276 N.C. App.—No. 3 Pages 148-276

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 21, 2021

MAILING ADDRESS: The Judicial Department
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OF

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COURT OF APPEALS

CASES REPORTED

FILED 16 MARCH 2021

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Appellate jurisdiction—no cross appeal—no notice of appeal—In a case involving the determination of insurance coverage of a newly purchased vehicle that was involved in an accident the day of purchase, an argument by the purchaser's insurer that the trial court erred by making the insurer responsible for excess liability coverage was dismissed where the insurer did not file a notice of appeal or cross appeal. The argument did not constitute an alternative basis in law for supporting the court's order but should have been preserved separately. **Erie Ins. Exch. v. Smith, 166.**

Preservation of issues—challenges to sufficiency of the evidence—criminal cases—Defendant's act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review. Thus, defendant's motion to dismiss drug trafficking charges based upon a defect in the chain of custody preserved the issue of the insufficiency of the evidence. **State v. Walters, 267.**

Preservation of issues—jury instructions—active participation by defense counsel—The Court of Appeals declined to consider—even under plain error review—defendant's argument regarding the trial court's jury instructions in his trial for first-degree murder where defense counsel did not object to and in fact actively participated in the formulation of the instructions. **State v. Copley, 211.**

Neglect and dependency—mother's visitation—discretion of child's therapist—no consideration of child's wishes—In a matter involving a neglected and dependent child, the trial court erred by denying any contact between respondent-mother and her son without knowing or considering the wishes of the son, who was in his mid-teens when the permanency planning review hearing took place. Although the guardian ad litem failed to communicate the child's wishes to the court, instead relying on a statement from the child's therapist recommending no physical contact between respondent and her son, the information before the court at the hearing was outdated by six months to a year, and the child's age should have prompted additional questions or action from the court. **In re J.C.-B., 180.**

CONSTITUTIONAL LAW

Equal protection—vehicle checkpoint—N.C.G.S. § 20-16.3A—In a driving while impaired case in which defendant was stopped at a vehicle checkpoint, the statute authorizing the checkpoint, N.C.G.S. § 20-16.3A, did not preclude defendant from raising an equal protection challenge, but nonetheless defendant's right to equal protection of the laws was not violated. **State v. Macke, 242.**

Right to counsel—waiver—statutory inquiry—desire to prevent delay—There was no error in the trial court's acceptance of a criminal defendant's waiver of his right to counsel where the trial court conducted a thorough inquiry pursuant to N.C.G.S. § 15A-1412 to ensure that the waiver was knowing, intelligent, and voluntary. Defendant's motivation for his waiver of counsel—to prevent his trial from being delayed by two months—did not prevent his waiver from being voluntary. **State v. Bannerman, 205.**

Right to travel—vehicle checkpoint—N.C.G.S. § 20-16.3A—In a driving while impaired case, a vehicle checkpoint conducted pursuant to N.C.G.S. § 20-16.3A did not violate defendant's constitutional right to freely travel where the checkpoint was established for a valid public safety reason—to check for legitimate driver's licenses and evidence of impairment. **State v. Macke, 242.**

CONSTRUCTION CLAIMS

Collateral source rule—subcontractors—independent contractor—failed construction of retaining wall—The collateral source rule applied to prevent plaintiff subcontractor, who was found liable in tort for damages it caused on a construction project, from receiving a credit for payments that another subcontractor made to defendant general contractor for damages he caused on the same project. The other subcontractor, who hired plaintiff as an independent subcontractor to reconstruct a retaining wall that he had unsuccessfully attempted to construct for defendant general contractor, was not plaintiff subcontractor's agent and had no obligation to defendant (beyond his duties under his contract with defendant) to rectify damages caused by plaintiff's negligence. **Caroline-A-Contr'g, LLC v. J. Scott Campbell Constr. Co., Inc., 158.**

CRIMINAL LAW

Jury instructions—flight—after felony hit and run—not element of offense—evidentiary support—In a trial for felony hit and run, the trial court did not err by instructing the jury it could consider defendant's flight after an accident on a highway as evidence of defendant's guilt. Flight was not an essential element of felony

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.

ALEXANDER v. ALEXANDER

[276 N.C. App. 148, 2021-NCCOA-61]

AMY H. ALEXANDER, Plaintiff
v.
EDWARD D. ALEXANDER, Defendant
v.
CHARLES ALEXANDER and CLARIA ALEXANDER, Intervenor-Defendants

No. COA19-391

Filed 16 March 2021

1. Child Visitation—grandparents—constitutional authority—as applied—violation of mother's parental rights

Although the trial court had statutory authority to award visitation rights to the paternal grandparents of plaintiff-mother's child where the grandparents had initiated their visitation claim prior to the father's death, the trial court lacked constitutional authority to do so in this case. The trial court unconstitutionally failed to give deference to the mother's determination of whom her child may associate with, and, even assuming the grandparents were entitled to some visitation, the trial court was unconstitutionally generous in granting visitation every other Christmas and Thanksgiving and every other weekend.

2. Attorney Fees—sufficiency of findings—award less than incurred expenses

In a child visitation case, the portion of the trial court's order awarding attorney fees was vacated and remanded where the trial court failed to make a finding explaining why it awarded substantially less than the mother's incurred litigation expenses.

Appeal by Plaintiff from orders entered 17 February 2017, 8 May 2017, 6 July 2017, 29 November 2017, and 30 April 2018 by Judge Anna E. Worley in Wake County District Court. Heard in the Court of Appeals 18 March 2020.

Jonathan McGirt for Plaintiff-Appellant.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia Jurney, and Parker Bryan Family Law, by Amy L. Britt, for Intervenor-Defendant-Appellees.

DILLON, Judge.

¶ 1 Plaintiff appeals from various orders culminating in a Permanent Order Granting Grandparent Visitation to Intervenor-Defendants and Awarding Attorney's Fees to Plaintiff.

I. Background

¶ 2 This matter concerns the custody of the child (the "Child") who was born to Plaintiff Amy H. Alexander ("Mother") and Defendant Edward D. Alexander ("Father"). Father is now deceased; therefore, his custody claim has abated. The remaining dispute is between Mother and Father's parents, Intervenor-Defendants Charles and Claria Alexander ("Grandparents"), and concerns whether Grandparents should enjoy visitation rights with the Child of their deceased son.

¶ 3 Mother and Father were married in 2006. Their Child was born in 2009. In 2014, when the Child was five years of age, Mother and Father divorced. They entered a consent order (the "2014 Consent Order") agreeing to joint custody.

¶ 4 Two years later, in 2016, Father developed cancer. As Father's condition worsened, he moved in with Grandparents. The Child lived with Grandparents (and Father) during Father's custody periods.

¶ 5 In 2017, Father moved to modify his 2014 Consent Order with Mother. Grandparents then moved to intervene and for permanent visitation rights. In February 2017, the trial court allowed Grandparents to intervene but put off consideration of their motion for visitation rights.

¶ 6 Three months later, in May 2017, as Father's condition grew more dire, the trial court entered an order which essentially granted Grandparents some temporary rights regarding the care of the Child. Specifically, the trial court ordered that the status quo be maintained until such time that it ruled on Father's motion to modify the 2014 Consent Order and Grandparents' motion for visitation rights.

¶ 7 On 8 June 2017, Father died. The trial court dismissed Father's motion to modify the 2014 Consent Order due to mootness. By its terms, the "status quo" order remained in effect. Mother, though, sought an order to have Grandparents' temporary rights terminated as she was now the Child's sole parent.

¶ 8 In 2018, after a hearing on the matter, the trial court entered its permanent order (the "2018 Permanent Order"). In the 2018 Permanent Order, the trial court awarded Mother primary physical and sole legal custody of the Child but granted Grandparents permanent, extensive

visitation rights. The trial court also awarded Mother *some* of the attorney's fees that she had incurred. Mother appealed.

II. Analysis

¶ 9 Mother makes two arguments on appeal, which we address in turn.

A. Grandparent Visitation

¶ 10 **[1]** Mother argues that the trial court had no statutory authority to award Grandparents visitation rights once Father had died and she became the Child's sole parent. Alternatively, Mother argues that any statute which authorizes a court to grant grandparents visitation rights is unconstitutional as applied to her in this case because the granting of visitation rights to Grandparents violates her constitutional rights to raise her Child as she sees fit.

¶ 11 Indeed, grandparents do not have a *constitutional* right nor rights under our common law to seek visitation as against the rights of a custodial parent(s). *See*, *e.g.*, *Montgomery v. Montgomery*, 136 N.C. App. 435, 436, 524 S.E.2d 360, 361 (2000). Our General Assembly, though, has *by statute* authorized the granting of visitation rights for grandparents in certain instances.

¶ 12 Before considering Mother's constitutional arguments, we first address whether the trial court exceeded its *statutory* authority to award Grandparents visitation rights in this case.

B. Grandparent Visitation - Statutory Authority

¶ 13 The trial court granted Grandparents visitation rights based on Section 50-13.2(b1) and Section 50-13.5(j) of our General Statutes. N.C. Gen. Stat. §§ 50-13.2(b1), 13.5(j) (2017).

¶ 14 Section 50-13.2(b1) provides that a trial court may include in a custody order terms "provid[ing] visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate." Section 50-13.5(j) provides that after a custody determination has been made, grandparents may seek visitation rights where there has been a showing of changed circumstances.

¶ 15 The seminal case from our Supreme Court on grandparent visitation rights is *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995). In that case, the Court held that the rights granted to grandparents in Sections 50-13.2(b1) and 50-13.5(j) "do not include that of *initiating suit* against parents whose family is intact and where no custody proceeding is ongoing." *Id.* at 635, 461 S.E.2d at 750 (emphasis added).

¶ 16 Following *McIntyre*, our Court has repeatedly held that grandparents only have statutory standing to sue for visitation (where custodial parents are involved) when "the custody of a child [is] 'in issue' or 'being litigated' " by the parents. *Adams v. Langdon*, 264 N.C. App. 251, 257, 826 S.E.2d 236, 240 (2019) (quoting *Smith v. Barbour*, 195 N.C. App. 244, 251, 671 S.E.2d 578, 584 (2009)).

¶ 17 Here, Grandparents did seek to intervene and be granted visitation rights while custody between Father and Mother was being litigated: they filed their motion just after Father filed his motion to modify the original 2014 Consent Order. And it was while Father's motion was still pending that the trial court allowed Grandparents' motion to intervene. Accordingly, based on our jurisprudence, since the custody of the Child was "in issue" and "being litigated" by the parents, the trial court had the statutory authority to allow Grandparents to intervene.

¶ 18 Mother contends, though, that the trial court lost any authority it otherwise might have had to grant the intervening Grandparents visitation rights once Father died, since *at that point* there was no longer a custody dispute between her and Father. Indeed, an underlying custody dispute between parents abates upon the death of one of them. *See*, *e.g.*, *McDuffie v. Mitchell*, 155 N.C. App. 587, 590, 573 S.E.2d 606, 608 (2002) ("Upon the death of the mother in the instant case, the ongoing case between the mother and father ended.").

¶ 19 We note that our Supreme Court's decision in *McIntyre* does not definitively resolve this issue, as the grandparents in that case initially filed their claim at a time when there was "no [ongoing] custody proceeding" between the children's parents and the "family was intact." *McIntyre*, 341 N.C. at 629, 461 S.E.2d at 746. And to reiterate, the Court merely held that our statutes do not allow grandparents the right of "*initiating suit* against parents whose family is intact and where no custody proceeding is ongoing." *Id.* at 635, 461 S.E.2d at 750 (emphasis added).

¶ 20 Our Court, though, has addressed the issue on a number of occasions since *McIntyre*. For instance, two years ago, our Court summarized many of our other cases to explain that where grandparents have intervened or at least have been made *de facto* parties while the parents are disputing custody of a child, a resolution or abatement of the parents' custody dispute does not cut off the grandparents' statutory right to have their claim for visitation rights heard:

> [T]his Court has recognized where one parent dies in the midst of a custody action, but before the grandparent seeks to intervene, there was no ongoing custody

> action in which the grandparent could intervene, nor could the grandparent initiate a separate action. . . .
>
> However, once grandparents have become parties to a custody proceeding—whether as formal parties or as *de facto* parties—then the court has the ability to award or modify visitation even if no ongoing custody dispute exists between the parents at the time. This is because once a grandparent intervenes in a case, they are as much a party to the action as the original parties are and have rights equally as broad. Once an intervenor becomes a party, he should be *a party for all purposes*. Thus, there, the trial court retained jurisdiction over a pending grandparental visitation claim even where the parents resolved their own custody claims via consent order.

Adams, 264 N.C. App. at 257-58, 826 S.E.2d at 240 (emphasis in original) (internal quotation marks and citations omitted).

¶ 21 In 2004, nine years after *McIntyre*, our Court considered another case involving the rights of grandparents to seek expanded visitation rights against a mother of their grandchild after their son (the child's father) had died. *Sloan v. Sloan*, 164 N.C. App. 190, 595 S.E.2d 228 (2004). In *Sloan*, the paternal grandparents were granted certain temporary visitation rights while the parents were engaged in a custody dispute, even though the grandparents had never formally intervened. *Id.* at 191, 595 S.E.2d at 229. After the father of the child unexpectedly died, the grandparents sought to intervene formally and to protect their visitation rights. *Id.* at 192, 595 S.E.2d at 230. Our Court held that since the grandparents had already been awarded visitation rights while there was an active custody dispute between the parents, the trial court retained jurisdiction after the father died to allow the grandparents to formally intervene and to grant the grandparents even greater visitation rights. *Id.* at 196-97, 595 S.E.2d at 232.

¶ 22 Therefore, we conclude that, based on our jurisprudence, Grandparents had statutory standing to seek permanent visitation rights, notwithstanding that Father had died, as they had been allowed to intervene during a time when custody between Father and Mother was in dispute.[1]

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1. We note Mother's argument that the trial court lacked authority to enter its "status quo" order shortly before Father's death which granted Grandparents temporary visitation rights. However, whether Grandparents were properly granted temporary rights prior to

C. Grandparent Visitation - Constitutional Authority

¶ 23 Having determined that the trial court had *statutory* authority to award visitation rights to Grandparents, we must consider Mother's challenge that the 2018 Permanent Order violates her *constitutional* right to raise her Child as she sees fit.

¶ 24 We first consider Grandparents' contention that Mother has failed to preserve her constitutional argument. We hold that Mother has preserved this argument: Mother made constitutional arguments when the trial court considered Grandparents' Motion to Intervene, at a hearing which culminated in the entry of the 2018 Permanent Order, and in her appellate brief. We note that Mother primarily makes a "facial" attack on the grandparent visitation statutes, an argument we find unconvincing. For instance, clearly Grandparents may be awarded visitation against the will of the parents without violating the parents' constitutional rights where the parents have been deemed unfit or otherwise have acted inconsistently with their constitutional rights as a parent. *See*, *e.g.*, *Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 266 (2003). Notwithstanding, we turn to address whether these statutes are unconstitutional "as-applied" to Mother.[2]

¶ 25 The United States Supreme Court has long recognized the constitutional right of parents to "make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (citing several prior decisions). Likewise, our Supreme Court has recognized that "parents have a paramount right to custody, care and nurture of their children" and that this paramount right "includes the right to determine with whom their children shall associate[.]" *McIntyre*, 341 N.C. at 631, 461 S.E.2d at 748 (internal quotation marks omitted). *See also*

Father's death has no bearing on our analysis regarding whether the trial court had authority to enter its subsequent 2018 Permanent Order after Father's death: Grandparents were made parties and had asserted claims for visitation rights prior to Father's death. Under our case law, it was not necessary for the trial court to have granted Grandparents rights before Father's death in order to have authority to grant Grandparents rights after his death. All that was necessary was that Grandparents had initiated their claim for visitation prior to Father's death at a time when Father and Mother were litigating custody.

2. *See Yee v. Escondido*, 503 U.S. 519, 534-35 (1992) (internal citations omitted) ("[P]arties are not limited to the precise arguments they made below. Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim -- that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.").

Petersen v. Rogers, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994) (recognizing "the paramount right of parents to custody, care, and nurture of their children").

¶ 26 However, the paramount right of parents is "not absolute." *Price v. Howard*, 346 N.C. 68, 76, 484 S.E.2d 528, 533 (1997). For instance, the United States Supreme Court has recognized that the State "[a]cting to guard the general interest in [a child's] well being[,] may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Our Supreme Court has recognized that the State may strip parents of their constitutional rights to raise their children in certain situations;[3] the State can "establish minimum educational requirements and standards for this education[;]"[4] and the State may require children to undergo certain medical treatments, as the constitutionally-protected paramount right of parents to custody, care, and control of their children does not extend to neglecting the welfare of their children.[5]

¶ 27 While our Supreme Court has stated that custodial parents have a paramount right to determine with whom their children associate, that Court has also determined that the State may grant visitation rights to third parties, such as grandparents, against the wishes of custodial parents in some situations. *McIntyre*, 341 N.C. at 631, 461 S.E.2d at 748.

¶ 28 And in the *Troxel* case, the seminal case from the United States Supreme Court on grandparent visitation statutes, the majority[6] of justices on that high Court (in separate opinions) refused to hold that such statutes are *facially* unconstitutional:

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3. *In re Clark*, 303 N.C. 592, 607, 281 S.E.2d 47, 57 (1981) (holding that our statutes providing for the termination of parental rights in certain situations do not "contravene[] the Constitutions of the United States [or] the State of North Carolina").

4. *Delconte v. State*, 313 N.C. 384, 402, 329 S.E.2d 636, 647 (1985).

5. *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905 (internal quotation marks omitted).

6. The plurality opinion was signed onto by four justices. Justice Stevens wrote a dissenting opinion recognizing the right to provide for grandparent visitation, writing that "it would be constitutionally permissible for a court to award some visitation of a child to a [] previous caregiver [in some circumstances]." *Troxel*, 530 U.S. at 85 (Stevens, J., dissenting). Justice Kennedy wrote a dissenting opinion recognizing this power as well, writing that there does not need to be any finding that the child has been harmed by her decision to justify granting visitation rights. *Id.* at 94 (Kennedy, J., dissenting).

> We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with JUSTICE KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best elaborated with care.

Troxel, 530 U.S. at 73 (plurality opinion) (internal quotation marks omitted) (refusing to hold that the Washington State grandparent visitation statute was *facially* unconstitutional). The Court recognized that all 50 states have provided grandparent visitation rights by statute. *Id.* at 73 n.1.

¶ 29 In *Troxel*, the Court held that a grandparent visitation statute was unconstitutional as applied where the trial court granted grandparents visitation rights based on the court's own determination that said visitation was in the best interest of the child, without giving "any material weight" to the wishes of "a fit custodial parent[.]" *Id.* at 72.

¶ 30 While the Court in *Troxel* did not set forth definitive rules regarding when the grant of visitation for grandparents against the wishes of the custodial parent would be constitutionally permissible, the Justices did give some hints. For instance, the plurality opinion suggests that a trial court may consider granting grandparents visitation rights only after giving special weight to the parent's determination whether such visitation would be in the child's best interest:

> In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren.
>
> [However,] the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance.
>
> And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, *the court must accord at least some special weight to the parent's own determination.*

Id. at 70 (emphasis added) (paragraph breaks supplied). The plurality recognizes a presumption that the fit parent makes decisions that are in the best interests of her child and cannot be overturned merely because

a judge believes that a different decision would have been better. *Id.* at 68. Further, the plurality suggests that any visitation order should not adversely "interfere with the parent-child relationship." *Id.* at 70.

