence of fees charged by others in the legal market with similar skills and experience for like work to support such a finding. We vacate the sanctions order with respect to the amounts awarded pursuant to North Carolina Rules of Civil Procedure 11 and 37 and remand to the trial court for further hearing. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges INMAN and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
ANTHONY CAZAL ARNETT

No. COA20-324

Filed 2 March 2021

1. Assault—with a deadly weapon inflicting serious injury—general intent crime—voluntary intoxication defense unavailable

Voluntary intoxication, a defense only for specific intent crimes, could not serve as a defense to assault with a deadly weapon inflicting serious injury, a general intent crime.

2. Constitutional Law—concession of guilt—to element of crime—Harbison inquiry—reliance upon unavailable defense

There was no error in defendant's prosecution for assault with a deadly weapon inflicting serious injury (AWDWISI) where, after

ruling that voluntary intoxication was not available as a defense to AWDWISI because it was a general intent crime, the trial court thereafter allowed defense counsel to admit to the physical act of the offense while denying defendant's intent to commit the offense based on his intoxication. The trial court fulfilled the requirements of *State v. Harbison*, 315 N.C. 175 (1985), by personally inquiring of defendant twice—after denying the voluntary intoxication defense—to ensure that he understood and agreed with his trial counsel's strategy.

3. Constitutional Law—effective assistance of counsel—admission of guilt to element of crime—intoxication defense pursued but unavailable—trial strategy

Defendant failed to show ineffective assistance of counsel where trial counsel admitted to defendant's commission of the physical act of assault with a deadly weapon inflicting serious injury (AWDWISI) while denying defendant's intent to commit the offense based on his intoxication—even though the trial court had ruled that voluntary intoxication was not available as a defense to AWDWISI because it was a general intent crime. The record showed a deliberate trial strategy in the face of overwhelming and uncontradicted evidence of defendant's guilt, and defendant consented to trial counsel's strategy and testified that he committed the assault against the victim.

Appeal by defendant from judgment entered 19 September 2019 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 10 February 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara M. Van Pala, for the State.

Leslie Rawls for defendant-appellant.

TYSON, Judge.

¶ 1 Anthony Cazal Arnett ("Defendant") appeals from judgments entered after a jury returned verdicts finding him guilty of assault with a deadly weapon inflicting serious injury ("AWDWISI") with two aggravating factors and guilty of attaining habitual felon status. We find no error.

I. Background

¶ 2 Defendant was married to Karen Arnett, the complaining witness in this matter, for about four years at the time of trial. A few months prior

to the events underlying these charges, Mrs. Arnett came home from work on 21 November 2018 and found Defendant at home, drinking. He accused her of cheating on him.

¶ 3 They got into Defendant's car and drove to the grocery store. As they drove, Defendant struck Mrs. Arnett and took her cellphone. When they arrived at the store, Defendant threatened to "stomp her" if she began "showing out." Mrs. Arnett went inside the store and asked the manager to call law enforcement. Defendant was charged in the incident, and a court date was set for 23 January 2019.

¶ 4 Two days prior to trial on 21 January 2019, Mrs. Arnett arrived home from work around 3:00 p.m. Defendant was already home and had started drinking around 2:30 p.m. Defendant was drinking twenty-five-ounce High Gravity Category Five Hurricane beers. The beers are a malt liquor with a content of 8.1 percent alcohol. Defendant had ingested three beers prior to his wife arriving home. Defendant and Mrs. Arnett drove to the grocery store to purchase food and more beer. Defendant had consumed another beer by the time they returned home from the grocery store.

¶ 5 During dinner, Defendant drank yet another beer and started another. Defendant then went to a neighbor's home for marijuana. The neighbor offered Defendant Xanax instead, so Defendant took eight Xanax bars. He ingested two of them, returned home and sat down to finish his dinner.

¶ 6 Mrs. Arnett testified Defendant's demeanor had changed when he returned home. Mrs. Arnett believed Defendant had "done something else back there besides drinking the alcohol." Defendant stood in their bedroom and threw a beer can. Mrs. Arnett telephoned her mother and remained on the phone so Defendant would not "put his hands on [her]."

¶ 7 A few minutes later, as Mrs. Arnett sat on the bed, Defendant came back into the bedroom and began assaulting her. He slammed her face against the wall. "[H]e took his fist with the rings on and hit me [] in the eye and busted my eye." Next, "he got the knife with the little hook on it and he sat down on top of me and he brought it to my throat . . . And then he took it to my chin and cut my chin."

¶ 8 Defendant told Mrs. Arnett that she was not going to make it to court on January 23. He got a butcher knife from the kitchen and threatened to cut her eyes. When Mrs. Arnett put up her hands in defense, Defendant cut her arm and thumb. Defendant also punched her repeatedly.

¶ 9 When Mrs. Arnett got up to go into the bathroom, he kicked her legs and said he would break them so she could not go to court. Defendant cut her head and stabbed her in the side. Mrs. Arnett testified that Defendant repeatedly punched her in the face "so nobody else would look at me." Defendant hit Mrs. Arnett in the back of the head with a CO2 air gun. Around 3:30 a.m., Defendant went to sleep.

¶ 10 Mrs. Arnett woke up in pain around 7:20 a.m. and asked Defendant to take her to the hospital. She offered to say whatever he wanted. He drove her to the Haywood Regional Medical Center emergency room.

¶ 11 Mrs. Arnett told the hospital staff she had fought with three women at the Dollar General store. The nurse responded the hospital was required to call law enforcement officers. Mrs. Arnett agreed.

¶ 12 Haywood County Sheriff's deputies Ken Stiles and Randy Jenkins responded to the hospital's call. Deputy Jenkins took Defendant into a separate room. Deputy Stiles then asked Mrs. Arnett what happened. She described what Defendant had done to her. Deputy Stiles smelled alcohol on Defendant, but he was not slurring his words nor stumbling while he was walking.

¶ 13 Defendant was arrested for violating the pretrial release conditions imposed from his November 2018 arrest. Upon searching him, deputies found Mrs. Arnett's cellphone, a wallet, and a hook blade pocketknife with fresh blood on it. Deputy Stoller transported Defendant to jail.

¶ 14 Mrs. Arnett's head and cheek were swollen. Both of Mrs. Arnett's eyes were black and blue. She suffered lacerations across her forehead and on her chin. She was bruised, and her hands and arms contained cuts. Her nose was broken, and she had a stab wound on her abdomen. She had a deep cut in the tendon between her thumb and index finger, which required surgery. She remained hospitalized until 24 January 2019. As a result of her injuries, Mrs. Arnett cannot grasp well with her hand, which affects her ability to work.

¶ 15 Officers secured and executed a search warrant at the Arnetts' home. They found and collected multiple bloody items from the bedroom and bathroom. In a kitchen drawer, they found a bloody knife.

A. Proceedings in the Trial Court

¶ 16 Defendant was indicted on charges of AWDWISI and attaining habitual felon status. The State gave notice of its intent to prove multiple aggravating factors related to the assault charge.

¶ 17 Defendant's trial counsel filed a Notice of Voluntary Intoxication Defense stating he would "show [Defendant] could not form the specific intent necessary for the crimes charged." The State submitted a memorandum of law in opposition and argued AWDWISI is not a specific intent crime and Defendant's voluntary intoxication is not a valid defense.

¶ 18 The trial court ruled AWDWISI was a general intent crime and the asserted defense of voluntary intoxication was not available to Defendant.

> [T]he Court having heard from counsel, would determine that in this particular offense, more specifically [AWDWISI], which is not the offense of intent to kill, this is a general intent crime, there is no specific intent element . . . for the charge for which the State is proceeding today, the voluntary intoxication is not available to the defendant and as such, the Court will abide by, comply with, and follow prior North Carolina precedent and not allow the defense of voluntary intoxication.

¶ 19 Defendant was tried by jury on 16 September 2019. The substantive offense of assault and habitual felon status trials were bifurcated.

¶ 20 Defendant's attorney stated he would admit an element of the physical act of the offense, but not Defendant's guilt because he lacked intent. Defendant told the court he understood his attorney would admit an element of the offense. Defendant further affirmed he had discussed this strategy with his attorney and agreed with this argument.

¶ 21 The trial court inquired of Defendant and his counsel as follows:

> THE COURT: [I]f you're admitting that the defendant's guilty of the offense, then we have to make a *Harbison* inquiry. . . you need to talk to your client and let me know if you're admitting that you're guilty or if you are simply admitting to some elements of the crime but denying that he's guilty.
>
> [TRIAL COUNSEL]: Given the jury instructions, Your Honor, and the fact that the jury instructions state that to find the defendant guilty, he must have intentionally assaulted and inflicted serious injury, my interpretation of that is that he is not admitting guilt, just some elements. And I have discussed that with him.
>
> THE COURT: Okay. Mr. Arnett, you understand that [Defense Counsel] is going to admit that you

committed some of the elements of the crime for which you stand accused, that being [AWDWISI]?

THE DEFENDANT: Yes, sir.

THE COURT: And have you discussed that with [Defense Counsel]?