¶ 31 Applying the principles set forth in *Troxel*, we conclude that the 2018 Permanent Order is unconstitutional in two main ways.

¶ 32 First, the trial court failed to give deference to Mother's determination regarding with whom her Child may associate. It is not clear from the record whether Mother wishes that her Child have *no* relationship with Grandparents or to what extent of a relationship she has deemed appropriate. The trial court needs to make findings in this regard. And the court must *presume* that the Mother's determination is correct. This is not to say that the presumption cannot be constitutionally overcome. For instance, there is evidence that the Child has formed a significant bond with Grandparents.

¶ 33 Second, even assuming Grandparents are entitled to an order providing visitation rights, the extent of visitation granted in the 2018 Permanent Order is unconstitutionally generous, as it impermissibly interferes with the parent-child relationship between Mother and her Child.[7] For instance, the trial court's grant of visitation every other Christmas and Thanksgiving is unconstitutional. Mother, as the Child's sole custodial parent, has the right to determine with whom her Child spends these major holidays and should not be deprived of any right to spend these holidays with her Child. Also, the grant of visitation every other weekend is too extensive. Mother, as the Child's sole custodial parent, has the right to direct how her Child spends a large majority of the weekends.

¶ 34 We, therefore, vacate the visitation provisions in the 2018 Permanent Order. On remand, the trial court shall apply the appropriate legal standard as set forth in *Troxel* and other binding authority, recognizing the paramount right of Mother to decide with whom her Child may associate. We make no determination as to whether there is evidence from which findings could be made to overcome Mother's paramount right to justify granting Grandparents visitation rights.

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7. While "in certain contexts 'custody' and 'visitation' are synonymous[,] . . . it is clear that in the context of grandparents' rights to visitation, the two words do not mean the same thing." *McIntyre*, 341 N.C. at 634, 461 S.E.2d at 749. The trial court erred by awarding Mother primary physical custody instead of sole physical custody, and erred by essentially awarding Grandparents secondary custody instead of visitation.

D. Attorney's Fees

¶ 35 **[2]** Mother also argues that the trial court abused its discretion in awarding her only part of the attorney's fees she has expended.

¶ 36 Our Supreme Court directs that "the *amount* of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion." *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980) (emphasis in original).

¶ 37 "If the court elects to award attorney's fees, it must also enter findings to support the amount awarded." *Porterfield v. Goldkuhle*, 137 N.C. App. 376, 378, 528 S.E.2d 71, 73 (2000). These findings of fact must include "the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney[] based on competent evidence." *Id.* at 378, 528 S.E.2d at 73.

¶ 38 Here, although the trial court concluded that Mother's $45,753.00 in attorney's fees was reasonable, it ultimately awarded $14,548.50. The court included a finding of fact as to the time expended on the case, skill required, customary fee, and experience of the attorney:

> 54. As of December 15, 2017, Plaintiff had incurred litigation expenses in the amount of $45,753.00. Plaintiff's attorney or members of her staff billed in excess of 231 hours in this matter. Plaintiff's attorney charges $275.00 per hour for her in-court time and $250.00 per hour for in-office time and her associates charge $225.00 per hour for in-court time and $200.00 per hour for in-office time. Plaintiff's paralegals time is billed at $110.00 per hour. These rates and fees are reasonable for Plaintiff's attorneys' experience.

The trial court provided several findings in support of its award of attorney's fees to Mother but did not provide a finding explaining its decision to award substantially less than Mother's incurred litigation expenses. We conclude that without such an explanation, the order is insufficient for our review. Therefore, we vacate this portion of the 2018 Permanent Order and remand for additional findings.

VACATED AND REMANDED.

Judges COLLINS and GRIFFIN concur.

CAROLINE-A-CONTRACTING, LLC, PLAINTIFF
v.
J. SCOTT CAMPBELL CONSTRUCTION COMPANY, INC., DEFENDANT

No. COA20-60

Filed 16 March 2021

Construction Claims—collateral source rule—subcontractors—independent contractor—failed construction of retaining wall

The collateral source rule applied to prevent plaintiff subcontractor, who was found liable in tort for damages it caused on a construction project, from receiving a credit for payments that another subcontractor made to defendant general contractor for damages he caused on the same project. The other subcontractor, who hired plaintiff as an independent subcontractor to reconstruct a retaining wall that he had unsuccessfully attempted to construct for defendant general contractor, was not plaintiff subcontractor's agent and had no obligation to defendant (beyond his duties under his contract with defendant) to rectify damages caused by plaintiff's negligence.

Appeal by Plaintiff from judgment entered 14 June 2019 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 27 January 2021.

McAngus Goudelock & Courie, PLLC, by John E. Spainhour and Lucienne H. Peoples, for Plaintiff-Appellant.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Allan R. Tarleton and Martin E. Moore, for Defendant-Appellee.

INMAN, Judge.

¶ 1 Caroline-A-Contracting, LLC ("CAC"), a subcontractor found liable in tort for damages it caused on a construction project, appeals from the trial court's judgment applying the collateral source rule to deny a credit for payments made to the general contractor, J. Scott Campbell Construction Company ("Campbell"), by another subcontractor. After careful review, we affirm.

I. FACTUAL & PROCEDURAL HISTORY

¶ 2 In early 2015, Campbell contracted to build a house in Maggie Valley, North Carolina. As part of the project, Campbell hired Ariel Mendoza

("Mr. Mendoza") of Mendoza Masonry and Landscaping to construct a boulder retaining wall to support a vehicle turnaround area. The wall collapsed twice during construction because its water drainage system failed and its foundation was compromised after significant rains. To remove his own damaged work, stabilize the slope, and erect the wall anew, Mr. Mendoza contracted with CAC. Mr. Mendoza and CAC were the only parties to the written contract, but the contract committed CAC to the "[c]ompletion of the work and satisfaction of [Campbell] and [home-owner]."

¶ 3 While CAC was reconstructing the boulder wall, Campbell determined that the new construction was a failure[1] and ordered CAC to immediately stop work and remove its equipment and employees from the site. Campbell then hired a replacement contractor, Tim Burress ("Mr. Burress"), to raze the existing construction and rebuild the wall, at a cost of $106,000. Campbell and Mr. Mendoza each refused to pay CAC.

¶ 4 On 15 March 2015, CAC filed separate lawsuits against Campbell and Mr. Mendoza.

¶ 5 CAC's lawsuit against Mr. Mendoza for breach of contract alleged CAC had incurred $20,000 in damages. Mr. Mendoza filed an answer and counterclaim alleging that CAC's work was defective, was not supervised by an engineer as required by the contract, and caused damages to Mr. Mendoza exceeding $50,000.

¶ 6 CAC's separate lawsuit against Campbell sought to recover damages for breach of contract in the amount of $30,000 and, in the alternative, damages of $35,000 in *quantum meruit*. Campbell denied the existence of a contract with CAC as well as the basis for the *quantum meruit* claim. Campbell also asserted a counterclaim of negligence for damages as a result of CAC's work. In response to the counterclaim, CAC raised a defense requesting a credit or offset against any amounts paid by another source to Campbell for the damages Campbell claimed against CAC.

¶ 7 While both actions were pending, CAC learned that Mr. Mendoza had paid money to Campbell related to damages caused by the defective retaining wall.

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1. At trial, Campbell testified that CAC had not correctly compacted the site to prevent saturation and to stabilize the area for construction of the wall: "You could take a piece of rebar with your hand and sink it out of sight. It looked like a pond. There was so much water standing there. . . . It was just unacceptable work. . . . Everything about that job was questionable."

¶ 8 In the lawsuit against Campbell, CAC moved for summary judgment, arguing that Campbell was not entitled to recover from CAC money damages that had already been paid by Mr. Mendoza. In response, Campbell argued that the collateral source rule should exclude evidence of such payments because Mr. Mendoza was an independent party. The trial court denied CAC's motion for summary judgment in September 2018.

¶ 9 Three months later, in December 2018, CAC and Mr. Mendoza dismissed with prejudice their claims against each other. The terms of the dismissal are not reflected in the record on appeal.

¶ 10 Following the dismissal of its action against Mr. Mendoza and two months before trial of the action from which the appeal arises, CAC filed a motion for a credit of at least $90,000 in the event of an adverse verdict on Campbell's counterclaim, based on payments Campbell had received from Mr. Mendoza. Campbell filed a motion to exclude evidence of these payments. The trial court granted Campbell's motion based on the collateral source rule and because such evidence "might confuse the jury or diminish any award based on the evidence." The trial court allowed CAC to proffer evidence pre-trial on its motion for credit and decided that if a verdict was returned adverse to CAC, "the court will hear arguments that the award should be reduced or credited by payments from [Mr.] Mendoza."[2]

¶ 11 The case came on for trial in May 2019. The jury determined that CAC did not have a contract with Campbell, but it awarded $5,000 to CAC in *quantum meruit* for its supplies and efforts to remediate the site. The jury also found that Campbell had been damaged by CAC's negligence in construction and awarded Campbell $41,678.09 plus interest in damages.

¶ 12 After trial, CAC renewed its motion for credit based on Mr. Mendoza's prior payments to Campbell. The trial court denied CAC's motion in an order that restated the jury verdict and found, in relevant part:

> 28. . . . [Mr. Mendoza] paid [Campbell] $105,000 for costs attributable to the repair of the wall.
>
> . . . .

2. By the time of trial, Mr. Mendoza had paid a total of $147,500 to repair damage related to the wall—$105,000 to Campbell and $42,500 to the replacement contractor, Mr. Burress.

> 32. [T]he payments made by [Mr. Mendoza] to [Campbell] were not the result of any type of insurance coverage that [Campbell] had purchased.
>
> . . . .
>
> 38. The gravamen of this case turns on the status of [Mr.] Mendoza. The evidence is uncontroverted that [Mr.] Mendoza is independent of the Plaintiff, Caroline-A-Contracting, LLC. [Mr.] Mendoza is not an employee or agent of [CAC]. [Mr.] Mendoza was not a party to this lawsuit.
>
> 39. . . . [T]he work performed by [CAC] independent of [Mr. Mendoza] was determined to be negligent and damages were awarded to Campbell Construction.
>
> . . . .
>
> 42. Under the unique facts of this case . . . the payments made by [Mr.] Mendoza constitute payments made from an independent, collateral source.

The trial court denied CAC's motion for a credit, concluding:

> 2. [Mr.] Mendoza is a source independent of [CAC].
>
> 3. The collateral source rule applies in this case and as such its application bars the tortfeasor [CAC] from reducing its own liability for damages by any amount of compensation the injured party [Campbell] received from an independent source.
>
> 4. Based upon the collateral source rule [CAC] is not entitled to a credit for payments made by [Mr.] Mendoza to [Campbell].

CAC filed written notice of appeal on 10 July 2019.

II. ANALYSIS

¶ 13 On appeal, we are bound by the facts found by the trial court if they are supported by the evidence, *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980), and we review a trial court's conclusions of law *de novo*, *Hairston v. Harward*, 371 N.C. 647, 656, 821 S.E.2d 384, 391 (2018).

¶ 14 The sole issue on appeal is whether the trial court erred by treating the payments from Mr. Mendoza as a collateral source, and consequent-

ly denying a credit to CAC. Whether the collateral source rule applies to payments made by a source independent of the negligent actor to an injured party in the context of a construction dispute appears to be an issue of first impression in North Carolina.[3]

A. Collateral Source Rule Precedent

¶ 15 The collateral source rule provides that a "tort-feasor should not be permitted to reduce his own liability for damages by the amount of compensation the injured party receives from an independent source." *Katy v. Capriola*, 226 N.C. App. 470, 482, 742 S.E.2d 247, 256 (2013) (citations and quotation marks omitted). The collateral source rule "is punitive in nature, and is intended to prevent the tortfeasor from a windfall when a portion of plaintiff's damages have been paid by a collateral source." *Wilson v. Burch Farms, Inc.*, 176 N.C. App. 629, 639, 627 S.E.2d 249, 257 (2006).

¶ 16 Our Supreme Court "has not clearly enunciated the factors that should be taken into account in determining whether a payment source is or is not collateral to a defendant," but the "defining characteristic of a collateral source is its *independence from the tortfeasor*." *Hairston*, 371 N.C. at 658-60, 821 S.E.2d at 392-93 (citing *Fisher v. Thompson*, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981)) (emphasis added). The most explicit definition of "collateral source" was provided only by way of examples listed a half century ago: "[A] plaintiff's recovery will not be reduced by the fact that . . . expenses were paid by some source collateral to the defendant, such as by a beneficial society, by members of the plaintiff's family, by the plaintiff's employer, or by an insurance company." *Young v. Balt. & Ohio R.R.*, 266 N.C. 458, 466, 146 S.E.2d 441, 446 (1966) (citation and quotation marks omitted); *see also Cates v. Wilson*, 321 N.C. 1, 5, 361 S.E.2d 734, 737 (1987); *Hairston*, 371 N.C. at 657, 821 S.E.2d at 391.

¶ 17 The collateral source rule is an exception to the general common-law principle that there should be only one recovery for one injury. *See Holland v. S. Pub. Utils. Co.*, 208 N.C. 289, 292, 180 S.E.2d 592, 593 (1935) ("All of the authorities are to the effect that, where there are joint

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3. We note that just last year, in *Crescent University City Venture, LLC v. Trussway Manufacturing, Inc.*, our Supreme Court unanimously held that a commercial property owner could not recover for economic loss by asserting a tort claim against a subcontracted manufacturer of building materials with whom the property owner had no contract. __ N.C. __, __, 852 S.E.2d 98, 99 (Dec. 18, 2020). In this appeal, CAC challenges only the amount of damages awarded to Campbell on a counterclaim for negligence. CAC does not challenge the validity of Campbell's tort claim. So the economic loss rule applied in *Crescent* is not before us.

tort-feasors, there can be but one recovery for the same injury or damage, and that settlement with one of the tort-feasors releases the others. . . ."). This Court has extended *Holland*'s "one satisfaction" principle to breach of contract cases. *RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 357, 570 S.E.2d 510, 519 (2002) ("In a breach of contract action, a defendant is entitled to produce evidence of payment of compensation by a third party to a plaintiff for damages resulting from a similar claim regarding the same subject matter.").

¶ 18 CAC relies on *Holland*'s holding to suggest that "any amount paid by anybody . . . should be held for a credit on the total recovery in any action for the same injury or damage." *Holland*, 208 N.C. at 292, 180 S.E.2d at 593. But, in *Hairston v. Harward*, our Supreme Court emphasized that "the continued viability of the collateral source rule clearly indicates that . . . *Holland* cannot be properly understood as meaning that 'any amount paid by anybody' that benefits plaintiff or covers costs that plaintiff incurred as the result of a compensable injury must be credited against the judgment amount." *Hairston*, 371 N.C. at 659, 821 S.E.2d at 392. Though "gratuitous payments made against the judgment would also have to be credited against the judgment amount," *id.* at 659 n.6, 821 S.E.2d at 392 n.6, such payments, as in this case, are nonetheless subject to the same independent, third-party inquiry.

¶ 19 Other state appellate courts have applied the collateral source rule to claims for negligent construction resulting in injury to real property. *See, e.g.*, *New Found. Baptist Church v. Davis*, 186 S.E.2d 247, 248-49 (S.C. 1972) (denying a defendant found liable for negligent construction a credit for repairs completed by the church trustee); *Hurd v. Nelson*, 714 P.2d 767, 768, 770-71 (Wyo. 1986) (holding that volunteer labor from church congregants to remodel a home and construct a shop and storage building constituted a collateral source, so the defendant could not receive a credit against a judgment for breach of his divorce settlement); *Shaffer v. Debbas*, 21 Cal. Rptr. 2d 110, 113 (Cal. App. 4th 1993) (holding homeowner's settlement with the property insurer was a collateral source and did not offset damages owed by defendant builders in defective construction case). As in North Carolina, the collateral source rule in these states is governed entirely by common law, because these states' legislatures have not defined the collateral source rule by statute.[4] Other states have done so. *See, e.g.*, Fla. Stat. § 768.76(2)(a) (2020)

4. And, like North Carolina, all three jurisdictions—South Carolina, Wyoming, and California (along with several other states)—apply the collateral source rule to gratuitous payments or services in the same manner as they do insurance payments.

(limiting collateral sources to four categories: federal social security benefits; "health, sickness, or income disability insurance" and automobile accident insurance; any contract or agreement to reimburse for health care services; and an employer continuation plan that pays wages during a period of disability).

B. Applying the Collateral Source Rule

¶ 20 Here, to decide whether the collateral source rule applies, we must consider Mr. Mendoza's role in the residential construction project and his relationship to tortfeasor CAC. After his own attempt to build the retaining wall failed, Mr. Mendoza hired CAC to re-erect it; Campbell was not a party to the contract between Mr. Mendoza and CAC. Other than contracting with CAC, Mr. Mendoza had no further involvement with the reconstruction of the wall. Mr. Mendoza was not CAC's agent or employee.

¶ 21 Campbell's counterclaim against CAC sought recovery on a theory of negligence, not breach of contract. Campbell admitted that it ordered CAC from the property "as a result of its negligent and dangerous work causing damage to the surrounding work and real property." Campbell alleged that Mr. Mendoza entered into a contract with CAC without Campbell's knowledge, and that by engaging in the work, CAC "owed a duty to [Campbell] to perform its [w]ork in such a manner as not to interfere with, damage, or hinder . . . the [p]roject" and "not to damage real or personal property at the [p]roject." Campbell's counterclaim was for damage CAC caused to *both* the project *and* the real property.

¶ 22 Mr. Mendoza's payments to Campbell for his failure to fulfill his obligations were entirely independent of CAC's negligence and do not relieve CAC from its own distinct liability to Campbell for damage caused at the site. *See Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991) ("Generally, one who employs an independent contractor is not liable for the independent contractor's negligence unless the employer retains the right to control the manner in which the contractor performs his work.") (citation omitted); *see also Copeland v. Amward Homes of N.C., Inc.*, 269 N.C. App. 143, 147, 837 S.E.2d 903, 906 (2020), *cert. granted*, 851 S.E.2d 360 (N.C. 2020) (mem.) ("The legal responsibility for the safe performance of that work rests entirely on the independent contractor.") (citation omitted). Because CAC was an independent subcontractor, Mr. Mendoza had no obligation beyond his own contractual duties to Campbell to rectify damages caused by CAC's negligence. Mr. Mendoza's payments to Campbell, thus, constitute payments made from a collateral source.

¶ 23 CAC compares this case to another construction contract case in which the collateral source rule did not apply. In *RPR & Associates, Inc.*, a construction contractor claimed it had incurred expenses as a result of a delay by "the State of North Carolina *through* its *agent* architect" for a project on a college campus. 153 N.C. App. at 357, 570 S.E.2d at 519 (emphasis added). The plaintiff had already sued the architect for breach of contract because of the same delay in construction and obtained payment of $200,000 in settlement. *Id.*, 570 S.E.2d at 520. When the plaintiff then sued the State, our Court decided that "defendant was entitled to a reduction of damages for monies plaintiff received for identical injuries resulting from an identical delay." *Id.* (citing *Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 134, 141-42, 468 S.E.2d 69, 74-75 (1996)).

¶ 24 Here, by contrast, Campbell did not sue Mr. Mendoza or allege that Mr. Mendoza was an agent of CAC. CAC pursued a separate action against Mr. Mendoza arising from the wall reconstruction project. CAC and Mr. Mendoza then dismissed their claims against each other with prejudice.

¶ 25 In addition, unlike the work of the architect in *RPR & Associates, Inc.*, CAC's work on the retaining wall in this case was entirely separate from Mr. Mendoza's work, causing injury and delay distinct from Mr. Mendoza's own deficient work and failure to perform under its agreement with Campbell. As established above, Mr. Mendoza was not CAC's agent. CAC therefore is not entitled to a credit for Mr. Mendoza's payments to Campbell.

¶ 26 CAC bemoans that Campbell will recover doubly for the same injury. To the extent Mr. Mendoza's payments and the damages awarded overlap, our prior decisions have established that in this situation, the injured party—Campbell, not the tortfeasor—CAC, should reap any such windfall. *See Wilson*, 176 N.C. App. at 639, 627 S.E.2d at 257. Thus, we conclude the collateral source rule applies in this case and bars CAC from reducing its liability by the amount of compensation Campbell received from Mr. Mendoza.

III. CONCLUSION

¶ 27 For the foregoing reasons, we hold that the collateral source rule applies to Mr. Mendoza's payments to Campbell in this case, barring CAC from reducing its own liability by any amount of compensation Campbell received from an independent source. Therefore, we find no error and affirm the judgment of the trial court.

AFFIRMED.

Judges COLLINS and GRIFFIN concur.

ERIE INSURANCE EXCHANGE, PLAINTIFF
v.
EDWARD R. SMITH; ARCHIE N. SMITH, A MINOR; EMILY A. TOBIAS, AS ADMINISTRATOR OF THE ESTATE OF JOHN PINTO, JR., DECEASED; VALLEY AUTO WORLD, INC.; UNIVERSAL UNDERWRITERS INSURANCE COMPANY; VW CREDIT LEASING, LTD.; AND DOE INSURANCE COMPANIES 1-3; DEFENDANTS

No. COA20-246

Filed 16 March 2021

1. Motor Vehicles—determination of insurance—financing not yet obtained—N.C.G.S. § 20-75.1—conditional delivery

Where the purchaser of a car had not yet obtained final approval of financing before taking possession of the car and getting into an accident, the vehicle was covered by the dealer's insurance because the sales transaction was a conditional sale and delivery under N.C.G.S. § 20-75.1.

2. Insurance—conditional sale of vehicle—N.C.G.S. § 20-75.1—dealer's insurer responsible for primary coverage

In a case involving the determination of insurance coverage of a newly purchased vehicle that was involved in an accident the day of purchase, where the trial court properly determined that N.C.G.S. § 20-75.1 applied to the vehicle transaction because it involved a conditional sale and delivery, the court did not err by determining that the dealer's insurer was responsible for primary coverage.

3. Insurance—coverage by operation of law—liability coverage—minimum statutory limits—terms of policy

Where, by operation of N.C.G.S. § 20-75.1, a dealer's insurer was required to cover a car that was involved in an accident during a conditional-delivery period, but the terms of the insurance contract only required coverage in accordance with minimum statutory limits, the trial court erred by ordering the insurer to provide coverage up to $500,000.00, rather than the statutory limit of $30,000.00 per person.

4. Insurance—coverage by operation of law—umbrella liability coverage—terms of policy

Where, by operation of N.C.G.S. § 20-75.1, a dealer's insurer was required to cover a car that was involved in an accident during a conditional-delivery period, the trial court erred by ordering the insurer to provide umbrella liability coverage, because neither

the personal nor the commercial umbrella provisions in the contract applied in these circumstances.

5. Appeal and Error—appellate jurisdiction—no cross appeal—no notice of appeal

In a case involving the determination of insurance coverage of a newly purchased vehicle that was involved in an accident the day of purchase, an argument by the purchaser's insurer that the trial court erred by making the insurer responsible for excess liability coverage was dismissed where the insurer did not file a notice of appeal or cross appeal. The argument did not constitute an alternative basis in law for supporting the court's order but should have been preserved separately.

Appeal by Defendant Universal Underwriters Insurance Company from Order entered 17 January 2020, by Judge James M. Webb in Hoke County Superior Court. Heard in the Court of Appeals 12 January 2021.

Martineau King PLLC, by Lee M. Thomas and Elizabeth A. Martineau, for plaintiff-appellee Erie Insurance Exchange.

Van Camp, Meacham & Meacham, PLLC, by Thomas M. Van Camp, for defendant-appellees the Smiths.

Gallivan, White & Boyd, P.A., by James M. Dedman and Tyler L. Martin, for defendant-appellant Universal Underwriters Insurance Company.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 This appeal involves a Declaratory Judgment action filed consistent with N.C. Gen. Stat. § 1-283 *et seq.*, to establish the respective obligations, if any, of Erie Insurance Exchange (Erie) and Universal Underwriters Insurance Company (Universal) to provide insurance coverage for liability arising from a 2016 car accident. Specifically, Universal appeals from an Order entered 17 January 2020, granting in part Erie's Motion for Summary Judgment, denying Universal's cross Motion for Summary Judgment, and entering a Declaratory Judgment adjudicating:

¶ 2 1. Universal was obligated to provide liability insurance coverage with limits of $500,000.00, umbrella liability coverage with limits of

$10,000,000.00, and that the aggregate coverage of $10,500,000.00 was the primary insurance coverage for the liability arising from the 2016 accident; and

¶ 3 2. Erie was obligated to provide excess liability insurance coverage with limits in the amount of $100,000.00 per person and $300,000.00 per accident.

¶ 4 The factual background giving rise to the present case is set forth in this Court's earlier opinion in *Smith v. USAA Cas. Ins. Co.*, 261 N.C. App. 40, 819 S.E.2d 210 (2018), involving a separate but related action arising from the same underlying facts.

> On the morning of Saturday, 30 April 2016, Pinto went to [Valley Auto World (Valley)] for the purpose of trading in his 2004 Saturn and purchasing another vehicle. He ultimately decided to purchase the Beetle that had been traded in by Copes. Despite the fact that [Valley] did not actually own the vehicle, [Valley] sales representatives and Pinto nevertheless agreed upon a purchase price of $14,500 for the Beetle with a trade-in value of $2,000 for the Saturn. Because Pinto did not put any money down, a credit application was prepared and submitted by [Valley] to VW Credit for $12,500, the full amount necessary to fund the purchase.
>
> At 12:05 p.m., while Pinto remained on the [Valley] premises, [Valley] received a fax from VW Credit containing VW Credit's approval of $11,990 in financing for Pinto's purchase of the Beetle. As a result, a $510 gap remained between the amount of financing approved by VW Credit and the total purchase price of the vehicle that had been agreed upon by Pinto and [Valley]. Despite this shortfall, Gary Carrington, the business manager of [Valley], believed that he would ultimately be able to secure the full financing amount by resubmitting Pinto's credit application to VW Credit the following Monday. For this reason, Carrington proceeded to assist Pinto in completing the necessary paperwork memorializing the sale.
>
> Among the various documents executed by Pinto and [Valley] on 30 April 2016 was a Conditional Delivery Agreement ("CDA"). The CDA stated, in

> pertinent part, as follows: DEALER'S obligations to sell the SUBJECT VEHICLE to PURCHASER and execute and deliver the manufacturer's certificate of origin or certificate of title to SUBJECT VEHICLE are expressly conditioned on FINANCE SOURCE'S approval of PURCHASER'S application for credit as submitted AND dealer being paid in full by FINANCE SOURCE.
>
> Upon signing the documents provided to him by Carrington, Pinto drove the Beetle off the [Valley] lot that afternoon. Later that evening, Pinto was driving the Beetle when he was involved in a head-on collision (the "30 April Accident") with another vehicle being driven by Edward Smith. Smith's son, Archie, was a passenger in his vehicle. Pinto was killed in the collision, and both Edward Smith and Archie Smith were seriously injured.
>
> Unaware of Pinto's death, Carrington resubmitted his credit application to VW Credit on 2 May 2016. At 4:40 p.m. that day, VW Credit faxed [Valley] its approval for the full $12,500 that [Valley] had requested. The following day, [Valley] paid off the balance owed to VW Credit under Copes' lease. On 9 May 2016, VW Credit executed a reassignment of title to [Valley]. [Valley], in turn, transferred title to Pinto on 23 May 2016.

Id. at 42-43, 819 S.E.2d at 612 (footnote and quotation marks omitted).

¶ 5 After the accident, the Smiths filed a Complaint alleging a Negligence action against Pinto's Estate and a Declaratory Judgment action seeking to establish, in part, the respective obligations of Erie and Universal to provide insurance coverage. *Id.* at 43, 819 S.E.2d at 612. Erie brought a crossclaim for Declaratory Judgment in that action. *Id.* In that case, the trial court also entered Summary Judgment concluding Universal was obligated to provide aggregate primary insurance coverage of up to $10,500,000.00 and Erie's policy provided excess coverage. *Id.* at 44, 819 S.E.2d at 613. On appeal, this Court vacated that order and remanded that case for additional proceedings after concluding there was a failure to join necessary parties precluding entry of a Declaratory Judgment. *Id.* at 49-50, 819 S.E.2d at 616-17. On remand, the trial court entered a Consent Order severing the Smiths' Negligence action from the

Declaratory Judgment action and permitting Erie to re-plead its claim for Declaratory Judgment. *Id.*

¶ 6 As a result, on 19 November 2018, Erie, who issued the auto insurance policy to Pinto covering his 2004 Saturn, initiated this action by filing a Complaint for Declaratory Judgment "seeking a determination [by the trial court] concerning its rights and obligations under a policy of insurance issued by it[.]" Universal, as the insurer for Valley, the dealer that sold the Beetle to Pinto, filed its Answer to Erie's Complaint on 30 January 2019, in which it also asserted counterclaims against Erie and sought Declaratory Judgment. On 21 October 2019, both Erie and Universal filed cross Motions for Summary Judgment seeking a determination of the application of N.C. Gen. Stat. § 20-75.1 addressing the conditional delivery of vehicles by a dealer to a purchaser and the obligations of a dealer to provide liability insurance in conditional delivery transactions.

¶ 7 After hearing arguments from the parties on 13 December 2019, the trial court entered its Order on 17 January 2020, ultimately granting Erie's Motion for Summary Judgment in part, denying Universal's Motion for Summary Judgment, and entering Judgment against Universal and Erie. The trial court determined "all necessary parties to this dispute have been joined and provided the opportunity to be heard in this matter." Then, the trial court concluded the transaction between Pinto and Valley, as the dealer, was a conditional sale and delivery and "Pinto was operating a covered vehicle with permission, [and] he became an insured under the terms of the Dealer's policy[ ]" and, therefore, N.C. Gen. Stat. § 20-75.1 applied. As it related to the policies' respective coverage, the trial court ordered:

> 2. With respect to the 30 April 2016 accident, Universal's policy issued to Dealer provides to Estate liability coverage of $500,000.00 and umbrella liability coverage of $10,000,000.00. This aggregate coverage of $10,500,000.00 is primary.
>
> 3. Erie's policy issued to Pinto provides to Estate excess liability coverage in the amount of $100,000.00 per person and $300,000.00 per accident, collectible only after Universal's aggregate policy limits of $10,500,000.00 have been exhausted.

¶ 8 Universal filed Notice of Appeal from the trial court's Order on 29 January 2020. The trial court's Order, which fully and conclusively

establishes the rights and responsibilities of the parties in a Declaratory Judgment, operates as a final judgment. *See* N.C. Gen. Stat. § 1-283 (2019). Thus, this Court has jurisdiction to review Universal's appeal as a final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b)(1). In addition, without taking a cross appeal, Erie purports to challenge the trial court's ruling it is obligated to provide excess insurance coverage for the accident.

Issues

¶ 9 The dispositive issues in this appeal are: (I) whether Valley's sale and delivery of the Beetle to Pinto was a conditional delivery under N.C. Gen. Stat. § 20-75.1 such that Universal, as the dealer's insurer, was obligated to provide insurance coverage at the time of the accident; and if so, (II) whether such insurance coverage by Universal operated as the primary or excess insurance coverage; (III) what coverage limits are applicable under Universal's liability insurance policy with the dealer; (IV) whether Universal is obligated to provide additional coverage for the accident under its umbrella insurance policy covering the dealer; and (V) whether this Court has appellate jurisdiction to review Erie's separate challenge to the trial court's Order concluding Erie is obligated to provide excess insurance coverage for liability arising from the accident.

Standard of Review

¶ 10 We review a trial court's grant of summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). We also review questions of statutory interpretation and a "lower court's interpretation of an insurance policy's language[,]" de novo. *Satorre v. New Hanover Cnty. Bd. of Comm'rs*, 165 N.C. App. 173, 176, 598 S.E.2d 142, 144 (2004); *JVC Enters., LLC v. City of Concord*, 269 N.C. App. 13, 16, 837 S.E.2d 206, 209 (2019) ("The *de novo* standard also applies to questions of statutory interpretation." (citation omitted)).

Analysis

I. Conditional Delivery

¶ 11 **[1]** As a threshold matter, Universal contends the trial court erred in determining N.C. Gen. Stat. § 20-75.1, which governs the conditional delivery of motor vehicles, applied to the transaction in the present case. N.C. Gen. Stat. §20-75.1 (2019). Universal argues its coverage never extended to Pinto as the Beetle's purchaser because "Pinto had 'obtained' financing prior to the sale and delivery of the [Beetle] and that [Valley] did not consider the sale of the [Beetle] at issue to be a 'conditional' sale."

¶ 12 Section 20-75.1 was enacted in 1993 as a part of North Carolina's Motor Vehicle Act "to clarify the law relating to the conditional delivery of motor vehicles and to provide for insurance coverage for vehicles added to existing policies on nonbusiness days." 1993 N.C. Sess. Laws 328 (N.C. 1993). In relevant part, Section 20-75.1 provides:

> Liability, collision, and comprehensive insurance on a vehicle sold and delivered conditioned on the purchaser obtaining financing for the purchaser of the vehicle shall be covered by the dealer's insurance policy until such financing is finally approved and execution of the manufacturer's certificate of origin or execution of the certificate of title. Upon final approval and execution of the manufacturer's certificate of origin or the certificate of title, and upon the purchaser having liability insurance on another vehicle, the delivered vehicle shall be covered by the purchaser's insurance policy beginning at the time of final financial approval and execution of the manufacturer's certificate of origin or the certificate of title.

N.C. Gen. Stat. § 20-75.1.

¶ 13 In its Order denying Universal's Motion for Summary Judgment, the trial court concluded "the transaction between [Pinto] and [Valley] involved a conditional sale and delivery of the 2013 Volkswagen Beetle automobile at issue, and North Carolina's 'Conditional [D]elivery of [M]otor [V]ehicles' statute applies to the transaction." Conducting a de novo review of the Record, we agree with the trial court and conclude Universal's argument asserting Pinto had already obtained financing is inconsistent with both the plain language of the statute and this Court's precedent. *See Hester v. Hubert Vester Ford, Inc.*, 239 N.C. App. 22, 27, 767 S.E.2d 129, 134 (2015) ("[T]ransferring auto insurance to a consumer's policy is only supposed to occur once financing is finalized and the consumer has taken title to the vehicle." (citing N.C. Gen. Stat. § 20-75.1)).

¶ 14 Here, undisputed evidence in the Record reflects Pinto did not fully obtain financing "finally approved" before he left Valley in the Beetle on Saturday 30 April 2016. N.C. Gen. Stat. § 20-75.1. Pinto visited Valley to look for a newer car and settled on the 2013 Beetle at a purchase price of $14,500.00. Pinto traded in his 2004 Saturn for a $2,000.00 credit.[1]

1. At that time, Pinto did not provide Valley with the Saturn's title and executed a "We Owe Form" identifying he owed Valley the title to the trade-in vehicle.

To cover the remainder of the balance, Pinto applied for financing through VW Credit in the amount of $12,500.00. Prior to his departure on 30 April, Pinto's application was approved for financing in the amount of $11,990.00, leaving a balance due of $510.00. Pinto signed the CDA on 30 April 2016, which provided, "[Valley's] obligations to sell the [Beetle] to [Pinto] and execute and deliver the manufacturer's certificate of origin or certificate of title to [the Beetle] are expressly conditioned on FINANCE SOURCE'S approval of [Pinto's] application for credit *as submitted* AND dealer being paid in full . . . ."[2] (emphasis added). It was not until the following Monday, 2 May 2016, that Valley resubmitted Pinto's credit application and Pinto was approved, *as submitted*, for the full balance of $12,500.00. Therefore, at the earliest, Pinto "obtained financing" for the Beetle on 2 May 2016.[3]

¶ 15 Universal's assertion that Valley's employees considered the financing to be final despite the $510.00 balance is not conclusive. N.C. Gen. Stat. § 20-75.1 is clear: "[I]nsurance on a vehicle sold and delivered conditioned on the purchaser *obtaining financing* for the purchaser of the vehicle shall be covered by the dealer's insurance policy until such financing is finally approved and execution of the manufacturer's certificate of origin or execution of the certificate of title." N.C. Gen. Stat. § 20-75.1 (emphasis added). "[W]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning[.]" *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 244, 539 S.E.2d 274, 277 (2000) (citations and quotation marks omitted).

¶ 16 Valley delivered the Beetle to Pinto conditioned on Pinto's obtaining approval of the full financing, as verified in the CDA, in order to pay Valley the purchase price in full. At the earliest, such financing was obtained on 2 May 2016, when VW Credit approved Pinto's application for the full amount—two days after the accident giving rise to the present case—and, at the latest, on 23 May 2016, when Pinto was transferred title to the Beetle from the North Carolina Department of Motor Vehicles.

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2. On appeal, Universal argues the CDA is merely a formality because Valley requires all customers execute one regardless of financing status. That may well be the case in many, if not most, instances. However, it does not alter the specific facts of this case in which the delivery was, in fact, "expressly conditioned" on the approval of the full financing, which approval had not been obtained at the time of delivery.

3. Because we conclude on the Record that Pinto could not have "obtained" financing prior to 2 May 2016, when his credit application was approved in full, we do not address the issues surrounding the transfer of title, which ultimately did not happen until 23 May 2016.

Thus, at the time of the accident on 30 April 2016, Pinto was operating a conditionally delivered vehicle required to be insured by the dealer under N.C. Gen. Stat. § 20-75.1. Therefore, at the time of the accident, the Beetle was a covered vehicle under Valley's insurance policy issued by Universal. Consequently, the trial court properly granted Summary Judgment on this question, and the trial court's Order in this regard is affirmed.