THE DEFENDANT: Yes, sir.

THE COURT: And are you in agreement with that strategy?

THE [DEFENDANT]: Yes, sir.

THE COURT: And you also understand that while he may admit to some elements, he will not be admitting that you are, in fact, guilty of that offense?

THE [DEFENDANT]: Yes, sir.

THE COURT: And you are an (sic) agreement with that?

THE [DEFENDANT]: Yes, sir.

¶ 22 Defense counsel focused much of his cross-examination of Mrs. Arnett and the investigating officers on proving elements of voluntary intoxication.

¶ 23 Defendant testified in his defense. Trial counsel's direct examination primarily focused on Defendant's consumption of intoxicants, including Xanax, during the afternoon and night of the assaults. Defendant testified that he blacked out and did not remember his actions. Defendant maintained, throughout direct and cross examinations, that his last memory is a few moments after taking the Xanax and he did not remember the later events of that night.

¶ 24 Defendant's trial counsel made an offer of proof from Dr. Andrew Ewens, an expert in toxicology and pharmacology. Dr. Ewens had reviewed and evaluated the effects of alcohol and Xanax on Defendant's actions. In Dr. Ewens' opinion, Defendant's actions were consistent with alcohol intoxication and paradoxical effects of Xanax, which could have prevented Defendant from being in control of his actions the night of the crimes.

¶ 25 After hearing from Dr. Ewens, the trial court declined to change its ruling to exclude the defense of voluntary intoxication and declined to give the jury charge on the defense of voluntary intoxication.

¶ 26 Prior to closing arguments, the trial court again inquired of Defendant and his counsel in reference to his admissions under *Harbison*:

> THE COURT: Okay. [Defense Counsel], do you plan on making any admissions of guilt pursuant to *North Carolina versus Harbison* in closing?
>
> [DEFENSE COUNSEL]: Just as a I previously stated, Your Honor, that Mr. Arnett does not deny the actual physical act; however, does deny per the jury instructions that he acted intentionally as to even the overt act itself, not just the harm related.
>
> THE COURT: Okay. And Mr. Arnett, as we discussed earlier, you understand [Defense Counsel] would be admitting that the assault occurred, he's just denying that you were guilty of it because you did not intend for it to occur. Is that correct?
>
> THE DEFENDANT: That's correct, sir.
>
> THE COURT: And you're in agreement with that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay.

B. Verdicts and Sentence

¶ 27 The jury convicted Defendant of AWDWISI and found two aggravating factors existed beyond a reasonable doubt. Following the habitual felon trial, the jury found Defendant guilty of being a habitual felon.

¶ 28 At sentencing, the trial court found aggravating factors outweighed mitigating factors. Defendant was sentenced in the aggravated range to an active term of 120-156 months in prison. Defendant timely filed written notice of appeal.

II. Jurisdiction

¶ 29 Defendant's right to appeal arises from the final judgments entered. N.C. Gen. Stat. §§ 7A–27(b)(1), 15A–1444(a) (2019).

III. Issues

¶ 30 The issues before this Court are whether: (1) the trial court correctly ruled Defendant's defense of voluntary intoxication did not apply to his assault charge; (2) the trial court's *Harbison* inquiries were ad-

equate; and, (3) Defendant's counsel's concession denied him effective assistance of counsel.

IV. Voluntary Intoxication Defense

¶ 31 **[1]** The Supreme Court of the United States explained the difference between the general intent crimes and specific intent crimes:

> [A] person entered a bank and took money from a teller at gunpoint, but deliberately failed to make a quick getaway from the bank in the hope of being arrested so that he would be returned to prison and treated for alcoholism. Though this defendant knowingly engaged in the acts of using force and taking money (satisfying "general intent"), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy "specific intent").

Carter v. United States, 530 U.S. 255, 268, 147 L.Ed.2d 203, 215-16 (2000) (internal citations omitted).

¶ 32 Voluntary intoxication is a defense only to a crime that requires a showing of specific intent. *State v. Harvell*, 334 N.C. 356, 368, 432 S.E.2d 125, 132 (1993), (citing *State v. Jones* 300 N.C. 363, 365, 266 S.E.2d 586, 586 (1980)). Trial counsel admitted the assault but argued to the jury that Defendant had consumed so much alcohol and Xanax, he could not intentionally do anything and did not know what he was doing.

¶ 33 AWDWISI is not a specific intent crime. *State v. Woods*, 126 N.C. App. 581, 587, 486 S.E.2d 255, 258 (1997). Voluntary intoxication was never a legal defense available to Defendant.

V. *Harbison* Inquiry

A. Standard of Review

> Although this Court still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. We [] hold that when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed.

State v. McAllister, 375 N.C. 455, 463, 847 S.E.2d 711, 716 (2020) (alterations, citations, and internal quotations omitted) (emphasis supplied).

B. *Harbison*

¶ 34 **[2]** Defendant argues the trial court erred by failing to make an adequate inquiry under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985).

> A defendant's right to plead not guilty has been carefully guarded by the courts. When a defendant enters a plea of not guilty, he preserves two fundamental rights. First, he preserves the right to a fair trial as provided by the Sixth Amendment. Second, he preserves the right to hold the government to proof beyond a reasonable doubt.
>
> . . . .
>
> A plea decision must be made exclusively by the defendant. A plea of guilty or no contest involves the waiver of various fundamental rights such as the privilege against self-incrimination, the right of confrontation and the right to trial by jury. Because of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences.

Id. at 180, 337 S.E.2d at 507 (internal citations, quotation marks and alterations omitted). Defendant proffers several cases to support his argument that a *Harbison* violation occurred.

1. *State v. Foreman*

¶ 35 The issue in *Foreman* was whether the defendant "received ineffective assistance of counsel when his trial counsel conceded [the [d]efendant's guilt to AWDWISI without his knowing and voluntary consent." *State v. Foreman*, 270 N.C. App. 784, 785, 842 S.E.2d 184, 185 (2020). In *Foreman*, defendant's counsel introduced a "*Harbison* Acknowledgement" prior to opening statements. *Id.* The sworn statement was signed by the defendant and his trial counsel, and stated:

> [I], hereby give my informed consent to my lawyer(s) to tell the jury at my trial that I am guilty of Assault with a Deadly Weapon Inflicting Serious Injury. I understand that:
>
> 1. I have a right to plead not guilty and have a jury trial on all of the issues in my case.

> 2. I can concede my guilt on some offenses or some lesser offense than what I am charged with if I desire to for whatever reason.
>
> 3. My lawyer has explained to me, and I understand that I do not have to concede my guilt on any charge or lesser offense.
>
> 4. My decision to admit that I am guilty of Assault with a Deadly Weapon Inflicting Serious Injury is made freely, voluntarily and understandingly by me after being fully appraised of the consequences of such admission.
>
> 5. I specifically authorize my attorney to admit that I am guilty of Assault with a Deadly Weapon Inflicting Serious Injury.

¶ 36 The trial court found the defendant had "been advised of his attorney's intention to admit his guilt to [AWDWISI]." *Id.* at 787, 842 S.E.2d at 187.

¶ 37 The jury found the defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree murder, and felonious breaking and entering. *Id.* The defendant appealed "alleging he was denied effective assistance of counsel because his concession of guilt to AWDWISI was not knowing or voluntary." *Id.*

¶ 38 This Court held:

> Defendant's consent to his concession of guilt for AWDWISI was knowing and voluntary. Defendant confirmed that he understood the ramifications of conceding guilt to AWDWISI and that he had the right to plead not guilty. Defendant's counsel filed the *Harbison* Acknowledgment in which Defendant expressly gave his trial counsel permission to concede guilt to AWDWISI after "being fully appraised of the consequences of such admission." In this case, the facts show that Defendant knew his counsel was going to concede guilt to AWDWISI, and the trial court properly ensured that Defendant was aware of the ramifications of such a concession.

Id. at 789–90, 842 S.E.2d at 188.

¶ 39 Here, Defendant was present for two separate *Harbison* inquires, one at the beginning and one at the end of trial. He was addressed personally by the trial court both times and confirmed he understood and consented to his counsel's actions prior to any purported admission by his counsel.

¶ 40 Defendant heard the trial court's ruling that voluntary intoxication would not be allowed as a defense to his general intent crime. Trial counsel told the court he had discussed this admission of physical acts with his client. The court asked Defendant if he understood his attorney would be admitting some elements of the offense after the trial court had denied the voluntary intoxication defense.

> [DEFENSE COUNSEL]: -- [I]f you look at the jury instructions, Your Honor, they do state intentionally. Expert witness or not, voluntary intoxication defense or not, we still intend to present that defense to the jury.
>
> THE COURT: You can certainly elicit testimony and Mr. Arnett can certainly testify in the manner he deems appropriate. And [we're] just not going to submit as a substantive defense to the jury of involuntary intoxication.