II. Primary Coverage

¶ 17 **[2]** Universal contends, in the event Section 20-75.1 applies, the trial court erred in determining its coverage is primary because Section 20-75.1 "does not resolve the issue of priority of coverage." We conclude the trial court correctly determined Universal's coverage is primary.

¶ 18 Here, it is undisputed Valley was the dealer and Universal is Valley's insurer. As discussed above, Section 20-75.1 compels "the vehicle *shall be covered by the dealer's insurance policy*" and as such, Universal's policy issued to Valley in the present case applies. N.C. Gen. Stat. § 20-75.1 (emphasis added). Although Universal's policy provides, "[w]hen there is other insurance applicable, WE will pay only the amount required to comply with such minimum limits after such other insurance has been exhausted[,]" Section 20-75.1 expressly states, "the purchaser of the vehicle shall be covered by the *dealer's* insurance policy" where a vehicle is "sold and delivered conditioned on the purchaser obtaining financing[.]" *Id.* Universal points to no other insurance policy issued to or covering the dealer in this case under Section 20-75.1. Because Section 20-75.1 applies to the underlying transaction and requires liability coverage by Universal as Valley's insurer, we also conclude Universal's coverage is primary. The trial court's Order in this regard is affirmed.

III. Minimum Limits

¶ 19 **[3]** Next, Universal contends it is only required to provide liability insurance coverage in this case in compliance with the minimum statutory limits of North Carolina law. In its Order, the trial court determined Universal's policy provides "liability coverage of $500,000.00 and umbrella liability coverage of $10,000,000.00." Although Section 20-75.1 extends Universal's coverage to Pinto, it only provides Pinto "shall be covered by the dealer's insurance policy"; to discern the extent of Universal's coverage, we must examine the terms of Universal's insurance policy. *Nationwide Mut. Ins. Co. v. Massey*, 82 N.C. App. 448, 450, 346 S.E.2d 268, 270 (1986) ("To the extent coverage provided by motor vehicle liability insurance policies exceeds the mandatory minimum coverage required by statute, the additional coverage is voluntary, and is governed by the terms of the insurance contract.").

¶ 20 Universal argues Pinto is insured only up to the minimum limits as required by North Carolina Law—$30,000.00 per person or $60,000.00 per accident—because Pinto is a permissive user by operation of law and not a named policyholder. *See* N.C. Gen. Stat. § 20-279.21(b)(2) (2019). Universal's policy contains two provisions Universal concedes are "potentially applicable": Coverage Part 500 (Garage Liability) or Coverage Part 830 (Basic Auto Liability). The Smiths argue Garage Liability does not apply under the circumstances because the injury was not the result of an "AUTO HAZARD" or "GARAGE OPERATION" as defined within the provision. However, regardless of whether Pinto would be covered under Garage Liability, the express language of Universal's Basic Auto Liability provision does apply to provide coverage to Pinto.

¶ 21 Basic Auto Liability, Coverage Part 830, provides as follows:

> *Who Is An Insured*
>
> A. With respect to INJURY and COVERED POLLUTION DAMAGES:
>
> . . . .
>
> 4. any other person or organization required by law to be an INSURED while using an OWNED AUTO or TEMPORARY SUBSTITUTE AUTO within the scope of YOUR permission, unless it is being loaded or unloaded. . . .
>
> . . . .
>
> *The Most We Will Pay*
>
> A. Injury and Covered Pollution Damages
>
> 1. Regardless of the number of INSUREDS or AUTOS insured or premiums charged by this coverage part, . . . the most WE will pay is the applicable limit shown in the declarations for any one OCCURRENCE.
>
> However, with respect to parts A.3 and A.4 of the Who Is An Insured condition for:
>
> a. any CONTRACT DRIVER; or
>
> b. any other person or organization required by law to be an INSURED while using an OWNED AUTO or TEMPORARY

> SUBSTITUTE AUTO within the scope of YOUR permission,
>
> the most WE will pay is that portion of such limits required to comply with the minimum limits provision law in the jurisdiction where the OCCURRENCE took place. When there is other insurance applicable, WE will pay only the amount required to comply with such minimum limits after such other insurance has been exhausted.

The policy further defines an "OWNED AUTO" as "an AUTO YOU own or LEASE and is scheduled in the declarations, and any AUTO YOU purchase or lease as its replacement during the Coverage Part period."

¶ 22 Thus, Pinto, was a "person . . . required by law to be an INSURED while using an OWNED AUTO . . . within the scope of YOUR permission[,]" covered under part A.4 of Universal's Basic Auto Liability policy.[4] However, as Universal correctly notes, its policy expressly limits payments for individuals covered by operation of law to "that portion of such limits required to comply with the minimum limits provision law in the jurisdiction where the OCCURRENCE took place."

¶ 23 The Smiths' argument Section 20-75.1 entitled them to the full policy limits of the liability coverage is unpersuasive. As this Court previously emphasized, "[t]o the extent coverage provided by motor vehicle liability insurance policies exceeds the mandatory minimum coverage required by statute, the additional coverage is voluntary, and is governed by the terms of the insurance contract." *Nationwide Mut. Ins. Co.*, 82 N.C. App. at 450, 346 S.E.2d at 270.

¶ 24 Accordingly, the express terms of Universal's "insurance contract" only required Universal to insure Pinto in accordance with the minimum limits provisions of North Carolina law during the conditional-delivery

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4. The Smiths argue because the Beetle was transferred to Valley for sale, it is not an "OWNED AUTO." Indeed, as this Court noted in *Smith*, "VW Credit remained the title owner of the [Beetle]." *Smith*, 261 N.C. App. at 42, 819 S.E.2d at 612. However, this issue is not of significant consequence. Regardless of whether the Beetle was an "OWNED AUTO" under Universal's policy, Universal is still required by operation of law to insure Pinto because Universal is the *insurer of the Dealer*. N.C. Gen. Stat. § 20-75.1 ("the purchaser of the vehicle shall be covered by the dealer's insurance policy"). Such insurance, moreover, would be required to meet the minimum limits of North Carolina law. Therefore, whether Valley was the title owner of the Beetle at the time of the sale is not material. Valley was the *Dealer*.

period under N.C. Gen. Stat. § 20-75.1. The limits, therefore, are those provided in Section 20-279.21—"thirty thousand dollars ($30,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, sixty thousand dollars ($ 60,000) because of bodily injury to or death of two or more persons in any one accident[.]" N.C. Gen. Stat. § 20-279.21 (2019). Thus, the trial court erred in ruling the $500,000.00 Universal policy limits applied in this case. Therefore, we vacate the portion of the trial court's Order as to the amount of Universal's liability coverage and remand this matter to the trial court to enter a judgment reflecting that the Universal liability policy provides coverage up to the applicable minimum statutory limits as provided in N.C. Gen. Stat. § 20-279.21.

IV. Umbrella Coverage

¶ 25 **[4]** Universal also contends the trial court erred in determining it was required to provide additional umbrella coverage of $10,000,000.00 for liability arising from the accident in this case under its policy issued to Valley. Universal's policy contains two provisions outlining its umbrella coverage: Coverage Part 970 (Personal Umbrella) and Coverage Part 980 (Commercial Umbrella). Personal Umbrella limits "*Who Is An Insured*" to: "A. YOU; B. If a resident of YOUR household: 1. YOUR spouse; 2. a relative or ward of YOURS; 3. any other person under the age of 21 in the care of any of the foregoing." Meanwhile Commercial Umbrella limits "*Who Is An Insured*" to:

> 1. YOU; . . .
>
> 2. YOUR directors, executive officers or stockholders.
>
> . . . .
>
> 5. any other person or organization:
>
> a. named in the UNDERLYING INSURANCE (provided to the Named Insured of this coverage part);
>
> b. granted INSURED status under:
>
> (1) Parts A.5 or A.6 of the Who Is An Insured condition in Coverage Part 500 - Garage; or
>
> (2) Parts A.7 or A.8 of the Who Is An Insured condition in Coverage Part 660 - General Liability;

¶ 26 Here, it is evident from the plain language of the policy the Personal Umbrella coverage is inapplicable to the claims asserted. Moreover, Pinto would only have been covered under the Commercial Umbrella coverage provisions if he was either a named insured in the underlying policy or granted insured status under respective Coverage Parts listed above. Pinto was not a named insured in the underlying policy. Pinto was insured by operation of law pursuant to Basic Auto Liability Coverage Part 830 subsection A.4, and not under the provisions granting insured status listed in the Commercial Umbrella policy coverage. Thus, neither Universal's Personal Umbrella nor Commercial Umbrella coverage provisions provide an avenue for Pinto to be insured under the umbrella coverage. Accordingly, the trial court erred when it determined Pinto was entitled to "umbrella liability coverage of $10,000,000.00." The portion of the trial court's Order determining Pinto was entitled to umbrella coverage is reversed, and this matter is remanded to the trial court to enter a judgment reflecting the Universal umbrella policy issued to Valley is not applicable in this case.

V. Erie's Challenge to the Trial Court's Order

¶ 27 **[5]** In its Appellee's Brief, Erie contends the trial court erred in concluding Erie's auto insurance policy issued to Pinto provided "excess liability coverage in the amount of $100,000.00 per person and $300,000.00 per accident, collectible only after Universal's aggregate policy limits of $10,500,000.00 have been exhausted." Erie argues the trial court erred when it denied Erie's Motion for Summary Judgment asserting Erie's policy was not implicated at all. Erie concedes it did not file a Notice of Appeal or Cross Appeal from the trial court's Order in compliance with Rule 3 of the North Carolina Rules of Appellate Procedure; however, Erie contends its argument constitutes an "alternative basis in law" supporting the trial court's Order under N.C. R. App. P. 28(c) to which no separate notice of appeal was required by Erie as an appellee.

¶ 28 North Carolina Rule of Appellate Procedure 28(c) provides: "Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C. R. App. P. 28(c) (2021). However, "the proper procedure for presenting alleged errors that purport to show that the judgment was erroneously entered and that an altogether different kind of judgment should have been entered is a cross-appeal." *Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 684 (2002).

¶ 29 Here, Erie's argument is directed at the trial court's conclusion Erie's policy provided Pinto excess liability coverage. This is not an alternative basis in law for supporting entry of the Order; Erie's argument is that "an altogether different kind of [order] should have been entered"—an order granting their motion for summary judgment in full. *Id.* Thus, "this alleged error should have been separately preserved and made the basis of a separate cross-appeal." *Bd. of Dirs. of Queens Towers Homeowners' Assoc. v. Rosenstadt*, 214 N.C. App. 162, 168, 714 S.E.2d 765, 770 (2011) (citation omitted). Therefore, because Erie did not notice its appeal from the trial court's Order as required by Rule 3, this Court does not have jurisdiction under Rule 28(c) over Erie's arguments. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure."). In the absence of jurisdiction to review Erie's argument, we dismiss Erie's arguments; the trial court's Order adjudicating Erie's obligation to provide insurance coverage for liability arising from the accident in this case must be left undisturbed.

Conclusion

¶ 30 Accordingly, the trial court's Order concluding that Section 20-75.1 applies to the conditional delivery of the Beetle, and therefore that the Universal liability insurance policy issued to Valley is the primarily applicable insurance policy in this case is affirmed. The portion of the trial court's Order concluding Universal's policy provided liability insurance up to the amount of $500,000.00 is vacated and this matter remanded for the trial court to enter Judgment reflecting the Universal liability policy provides coverage for the accident in this case only up to the minimum statutory limits provided in N.C. Gen. Stat. § 20-279.21.

¶ 31 The trial court's conclusion the Universal policy issued to Valley provides umbrella coverage in the amount of $10,000,000.00 is reversed and this matter remanded to the trial court to enter judgment reflecting the Universal umbrella policy does not provide coverage in this case. In the absence of a valid cross appeal, Erie's argument is dismissed and the trial court's Order concluding Erie is obligated to provide excess coverage upon the exhaustion of the applicable coverage limits under Universal's policy in this case is affirmed.

AFFIRMED IN PART; VACATED IN PART; REVERSED IN PART; AND REMANDED.

Judges TYSON and MURPHY concur.

IN RE J.C.-B.

[276 N.C. App. 180, 2021-NCCOA-65]

IN THE MATTER OF J.C.-B.

No. COA20-458

Filed 16 March 2021

1. Child Abuse, Dependency, and Neglect—custody awarded to grandmother—no finding parent was unfit

After a child was adjudicated neglected and dependent, the trial court erred in awarding custody to the child's maternal grandmother without first finding that the child's mother was unfit or had acted inconsistently with her constitutionally protected parental rights. Further, although the child had been placed with the grandmother for a lengthy period of time, the trial court did not address whether the grandmother understood the legal significance of the custodial placement.

2. Child Abuse, Dependency, and Neglect—permanent plan—ceasing reunification efforts—statutory requirements

In a matter involving a neglected and dependent child, the trial court erred by ordering the department of social services (DSS) to cease reunification efforts with respondent-mother without making the necessary statutory findings pursuant to N.C.G.S. § 7B-906.2 regarding the reasonableness of DSS's efforts or whether reunification efforts would be unsuccessful or inconsistent with the child's health, safety, and need for a permanent home. Further, there was no evidence from which these findings could be made, where respondent was actively participating in her case plan, she had maintained stable employment and housing, and DSS had established no steps or timelines to reunify respondent with her son.

3. Child Visitation—neglect and dependency—mother's visitation—discretion of child's therapist—no consideration of child's wishes

In a matter involving a neglected and dependent child, the trial court erred by denying any contact between respondent-mother and her son without knowing or considering the wishes of the son, who was in his mid-teens when the permanency planning review hearing took place. Although the guardian ad litem failed to communicate the child's wishes to the court, instead relying on a statement from the child's therapist recommending no physical contact between respondent and her son, the information before the court at the hearing was outdated by six months to a year, and the child's age should have prompted additional questions or action from the court.

IN RE J.C.-B.

[276 N.C. App. 180, 2021-NCCOA-65]

Appeal by respondent from order entered 16 March 2020 by Judge Ericka Y. James in Wayne County District Court. Heard in the Court of Appeals 24 February 2021.

E.B. Borden Parker for petitioner-appellee Greene County Department of Social Services and White & Allen P.A., by Delaina Davis Boyd, for custodian (joint brief).

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for respondent-appellant.

Poyner & Spruill, LLP, by John Michael Durnovich and Christopher S. Dwight, for Guardian ad Litem.

TYSON, Judge.

¶ 1 Respondent-mother appeals from a trial court order awarding custody of her son, Jacob, to his maternal grandmother ("Grandmother"), and eliminating visitation and reunification with Jacob from her permanent plan. *See* N.C. R. App. P. 42(b)(1),(b)(4) (permitting the use of pseudonyms to protect the identity of the child). We vacate and remand.

I. Background

¶ 2 Respondent-mother attempted suicide and was involuntarily committed. Respondent-mother was discharged after spending a week in the hospital. Wayne County Department of Social Services ("DSS") alleged her son, Jacob, who was thirteen-years-old at that time, to be neglected and dependent. DSS petitioned for nonsecure custody, and Jacob was placed with his maternal grandmother on 26 April 2017.

¶ 3 DSS maintained Jacob's placement with Grandmother after Respondent-mother's discharge. Jacob was adjudicated neglected and dependent on 31 August 2017. After the disposition hearing, legal custody was continued with DSS and Jacob's placement was continued with Grandmother.

¶ 4 The permanent plan was set as reunification with Respondent-mother. Reunification remained the sole permanent plan at the 8 February 2018 review hearing. A permanency planning hearing was scheduled for April, 2018.

¶ 5 At the 5 April 2018 permanency planning hearing, permanent custody of Jacob was awarded to Grandmother and reunification efforts with Respondent-mother were ceased. The juvenile court's jurisdiction

over Jacob was converted to a civil custody action by order filed 7 June 2018. Respondent-mother appealed the order and soon thereafter moved to Texas.

¶ 6 This Court unanimously vacated the 7 June 2018 order in its entirety and remanded by opinion filed on 26 March 2019. This Court held:

> [T]he trial court must conduct a hearing before entering a permanency planning order. This Court has held that the language of the statute requires live testimony at the hearing; the court cannot rely solely on "the written reports of DSS and the guardian ad litem, prior court orders, and oral arguments by the attorneys involved in the case." *In re D.Y.*, 202 N.C. App. 140, 143, 688 S.E.2d 91, 93 (2010). Accordingly, we vacate the trial court's permanency planning order and the corresponding order terminating juvenile court jurisdiction, and we remand this case for further proceedings.

In re J.C.-B. I, 264 N.C. App. 667, 828 S.E.2d 676, 2019 WL 2528342 at *1 (2019) (unpublished). The mandate issued on 15 April 2019.

¶ 7 While her appeal was pending, Respondent-mother initiated an email exchange with Jacob in February 2019. They conversed, and she cautioned him to avoid using drugs, smoking, drinking, and having sex. The mother and son took turns initiating and communicating through emails throughout 2019.

¶ 8 Dr. Kulikanda Chengappa ("Dr. Chengappa"), Jacob's psychiatrist, recommended that Jacob have "no physical contact with his biological mother at this time due to his unstable mental condition" on 11 July 2019. Five days later, DSS filed a motion for review and sought to eliminate Respondent-mother's parental rights to visit and contact Jacob. When the guardian *ad litem* ("GAL") visited Jacob on 24 July 2019, he reported that Jacob was "very relaxed[,]" and "doing well" at Grandmother's home. The GAL failed to report to the court Jacob's express wishes regarding maintaining visitation and contact with his mother. The GAL recommended only for the therapist's advice to be followed.

¶ 9 The hearing on DSS' motion was held 1 August 2019. The trial court ordered Jacob and Respondent-mother to have no further contact, the order was filed and entered 27 August 2019.

¶ 10 Respondent-mother had emailed a birthday greeting to Jacob's two email addresses in late August 2019. On 24 October 2019, Jacob emailed

Respondent-mother from his school account stating, "im (sic) going to make a new email so we can talk with out they seeing it they cant (sic) stop me from talking to my own mom[.]" They exchanged several emails that day. Respondent-mother also sent a Christmas message to both of Jacob's email accounts.

¶ 11 DSS prepared a reunification assessment on 2 January 2020. It stated "[s]trengths for the mother are employment, housing and use of community services." It stated needs as "mental health issues of [Jacob] and [Respondent-mother]." Joseph Brown ("Mr. Brown"), a new therapist, reported that Jacob was "a very emotionally intelligent young man" who "struggle[d] with a lot of anxiety" on 6 January 2020. Mr. Brown recommended that Jacob "be allowed to decide when he is ready to pursue a relationship with his mother rather than being required."

¶ 12 The trial court's hearing upon remand from this Court was not held until 30 January 2020, *over 10 months after* this Court's opinion in the prior appeal. In the order, reunification was eliminated from the permanent plan. The trial court found Respondent-mother had mental health issues which prevent her from parenting. The court also found Respondent-mother was under order to have no contact with [Jacob], but the two had exchanged many emails. Custody of Jacob was granted to Grandmother, and Respondent-mother was forbidden from any contact with Jacob "until recommended by the juvenile's therapist." Respondent-mother again appeals.

II. Jurisdiction

¶ 13 Jurisdiction is proper pursuant to N. C. Gen. Stat. § 7B-1001(a) (2019).