¶ 41 Defendant was given an oral explanation of trial counsel's strategy to admit one element of the crime knowing his voluntary intoxication would not suffice as a defense. Defendant was directly addressed by the trial court to confirm his understanding and agreement to his counsel's plans and strategy. The *Harbison* inquiries as well as the conversation leading up to them are adequate to show Defendant was thoroughly advised and knowingly consented to his attorney's admission to the jury. *Foreman* does not compel a different result under these facts. *Id.*

2. *State v. Fisher*

¶ 42 As the trial court correctly noted, defense counsel can admit an element of a charge without triggering a *Harbison* violation. Our Supreme Court stated: "Although counsel stated there was malice, he did not admit guilt, as he told the jury that they could find the defendant not guilty." *State v. Fisher*, 318 N.C. 512, 533, 350 S.E.2d 334, 346 (1986).

¶ 43 Defense counsel in *Fisher* stated to the jury:

> You heard [the defendant] testify, *there was malice there*[,] and then another possible verdict is going to say[,] "Do you find him guilty of voluntary

> manslaughter[?] Voluntary manslaughter is the killing of a human being without malice and without premeditation. It's a killing. And it also has not guilty, remember that too.

Id. (emphasis supplied).

¶ 44 Our Supreme Court held counsel's admission in *Fisher* was "factually distinguishable from [the violation in] *Harbison* in that the defendant's counsel never clearly admitted guilt." *Id.* Rather, defense counsel "stated there was malice [and] . . . told the jury that they could find the defendant not guilty." *Id.*

¶ 45 Like the defendant in *Fisher*, Defendant's counsel conceded Defendant had committed an element of the crime. Trial counsel told the court he planned to admit an element of the offense, but not all of the elements. When asked to clarify, trial counsel said he would not deny Defendant's physical acts but would deny the assault was intentional based on Defendant's not remembering his actions due to voluntary intoxication.

¶ 46 Here, trial counsel admitted an element of the assault charge, rather than admitting guilt to the charge. *Id.* The holding in *Fisher* does not support a reversal in this case.

3. *State v. McAllister*

¶ 47 Our Supreme Court stated in *McAllister*, "we consider whether *Harbison* error exists when defense counsel impliedly—rather than expressly—admits the defendant's guilt to a charged offense. [It is] our determination that the rationale underlying *Harbison* applies equally in such circumstances." *Id.* at 456, 847 S.E.2d at 712.

¶ 48 In *McAllister*, the trial court asked defense counsel if they had a *Harbison* issue prior to opening statements. *Id.* at 459, 847 S.E.2d at 714. The exchange between defense counsel and the court follows:

> THE COURT: Are you expecting to make any [*Harbison*] comments in your opening with regard to admissions?
>
> [DEFENSE COUNSEL]: Well, Judge, we have a lot to say about how and why he was interrogated which may brush up against—
>
> THE COURT: Well, can you get more specific than that. Because I want to make sure your client

> understands that the State has the burden to prove each and every element of each claim and if you're going to step into an admission during opening then I need to make sure that he understands that and he's authorized you to do that.
>
> [DEFENSE COUNSEL]: Not in opening, I can stipulate to that.

Id. No discussion related to *Harbison* took place throughout the remainder of the trial. *Id.* In defense counsel's closing argument, he made these statements to the jury:

> You heard [the defendant] admit that things got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives.

Id. at 461, 847 S.E.2d at 715. "[T]he jury returned a verdict finding defendant guilty of assault on a female and not guilty of all other charged offenses." *Id.*

¶ 49 On appeal, our Supreme Court reasoned, "The only logical inference in the eyes of the jury would have been that defense counsel was implicitly conceding defendant's guilt as to that charge. *Id.* at 474, 847 S.E.2d at 723. Further, the *Harbison* issue was never mentioned again throughout the remainder of the trial, and thus the *Harbison* inquiry in *McAllister* was inadequate. *Id.*

¶ 50 Here, Defendant did not deny committing the physical acts toward his wife on direct testimony, and trial counsel stated he was not denying the acts occurred. Unlike the defendant in *McAllister*, the trial court, defense counsel, and Defendant engaged in multiple separate and extensive colloquies, prior to trial and again prior to closing arguments, to address Defendant and his counsel's intent to admit Defendant's physical acts, but not his intent prior to the admission.

¶ 51 Trial counsel stated, "I do have some written [*Harbison*] forms necessary for [Defendant] to sign." Defendant agreed to the admissions prior to trial and to opening and closing statements. Trial counsel did not specifically admit Defendant's guilt to the crime charged. The holding in *McAllister* does not support error, prejudice, or reversal under these facts. *Id.*

VI. Ineffective Assistance of Counsel

A. Standard of Review

¶ 52 **[3]** As noted, *Harbison* errors may also exist when "defense counsel impliedly—rather than expressly—admits the defendant's guilt to a charged offense." *Id.* at 456, 847 S.E.2d at 712.

> Although this Court still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. We [] hold that when counsel *to the surprise of his client admits his client's guilt*, the harm is so likely and so apparent that the issue of prejudice need not be addressed.

Id. at 463, 847 S.E.2d at 716 (emphasis supplied) (alterations, citations, and internal quotations omitted)

B. Analysis

¶ 53 Here, there was no surprise to Defendant of defense counsel's admissions. Defendant testified to the acts which occurred and sought to excuse his culpability based upon his voluntary intoxication. The timing, nature, extent, cause and motive for Mrs. Arnett's injuries was never in dispute. A bloody knife with a hooked blade was recovered from Defendant's person at the hospital. A bloody butcher knife was found in the kitchen drawer at the Arnetts' home.

¶ 54 The trial court correctly ruled Defendant's proffered voluntary intoxication to mitigate or excuse Defendant's actions was not available as a defense to the assaults, which requires only proof of a general intent. Defendant testified, was cross examined, and clearly consented to trial counsel's acknowledgement of Defendant's actions against his wife to the jury during closing argument. The record shows a deliberate, knowing, and consented to trial strategy in the face of overwhelming and uncontradicted evidence of Defendant's guilt. Defendant has failed to show his trial counsel's performance and conduct was deficient. Defendant's argument is without merit and overruled.

VII. Conclusion

¶ 55 Defendant argues he could not knowingly and understandingly consent to counsel's admitting the assault. Defendant further argues the

trial court's *Harbison* inquiry was inadequate to confirm Defendant understood and knew he was agreeing for counsel admit the charged offense and present an invalid defense.

¶ 56 The trial court personally inquired of Defendant on two occasions to ensure he understood and agreed with this strategy after the court had denied the involuntary intoxication defense and to so instruct the jury. The *Harbison* inquiry adequately established Defendant fully understood his counsel was admitting an element of the charge.

¶ 57 Defendant did not receive ineffective assistance of counsel when his trial counsel admitted an element of the charged offense with Defendant's prior knowledge and consent. Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges INMAN and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
EMUNTA CARPENTER

No. COA19-1006

Filed 2 March 2021

Sexual Offenses—first-degree forcible sexual offense—jury instructions—lesser-included offense—no contradictory evidence

In defendant's trial for first-degree forcible sexual offense, arising from defendant forcing the victim to perform fellatio on him while his cousin watched and waited to rape her, the trial court did not err by denying defendant's request for a jury instruction on the lesser-included offense of second-degree forcible sexual offense. The State's evidence supported all the elements of the first-degree offense, and defendant failed on appeal to show that any contradictory evidence was presented as to the element of defendant being aided and abetted by another person where his cousin knew of defendant's unlawful purposes and helped to facilitate the crime, with no evidence supporting the notion that the cousin was merely a bystander.

Appeal by defendant from judgment entered 5 February 2019 by Judge Quentin T. Sumner in Wilson County Superior Court. Heard in the Court of Appeals 10 February 2021.

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

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

TYSON, Judge.

I. Background

¶ 1 D.C. and Emunta Carpenter ("Defendant") were involved in a romantic relationship. They are the parents of a child, who was five years old when these events occurred on 17 January 2017. That day, Defendant became angry about contacts he had found on D.C.'s cellphone. While walking to D.C.'s car, Defendant inquired whether D.C. had engaged in intimate relationships while he was an inmate in prison for a year. She told Defendant she had. Once seated in D.C.'s car, Defendant's anger quickly devolved into abuse and violence.

¶ 2 Defendant punched D.C. twice as she sat in the driver's seat. He berated her about her sexual relationships while he was imprisoned. The physical violence escalated as Defendant repeatedly hit her. D.C. testified Defendant "got so mad he just start (sic) beating on me and telling me I'm going to get flipped . . . and I'm going to have sex with him and his cousin."

¶ 3 D.C. told Defendant she "wasn't going to do it," refusing to participate in sexual acts with both Defendant and his cousin, Tafari Battle ("Battle"). When D.C. told Defendant no, he continued to hit her. D.C. testified Defendant, "told me to take him to his cousin's house . . . when I told him no, he picked up some grip pliers in my car and raised them up at me as if he was going to hit me." D.C. stated Defendant said, "on 8 Trey you going to get flipped." She continued, "[w]hen he said 8 Trey I knew he was serious because that's his gang and when he say that he will do it."

¶ 4 Defendant forced D.C. to drive to Battle's house. Upon arrival, Defendant walked past one cousin, Kwon, and into Battle's home. Shortly thereafter, Defendant and Battle emerged from the house. D.C. attempted to drive away, but Defendant jumped back into the car, leaving Battle behind. D.C. and Defendant drove around for a few moments. D.C. testified, "I asked him like if I do this what is he going to get out of

it. He was like it's for [Battle]." D.C. testified that she tried to speed in hopes of drawing attention from a nearby police station.

¶ 5 D.C. and Defendant pulled her car back into Battle's driveway. While Defendant was out of the car retrieving Battle, D.C. began recording the events on a cellphone she had secreted inside her bra. This recording of the entire crime was admitted into evidence and played for the jury.

¶ 6 As Defendant and Battle approached the car again, both men were laughing and smiling. Battle got into the backseat of the car and D.C. was instructed to drive to Defendant's sister's house while being threatened with the grip pliers. Upon arrival, Defendant instructed Battle to go to the shed behind the house. D.C. testified that she tried slamming the car doors loudly in hopes of garnering attention from a passerby. Defendant threatened to beat D.C. further if she did not move to the shed.

¶ 7 Battle was already in the shed waiting when D.C. entered with Defendant. Defendant demanded D.C. perform oral sex on him while Battle watched in close proximity. Defendant told Battle to get ready to have sex with D.C., because D.C. "can't" perform oral sex on Battle. Battle manipulated himself to get his penis erect. Defendant asked Battle if he was ready, and Battle said yes.

¶ 8 Defendant demanded D.C. bend over so Battle could have sex with her. When she refused, he beat her further with his hands, feet, and the pliers. After beating her, Defendant again forced D.C. to perform oral sex on him.

¶ 9 Battle and Defendant made D.C. stand up and together they forcibly removed her shorts. As they removed her shorts, she kept objecting and saying no. "I was begging [Battle] not to do it. I was looking at [Battle] crying while [Defendant] kept beating me up." Battle raped D.C. as she was bent over a chair in the shed.

¶ 10 D.C. moved her body so that she could no longer be penetrated by Battle and this action enraged Defendant. He cursed her and started to beat, choke, kick and spit on her. Battle told her she might as well get it over with.

¶ 11 After beating D.C., Defendant demanded, for the third time, she perform oral sex on him. When D.C. did not perform the act in the manner Defendant preferred, he resumed hitting her. Defendant told Battle to "get out right quick" as Defendant continued to hit D.C. After Battle re-entered the shed, Defendant's beating became so violent, D.C. testified she thought she was going to die.

¶ 12 In desperation, D.C. told Defendant if he gave her the pliers, she would let Battle have sex with her. When D.C. received the pliers, she threw them out the window, further enraging Defendant and causing him to throw her around the shed and continue to hit her. Battle watched as D.C. cried out for his assistance. He stood by and watched Defendant's actions.

¶ 13 As Defendant held D.C.'s hair and assaulted her, she tried to escape. D.C. pulled away, leaving a clump of hair in Defendant's hand, and ran to her car. Battle made no attempt to stop her. D.C. drove to her mother's house and went to the police station to report the crimes.

¶ 14 Defendant was indicted on 17 July 2017 for: (1) first-degree kidnapping; (2) first-degree forcible rape; and (3) first-degree forcible sex offense. The trial court dismissed the charge of first-degree forcible rape.

¶ 15 The jury returned verdicts finding Defendant guilty of first-degree kidnapping and first-degree sex offense. Defendant was sentenced to imprisonment for 317-441 months on the charge of first-degree sex offense and to a consecutive term of imprisonment for 96-172 months on the charge of first-degree kidnapping. Defendant gave notice of appeal in open court following entry of the judgments and commitments.

II. Jurisdiction

¶ 16 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issue

¶ 17 The issue before this Court is whether the trial court should have given a jury instruction for the lesser included offense of second-degree forcible sex offense.

IV. Standard of Review

¶ 18 Our Supreme Court stated: "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E. 2d 186, 191 (1973).

¶ 19 Applying this standard, our Supreme Court has held, "[a]n instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). "If the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense

and there is no evidence to negate those elements other than defendant's denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense." *State v. Smith*, 351 N.C. 251, 267–68, 524 S.E.2d 28, 40 (2000) (citation omitted). If there is "no evidence giving rise to a reasonable inference to dispute the State's contention," the trial court is not obligated to give a lesser included instruction. *State v. McKinnon*, 306 N.C. 288, 301, 293 S.E.2d 118, 127 (1982).

¶ 20 When determining whether the evidence is sufficient for instruction on a lesser included offense, the evidence must be viewed in the light most favorable to the defendant. *State v. Barlowe*, 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994). It is reversible error for a trial court to fail to submit lesser included offenses to the crime charged that are supported by the evidence. *State v. Lytton*, 319 N.C. 422, 426-27, 355 S.E.2d 485, 487 (1987). Preserved challenges to jury instructions are reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E. 2d 144, 149 (2009).

V. Analysis

A. First-Degree Forcible Sex Offense

¶ 21 Defendant was indicted for first-degree forcible sex offense in violation of N.C. Gen. Stat. § 14-27.26(a)(3) (2019). The elements of this offense are: (1) engaging in a sex act [fellatio] with another person, (2) by force and against the will of the other person; and (3) while being aided and abetted by one or more other persons [Battle]. Proof of the first two elements, engaging in a sex act with another person by force and against that person's will is sufficient to establish guilt of second-degree sex offense in violation of N.C. Gen. Stat. § 14-27.27(a) (2019).

B. Aid or Abet

¶ 22 Defendant argues the evidence of element (a)(3): aided or abetted by one or more persons supports the instruction on the lesser-included offense. The trial court instructed the jury on this element of first-degree forcible sex offense:

> "[F]ourth, that defendant was aided or abetted by one or more other persons. A defendant would be aided or abetted by another person if that person was present at the time the sexual offense was committed *and knowingly aided the defendant to commit the crime.* (emphasis supplied).

¶ 23 Mere presence is not enough to meet the burden of aid or abet:

> A person is not guilty of a crime merely because he is present at the scene even though he may silently approve of the crime or secretly intend to assist in its commission; to be guilty he must aid or actively encourage the person committing the crime or in some way communicate to this person his intention to assist in its commission.

*State v. Good*e, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (citations omitted). "[A] person may be an aider or abettor if he shares the criminal intent of the perpetrator and if, during the commission of the crime, he is in a position to render any necessary aid to the perpetrator." *McKinnon*, 306 N.C. at 298, 293 S.E.2d at 125.

1. Knowledge

¶ 24 "The aiding element requires some conduct by the accomplice that results in the accomplice becoming involved in the commission of a crime. The typical way in which a party becomes involved in the commission of a crime is through the assistance, promotion, encouragement, or instigation of criminal action". *State v. Bowman*, 188 N.C. App. 635, 648, 656 S.E.2d 638, 648 (2008) (internal quotations omitted). This Court explained that the element of abetting requires "a criminal state of mind-*specifically, it requires that the accomplice has both knowledge of the perpetrator's unlawful purpose to commit a crime, and the intent to facilitate the perpetrator's unlawful purpose.*" *Id.* (emphasis original).

¶ 25 The State argues no contradictory evidence exists to the aiding or abetting elements. It asserts D.C.'s testimony and the audio recording provide clear and unequivocal evidence of Battle's actions before and during the kidnapping and sexual assaults committed by Defendant. Defendant told D.C. she was going to have sex with him and his cousin. Evidence tends to show Defendant has a specific plan to include Battle. Defendant told D.C. again that she was going to engage in a "flip" while they were in Battle's driveway. Testimony tends to show Defendant used "flip" to mean D.C. would engage in sexual acts with Defendant and somebody else at the same time.

¶ 26 Battle was not merely present, but was recruited by Defendant to assist in the sexual assaults of D.C. Battle willingly accompanied and rode with Defendant and D.C., who had been and was being beaten and crying, to Defendant's sister's house. Defendant told D.C. this "flip"

was for Battle. Battle, following instructions from Defendant, waited while Defendant forced D.C. to enter the shed. Defendant forced D.C., by threat of being beaten with pliers, to perform oral sex on him three times in the shed while Battle was present. Battle was present and heard Defendant tell D.C. to "let his cousin get his nut" and that D.C. "was going to suck his d**k and f**k his cousin."

¶ 27 Evidence tends to show Battle helped Defendant to restrain and remove D.C.'s shorts, and Battle stated to D.C. she "might as well get it over with." A reasonable jury could find "it" implies communicating what submission was being expected of D.C. and "get it over with" implies "aid[ing] or actively encourag[ing]" his cousin to sexually assault D.C. as Defendant interchangeably requested oral sex and then demanded D.C. comply with Battle's rape attempts.

¶ 28 Battle was not a passive bystander. Battle assisted, promoted, and encouraged Defendant in the sexual offense. Evidence tends to show Battle knew of Defendant's unlawful purpose and helped to facilitate the crimes. Battle was a willing participant in the numerous sexual offenses committed against D.C.

2. Relation to Perpetrator

> The communication or intent to aid does not have to be shown by express words of the defendant but may be *inferred* from his actions and from his *relation to the actual perpetrators.* Furthermore, when the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement.