III. Issues

A. Did the trial court err when it failed to make findings regarding Respondent-mother's constitutionally protected parental status and failed to verify the custodian's understanding of legal custody?

B. Did the trial court err in eliminating reunification from the permanent plan when Respondent-mother's case plan compliance and progress show that continued reunification efforts were likely to be successful and would promote health, safety and permanence for Jacob?

C. Did the trial court err when it left contact and visitation in the discretion of the therapist without considering Jacob's and Respondent-mother's wishes?

IV. Standard of Review

¶ 14 Prior to depriving parents of their natural and constitutionally protected rights of care, custody, and control over their minor child, "[a] trial court must determine by clear and convincing evidence that a parent's conduct is inconsistent with his or her protected status." *Weideman v. Shelton*, 247 N.C. App. 875, 880, 787 S.E.2d 412, 417 (2016) (internal quotation marks omitted).

> The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters. Our inquiry as a reviewing court is whether the evidence presented is such that a factfinder applying that evidentiary standard could reasonably find the fact in question.

In re A.C., 247 N.C. App. 528, 533, 786 S.E.2d 728, 733–34 (2016) (alterations, citations, and internal quotation marks omitted).

¶ 15 The determination of parental unfitness or whether parental conduct is inconsistent with the parents' constitutionally protected status is reviewed *de novo*. *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018). Under *de novo* review, the appellate court "considers the matter anew and freely substitutes judgment for that of the lower tribunal." *Id.* (alterations, citations and internal quotations omitted).

¶ 16 This Court "reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *Id.*

V. Analysis

A. Respondent-Mother's Appeal

1. Fitness

¶ 17 **[1]** Respondent-mother argues that the trial court erred when it failed to make findings regarding her constitutionally protected parental status and failed to verify the custodian's understanding of legal custody. This Court recently and unanimously held:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. A natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status. . . . To apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status.

Id. at 250, 811 S.E.2d at 731–32 (alterations, citations, and internal quotations omitted).

¶ 18 If the trial court fails to find the parent unfit or to have acted inconsistently with her constitutionally protected status, by clear and convincing evidence, a permanent custody award to a non-parent must be vacated. *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009).

a. DSS' and Grandmother's arguments

¶ 19 DSS and Grandmother concede the trial court did not find nor use the word "unfit," in its conclusion, but argue the order provided ample findings which may support "unfitness." DSS and Grandmother argue the trial court found that Jacob and Respondent-mother had lived in a car for a few days in an adjudicatory order filed on 6 September 2017.

¶ 20 At that time, the court also found Jacob occasionally forgot his keys, was locked out of his home and neighbors would give him water. The court further found Respondent-mother drove erratically, ran off the road, threw up and this had scared Jacob and found Respondent-mother attempted suicide because she had a "rotten" relationship with her girlfriend. The court identified Jacob has lived with Grandmother as his custodian since his mother's suicide attempt and found Jacob is afraid of Respondent-mother and wants her to be nicer.

¶ 21 DSS points out Jacob was diagnosed with post-traumatic stress disorder ("PTSD") and Respondent-mother has been treated in mental hospitals on more than one occasion, including once after a former girl-

friend had committed suicide. DSS highlights Respondent-mother has cursed, made inappropriate comments to, and threatened to kill Jacob.

¶ 22 DSS and Grandmother rely on the order filed on 16 March 2020 wherein the trial court found: Respondent-mother testified she was receiving counseling and medication in Texas, but none of her counselors have filed a report or responded when a drug screen was requested. They assert Respondent-mother has significant mental health issues that prevent her from being a good parent. Respondent-mother is under order to have no contact with Jacob, but she has emailed with him. The court again found Jacob lives with Grandmother, is stable and meets the diagnostic criteria of PTSD and ADHD.

¶ 23 Finally, DSS and Grandmother argue Respondent-mother moved to Texas in 2018, rather than working the case plan in North Carolina. DSS and Grandmother further assert it is not in Jacob's best interest to have any contact with Respondent-mother unless the therapist recommends it.

b. Respondent-Mother's Arguments

¶ 24 Respondent-mother argues Jacob was removed from her custody in 2017 when she was involuntarily committed due to an episode of mental illness which required inpatient treatment. At that time, Jacob was thirteen years old. No evidence tends to show Respondent-mother has suffered another episode, which required acute care or hospitalization. DSS had consistently reported that she was engaged in the services prescribed for reunification and was making steady progress.

¶ 25 Respondent-mother sought and received treatment for her mental health, and testified she was still engaged with treatment at the time of the order pending appeal. She visited Jacob when provided opportunities by the trial court and those visits went well. Respondent-mother's counselor reported in April 2018 that she found "no barriers preventing [Respondent-mother] from parenting her child." Jacob is now seventeen years old.

¶ 26 Communicating with a child is not evidence to support a finding of unfitness or conduct inconsistent with a parent's constitutional rights. *Sides v. Ikner*, 222 N.C. App. 538, 549, 730 S.E.2d 844, 851 (2012) (examining the mother's "intentions and conduct" to determine if she "reasonably engaged" in the child's care under the circumstances).

¶ 27 Respondent-mother sought legal process to file a motion for contempt when Grandmother did not allow her to visit with Jacob. She answered Jacob's emails, as any caring parent would. She flew from Texas

to North Carolina to attend counseling appointments and to see and visit with Jacob, even though she had been denied any access to her son by the Grandmother. She complied with the plan's requirements and goals DSS and the courts had placed upon her.

¶ 28 Respondent-mother resumed teaching third grade in the fall of 2017. No clear and convincing evidence or finding supports a conclusion of unfitness or engaging in conduct inconsistent with her parental rights. The trial court erred in awarding custody to Grandmother without evidence or findings to conclude Respondent-mother was unfit or had acted inconsistently with her constitutionally protected parental rights. The court's order is again erroneous and must be vacated. *In re B.G.*, 197 N.C. App. at 574, 677 S.E.2d at 552; *see In re J.C.-B. I*, 2019 WL 2528342 at *1.

2. Findings the Custodian Understands Legal Custody

¶ 29 Respondent-mother argues the trial court failed to address Grandmother's understanding of the legal significance of becoming Jacob's custodian. When the trial court appoints a permanent custodian for a juvenile in a neglect and dependency case, "the court shall verify that the person receiving custody . . . understands the legal significance of the placement." N.C. Gen. Stat. § 7B-906.1(j) (2019). A permanent plan of custody order which does not contain the required verification must be vacated and remanded. *In re P.A.*, 241 N.C. App. 53, 65, 772 S.E.2d 240, 248 (2015). *But see In re J.E.*, *B.E.*, 182 N.C. App. 612, 616-17, 643 S.E.2d 70, 73 (2007) (affirming guardianship order without specific verification findings).

¶ 30 DSS argues if the trial court erred by failing to verify such failure, such error is not prejudicial pursuant to N.C. Gen. Stat. § 7B-906.1(j), stating, "[t]he fact that the prospective custodian or guardian has provided stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources." The trial court found on more than one occasion that Grandmother had been the caregiver for Jacob under DSS' placement since 26 April 2017. When Respondent-mother filed her brief for this appeal, Jacob had lived with Grandmother for more than 39 consecutive months, far exceeding the six consecutive months in the statute. Respondent-mother filed a motion for contempt after Grandmother refused to allow her to visit with Jacob.

¶ 31 Under N.C. Gen. Stat. § 7B-906.1, if a "custodian or guardian has provided stable placement for the juvenile for at least six consecu-

tive months is evidence that the person has adequate resources," but such evidence does not *per se* compel a conclusion that the "person receiving custody . . . understands the legal significance of the placement." N.C. Gen. Stat. § 7B-906.1(j). During continuing months at a time, Respondent-mother was not allowed to communicate with or to visit her child.

¶ 32 DSS and the trial court unexplainedly delayed re-convening the hearing *for over ten months* after Respondent-mother's previous successful appeal, and then only to violate her constitutionally protected parental rights yet again. *In re D.A.*, 258 N.C. App. at 250, 811 S.E. 2d at 731-32; *see In re J.C.-B. I*, 2019 WL 2528342 at *1.

B. Compliance with Reunification Efforts

¶ 33 **[2]** This Court reviews the order to cease reunification:

> [to] consider whether the trial court's order contains the necessary statutory findings to cease reunification efforts. Under our statutes: "Reunification shall remain a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2017). Here, the trial court failed to make findings under N.C. Gen. Stat. § 7B-901(c) (2017). The court could only cease reunification efforts after finding that those efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.

Id. at 253, 811 S.E.2d at 733–34.

1. Statutory Requirements

¶ 34 Specific evidentiary findings must show:

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

> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2019).

¶ 35 The court shall not cease reunification efforts without supported findings and conclusions those efforts would be unsuccessful or inconsistent with Jacob's health or safety. *In re D.A.*, 258 N.C. App at 253, 811 S.E.2d at 733-34. Neither the trial court's 16 March 2020 order nor DSS' evaluation provide evidence to support findings specifically addressing any of the statutory factors of section 7B-906.2(d).

¶ 36 The court's findings included: Jacob's therapist's belief he needs to remain with Grandmother; Respondent-mother testified she was receiving counseling, but did not file a report and has not provided a signed release to her counselors; Respondent-mother is taking four medications for headaches, mood and anxiety; she has significant mental health issues and emailed her son in violation of a court order; and Jacob stated he is now "bigger and stronger" than his mother. These findings, even if true, do not support a conclusion to eliminate reunification under the statute. N.C. Gen. Stat. § 7B-906.2(d). The trial court's order does not state adequate findings to support its conclusion to cease reunification efforts. *Id.*

2. Futile Efforts

¶ 37 DSS and Grandmother argue, "[t]he language of Section 7B-906.2(b) seems plainly to provide that a trial court, in any permanency planning hearing, can omit reunification as a concurrent plan if it determines that reunification efforts are either futile or contrary to the juvenile's well-being." *In re M.T.-L.Y.*, 265 N.C. App. 454, 462, 829 S.E. 2d 496, 502 (2019). DSS argues Respondent-mother failed to visit Jacob for more than a year, moved to Texas, and failed to file regarding visitation with Jacob until after DSS' motion to suspend her visitation had been granted on 1 August 2019. Finally, DSS argues Respondent-mother has not provided evidence of her mental health counseling in Texas.

¶ 38 The transcript and record show DSS' witnesses answered "yes" to questions of whether Respondent-mother was "actively participating in or cooperating with the plan, DSS, and the guardian ad litem[.]" DSS' witnesses also answered "yes" to the question of whether Respondent-mother "remain[ed] available to the court, DSS, and the guardian ad litem[.]" DSS' witnesses further answered "no" to the question of whether Respondent-mother was "acting in a manner inconsistent with the health or safety of the juvenile[.]"

¶ 39 No evidence tends to show Respondent-mother was abusing prescription medications, having mental health breakdowns, or was involved in unhealthy relationships for nearly three years after Jacob was removed from her care. Her limited communications and visits with Jacob were described as appropriate, warm, and affirming.

¶ 40 The social worker further testified Respondent-mother had maintained stable employment as a third grade teacher and housing. Respondent-mother testified she regularly attended therapy and medication management appointments and named her physicians. There were no positive tests for illegal substances.

¶ 41 A finding and conclusion that reunification efforts would be unsuccessful or inconsistent with Jacob's health, safety and need for a permanent home is unsupported by clear and convincing evidence and does not meet the mandatory requirements of N.C. Gen. Stat.§ 7B-906.2(b).

3. Reasonable Efforts

¶ 42 "[A]t each permanency planning hearing the court shall make a finding about whether the reunification efforts of the county department of social services were reasonable." N.C. Gen. Stat. § 7B-906.2(c) (2019). For DSS' reunification efforts to be "reasonable" under the Juvenile Code, they are statutorily required to be "diligent." N.C. Gen. Stat. § 7B-101(18) (2019).

¶ 43 Regarding DSS' "reasonable efforts" at reunification with Respondent-mother, the trial court found DSS had:

> a. Maintained contact with and visits with the juvenile in the home of the grandmother;
>
> b. Collateral contacts with the therapist, the In Home Program, and reviewed ECU Neurology reports;
>
> . . . .
>
> d. Contact with the mother.
>
> e. Permanency Planning reviews;
>
> f. Completed strengths and needs assessment and a reunification assessment and determined that the risk to the juvenile if returned to the mother remains high due to a poor relationship between the juvenile and the mother.

¶ 44 DSS' contacts with Jacob in the relative placement were to determine whether Jacob was being cared for in that placement. Their actions were not aimed at reunifying him with his mother. The collateral contacts were similarly aimed at monitoring Jacob's well-being where he was, not to achieve the goal of reunification. Contact with Respondent-mother, reviews, and assessments are undoubtedly an important part of monitoring progress towards reunification Nothing in the record indicates concrete action steps or that timelines were established from the contacts, reviews, and assessments, to reunify Jacob with Respondent-mother.

¶ 45 DSS made no "diligent" or substantial efforts towards reunification in the more than 10 months between this Court's decision in *In re J.C.-B. I* in March 2019 and the hearing in January 2020. DSS never requested its social services counterpart in Texas to assess Respondent-mother's home in Texas, even after reunification was reinstated as the permanent plan with this Court's mandate in April 2019. Three months after this Court vacated the prior unlawful order eliminating reunification, DSS successfully moved the trial court in July 2019 to completely cut off all of Respondent-mother's contact with Jacob, even so far as not letting her answer his emails. The record does not show the statutorily required efforts by DSS to support reunification were "diligent" and reasonable. N.C. Gen. Stat.§ 7B-101(18). These statutorily required efforts were arguably non-existent. *See id.*

C. Visitation at Discretion of Jacob's Therapist

¶ 46 **[3]** To deny visitation, the trial court must make material findings sufficient enough to support and conclude a parent has forfeited her right to visitation or by findings the parent-child contact is not in the child's best interest. *See In re Custody of Stancil*, 10 N.C. App. 545, 548, 179 S.E.2d 844, 848 (1971). Fifty years ago, this Court stated:

> When the custody of a child is awarded by the court, it is the exercise of a judicial function. In like manner, when visitation rights are awarded, it is the exercise of a judicial function. We do not think that the exercise of this judicial function may be properly delegated by the court to the custodian of the child . . . To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian.

Id. at 552, 179 S.E.2d at 849. Ten years ago, this Court re-stated and re-affirmed, "the trial court must set the parameters of visitation[,]" and should not leave visitation in the discretion of another person, including a "treatment team" or therapist. *In re D.M.*, 211 N.C. App. 382, 388, 712 S.E.2d 355, 358 (2011).

¶ 47 At each permanency planning hearing, the trial court must consider information from the GAL and from the juvenile. N.C. Gen. Stat. § 7B-906.1(c) (2019). This statutory provision is consistent with long-standing case law holding a trial court has a duty both to ascertain and consider the child's preference in custody determinations. *Mintz v. Mintz*, 64 N.C. App. 338, 341, 307 S.E.2d 391, 394 (1983).

¶ 48 The trial court is not required to abide by a child's express wishes, but the child's wishes are part of the totality of circumstances the trial court must consider, and consider those wishes more particularly as a child approaches majority. *See Bost v. Van Nortwick*, 117 N.C. App. 1, 9, 449 S.E.2d 911, 916 (1994).

¶ 49 One of the duties of a GAL is to ascertain from the child they represent what their wishes are and to convey those express wishes accurately and objectively to the court. *See* N.C. Gen. Stat. § 7B-601(a) (2019). Jacob's wishes as an older teen were never sought nor conveyed to the trial court.

1. Statutory Violations

¶ 50 When an appellant argues the trial court failed to follow a statutory mandate, the error is preserved, and the issue is a question of law and reviewed *de novo*. *See In re E.M.*, 263 N.C. App. 476, 479, 823 S.E.2d 674, 676 (2019). Specifically, violation of N.C. Gen. Stat. § 7B-601, the statute listing the GAL's duties, or N.C. Gen. Stat. § 7B-906.1(c), the statute listing the evidence to support requirements at a permanency planning hearing, requires reversal and remand for a new hearing. *In re R.A.H.*, 171 N.C. App. 427, 432, 614 S.E.2d 382, 385 (2005).

2. Jacob's Wishes

¶ 51 Jacob was sixteen years old at the time of the permanency placement hearing under appeal. He was old enough to petition for emancipation, and well past the age when a juvenile's wishes regarding his own placement and associations must be considered. N.C. Gen. Stat. § 7B-3500 (2019).

¶ 52 The only recent indication in the record of Jacob's wishes came from an email he sent his mother on 24 October 2019 stating, "im [sic]

going to make a new email so we can talk with out they [sic] seeing it they cant stop me from talking to my own mom[.]" Jacob's express wishes are missing from the only GAL report in July 2019 prepared after this Court's remand, and six months before the January hearing. The GAL did not communicate Jacob's wishes to the court and apparently simply deferred to the therapist's opinion.

¶ 53 The GAL presented letters from service providers, including two that were identical to previous letters except for the date. One of those letters, from Dr. Paul Brar in October 2018, was based on examinations in September 2017 and August 2018. It stated, "[i]n my professional opinion in the best interest of Jacob he should not be allowed to have visitation even contact with the mother."

¶ 54 The GAL presented two letters from Timothy Hunt ("Mr. Hunt"). Mr. Hunt, a therapist hired by Grandmother, provided identical letters except one was dated 1 December 2018 and the other was dated 14 July 2019. Mr. Hunt's assessment was based upon observations he made from October 2017 to May 2018. Mr. Hunt recommended that Jacob's "contact with his mother [be] limited to when [Jacob] would like to make contact with her. . . I would ask the court that [Jacob] be allowed to decide when he would like to pursue a relationship with his mother rather than being required."

¶ 55 The GAL presented a letter, written by Dr. Chengappa on 11 July 2019, which referred to treatment "since 2012." Dr. Chengappa recommended "[i]t is my professional opinion that [Jacob] should have no physical contact with his biological mother at this time due to his unstable mental condition."

¶ 56 The only rationale the therapists' letters supply is in Mr. Hunt's letter, "[Jacob] is sensitive and struggles with anxiety . . . mother's behaviors are erratic and cause him a lot of internal conflict." No statements support an order to forbid visitations or contact between Jacob and his mother.

¶ 57 Further, the information provided by the GAL was several months old by the time of the January 2020 hearing. The information from both Mr. Hunt and Dr. Brar was over a year old. Dr. Chengappa's information was more than six months old.

¶ 58 The most current information, a letter from Jacob's current therapist, Mr. Brown, which was attached to the DSS report, recommended that Jacob "be allowed to decide when he is ready to pursue a relationship with his mother."

¶ 59 The therapists' opinions are divided on whether Jacob should be reunited or be allowed visitation with his mother, but the most recent recommendation is to allow Jacob to decide. The record also shows Jacob's expressed desire and efforts to maintain contact with his mother, which was not communicated to the court by the GAL. Why Jacob was not called and permitted to testify is suspiciously missing from the record. Jacob is now seventeen years old, eligible for emancipation and his opinion carries great weight. *See* N.C. Gen. Stat. § 7B-3500.

VI. Conclusion

¶ 60 Our Supreme Court held, "this Court has enunciated the fundamental principle that absent a finding parents, (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) (citation and quotation marks omitted).