Goode, 350 N.C. at 260, 512 S.E.2d at 422. (emphasis supplied).

¶ 29 Battle and Defendant are cousins. Defendant told D.C. the "flip" was for Battle. As Defendant and Battle approached the car, both of them were smiling and laughing. Battle cooperated with Defendant's orders and waited in the shed. During the forced oral sex, Defendant instructed Battle to get his penis erect so that Battle could rape D.C. Defendant beat D.C. while Battle was exposed and watched, before forcing her to perform oral sex on him a second time. Defendant stopped forcing D.C. to perform oral sex and worked with Battle to forcibly remove D.C.'s shorts and to bend her over the chair.

¶ 30 After Battle raped D.C., and after D.C. had moved her body to try to stop the rape, Defendant beat her. Battle told D.C. she might as well

get "it" over with. Evidence tends to show "it" was the "flip" or sexual acts with multiple people Defendant and Battle had planned. Defendant again forced D.C. to perform oral sex on himself. The relationship between Defendant and Battle was known and clear.

¶ 31 Battle was a close familial relation to Defendant. D.C. knew of this relationship. The evidence tends to show Battle had a motive in the sexual assault in that he was going to have an opportunity to rape D.C. while Defendant was present and assisting. Finally, his words show that he played an active role in counseling and encouraging Defendant to complete their crimes.

3. Atmosphere to Subvert the Will of the Victim

¶ 32 "By joining defendant in unclothing and immobilizing [the victim], while performing a series of overt acts that created an atmosphere to subvert the will of [the victim], others are deemed to have contributed to the commission of the crime." *State v. Dick*, 370 N.C. 305, 312, 807 S.E.2d 545, 549 (2017).

¶ 33 The joint actions of Defendant and Battle in removing D.C.'s shorts, physically moving her about the shed, refusing to respond as she pleaded for help and resisted, and uttering words that encouraged D.C. to submit. Battle's words and actions created an atmosphere to subvert the will of D.C. *Id.*

4. Aid or Abet Reversals

¶ 34 Battle's aiding or abetting Defendant in the sexual assault distinguishes this case from those where courts found a person's mere presence did not amount to counseling or encouraging the commission of a crime. *See State v. Ikard*, 71 N.C. App. 283, 321 S.E.2d 535 (1984) (holding defendant was present but had no knowledge that the crime was to be committed and did not know others were armed); *State v. Gaines*, 260 N.C. 228, 132 S.E.2d 485 (1963) (holding the defendant had no knowledge of the crime and only ran with the defendant after he was discovered); *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984) (holding the defendant's uncontradicted testimony that he "didn't do nuthin," and that he was "thrown" on the victim is not enough to be deemed aiding or abetting).

¶ 35 No evidence rebuts D.C.'s clear testimony and the audio recording of the crimes as they occurred. The recording of the assaults, D.C.'s contemporaneous written account, and her testimony all show Battle was aiding or abetting Defendant's crimes against D.C.

¶ 36 Defendant argues the jury may not have believed all of D.C.'s testimony. Defendant is not entitled to an instruction on a lesser-included offense by merely asserting jury could possibly believe some, but not all, of the State's evidence. *State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991). The jury also heard the contemporaneous cellphone recording of the beatings and assaults as they occurred.

VI. Conclusion

¶ 37 The State's evidence tends to show each element of the offenses charged to support submission to the jury. No contradictory evidence was presented in relation to the third element in question to justify an instruction on a lesser-included offense. No evidence tends to show Battle was merely a bystander. Battle knowingly aided, abetted, encouraged, and participated with Defendant in his sexual assaults of D.C.

¶ 38 The trial court did not err in denying Defendant's motion for an instruction on a lesser-included offense. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges INMAN and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
CHARLIE JAMES HARRIS, III, DEFENDANT

No. COA19-617

Filed 2 March 2021

Evidence—husband and wife as witnesses—in criminal actions—communications made during assault—not confidential marital communications

In a prosecution for defendant's attempted murder of his wife, the trial court did not err by compelling the wife to testify as to statements that defendant made while he was stabbing her with a knife and while she was attempting to escape. Under N.C.G.S. § 8-57, these statements—including defendant's demands for sex, confessions of suicidal thoughts, and admissions of guilt—were not confidential marital communications because they were made

during the assault and not induced by the affection, confidence, and loyalty borne out of the marital relationship. Even assuming error, defendant could not demonstrate prejudice where the wife's testimony as to defendant's actions and the evidence of her injuries were before the jury.

Appeal by defendant from judgment entered 1 March 2018 by Judge Marvin K. Blount III in Superior Court, Pitt County. Heard in the Court of Appeals 14 April 2020.

Attorney General Joshua H. Stein, by Special Counsel to the Chief Deputy Attorney General, Shannon J. Cassell, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant appeals judgments convicting him of first degree attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury. Under North Carolina General Statute § 8-57, defendant's wife was "both competent and compellable to" testify against defendant as this is "a prosecution for assaulting or communicating a threat to the other spouse[.]" Defendant's wife's testimony regarding his statements to her while he was attacking her with a knife and while she was attempting to escape were not "prompted by the affection, confidence, and loyalty engendered by such relationship," so these statements were not "confidential communication[s.]" The trial court did not err in compelling wife to testify as to the statements' defendant made and in not striking her testimony. N.C. Gen. Stat. § 8-57 (2015); *State v. Rollins*, 363 N.C. 232, 237, 675 S.E.2d 334, 337 (2009) (citations and quotation marks omitted). We conclude there was no error.

I. Background

¶ 2 On the first day of defendant's jury trial, defendant's wife, Leah,[1] testified that on 30 July 2016, she and defendant got into an argument, and when she began walking upstairs defendant stabbed her multiple times in her back, arms, leg, stomach, face, and neck. Leah further testified that defendant stopped stabbing her after he cut himself, and he began taking off her pants; when she asked what he was doing he responded, "I want to have sex, this could be my last time having sex."

1. A pseudonym is used.

Leah testified she told defendant she would have sex with him if he put the knife down, but she did not want to have sex, rather she "just wanted to go to the hospital[,]" and she only agreed so defendant would "put the knife down."

¶ 3 Defendant had sex with Leah and requested her to do certain things, but she was in pain and "really couldn't move." At some point, Leah gained control of the knife, and she testified defendant told her "it's over for him now and he knows the police is coming and he just wanted me to let the knife go so he could kill hisself[.]" Leah begged for water, and defendant asked her "all of these questions," and then took her phone into another room. Leah ran out of the house, still without her pants and screaming, and drove to a Kangaroo store "around the corner" for help. Leah required trauma surgery for her wounds from the stabbing, and she remained in the hospital approximately a week. During the first day of trial, when all of this testimony was presented, defendant did not object to Leah's testimony about defendant's statements.

¶ 4 On the second day of defendant's trial, Leah informed the trial court she did not want "to testify against [her] husband." Defense counsel argued Leah was attempting to assert marital privilege, and he would "move to strike all of her testimony from yesterday." The State countered that marital privilege was not applicable if the defendant was being prosecuted for a felony he had committed against his wife. After much discussion and research, the trial court denied defendant's motion to strike and informed Leah

> you have a duty in this case to testify and that based on the Court's understanding of the statute, that you can be compelled to testify in this case and you have been subpoenaed in this case by the State to testify and that you have a duty and an obligation to answer all questions proposed of you or proposed to you in a truthful manner. And if you refuse to answer those questions, ma'am, you may be held and will be held in contempt of court[.[2]]

¶ 5 The jury found defendant guilty of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court entered judgments. Defendant appeals.

---

2. Leah countered that she was not certain she was competent because she had "depression and posttraumatic stress disorder." Counsel was appointed to represent Leah, and her counsel did not deem her to have any issues with competency as a witness. Leah's competency as a witness is not at issue on appeal.

II. Confidential Marital Communications

¶ 6 Defendant's only argument on appeal is that "the trial court committed reversible error under N.C. Gen. Stat. § 8-57(c) when it allowed into evidence privileged marital communications that the State compelled defendant's spouse to reveal pursuant to a subpoena." (Original in all caps.) Whether a statement is "a privileged confidential communication" as defined by North Carolina General Statute § 8-57 "is a question of law" which this Court reviews *de novo*. *State v. Matsoake*, 243 N.C. App. 651, 656, 777 S.E.2d 810, 813 (2015). Further, "[a]lleged statutory errors are questions of law and, as such, are reviewed *de novo*. Under *de novo* review, the appellate court considers the matter anew and freely substitutes its own judgment for that of the lower court." *State v. Hughes*, 265 N.C. App. 80, 81–82, 827 S.E.2d 318, 320 (citation omitted), *stay dissolved*, *writ of supersedeas denied*, *and disc. review denied*, 372 N.C. 705, 830 S.E.2d 827 (2019).

¶ 7 Defendant's argument focuses on limited portions of Leah's testimony he contends are "privileged and confidential marital communications[.] . . . Specifically, these communications were: (1) requests to have sex . . .; (2) confessions of suicidal thoughts . . .; and (3) admissions by defendant of guilt to crimes against his wife[.]" Defendant does not challenge her testimony describing defendant's actions, including stabbing her repeatedly.