¶ 61 The trial court erred by granting custody to Grandmother in derogation of Respondent-mother's constitutional rights as a parent without finding her to be unfit or engaged in conduct inconsistent with her parental rights. The trial court also erred by eliminating reunification with Respondent-mother without making proper findings of fact after multiple reports and testimony from DSS' witnesses affirming Respondent-mother's compliance with the plan.

¶ 62 Finally, the court erred when it made contact between Jacob and his mother contingent on the therapist's recommendation without knowing and considering Jacob's wishes. *In re D.M.*, 211 N.C. App. at 388, 712 S.E.2d at 358 (the trial court must set the parameters of visitation[,] and should not leave visitation in the discretion of another person, including a "treatment team" or therapist.).

¶ 63 For these reasons, the order is vacated and again remanded with instructions for immediate entry of an order consistent with this Court's opinion as contained herein. This mandate shall be effective upon filing. *It is so ordered.*

VACATED AND REMANDED.

Judges COLLINS and WOOD concur.

IN RE R.P.

[276 N.C. App. 195, 2021-NCCOA-66]

IN THE MATTER OF R.P., X.P.

No. COA20-311

Filed 16 March 2021

1. Child Abuse, Dependency, and Neglect—orders—signed by judge who did not preside over hearing—nullity

In a child abuse and neglect matter in which respondent-parents stipulated to the underlying facts but no other evidence was presented, adjudication and disposition orders signed by the chief district court judge after the presiding judge resigned were a nullity. Where the presiding judge did not articulate findings of fact, enter conclusions of law, and render an order, the chief district court judge could not sign written orders as merely a ministerial function.

2. Child Abuse, Dependency, and Neglect—abuse and neglect—stipulations—not valid for questions of law

In an abuse and neglect matter in which respondent-parents' stipulations were the only evidence presented, stipulations that the children were abused and neglected were invalid because those involved questions of law to be resolved by the trial court.

Appeal by respondents from order entered 14 February 2020 by Judge Robert Martelle in Rutherford County District Court. Heard in the Court of Appeals 24 February 2021.

King Law Offices PLLC, by Brian W. King and Thomas Morris, for petitioner-appellee Rutherford County Department of Social Services.

Miller and Audino LLP, by Jeffrey L. Miller, for respondent-appellant mother.

Surratt Thompson & Ceberio PLLC, by Christopher M. Watford, for respondent-appellant father.

Fox Rothschild LLP, by Kip D. Nelson, for Guardian ad Litem.

TYSON, Judge.

¶ 1 Respondents mother and father appeal the adjudication and initial disposition order adjudicating their minor child, X.P. ("Xavier") as abused

and neglected. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles). Respondent-father also appeals the trial court's adjudication of R.P. ("Rorie") as abused and neglected. We vacate the orders and remand for a new adjudication and disposition hearing.

I. Background

¶ 2 Respondent-mother gave birth to Xavier, while in the bathtub at her parents' home in July 2018. Xavier and Respondent-mother tested positive for amphetamines and benzodiazepine after Xavier's birth. Respondent-mother had failed to obtain prenatal care prior to the birth. The Rutherford County Department of Social Services ("DSS") became involved with the family two days after Xavier's birth.

¶ 3 DSS scheduled a child and family team ("CFT") meeting and drug testing for Respondents, their twelve-year-old child, Rorie, and Xavier for 28 August 2018. Both Respondent-mother and Xavier tested positive for methamphetamine. Respondent-mother and Xavier attended the CFT meeting and agreed to a safety plan. Respondent-father failed to attend or to bring Rorie to be drug tested.

¶ 4 The safety plan included the family moving into the juveniles' paternal grandfather's home. On 13 September 2018, when DSS arrived at the grandfather's home for the next scheduled CFT meeting, the family had moved back into their own home. Rorie told DSS she had observed both of her parents use methamphetamine in the home and she did not feel safe being around them. Rorie was tested the next day and was negative for drugs.

¶ 5 DSS filed its original juvenile petitions on 13 September 2018, alleging Rorie was neglected and Xavier was abused and neglected. DSS filed amended petitions with the same allegations on 16 October 2018. The juveniles were placed into DSS' custody. After initially being in foster care, Rorie was placed in the home of her paternal grandfather and Xavier resided in a kinship placement.

¶ 6 Respondents acquiesced to an out-of-home services agreement on 21 September 2018. Both parents agreed to complete mental health and drug assessments and comply with any recommended treatment. Respondents denied drug usage and did not complete any drug assessments.

¶ 7 Respondent-mother tested positive for methamphetamine on 25 September 2018 and again on 25 October 2018. Respondent-father provided his first drug screen on 25 October 2018, which was positive for methamphetamine and amphetamines. On 4 January 2019,

Respondent-mother tested positive for oxycodone, methamphetamine, and amphetamines. Respondent-father tested positive for methamphetamine and amphetamines on that same date.

¶ 8 The adjudication hearing was held 22 January 2019. All parties and their attorneys were present before Judge C. Randy Pool. The parties stipulated to thirteen statements of fact. The stipulations were introduced as Exhibit A and DSS offered no other evidence at adjudication. The stipulations included the results of the drug tests administered through the pendency of the case, that Xavier was abused and neglected, and that Rorie was neglected.

¶ 9 Judge Pool indicated "based on the stipulations [he] would make findings of fact consistent with those in the stipulation on Exhibit A, would -- based on that stipulation -- enter the adjudications of neglect [of both juveniles] and abuse [of Xavier]."

¶ 10 At the disposition stage of the hearing, the court received DSS' court reports and those of the guardian *ad litem* ("GAL"). The recommended permanent plan was reunification. Judge Pool listed several conditions to be included in the order and asked for DSS' attorney to draft the order. The matter was to be set for review in three months.

¶ 11 The adjudication and disposition orders were not signed until 14 February 2020. Judge Pool had resigned prior to that date, and the order was signed by the chief district court judge, Judge Robert Martelle. Respondents timely appealed. Respondent-mother noted her appeal only to the order regarding Xavier.

II. Jurisdiction

¶ 12 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(5) (2019).

III. Standards of Review

¶ 13 This Court reviews a trial court's adjudication of a child as a neglected or abused juvenile to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010) (citation and quotation marks omitted).

¶ 14 "The standard of review of the dispositional stage is whether the trial court abused its discretion." *In re D.R.B.*, 182 N.C. App. 733, 735, 643

S.E.2d 77, 79 (2007). An abuse of discretion occurs when the trial court acts under a misapprehension of the law or its ruling is "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

IV. Issues

¶ 15 Respondents assert the adjudication and disposition orders signed by Judge Martelle are void, and argue in the alternative, that their stipulations are insufficient, standing alone, to support an adjudication of abuse or neglect. Respondents further assert the trial court erred in relying solely upon written reports and attorney arguments at the disposition stage.

V. Analysis

A. Ministerial Action

¶ 16 **[1]** We take judicial notice that Judge Pool resigned from the bench and left the orders unsigned. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2019) (court may take judicial notice of fact not subject to reasonable dispute). North Carolina Rule of Civil Procedure 63 allows the chief district court judge to sign orders upon the resignation of a district court judge.

> If by reason of death, sickness or other disability, *resignation*, retirement, expiration of term, removal from office, or other reason, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed:
>
> . . .
>
> (2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.
>
> If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

N.C. Gen. Stat. § 1A-1, Rule 63 (2019) (emphasis supplied).

¶ 17 Respondents argue Rule 63 does not anticipate the chief district court judge's signing an adjudication order after the judge who presided at the hearing and heard the evidence resigned without entry of the orders. Respondents rely upon this Court's holding that the function of a substituted judge is "ministerial rather than judicial." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984).

¶ 18 In *Whisnant*, Judge Tate had conducted a hearing on a motion to terminate the respondent's parental rights on 20 October 1983. *Id.* at 440, 322 S.E.2d at 435. Judge Tate stated insufficient evidence supported neglect, but evidence existed to find nonpayment of support and "he believed the best interest of the child would be served by termination of parental rights." *Id.* Judge Tate directed the GAL attorney to prepare the order. *Id.* The resulting adjudication and disposition orders listed Judge Crotty had heard the matter and they were signed by Judge Crotty on 28 December 1983. *Id.* This Court held "Judge Crotty was without authority to sign the order terminating respondent's parental rights and the order he signed [was] a nullity." *Id.* at 441, 322 S.E.2d at 435.

¶ 19 Respondents, relying upon *Whisnant*, assert the judge presiding at the hearing is the only one who hears all the evidence, passes upon the credibility of the witnesses, and discerns the weight to be applied to the testimony and the inferences to be drawn therefrom to adjudicate the issues. Respondents also argue Judge Pool, not Judge Martelle, is the one who received their stipulation in open court on the day of the hearing.

¶ 20 DSS and the GAL argue Judge Pool presided over the hearing and articulated both his findings of fact and the basis of his decision, stating he "would make findings of fact consistent with those in the stipulation on Exhibit A." Judge Pool indicated he "would - based on that stipulation - enter the adjudication of neglect and abuse . . . as is admitted to." DSS and the GAL assert that because of the stipulation all that was left for Judge Martelle was to sign the order as a ministerial act.

¶ 21 Our Juvenile Code allows for stipulations by the parties to be received into evidence at adjudication. N.C. Gen. Stat. § 7B-807(a) (2019). The statute provides "[a] record of specific stipulated adjudicatory facts shall be made by either reducing the facts to a writing, signed by each party stipulating to them and submitted to the court; or by reading the facts into the record, followed by an oral statement of agreement from each party stipulating to them." *Id.* The statute requires the trial court shall make and state the same findings "that the allegations in the petition have been proven by clear and convincing evidence" as is required where live testimony is presented. *Id.*

¶ 22 Here, the parties stipulated to the facts underlying the adjudication. This stipulation was written and signed by all parties. It is unquestioned that the parties were lawfully able to stipulate to the adjudicatory facts in this matter. Such stipulations of underlying facts could properly have been included as part of the final judgment.

¶ 23 However, nothing in the record or transcript shows Judge Pool ever made or rendered the final findings of fact and conclusions of law in the unfiled and unsigned orders. He merely stated he would enter the adjudication "as is admitted to." Since the record on appeal shows only a stipulation without any adjudication of the facts and conclusions of law, or rendering of the order, any action by Judge Martelle to cause the later prepared and unsigned draft order to be entered was not solely a ministerial duty. *In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435.

¶ 24 Further, the statutorily required disposition hearing requires the presiding judge consider competent evidence "necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. § 7B-901 (2019). Judge Martelle's signing of the disposition orders cannot be considered simply a ministerial act.

¶ 25 At the 22 January 2019 hearing, Judge Pool stated he "would make findings consistent with the stipulations consistent with the reports presented by the guardian ad litem and by the department of social services." The court stated, "reasonable efforts [had] been made by the agency" and that it would be "in the best interest of the children to remain in DSS custody." The court ordered Respondents to comply with their out-of-home services agreements. These four findings are included in the written orders.

¶ 26 All other purported findings and conclusions included in the order signed by Judge Martelle are not reflected in any stipulations or oral statements of Judge Pool. The written disposition portion of the order went beyond the oral recitations of Judge Pool.

¶ 27 Rendering and entering judgment was more than a ministerial task. Judge Martelle was without authority to sign the adjudication and disposition orders and the orders are a "nullity." *In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435.

¶ 28 DSS asserts voiding Judge Martelle's order would be an improper extension of our Supreme Court of North Carolina's recent holding in *In re C.M.C.*, 373 N.C. 24, 28, 832 S.E.2d 681, 684 (2019). DSS argues the reasoning in *C.M.C.* is only applicable to termination of parental rights hearings and orders and not to the initial adjudication of the juveniles. DSS' argument is unpersuasive and erroneous.

¶ 29 In *C.M.C.*, our Supreme Court held a termination of parental rights order signed by a different judge than the judge who presided over the termination hearing was a nullity. *Id.* The Court specifically adopted the reasoning of this Court's decisions in *In re Whisnant*, 71 N.C. App. at 442, 322 S.E.2d at 435 and *In re Savage*, 163 N.C. App. 195, 198, 592 S.E.2d 610, 611 (2004). The Supreme Court concluded the appropriateness of nullifying the orders stems "from the fact that N.C.G.S. § 1A-1, Rule 52 requires a judge presiding over a non-jury trial to (1) make findings of fact, (2) state conclusions of law arising on the facts found, and (3) enter judgment accordingly." *In re C.M.C.*, 373 N.C. at 28, 832 S.E.2d at 684 (internal citation and quotation marks omitted). The Court further recognized the appropriateness of their result by noting N.C. Gen. Stat. § 1A-1, Rule 58 provides that "a judgment is entered when it is reduced to writing, signed by *the* judge, and filed with the clerk of court." *Id.* (citation omitted).

¶ 30 Contrary to DSS' assertion, our Supreme Court relied upon our rules of civil procedure, not upon some perceived distinction between the gravity of a hearing on a juvenile petition versus a hearing on a motion to terminate parental rights. *See id.* Here, Judge Pool did not recite, render, nor sign the order. His unsigned order is not a valid judgment from where Judge Pool presided over the adjudication hearing, and Judge Martelle's ministerial signature thereon cannot cure the judgment. *See In re C.M.C.*, 373 N.C. at 28, 832 S.E.2d at 684.

B. Stipulated Conclusions of Law

¶ 31 **[2]** Our conclusion to vacate is also supported by other precedent. "It is well established that stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *In re R.L.G.*, 260 N.C. App. 70, 76, 816 S.E.2d 914, 919 (2018) (citation and internal quotation marks omitted).

¶ 32 In the present case, the parties' stipulation includes "the Respondent parents stipulate and admit that [Xavier] is an abused and neglected juvenile" and that Rorie is "a neglected juvenile." Chapter 7B and our case law clearly require the trial court's legal conclusion that a child is abused or neglected be based upon DSS' presentment and admission of clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2019).

¶ 33 Here, the parties did not agree to the trial court entering a "consent adjudication order" pursuant to N.C. Gen. Stat. § 7B-801(b1) (2019) (allowing consent order to be entered where all parties consent, the juveniles are represented by counsel and the court makes sufficient findings of fact).

¶ 34 DSS concedes Respondents' stipulation that they believed their children to be neglected and abused is not binding on a court as a legal conclusion. *See In re R.L.G.*, 260 N.C. App. at 76, 816 S.E.2d at 919.

¶ 35 The juvenile petition filed alleges Xavier was abused in that Respondents "inflicted or allowed to be inflicted on the juvenile a serious physical injury by other than accidental means." *See* N.C. Gen. Stat. § 7B-101(1) (2019). The petition alleges Xavier was neglected in that the Respondents did "not provide proper care, supervision, or discipline" and "lives in an environment injurious to the juvenile's welfare." *See* N.C. Gen. Stat. § 7B-101(15) (2019). DSS' petition alleged the same statutory prongs of neglect concerning Rorie.

¶ 36 According to the trial court's finding of fact in *In re R.L.G.*, the respondent had admitted the juvenile was neglected because she did not ensure that the juvenile attended school regularly. *In re R.L.G.*, 260 N.C. App. at 76, 816 S.E.2d at 918. This Court recognized "the determination of whether a juvenile is neglected within the meaning of N.C. Gen. Stat. § 7B-101(15) is a conclusion of law." *Id.* at 76, 816 S.E.2d at 918-19. Such "[d]etermination that a child is not receiving proper care, supervision, or discipline, requires the exercise of judgment by the trial court." *Id.* This Court held the respondent's admission that the juvenile was a neglected juvenile "was ineffective to support the trial court's adjudication of neglect." *Id.*

¶ 37 The formulation of this conclusion requires the hearing judge to consider the properly admitted evidence, determine the weight and burden on DSS, and reconcile the nexus, if any, between the stipulated facts, and to adjudicate whether the child is neglected or abused. "The trial court's findings must consist of more than a recitation of the allegations contained in the juvenile petition. The trial court must, through processes of logical reasoning, based on the evidentiary facts before it, find the ultimate facts essential to support the conclusions of law." *In re K.P.*, 249 N.C. App. 620, 624, 790 S.E.2d 744, 747 (2016) (alterations and internal quotation marks omitted) (citation omitted).

¶ 38 Judge Pool would have been unable to simply rest alone upon a stipulated conclusion. It is equally clear Judge Martelle cannot, in the name of a ministerial act, do what Judge Pool himself could not do. *See id.* Judge Martelle was not present at the hearing and on the basis of the order alone could not adjudicate Rorie and Xavier as neglected and abused as a conclusion of law, in a ministerial act.

¶ 39 DSS asserts there exists a distinction between accepting a stipulation as a legal conclusion at an initial adjudication and disposition

hearing versus accepting one at a termination of parental rights hearing. DSS argues the trial court's action requires us to apply a lower standard, since it does not involve termination of parental rights or a substantial deprivation of Respondents' ability to see their children. DSS asserts another judge signing off on an order after conduct of this hearing on allegations of abuse and neglect and determining the appropriate initial disposition is a ministerial task.

¶ 40 This assertion is not supported by the statute or our case law. The case of *In re R.L.G.*, an appeal of the initial adjudication hearing, was held upon DSS' petition alleging the juvenile was neglected. The disposition order in that case ordered DSS to pursue the goal of reunification. *In re R.L.G.*, 260 N.C. App. at 73, 816 S.E.2d at 916.

¶ 41 In the case of *In re L.G.I.*, 227 N.C. App. 512, 515, 742 S.E.2d 832, 835 (2013), the respondent had entered into a stipulation of certain facts during the adjudication phase of the hearing. On appeal, this Court reviewed whether the adjudication order was a valid consent adjudication order, and no additional evidence showing neglect needed to be presented beyond the parties' agreed upon facts. The respondent asserted, and this Court agreed, that her stipulation did not convert the trial court's order into a consent adjudication order. *Id.* at 515, 742 S.E.2d at 835.

¶ 42 This Court affirmed the trial court's adjudication because additional medical record evidence in the record supported the respondent-mother's prenatal drug exposure, even without respondent-mother's stipulation. *Id.* at 516, 742 S.E.2d at 835.

¶ 43 No other evidence beyond the parties' stipulation was presented at the adjudication hearing. Judge Pool was required to make findings of fact, adjudicated and state conclusions of law arising on those facts, and enter judgment accordingly. The parties did not and could not have stipulated to the final conclusion in this matter.

¶ 44 Respondent-father also points out the written order also concludes Rorie "is adjudicated to be an abused and neglected juvenile." "The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805. The underlying petition only alleged neglect. The box alleging "abuse" on the petition was not checked. The parties stipulated Rorie is neglected "[a]s a result of the frequent use of illegal controlled substances." No evidence was offered at the adjudication hearing and no findings of fact in the order support a conclusion that Rorie was abused.

¶ 45 We categorically reject DSS' argument that Judge Martelle's rendering of Rorie as abused in the absence of such allegation in the petition was within his discretion or is, at worst, nonprejudicial or harmless error. Presuming Judge Pool had signed the order, this conclusion is erroneous. No clear and convincing evidence supports a conclusion Rorie was abused and that portion of the adjudication is vacated. *Id.*; *In re Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365; *see also In re D.C.*, 183 N.C. App. 344, 349, 644 S.E.2d 640, 643 (2007) (holding where DSS did not click the box or allege neglect in its petition, the trial court erred by entering an order adjudicating the juvenile to be a neglected juvenile"). That conclusion is vacated.