¶ 8 North Carolina General Statute § 8-57 provides,

> (b) The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action or grand jury proceedings, except that the spouse of the defendant shall be both competent and compellable to so testify:
>
> . . . .
>
> (2) In a prosecution for assaulting or communicating a threat to the other spouse;
>
> . . . .
>
> (c) No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage.

N.C. Gen. Stat. § 8-57.

> To assess whether the conversations between defendant and his wife were in fact protected by subsection 8–57(c), our analysis turns on whether there was a confidential communication between defendant and his wife in the DOC facilities. When defining a confidential communication in the context of the marital communications privilege, this Court has asked *whether the communication was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship.*

Rollins, 363 N.C. at 237, 675 S.E.2d at 337 (emphasis added) (citation, quotation marks and ellipses omitted).

¶ 9 The State contends that defendant failed to object to the statements at issue on appeal, and thus the issue is not preserved. Defendant contends his argument under North Carolina General Statute § 8-57 is preserved for appellate review even without a contemporaneous objection to the testimony. Defendant also made a motion to strike Leah's testimony, and the trial court heard extensive argument on the issues and ruled on the motion. But even if we assume *arguendo* that defendant's motion to strike Leah's testimony properly preserved his argument for appeal, the portions of testimony he challenges here were not confidential communications.

¶ 10 The State also contends that North Carolina General Statute § 8-57 is not applicable because Leah's testimony of defendant's statements were not "confidential communication" under the statute. Defendant counters in his reply brief he "has *only* challenged *confidential communications* pursuant to N. C. Gen. Stat.§ 8-57(c)," and thus "the State's attempt to rely on an exception to the N.C. Gen. Stat. § 8-57(b) rule is misplaced." (emphasis added). In defendant's reply brief he relies on *Biggs v. Biggs*, 253 N.C. 10, 16, 116 S.E.2d 178, 183 (1960), wherein the Supreme Court stated, "It is true that an act of intercourse between husband and wife is a confidential communication[;]" but defendant takes this sentence entirely out of context to create his argument.

¶ 11 The issue in *Biggs* was: "Where, in an action by a husband for divorce on the ground of adultery, the wife pleads condonation and testifies that the husband had intercourse after agreeing to forgive her and that she is pregnant as a result of the intercourse, is it error to permit the husband to deny the intercourse?" *Id.* at 14, 116 S.E.2d at 181. Based upon *Biggs*, a civil case under North Carolina General

Statute § 8-56 as it was written in 1960, *see id.*, 253 N.C. 10, 116 S.E.2d 178, defendant contends that "our North Carolina Supreme Court has recognized that communications about marital sex between spouses are confidential communications and N.C. Gen. Stat. § 8-57([c]) states, without exception, that no spouse 'shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage.'" Defendant argues any statement related to sexual intercourse between spouses is a "confidential communication" which the trial court cannot compel "in any event[.]"

¶ 12 We first note that only one of the statements challenged by defendant was about sex; the other statements were regarding suicidal thoughts and admission of guilt to his crimes. Further, defendant's *Biggs* argument, applicable only to the statement regarding sex, entirely ignores North Carolina General Statute § 8-57 (b)(2) which specifically provides that a spouse of a defendant "shall be both competent and compellable to testify" "[i]n a prosecution for assaulting or communicating a threat to the other spouse[.]" N.C. Gen. Stat. § 8-57(b)(2). A prosecution for attempted murder of a spouse and assault with a deadly weapon with intent to kill inflicting serious injury upon a spouse is "a prosecution for assaulting" the other spouse. *Id.*

¶ 13 Beyond the statements regarding sex, defendant also cites to criminal cases decided under North Carolina General Statute § 8-57 in support of his argument, but these cases are inapposite as the other spouse is not the victim in those cases, the very issue at the heart of North Carolina General Statute § 8-57(b)(2). *See*, *e.g.*, *Rollins*, 363 N.C. 232, 675 S.E.2d 334 (determining that spousal privilege under North Carolina General Statute § 8-57 "does not extend to communications occurring in the public visiting areas of the North Carolina Department of Correction (DOC) facilities because a reasonable expectation of privacy does not exist in such areas"); *State v. Holmes*, 101 N.C. App. 229, 398 S.E.2d 873 (1990), *aff'd*, 330 N.C. 826, 412 S.E.2d 660 (1992) (determining spousal privilege under North Carolina General Statute § 8-57 did apply when the defendant-husband told his wife he planned to kill someone else).

¶ 14 Ultimately,

> [w]hile recognizing that the cases and statutes pertinent to this issue have not been models of clarity, our Supreme Court has interpreted section 8–57 to mean that a spouse[] shall be incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a

> confidential communication between the marriage partners made during the duration of their marriage[.] This interpretation:
>
> > allows marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation. However, by confining the spousal disqualification to testimony involving confidential communications with the marriage, we prohibit the accused spouse from employing the common law rule solely to inhibit the administration of justice.
>
> To fall within the purview of this privilege, the communication must have been made confidentially between wife and husband during the marriage. Accordingly, the determination of whether a communication is confidential within the meaning of the statute depends on whether the communication was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship. With these rules in mind, we now turn to the facts of the case at bar.

State v. Hammonds, 141 N.C. App. 152, 169–70, 541 S.E.2d 166, 179 (2000) (citations and quotation marks omitted), *aff'd per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001).

¶ 15 As applied here, defendant's statements demanding sex from his wife after having repeatedly stabbed her and while still wielding a knife were not "prompted by *the affection*, *confidence*, *and loyalty engendered by such relationship*." N.C. Gen. Stat. § 8-57(c) (emphasis added). Further, defendant's statements of suicidal thoughts and concern about arrest for the crime defendant was in the process of committing against his wife cannot be said to spring from "affection, confidence, and loyalty" borne out of marital relations. *Id.* Defendant was not confessing to his wife about a prior crime against someone else or confiding in her about his plans of a future crime but instead speaking about the violent act he was currently committing – assaulting Leah while still wielding a weapon as she begged for water, attempted to escape from defendant, and desperately needed medical attention due to wounds inflicted by defendant – and his concerns about the possible repercussions. Although North Carolina General Statute § 8-57(c) could theoretically apply to

a defendant's statements made during the commission of a crime, in this situation, defendant's lack of "affection, confidence, and loyalty" in making these statements could not be clearer. *Id.*

¶ 16 Defendant has also failed to demonstrate prejudice from the admission of these portions of Leah's testimony. Even if we agreed with defendant that his statements were somehow prompted by "affection, confidence, and loyalty" based on the marital relationship, exclusion of these limited portions of Leah's testimony would not affect the outcome of the case. Leah's testimony regarding what defendant *did* to her and the evidence of her injuries was far more important than what defendant *said* while he was stabbing or assaulting her. *Id.*; *see generally State v. Godley*, 140 N.C. App. 15, 26, 535 S.E.2d 566, 574–75 (2000) ("The erroneous admission of evidence requires a new trial only when the error is prejudicial. To show prejudicial error, a defendant has the burden of showing that there was a reasonable possibility that a different result would have been reached at trial if such error had not occurred." (citations and quotation marks omitted)). This argument is overruled.

III. Conclusion

¶ 17 For the foregoing reasons, we conclude there was no error.

NO ERROR.

Judges ARROWOOD and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
EDWIN GUILLERMO PERDOMO

No. COA20-243

Filed 2 March 2021

1. Evidence—indecent liberties—credibility of child victim—vouching—medical opinion

No error, much less plain error, occurred in a trial for taking indecent liberties with a child by the admission of testimony from the doctor who examined the victim who stated that the victim's statements to a social worker were "consistent with" sexual abuse. The testimony did not constitute improper vouching of the victim's credibility in the absence of physical evidence because it did not consist of a definitive diagnosis of abuse, but presented an opinion based on medical expertise.

2. Appeal and Error—preservation of issues—closing courtroom to public—constitutional argument

Where defendant failed to present a constitutional argument to the trial court that its decision to close the courtroom to the public before a verdict was rendered violated defendant's right to have a public trial (for taking indecent liberties with a child), the Court of Appeals declined to invoke Appellate Rule 2 to review the matter on appeal. The trial court's actions appeared to be within its statutory and inherent authority to control the orderliness of courtroom proceedings.

3. Constitutional Law—effective assistance of counsel—prejudice analysis—burden not met

In a trial for taking indecent liberties with a child, defendant could not demonstrate that he was prejudiced by his counsel's allegedly deficient performance where, given the evidence against defendant, there was no reasonable probability that, but for the errors, a different result would have been reached.

Appeal by defendant from judgment entered 5 August 2019 by Judge Keith O. Gregory in Johnston County Superior Court. Heard in the Court of Appeals 13 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Ellen A. Newby, for the State.

Warren D. Hynson for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Edwin Guillermo Perdomo appeals from the judgment entered upon a jury's verdict finding him guilty of taking indecent liberties with a child. After careful review, we discern no prejudicial error in the judgment entered upon Defendant's conviction.

Background

¶ 2 In October 2013, Cesar Perdomo moved from Honduras to Johnston County, North Carolina, with his wife and eight-year-old daughter, A.P.[1] They lived with Cesar's brother, Defendant, for approximately seven months until they moved into their own home nearby. Cesar, Defendant, and their sister were close, and their families would often visit and travel together.

¶ 3 In September 2017, 13-year-old A.P. told a friend, her soccer coach, the school social worker, and the school principal that Defendant was behaving in a sexually inappropriate manner toward her. On 27 September 2017, school personnel called A.P.'s mother and asked her to come to the school. In a meeting with the principal and two other school personnel, A.P.'s mother learned that A.P. had told the school social worker that Defendant had "touched her."

¶ 4 That day, school officials also notified the Johnston County Department of Social Services ("DSS") about A.P.'s allegations. On 28 September 2017, a DSS social worker began investigating. DSS scheduled a Child Medical Evaluation ("CME"). The Selma Police Department also became involved on 28 September 2017, after A.P. evinced an intent to harm herself. Dr. Beth Harold of the Child Abuse and Neglect Medical Evaluation Clinic ("CANMEC") conducted A.P.'s CME on 16 November 2017, and Detective Johnathan Solomon then initiated his criminal investigation of A.P.'s allegations.

¶ 5 On 6 August 2018, a Johnston County grand jury returned a true bill of indictment charging Defendant with statutory rape of a person 15 years of age or younger and taking indecent liberties with a child. On 29 July 2019, the case came on for trial before the Honorable Keith O. Gregory in Johnston County Superior Court.

---

1. Initials are used to protect the identity of the juvenile.

¶ 6 On 5 August 2019, the jury returned its verdicts, finding Defendant guilty of taking indecent liberties with a child, but not guilty of statutory rape. The trial court sentenced Defendant to a term of 16 to 29 months in the custody of the North Carolina Division of Adult Correction. The trial court also ordered Defendant to register as a sex offender for a period of 30 years upon his release from prison, and prohibited any contact by Defendant with A.P. for the remainder of Defendant's life. Defendant gave oral notice of appeal in open court.

Discussion

¶ 7 On appeal, Defendant contends that (1) the trial court committed plain error by permitting the State's expert to vouch for A.P.'s credibility; (2) the trial court committed structural error by closing the courtroom and locking the doors during delivery of the jury instructions; and (3) Defendant received ineffective assistance of counsel at trial.

I.

¶ 8 **[1]** Defendant first argues that the trial court committed plain error by permitting the State's expert, Dr. Harold, to vouch for A.P.'s credibility by impermissibly testifying that A.P.'s medical history "was consistent with child sexual abuse" and that her "physical exam would be consistent with a child who had disclosed child sexual abuse." For the reasons that follow, we disagree.

A. Standard of Review

¶ 9 "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4). Because Defendant's counsel failed to object to the challenged portions of Dr. Harold's trial testimony,

> we review his challenge on appeal for plain error. To establish plain error defendant must show that a fundamental error occurred at his trial and that the error had a probable impact on the jury's finding that the defendant was guilty. A fundamental error is one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Warden, 376 N.C. 503, 506, 852 S.E.2d 184, 187 (2020) (citations and internal quotation marks omitted).

B. Analysis

¶ 10 "It is well settled that expert opinion testimony is not admissible to establish the credibility of the victim as a witness." *State v. Frady*, 228 N.C. App. 682, 685, 747 S.E.2d 164, 167 (citation and internal quotation marks omitted), *disc. review denied*, 367 N.C. 273, 752 S.E.2d 465 (2013). In cases involving the alleged sexual abuse of a child,

> the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

State v. Stancil, 355 N.C. 266, 266–67, 559 S.E.2d 788, 789 (2002) (per curiam) (citations omitted). "This rule permits the introduction of expert testimony only when the testimony is based on the special expertise of the expert, who because of his or her expertise is in a better position to have an opinion on the subject than is the trier of fact." *Warden*, 376 N.C. at 506–07, 852 S.E.2d at 187–88 (citation and internal quotation marks omitted).

¶ 11 Defendant specifically challenges two portions of Dr. Harold's testimony from the State's case-in-chief:

> Q. Would you say, Doctor, that [A.P.]'s disclosure or medical history to [the social worker] was that -- would you say that that was consistent with child sexual abuse?
>
> A. This child gave [the social worker] a history that was *consistent with* child sexual abuse.
>
> . . . .
>
> Q. So even despite her disclosure of penile penetration, this physical exam is consistent and not inconsistent with that disclosure; is that right?
>
> A. This physical exam would be *consistent with* a child who had *disclosed* child sexual abuse.

(Emphases added).

¶ 12 Defendant challenges two aspects of this testimony: Dr. Harold's use of the phrase "consistent with" and her use of the word "disclosed." Defendant cites dicta from a recent opinion of this Court to essentially argue that, in the absence of physical evidence of abuse, Dr. Harold's use of the phrase "consistent with" amounted to vouching per se. *See State v. Davis*, 265 N.C. App. 512, 517, 828 S.E.2d 570, 574, *disc. review denied*, 372 N.C. 709, 830 S.E.2d 839 (2019) ("While it is impermissible for an expert to offer an opinion that a lack of physical evidence *is consistent with* sexual abuse, it may [be] permissible for the State to offer expert testimony that the lack of physical evidence *does not necessarily rule out* that sexual abuse may have occurred."). Similarly, Defendant cites a recent line of our jurisprudence that wrestled with whether the use of the word "disclose" or its variants amounted to vouching. *See*, *e.g.*, *State v. Betts*, 267 N.C. App. 272, 281, 833 S.E.2d 41, 47 (2019) ("There is nothing about the use of the term 'disclose', standing alone, that conveys believability or credibility."), *appeal pending based on dissent*, 376 N.C. 549, 850 S.E.2d 348 (2020).

¶ 13 However, we need not address such word- or phrase-specific arguments, as our Supreme Court has explained that "[w]hether sufficient evidence supports expert testimony pertaining to sexual abuse is a highly fact-specific inquiry. Different fact patterns may yield different results." *State v. Chandler*, 364 N.C. 313, 318–19, 697 S.E.2d 327, 331 (2010) (citation omitted). For expert testimony to amount to vouching for a witness's credibility, that expert testimony must present "a definitive diagnosis of sexual abuse" in the absence of "supporting physical evidence of the abuse." *Id.* at 319, 697 S.E.2d at 331. Viewed in full context, it is clear that the specific challenged words and phrases from Dr. Harold's testimony did not present "a definitive diagnosis of sexual abuse." *See id.*

¶ 14 Immediately prior to the prosecutor's question that prompted Dr. Harold's first challenged answer, Dr. Harold explained:

> [Y]ou cannot tell from a medical exam whether a child has been sexually abused or not. The most important aspect of a child medical evaluation for a child who is undergoing a sexual abuse evaluation is the medical history that that child gives to whomever they give the history to. In this case, the history was provided to [the social worker].

¶ 15 This led directly to the first exchange that Defendant now challenges:

> Q. Would you say, Doctor, that [A.P.]'s disclosure or medical history to [the social worker] was that -- would you say that that was consistent with child sexual abuse?
>
> A. This child gave [the social worker] a history that was *consistent with* child sexual abuse.

(Emphasis added).

¶ 16 The prosecutor then invited Dr. Harold to "talk about [the] medical exam in this particular case." Dr. Harold thoroughly detailed her procedure for the exam and her findings, which led to the following exchange, including the second portion of testimony that Defendant challenges on appeal:

> Q. So there were no physical findings in this particular case?
>
> A. No physical findings.
>
> Q. Did that surprise you?
>
> A. Absolutely not.
>
> Q. Okay. For the same reasons you just testified here before?
>
> A. Yes, sir.
>
> Q. So even despite her disclosure of penile penetration, this physical exam is consistent and not inconsistent with that disclosure; is that right?
>
> A. This physical exam would be consistent with a child who had disclosed child sexual abuse.
>
> Q. Did that conclude your examination of her?
>
> A. Yes.

¶ 17 Our review of the full testimony, in proper context and beyond the isolated excerpts that Defendant challenges on appeal, reveals that Dr. Harold's statements were "based on [her] special expertise [as an] expert, who because of . . . her expertise [was] in a better position to have an opinion on the subject than" the jury. *Warden*, 376 N.C. at 506–07, 852 S.E.2d at 187–88 (citation and internal quotation marks omitted). Rather than vouching for A.P.'s credibility, as Defendant claims, Dr. Harold appropriately provided the jury with an opinion, based on her expertise,

that a lack of physical findings of sexual abuse does not generally correlate with an absence of sexual abuse.