C. Disposition

¶ 46 Respondents also argue the trial court abused its discretion in rendering its disposition without sufficient credible and competent evidence to support its findings. DSS and the GAL respond that the initial disposition hearings are informal and there is no requirement that the order be supported by live testimony, just competent evidence. Both DSS and the GAL presented court reports to Judge Pool at the disposition stage. Because we hold the adjudication orders signed by Judge Martelle are "a nullity," it is unnecessary to reach the merits of these arguments. *In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435.

VI. Conclusion

¶ 47 Notwithstanding the parties entered into specific stipulation of facts that Rorie was neglected and that Xavier was abused and neglected, Judge Pool did not adjudicate the evidence, enter conclusions of law, and render an order. The chief district court judge could not properly sign the later written adjudication and disposition orders as merely a ministerial duty. The orders are vacated and the case is remanded for a new hearing. *It is so ordered.*

VACATED AND REMANDED.

Judges COLLINS and WOOD concur.

STATE OF NORTH CAROLINA
v.
YUL BANNERMAN

No. COA20-495

Filed 16 March 2021

Constitutional Law—right to counsel—waiver—statutory inquiry—desire to prevent delay

There was no error in the trial court's acceptance of a criminal defendant's waiver of his right to counsel where the trial court conducted a thorough inquiry pursuant to N.C.G.S. § 15A-1412 to ensure that the waiver was knowing, intelligent, and voluntary. Defendant's motivation for his waiver of counsel—to prevent his trial from being delayed by two months—did not prevent his waiver from being voluntary.

Appeal by Defendant from judgment entered 18 December 2019 by Judge Richard K. Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 24 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Tien Cheng, for the State-Appellee.

Michael Spivey for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals from judgment entered upon jury verdicts of guilty of conspiracy to commit common law robbery, common law robbery, and being a habitual felon. Defendant contends that the trial court erred by accepting his waiver of counsel because it was not the result of a voluntary exercise of his free will. For the reasons stated below, we discern no error.

I. Procedural Background

¶ 2 On 20 February 2019, Defendant was arrested on charges of conspiracy to commit armed robbery. Attorney Jordan Duhe was assigned on 22 February 2019 to represent Defendant. Defendant was subsequently indicted for conspiracy to commit robbery with a dangerous weapon, robbery with a dangerous weapon, and being a habitual felon.

¶ 3 On 19 May 2019, Defendant requested new counsel, and Ms. Duhe filed a motion to withdraw alleging a breakdown in communication and a conflict of interest. This motion was granted and Attorney Merrit Wagoner was appointed on 3 June 2019 to represent Defendant.

¶ 4 On 10 October 2019, Mr. Wagoner filed a motion to withdraw, alleging Defendant had asked him to withdraw and had threatened to file grievances against him with the North Carolina State Bar. At the 22 October 2019 hearing on the motion, Defendant expressed a desire to represent himself and signed a written waiver of counsel. At a hearing on 10 December 2019, Defendant was appointed standby counsel.

¶ 5 A jury trial was held on 16-18 December 2019. Defendant was ultimately convicted of common law robbery and conspiracy to commit common law robbery, was found to be a habitual felon, and was sentenced to a prison term of 96 to 128 months. Defendant timely entered oral notice of appeal.

II. Discussion

¶ 6 Defendant's sole argument on appeal is that the trial court erred by accepting his waiver of counsel because the waiver was not the result of a voluntary exercise of his free will, but rather was the result of his belief that it was his only choice to avoid delaying his trial.

¶ 7 We review *de novo* a trial court's determination that a defendant has waived the right to counsel. *State v. Simpkins*, 373 N.C. 530, 533, 838 S.E.2d 439, 444 (2020). A criminal defendant's right to counsel during a criminal proceeding is protected by both the federal and state constitutions. *See* U.S. Const. amend. VI; N.C. Const. art. I § 19, 23. Although a defendant has a constitutional right to representation during a criminal proceeding, he may elect to waive that right and instead proceed *pro se*. *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972).

¶ 8 Any waiver of the right to counsel and concomitant election to represent himself must be expressed "clearly and unequivocally." *State v. Thomas* 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992) (citation omitted). "Upon receiving this clear request, the trial court is required to ensure that the waiver is knowing, intelligent, and voluntary." *Simpkins*, 373 N.C. at 534, 838 S.E.2d at 445 (citing *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476). The trial court can ensure a waiver is knowing, intelligent, and voluntary by fulfilling the mandate of N.C. Gen. Stat. § 15A-1242, which requires the trial court to conduct a "thorough inquiry" and to be satisfied that "(1) the defendant was clearly advised of the right to counsel, including the right to assignment of counsel; (2) the defendant '[u]nderstands and appreciates the consequences' of proceeding

without counsel; and (3) the defendant understands what is happening in the proceeding as well as 'the range of permissible punishments.' " *Simpkins*, 373 N.C. at 534, 838 S.E.2d at 445 (2020) (citing N.C. Gen. Stat. § 15A-1242).

¶ 9 For the reasons stated below, we conclude that Defendant clearly and unequivocally expressed his desire to waive counsel and represent himself, and that he made this decision knowingly, intelligently, and voluntarily.

¶ 10 On 22 October 2019, the trial court heard Defendant's second appointed attorney's motion to withdraw. After granting the motion and announcing that it would appoint Attorney Paul Mediratta to represent Defendant, the Assistant District Attorney (ADA) stated to the court,

> [W]ith . . . Mr. Wagoner's getting out of the case today, I hope that [Defendant] understands that this case will no longer be heard in December. . . . [W]e had this case set for December 16th. This is his doing, and we're going to have to put this case on the February 24th, 2020 trial calendar to get Mr. Mediratta a chance . . . to get into the case[.]

The trial court responded, "Okay." The following colloquy then took place:

> THE DEFENDANT: Excuse me, Your Honor. I withdraw for an attorney if we can have this date of December the 16th. I withdraw, and I will represent myself if I can have a date in court.
>
> THE COURT: I can hear you, but can we get that --
>
> THE DEFENDANT: I would withdraw counsel if I could have my date in court.
>
> THE COURT: You want to represent yourself on that?
>
> THE DEFENDANT: If we don't keep the December 16th date. I got some motions I need to be heard on.

¶ 11 Defendant proceeded to argue that the State was withholding exculpatory evidence. The trial court explained to Defendant, "that's not why we're in here right now," and again asked Defendant if he wanted to represent himself. Defendant responded, "Yes, I'm ready. I'll represent myself." Defendant signed a waiver of counsel form, waiving his right to assigned counsel. The trial remained set for 16 December 2019.

¶ 12 Defendant was brought back into court on 10 December 2019 to address his letter to the court requesting a "co-counselor" for trial. At the outset of the hearing, the trial court asked Defendant, "You want to represent yourself; is that correct? Do you intend to represent yourself?" Defendant responded, "Yes."

¶ 13 After some discussion about Defendant's desire to see some videos he thought were in the State's possession, the ADA explained to the trial court about Defendant's statements at the October hearing that he wanted to represent himself and the ADA "ask[ed] that the Court maybe go over some of those responsibilities, that he be made fully aware of what it would mean to represent himself if the Court is willing to do that."

¶ 14 The trial court then addressed Defendant, "Mr. Bannerman, I do need to ask you some questions about representing yourself. . . . [T]he questions I'm asking you right now about regarding your representing yourself. I have to ask you a series of questions." Defendant responded, "Okay." Through questioning, the trial court confirmed that Defendant was able to hear and understand him and was not under the influence of alcohol, drugs, or any other substances. The trial court discerned that Defendant was 51 years old, got his GED in 1987, and could read and write at an "A level." The following inquiry then took place:

> THE COURT: Do you understand that you have the right to have an attorney represent you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand you may ask for an attorney to be appointed to represent you -
>
> THE DEFENDANT: Yes.
>
> THE COURT: -- if you cannot afford to hire one?
>
> THE DEFENDANT: Yes.

¶ 15 The trial court informed Defendant he would be required to follow the same rules of evidence and procedure if he represented himself, the nature of the charges against Defendant, and his potential punishment. The trial court engaged in the following colloquy with Defendant:

> THE COURT: All right. Do you now waive your right to have counsel, or have an attorney represent you at your trial?
>
> THE DEFENDANT: That's going to move the date back, Your Honor.

> THE COURT: No, it's not going to move the date. I'm asking you, do you want an attorney?
>
> THE DEFENDANT: Yeah, I wanted a co-counsel.

¶ 16 At this point, the trial court told Defendant that he could not have co-counsel and that if the trial court appointed an attorney, it would be as standby counsel. The trial court explained that standby counsel is not co-counsel and that standby counsel "will not be sitting at the table beside you. You will be sitting at that table by yourself." Defendant responded, "Okay." The trial court further explained that standby counsel "will only be to assist you on some issues that you might have but not in the presence of the judge or in the presence of the jury." Defendant responded, "Okay. That's understandable. Yes." The following exchange then took place:

> THE COURT: So that's for standby counsel. I'm now talking about a regular attorney. You're waiving your right to have an attorney represent you at trial?
>
> THE DEFENDANT: Yes. I don't want my court date pushed back. I don't want the court date pushed back.
>
> THE COURT: All right. I understand that. So you're giving up that right, to have an attorney?
>
> THE DEFENDANT: Yes. You said I'm allowed to have standby, right?
>
> THE COURT: I haven't gotten there yet.
>
> THE DEFENDANT: All right. I'll waive that if I could have a standby, if you don't mind, for some legal issues.

¶ 17 The trial court accepted Defendant's waiver of counsel and appointed standby counsel.

¶ 18 These exchanges show that on several occasions, Defendant clearly and unequivocally stated his desire to waive counsel and represent himself. *State v. Paterson*, 208 N.C. App. 654, 663, 703 S.E.2d 755, 761 (2010) (determining that the trial court's multiple colloquies with defendant and defendant's "repeated assertion" that he wanted to represent himself demonstrated defendant's clear and unequivocal desire to represent himself). Moreover, the questions asked by the trial court mirrored the fourteen-question checklist published by the University of North Carolina School of Government, which "illustrate[s] the sort of 'thorough inquiry' envisioned by the General Assembly when

[N.C. Gen. Stat. § 15A-1242] was enacted[.]" *State v. Moore*, 362 N.C. 319, 327-28, 661 S.E.2d 722, 727 (2008). The trial court's thorough inquiry and Defendant's answers showed that Defendant's waiver was made knowingly, intelligently, and voluntarily.

¶ 19 Defendant does not contend that he did not clearly and unequivocally waive his right to counsel or that the trial court failed to conduct an adequate inquiry under N.C. Gen. Stat. § 15A-1242. Instead, citing *State v. Bullock*, 316 N.C. 180, 340 S.E.2d 106 (1986), and *State v. Pena*, 257 N.C. App. 195, 809 S.E.2d 1 (2017), Defendant contends that his decision to waive counsel was not the voluntary exercise of his free will because it was the result of his belief that it was his only choice to avoid delaying his trial from December to February. *Bullock* and *Pena* are distinguishable.

¶ 20 In *Bullock*, the trial court allowed defendant's privately retained counsel to withdraw, at defendant's request, six days before his trial date but informed defendant he would not receive a continuance. *Bullock*, 316 N.C. at 182-83, 340 S.E.2d at 107. On the day of his trial, defendant informed the court he had been unable to retain counsel, but the trial court told defendant "[t]he case will be for trial" and defendant proceeded to be tried without counsel. *Id.* at 184, 340 S.E.2d at 108. The Supreme Court ultimately held that defendant "acquiesced to trial without counsel because he had no other choice." *Id.* at 185, 340 S.E.2d at 108.

¶ 21 Likewise, in *Pena*, the trial court denied defendant's request for a different court-appointed attorney and denied defendant's request for additional time to retain a private attorney. *Pena*, 257 N.C. App. at 197-98, 809 S.E.2d at 3-4. Defendant was forced to choose between his original court-appointed counsel and representing himself, and he ultimately decided to represent himself. *Id.* at 203, 809 S.E.2d at 6. This Court determined that defendant did not "outright request" to represent himself but instead chose to do so when faced with no other option other than continuing with his court-appointed counsel. *Id.*

¶ 22 Unlike in *Bullock* and *Pena* where the trial court was unwilling to allow defendants more time to secure attorneys and, thus, defendants had no option but to represent themselves at trial, the trial court in this case had just announced that it would appoint Defendant his third attorney. At that point, Defendant voluntarily waived counsel to accommodate *his own desire* to keep a December trial date. His understanding, either correct or incorrect, that his trial could be delayed until February if he accepted the appointment of the third attorney did not make his choice to waive counsel involuntary. His motivation simply explains

why he chose to voluntarily waive counsel and proceed *pro se* with standby counsel.

III. Conclusion

¶ 23 Defendant clearly and unequivocally expressed his desire to waive his right to counsel and the trial court conducted a thorough inquiry, in compliance with N.C. Gen. Stat. § 15A-1412, to ensure this waiver was knowing, intelligent, and voluntary. Accordingly, we discern no error.

NO ERROR.

Judges TYSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
CHAD CAMERON COPLEY

No. COA18-895-2

Filed 16 March 2021

1. Homicide—first-degree murder—prosecutor's arguments—mischaracterized on appeal

In an appeal from defendant's conviction for first-degree murder, the Court of Appeals rejected defendant's argument that the trial court erroneously allowed the State to make improper statements of law during its closing argument. Defendant mischaracterized the State's statements as pertaining to the habitation defense when the statements actually pertained to self-defense.

2. Appeal and Error—preservation of issues—jury instructions—active participation by defense counsel

The Court of Appeals declined to consider—even under plain error review—defendant's argument regarding the trial court's jury instructions in his trial for first-degree murder where defense counsel did not object to and in fact actively participated in the formulation of the instructions.

3. Homicide—first-degree murder—lying in wait—jury instructions—defendant in his garage

In a murder trial, the trial court did not err by instructing the jury on the theory of lying in wait where defendant stationed himself

in his garage with a shotgun, concealed and waiting, before shooting the victim through the garage window.

Judge TYSON dissenting.

Appeal by defendant from judgment entered 23 February 2018 by Judge Michael J. O'Foghludha in Wake County Superior Court. Originally heard in the Court of Appeals 13 February 2019, and opinion filed 7 May 2019 reversing and remanding for new trial, *State v. Copley*, 265 N.C. App. 254, 828 S.E.2d 35 (2019). Reversed and remanded to the Court of Appeals by opinion of the North Carolina Supreme Court filed 3 April 2020, 374 N.C. 224, 839 S.E.2d 726 (2020), for consideration of defendant's remaining arguments on appeal.

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

Massengale & Ozer, *by Marilyn G. Ozer*, *for defendant.*

ARROWOOD, Judge.

I. Appellate History

¶ 1 On appeal, this Court, over a dissent, vacated defendant's convictions and remanded for retrial by reason that the State inappropriately discussed the race of defendant and the victim in his closing argument. *State v. Copley*, 265 N.C. App. 254, 257, 828 S.E.2d 35, 37-38 (2019). The Court did not reach defendant's remaining issues on appeal. Based upon the dissent, *id.* at 269-79, 828 S.E.2d at 45-50 (Arrowood, J., dissenting), the State appealed to the Supreme Court of North Carolina. Finding no prejudicial error in the prosecutor's closing argument with respect to race, our Supreme Court reversed and remanded for this Court to consider defendant's remaining arguments. *State v. Copley*, 374 N.C. 224, 232, 839 S.E.2d 726, 731 (2020). Upon consideration of defendant's remaining arguments on remand, we find defendant received a fair trial free from error.

II. Background

¶ 2 On 22 August 2016, a Wake County Grand Jury indicted defendant on one count of first-degree murder. The matter came on for trial on 12 February 2018 in Wake County Superior Court, the Honorable Michael J. O'Foghludha presiding. The State's evidence tended to show the following.

¶ 3 On 6 August 2016, Jalen Lewis ("Mr. Lewis") hosted a party at his parents' home, two or three houses down from defendant's house. Three of his guests, Kourey Thomas ("Mr. Thomas" or "victim"), David Walker ("Mr. Walker"), and Chris Malone ("Mr. Malone") arrived at the party in Mr. Walker's car around midnight, and parked on the street. As the party progressed, a group of approximately twenty people showed up that Mr. Lewis and his friends did not know. After about ten minutes, the group was asked to leave. The group agreed, and walked towards their cars, congregating near the curb in front of defendant's house to discuss where to go next.

¶ 4 Defendant, who was inside his home, became disturbed by the group's noise. He yelled out an upstairs window, "[y]ou guys keep it the f*** down; I'm trying to sleep in here." He then called 911, telling the operator he was "locked and loaded" and going to secure the neighborhood. Defendant also stated, "I'm going to kill him." The operator attempted to obtain more information from defendant, but the phone call was terminated.

¶ 5 Meanwhile, a law enforcement officer conducted a traffic stop nearby, causing the lights of his police cruiser to reflect down the street. Mr. Thomas, Mr. Walker, and Mr. Malone saw the lights and became worried about the presence of law enforcement because Mr. Thomas had a marijuana grinder on his person.

¶ 6 The three men decided to leave the party due to the police presence. Mr. Thomas left the party first. He ran from Mr. Lewis' house, cutting across the yard, towards Mr. Walker's car. Before he could reach the car, he was shot by defendant, who fired without warning, from his dark, closed garage. EMS arrived and took Mr. Thomas to the hospital, where he died as a result of the gunshot.

¶ 7 Deputy Barry Carroll of the Wake County Sheriff's Office ("Deputy Carroll"), one of the first investigators on the scene, approached defendant's house after observing broken glass in defendant's driveway and a broken window in the garage. He shined a light through a window, and saw defendant step through a door from the house into the garage. Deputy Carroll asked defendant if he had shot someone. Defendant admitted to shooting Mr. Thomas. Deputy Carroll requested defendant open the front door. Defendant complied and showed Deputy Carroll the shotgun he used to shoot the victim.

¶ 8 At the close of the State's evidence, defendant moved to dismiss the case. The trial court denied the motion. Defendant presented evidence tending to show as follows.

¶ 9 Defendant argued with his wife on the morning of 6 August 2016, and then spent the day drinking, sleeping, and "just hanging out in the garage." After going to sleep that evening, he woke and saw the group leaving Mr. Lewis' party. Irritated at the noise the group made, he yelled, "[y]ou guys keep it the f*** down; I'm trying to sleep in here" out the window. Members of the group yelled back, " 'Shut the f*** up; f*** you; go inside, white boy,' things of that nature." He saw "firearms in the crowd[,]" and two individuals "lifted their shirts up" to flash their weapons. He testified that he called 911 at his wife's request. When he called 911, he thought it was his son and his son's friends outside, and stated that the "him" he referred to killing while on the call was his son. After ending the call with 911, he grabbed his shotgun and loaded five rounds.

¶ 10 When he discovered his son was not part of the group outside, he told his son to get a rifle and go upstairs for safety. He again yelled at the group outside, instructing them to leave the premises and informing them that he had a gun. Defendant claimed Mr. Thomas then began to walk towards defendant's house and to reach for a gun, so he shot him.

¶ 11 At the close of defendant's evidence, he renewed his motion to dismiss, which the trial court denied. On 22 February 2018, the jury found defendant guilty of first-degree murder by premeditation and deliberation and by lying in wait. The trial court sentenced defendant to life without parole. Defendant timely noted his appeal.

III. Discussion

¶ 12 In his remaining arguments, defendant contends: (1) the trial court erred by allowing the State to make improper statements of law during its closing argument concerning the aggressor doctrine and defense of habitation; (2) the trial court plainly erred by instructing the jury that the defense of habitation was not available if defendant was the aggressor; and (3) the trial court erred by instructing the jury on the theory of first-degree murder by lying in wait. Addressing each in turn, we find no error.

A. Closing Argument

¶ 13 **[1]** Defendant first argues the trial court violated his constitutional rights when it failed to intervene when the State argued incorrect law concerning the aggressor doctrine of self-defense and defense of habitation in its closing argument. We disagree.

¶ 14 Because defendant failed to object on this basis at trial, we review the allegedly improper closing arguments for

> whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

¶ 15 First, defendant contends the State erred when it told the jury defendant could be found to be the aggressor if he left the second floor of his house and went downstairs to the garage because this argument is contrary to *State v. Kuhns*, 260 N.C. App. 281, 817 S.E.2d 828 (2018) and grossly prejudicial.

¶ 16 Defendant does not quote the language he refers to as egregious, and only provides a citation to a page in the transcript where the prosecutor discusses the aggressor doctrine. Upon review of the transcript, it is clear the references to the aggressor by the prosecutor in this portion of the transcript arose in the context of self-defense, *not the habitation defense*:

> And I'm going to talk more about some of the things that he told you later, but what I want to get to is this excused killing by *self-defense*, okay?
>
> . . . .
>
> He doesn't have to retreat from his home, but if you're upstairs and somebody makes a show of force at you, it's not retreating to stay upstairs. It's, in fact, the opposite of that, right? But if you take your loaded shotgun and go down to the garage and if you buy him at his word, which I don't know that you can, you are not retreating. You are being aggressive. You're continuing your aggressive nature in that case.

(Emphasis added). Therefore, defendant's argument that the trial court erred by failing to intervene when the State misstated the law on the *habitation defense* is without merit.

¶ 17 Second, defendant argues the State incorrectly added exceptions to the habitation defense that our statutes only permit as exceptions to self-defense. Defendant maintains the State committed this error in the following portion of its argument:

> You can consider the size, age, strength of defendant as compared to the victim. . . . You've got somebody who's standing at this point in a yard and you've got somebody on a second floor window. How much danger is he to him at that point? Especially at that point, he's not even saying they're pointing a gun at him. All they've done is this – (indicating) – if you buy him at his word.
>
> . . . .
>
> Reputation for violence, if any, of the victim, you didn't hear that he was a violent guy. You didn't hear that he was a gangbanger. All you heard is that he was actually the opposite of that, right?

We disagree. As with defendant's first argument, this portion of the transcript refers to self-defense, not the habitation defense. Defendant's argument is without merit.

B. Instruction on Defense of Habitation

¶ 18 **[2]** Next, defendant argues the trial court plainly erred by instructing the jury that the defense of habitation was not an available justification if defendant was the aggressor. Defendant alleges plain error because he did not object on this basis at trial. N.C. R. App. P. 10(a)(2), (a)(4) (2019). We decline to reach this assignment of error.

¶ 19 During the charge conference, the trial court stated that it would give N.C. Pattern Jury Instruction 308.80, defense of habitation. The trial court added it would include footnote four on aggression, which provides the defense is not available to one who provokes the use of force against himself, unless the person provoked responded with more serious force. Defense counsel did not object to the requested further instructions on the "aggressor" doctrine, but asked the trial court: "[I]f the jury is going to be given instruction on provocation, that they be informed on the law of initial aggression which is intended and designed to calculate this inspiring a fight." Defendant's request was honored by the trial court giving N.C. Pattern Jury Instruction 206.10.

¶ 20 In *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998), our Supreme Court held:

> Counsel . . . did not object when given the opportunity either at the charge conference or after the charge had been given. In fact, defense counsel affirmatively approved the instructions during the charge conference. Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal.

Id. at 570, 508 S.E.2d at 275 (citing *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 396 (1996)).

¶ 21 Defendant's trial counsel's requests and active participation in the formulation of the instructions during the charge conference waives any right he would have to have the instructions reviewed even under a plain error analysis. Thus, we decline to reach this issue.

C. Lying in Wait

¶ 22 **[3]** Finally, defendant argues the trial court committed reversible error by instructing the jury on the theory of lying in wait because the evidence did not support the instruction. We disagree.

¶ 23 "[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995) (citation omitted). However, if "a request for instructions is correct in law and supported by the evidence in the case, the court must give the instruction in substance." *State v. Thompson*, 328 N.C. 477, 489, 402 S.E.2d 386, 392 (1991).

¶ 24 Our Supreme Court defines "first-degree murder perpetrated by means of lying in wait" as "a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320 (1990) (citations and internal quotation marks omitted). The perpetrator must intentionally assault "the victim, proximately causing the victim's death." *State v. Grullon*, 240 N.C. App. 55, 60, 770 S.E.2d 379, 383 (2015) (citation and internal quotation marks omitted).

¶ 25 Defendant argues the evidence does not support an instruction on first-degree murder by lying in wait because the evidence did not show he laid in wait to shoot a victim, but, rather, it shows he armed himself to protect his house from intruders until police arrived to disperse the individuals gathered in front of his house. We disagree.

¶ 26 The State put forth sufficient evidence to support an instruction on lying in wait, even assuming *arguendo* that defendant offered evidence supporting his conflicting theory on defense of habitation. The State's evidence shows defendant concealed himself in his darkened garage with a shotgun, equipped with a suppression device. Defendant shot the victim, firing the shotgun through the garage's window. The shot bewildered bystanders because it was unclear what happened, and defendant had not warned the crowd before firing his weapon.

¶ 27 This evidence supports the lying in wait instruction because it tends to show defendant stationed himself, concealed and waiting, to shoot the victim, and this action proximately caused the victim's death. Accordingly, we hold the trial court did not err when it instructed the jury on murder by lying in wait.

IV. Conclusion

¶ 28 For the forgoing reasons, we find no error.

NO ERROR.

Chief Judge STROUD concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

¶ 29 Defendant was inside his home with his wife and children inside. He was alarmed after midnight by a rowdy and armed crowd which had gathered in front of his home. He raised his window to tell the crowd to quiet down and leave. Some of the crowd members responded by yelling profanity, racial slurs, and by displaying weapons. Defendant called 911 to report and request for law enforcement to disperse the crowd. A police officer was nearby with their vehicle's lights flashing. No officers responded immediately. Defendant armed himself with a shotgun and went downstairs to locate his son, who he believed may be outside the house. Defendant found his son in the converted garage that is part of the home. Defendant told his son to go upstairs for safety and to arm himself.

¶ 30 Defendant saw an individual in his yard coming toward his home armed with a gun. Defendant fired one shot from his shotgun through the window of his garage, striking the intruder.

¶ 31 When officers arrived and observed broken glass, he opened the door and admitted to firing the shotgun. Defendant gave the shotgun to the officers. Defendant never concealed himself, never left the interior of his home, other than shouting for the intruder to leave, had no prior interaction or altercation with the intruder, and expressed no animus toward the intruder. This evidence must be viewed in the light most favorable to Defendant and for him to be given the benefit of every inference. Defendant objected to and specifically preserved this error of submitting the theory of lying in wait for the intruder to the jury, as a basis to convict him for first-degree murder under these facts.

¶ 32 Defendant was convicted of first-degree murder under two distinct theories of premeditation and deliberation and by lying in wait. The majority's opinion fails to follow North Carolina's statutory provisions and unbroken precedents to analyze Defendant's murder conviction for lying in wait. Defendant's conviction under lying in wait is erroneous, prejudicial, and is properly vacated. I respectfully dissent.

I. Jury Instructions

¶ 33 During the charge conference, the following exchange took place between Defendant's counsel and the trial court:

> [DEFENSE COUNSEL]: Your Honor, just to clear up the record, I would say that it is very appreciative the work Your Honor has done in order to come up with that compromise, and that is not lost on us. For the record, we are objecting to the lying in wait instruction going to the jury. That's all I need to be heard about.
>
> THE COURT: Yes absolutely. And that's noted, and you-all know how to preserve it.

¶ 34 The majority's opinion states the prosecutor's references to the aggressor arose in the portion of transcript of self-defense; however, the cited portions of the transcript refer to "prevent a forcible entry into the defendant's home" and "he doesn't have to retreat from his home." This artificial delineation ignores our Court's many precedents concerning the special status of an inhabitant within the curtilage of and inside his home. *See State v. McCombs*, 297 N.C. 151, 157, 253 S.E.2d 906, 910 (1979) (usual rules of common law self-defense apply inside the home, except that the occupant does not have a duty to retreat).

¶ 35 Our Supreme Court recently held where the trial court failed to pro-

without further request or objection." *State v. Lee*, 370 N.C. 671, 676, 811 S.E.2d 563, 567 (2018). In *Lee*, the trial court failed to give a requested pattern jury instruction on stand your ground, when the defendant had properly entered evidence to support the defense. *Id.* at 673, 811 S.E.2d at 565.

¶ 36 Our Supreme Court has held:

> [A] request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.

State v. Ross, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988) (citation omitted). Defendant's objection is persevered and is properly before us.

II. Lying in Wait

A. Preservation of Error

¶ 37 Defendant argues the trial court erred by instructing the jury on him lying in wait to commit first-degree murder. As noted above, Defense counsel properly preserved this issue for appellate review:

> [DEFENSE COUNSEL]: For the record, we are objecting to the lying in wait instruction going to the jury. That's all I need to be heard about.
>
> The COURT: Yes absolutely. And that's noted, and you-all know how to preserve it.

¶ 38 The undisputed evidence shows Defendant was located inside of his residence with his family after being alarmed by an armed and noisy crowd after midnight for the entire time during the events leading to the shooting:

> When [Defendant] discovered his son was inside the garage and not part of the group outside, he told his son to go upstairs for safety and to get a rifle. He again yelled at the group outside, instructing them to leave the premises and informing them that he was armed. Defendant claimed [the intruder] began running towards Defendant's house and pulled out a gun. Defendant fired one shot from his shotgun towards [the intruder] through the window of his garage.

State v. Copley, 265 N.C. App. 254, 257, 828 S.E.2d 35, 37-38 (2019), *rev'd and remanded*, 374 N.C. 224, 839 S.E.2d 726 (2020).

¶ 39 During the trial court's instruction for the theories of first-degree murder, the jury was instructed on lying in wait as follows:

> The [D]efendant has also been charged with first degree murder perpetrated while lying in wait. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant lay in wait for the victim; that is, waited and watched for the victim in ambush for a private attack on him. Second, that he intentionally assaulted the victim. And, third that the [D]efendant's act was a proximate cause of the victim's death.

¶ 40 The natural and common law since ancient times, and our State's statutes and unbroken precedents, have recognized an individual's fundamental and absolute right to protect and defend themselves, their family, and their home with deadly force from individuals who are armed and violent.

> [T]here exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce themselves to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will have to wait for justice too – and meanwhile they must suffer injustice first. Indeed, even the wisdom of the law itself, by a sort of tacit implication, permits self-defense, because it does not actually forbid men to kill; what it does, instead, is to forbid the bearing of a weapon with the intention to kill. When, therefore, an inquiry passes beyond the mere question of the weapon and starts to consider the motive, a man who has used arms in

> self-defense is not regarded as having carried them with a homicidal aim.

Marcus Tuillius Cicero, *Selected Political Speeches*, trans. Michael Grant (New York: Penguin, 1969), p. 222.

¶ 41 Our Supreme Court confirmed: "The principle that *one does not have to retreat* regardless of the nature of the assault upon him *when he is in his own home* and acting *in defense of himself, his family and his habitation* is firmly embedded in our law." *McCombs*, 297 N.C. at 156, 253 S.E.2d at 910 (emphasis supplied) (citations omitted); *see* N.C. Gen. Stat. § 14-51.2(b) (2019).

B. *State v. Coley*

¶ 42 Our Supreme Court recently further examined and unanimously upheld a similar assertion of defense of one's habitation in *State v. Coley*, 375 N.C. 156, 159-60, 846 S.E.2d 455, 457-58 (2020):

> The jury charge is one of the most critical parts of a criminal trial. It is the duty of the trial court to instruct on all substantial features of a case raised by the evidence. This Court has consistently held that where competent evidence of self-defense is presented at trial, *the defendant is entitled to an instruction on this defense*, as it is a substantial and essential feature of the case, and *the trial judge must give the instruction even absent any specific request by the defendant*. When supported by competent evidence, self-defense unquestionably becomes a substantial and essential feature of a criminal case. In determining whether a defendant has presented competent evidence sufficient *to support a self-defense instruction*, *we take the evidence as true and consider it in the light most favorable to the defendant*. Once a showing is made that the defendant has presented such competent evidence, *the court must charge* on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence. *A defendant entitled to any self-defense instruction is entitled to a complete self-defense instruction*, which includes the relevant *stand-your-ground provision*.

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

¶ 43 Defendant's proper and preserved objection to the submission of and the jury instruction on lying in wait shows the trial court erroneously failed to include the correlation and preemption of Defendant's common law and statutory rights to defense of self, family, and habitation to this submission and instruction. No evidence tends to show Defendant was lying in wait, luring, or secreting himself, other than remaining inside of his home under threats by an armed crowd. He repeatedly told them to leave and sought assistance from law enforcement. Defendant's evidence and the inferences therefrom must be submitted, instructed, and considered most favorably to him.

C. Statutory Self-Defense, Defense of Others and Habitation

¶ 44 N.C. Gen. Stat. § 14-51.3(a) provides:

> A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, *a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies*:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
>
> (2) Under the circumstances permitted pursuant to G.S. 14-51.2.

N.C. Gen. Stat. § 14-51.3(a) (2019) (emphasis supplied).

¶ 45 When a defendant is inside his own home and under armed assault, N.C. Gen. Stat. § 14-51.2 provides:

> (b) The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, *or had unlawfully and forcibly entered*, *a home*, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.

The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

(c) The presumption set forth in subsection (b) of this section shall be rebuttable and does not apply in any of the following circumstances:

> (1) The person against whom the defensive force is used has the right to be in or is a lawful resident of the home, motor vehicle, or workplace, such as an owner or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person.
>
> (2) The person sought to be removed from the home, motor vehicle, or workplace is a child or grandchild or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used.
>
> (3) The person who uses defensive force is engaged in, attempting to escape from, or using the home, motor vehicle, or workplace to further any criminal offense that involves the use or threat of physical force or violence against any individual.
>
> (4) The person against whom the defensive force is used is a law enforcement officer or bail bondsman who enters or attempts to enter a home, motor vehicle, or workplace in the lawful performance of his or her official duties, and the officer or bail bondsman identified himself

> or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.
>
> (5) The person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace and (ii) has exited the home, motor vehicle, or workplace.
>
> (d) A person who unlawfully and by force enters or *attempts to enter a person's home*, motor vehicle, or workplace *is presumed to be doing so with the intent to commit an unlawful act involving force or violence.*
>
> (e) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.
>
> (f) *A lawful occupant within his or her home*, motor vehicle, or workplace *does not have a duty to retreat* from an intruder in the circumstances described in this section.
>
> (g) This section is *not intended to repeal or limit any other defense* that may exist under the common law.

N.C. Gen. Stat. § 14-51.2 (2019) (emphasis supplied).

¶ 46 Our Supreme Court has also held: "Where there is evidence that defendant acted in self-defense, *the court must charge* on this aspect even though there is contradictory evidence by the State or discrepancies in

defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) (emphasis supplied) (citations omitted).

D. State's Assertion of Lying in Wait

¶ 47 To warrant an instruction and support a conviction for first-degree murder under the theory of lying in wait, precedents mandate the trial court instruct the jury that the State carries the burden to disprove Defendant's assertion of self-defense, defense of others, and defense of his habitation. *See* N.C.P.I. - - Crim. 308.45A, 308.80 (2017). Also, the jury must be instructed that the evidence and inferences thereon must be reviewed in the light most favorable to Defendant to determine whether Defendant's defense of his self, home, or family did not fall under one of the exceptions articulated in N.C. Gen. Stat. § 14-51.2(c).

¶ 48 Our Supreme Court further held in *Coley*:

> [p]resuming [that] a conflict in the evidence exists . . . it is to be resolved by the jury, *properly instructed*, it is appropriately within the purview of the jury to resolve any conflicts in the evidence presented at trial and to render verdicts upon being *properly instructed* by the trial court based upon the evidence which competently and sufficiently supported the submission of such instructions to the jury for collective consideration.

Coley, 375 N.C. at 163, 846 S.E.2d at 460 (alterations in original) (emphasis supplied) (citations and internal quotation marks omitted).

¶ 49 In this case, as in *Coley*, the trial court improperly submitted and failed to instruct the jury on this requirement despite Defendant's express requests and preserved objections. Undisputed evidence shows Defendant was located inside of his home with his family during the entire time and sequence of events, during which he testified an armed intruder was running in his yard toward his home.

¶ 50 He called 911 to report the activities of and threats from a large belligerent and armed group massed outside his home after midnight and to request law enforcement to respond. After the 911 call, Defendant testified he left his bedroom and went downstairs to determine if his teenage son was outside. Defendant found his son was safe inside the home downstairs and sent him upstairs to greater safety. Any assertion that his prior words, behavior, or actions made him the aggressor while inside his own home is fallacious. Even if so, Defendant was entitled to

proper jury instructions, which the trial court failed to provide to his prejudice. *Id.*

¶ 51 The majority's opinion asserts the State put forth sufficient evidence to support an instruction on lying in wait. What evidence? That Defendant was inside of his home and protecting his family with a shotgun, while facing an armed intruder after midnight with no response from his 911 call? The State was required to disprove Defendant's claims beyond a reasonable doubt of self-defense prior to the jury reaching Defendant's claims of lying in wait. N.C.P.I. - - Crim. 308.45A, 308.80 (2017). The critical error by the trial court is the lying in wait submission and instruction, even if supported by the State's evidence, is not independent of Defendant's rights to mandatory and complete instructions on his preemptive rights. Defendant clearly preserved his preeminent right to defend himself, his family, and their habitation against the actions of an armed intruder.

¶ 52 All the evidence and inferences thereon must be viewed in the light most favorable to Defendant by the jury properly instructed on the law and the State's burdens. *See Dooley*, 285 N.C. at 163, 203 S.E.2d at 818. "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense. . . , courts must consider the evidence in the light most favorable to [the] defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citations omitted). Defendant carried no burden once competent evidence of self-defense, defense of others and habitation was admitted. A notion to rely solely upon the sufficiency of the State's evidence is erroneous and directly contrary to our binding precedents.

¶ 53 The trial court's failures denied Defendant of