¶ 18 Indeed, our courts have repeatedly held that a properly qualified expert may "testify concerning the symptoms and characteristics of sexually abused children and . . . state [the expert's] opinion[ ] that the symptoms exhibited by the victim were *consistent with* sexual or physical abuse." *State v. Kennedy*, 320 N.C. 20, 31–32, 357 S.E.2d 359, 366 (1987) (emphasis added); *accord State v. Aguallo*, 322 N.C. 818, 822–23, 370 S.E.2d 676, 678 (1988); *State v. Grover*, 142 N.C. App. 411, 419, 543 S.E.2d 179, 184, *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001). Our Supreme Court has explained that this is "a proper topic for expert opinion" as it "could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim." *Kennedy*, 320 N.C. at 32, 357 S.E.2d at 366.

¶ 19 In *Warden*, where "there was no physical evidence that [the child] was sexually abused, it was error to permit the DSS investigator to testify that sexual abuse had *in fact* occurred." 376 N.C. at 507, 852 S.E.2d at 188. By contrast, Dr. Harold's testimony, in its full context, is clearly distinct from offering an opinion that the child in question *has* or *has not* been abused, or *is* or *is not* credible—issues that are properly decided by the jury. *See, e.g.*, *State v. Worley*, 268 N.C. App. 300, 304, 836 S.E.2d 278, 282 (2019), *disc. review denied*, 375 N.C. 287, 846 S.E.2d 285 (2020).

¶ 20 Based on our courts' longstanding jurisprudence on this issue, and in light of our Supreme Court's recent decision in *Warden*, we discern no error, let alone plain error, in the trial court's admission of Dr. Harold's expert testimony. Defendant's argument is overruled.

II.

¶ 21 **[2]** Defendant next argues that, by "closing . . . the courtroom immediately prior to the jury charge[,]" the trial court committed structural error and "violated [his] constitutional right to a public trial[.]" However, he concedes that his counsel did not object to this procedure. Accordingly, Defendant requests that we invoke Appellate Rule 2 to review this purported constitutional error. We decline to do so. *See State v. Dean*, 196 N.C. App. 180, 188, 674 S.E.2d 453, 459 ("Defendant never presented any constitutional arguments to the trial court, and we will not address such arguments for the first time on appeal."), *appeal dismissed and disc. review denied*, 363 N.C. 376, 679 S.E.2d 139 (2009); *see also State v. Register*, 206 N.C. App. 629, 634, 698 S.E.2d 464, 469 (2010).

¶ 22 However, even assuming, *arguendo*, that this issue is properly before us, Defendant has not shown that the trial court's conduct in this case amounted to a closure of the courtroom in the constitutional sense. Before the jury instructions, and without objection from either Defendant or the prosecutor, the trial court stated:

> I'm going to do the jury instructions now, but I don't want people in and out of the courtroom while I'm doing that. So people on the State side, if they want to come in now, they can come in now. If they don't, fine. Same for the defense because I don't want people in and out. I think the sheriff is going to lock the doors. If people on the defense side, if they want to come in, they can come in, but after that, Sheriff, if you will close the courtroom.
>
> [COURTROOM CLOSED]

The court also instructed those assembled in the courtroom: "Once again, there's no outbursts. Please leave now if that's the issue. And there's no in and out. Make sure your cell phones are turned off or on vibrate." The trial court's actions in this case would appear to be squarely within its statutory and inherent authority to control the courtroom.

¶ 23 A trial court judge has the inherent authority to "remove any person other than a defendant from the courtroom when that person's conduct disrupts the conduct of the trial." *Dean*, 196 N.C. App. at 189, 674 S.E.2d at 460; *see also* N.C. Gen. Stat. § 15A-1033 (2019). The trial court may also "impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present." N.C. Gen. Stat. § 15A-1034(a).

¶ 24 Further, our courts have repeatedly upheld a trial court's imposition of reasonable limitations of movement in and out of the courtroom where such limits are established to minimize jury distractions. In *Dean*, "we conclude[d] that the removal of the spectators [did] not entitle [the d]efendant to a new trial" where "jurors were aware that [a co-defendant] was present in the courtroom" and the trial court knew "that jurors were concerned for their safety[,] . . . that jurors during the first trial were intimidated and afraid, and that at least some of those feelings were engendered by the presence and conduct of people in the gallery." 196 N.C. App. at 190, 674 S.E.2d at 460. In *Register*, "[t]he trial court chose to exclude everyone," except the mother of the 13-year-old victim testifying against the defendant, because "the trial court was very

concerned about the potential for outbursts or inappropriate reactions by supporters of both [the] defendant and the alleged victim, and the court in fact admonished family members at the start of the trial to control their reactions." 206 N.C. App. at 635, 698 S.E.2d at 469. And in *State v. Clark*, the trial court "warned [spectators] that if they wished to leave the courtroom, they should do so immediately, for they would not be allowed to do so after closing arguments began, barring an emergency." 324 N.C. 146, 167, 377 S.E.2d 54, 66 (1989).

¶ 25 The trial court appears to have acted within its statutory and inherent authority to control the courtroom. Thus, we decline to invoke Rule 2 and dismiss Defendant's constitutional argument as unpreserved.

III.

¶ 26 **[3]** Lastly, Defendant argues that he was prejudiced at trial by ineffective assistance of counsel. After careful review, we disagree.

¶ 27 "A defendant's right to counsel, as guaranteed by the Sixth Amendment to the United States Constitution, includes the right to effective assistance of counsel." *State v. Todd*, 369 N.C. 707, 710, 799 S.E.2d 834, 837 (2017). In order to demonstrate ineffective assistance of counsel,

> a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and internal quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

¶ 28 Our Supreme Court has held that "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether

counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

¶ 29 In the case at bar, Defendant argues that his counsel "failed in multiple instances to object to plainly impermissible testimony by numerous State's witnesses vouching for A.P., or otherwise consented to such inadmissible evidence, when there could be no reasonable strategic basis for doing so." Defendant specifically lists four purported errors, including counsel's failure to object to Dr. Harold's testimony that we addressed in section I of this opinion, which testimony, as previously discussed, was not error. The second alleged error is defense counsel's consent to the amendment of one of the State's exhibits to read "CANMEC concludes the examination results are *consistent with* sexual abuse." (Emphasis added). Again, as explained in section I regarding Dr. Harold's testimony, there was no error in the use of the phrase "consistent with." Accordingly, with regard to these two alleged errors, Defendant cannot "show that his counsel's performance was deficient[.]" *Allen*, 360 N.C. at 316, 626 S.E.2d at 286.

¶ 30 Defendant's remaining arguments concern defense counsel's failure to object to allegedly inadmissible hearsay, and counsel's consent to the admission of an audio recording of an interview with one of A.P.'s teachers. We need not analyze whether these were "unprofessional errors," as Defendant has not shown—given the remaining unchallenged evidence as well as the challenged evidence that we have held was not erroneously admitted—that either of these alleged errors give rise to a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* Accordingly, Defendant's arguments are overruled.

Conclusion

¶ 31 For the foregoing reasons, Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges DIETZ and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 MARCH 2021)

CALLAHAN v. N.C. DEP'T OF PUB. SAFETY 2021-NCCOA-46 No. 20-269	Chowan (19CVS73)	Dismissed
COUNTS v. COUNTS 2021-NCCOA-47 No. 20-12	Onslow (15CVD3631)	Affirmed
DAVIS v. DAVIS 2021-NCCOA-48 No. 20-303	Orange (18CVD1096)	DISMISSED IN PART; AFFIRMED AS MODIFIED IN PART; VACATED IN PART
FISH v. FISH 2021-NCCOA-37 No. 20-203	Catawba (18CVD357)	Affirmed
GUPTON v. N.C. DEP'T OF PUB. SAFETY 2021-NCCOA-49 No. 20-357	Office of Admin. Hearings (17OSP08648)	Dismissed
IN RE N.T. 2021-NCCOA-50 No. 20-247	Edgecombe (18JA51) (18JA52)	Vacated and Remanded
INROCK DRILLING SYS., INC. v. CMP TECHS., INC. 2021-NCCOA-51 No. 20-167	Harnett (18CVS2392)	Vacated and Remanded
PFOUTS v. N.C. DIV. OF EMP. SEC. 2021-NCCOA-52 No. 20-75	Wake (19CVS9911)	Affirmed
STATE v. HAYES 2021-NCCOA-53 No. 20-275	New Hanover (16CRS58709-10) (16CRS58725)	No Error
STATE v. JOHNSON 2021-NCCOA-54 No. 20-110	Wake (16CRS206998-99) (16CRS207001)	No Error
STATE v. MOORE 2021-NCCOA-55 No. 20-85	Union (16CRS51411)	No Error

STATE v. OWEN 2021-NCCOA-56 No. 20-210	Henderson (18CRS723-725)	No Error
STATE v. RHYNES 2021-NCCOA-57 No. 19-386	Forsyth (18CRS367)	No Error
STATE v. ROLLINSON 2021-NCCOA-58 No. 20-42	Iredell (17CRS50078-80) (18CRS2840)	VACATED AND REMANDED FOR NEW SENTENCING HEARING
STATE v. SAULPAUGH 2021-NCCOA-59 No. 20-301	Durham (18CRS1110)	Affirmed; Remanded for correction of clerical error.
STATE v. WEST 2021-NCCOA-60 No. 20-57	Forsyth (16CRS1033) (16CRS61367-68)	Affirmed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS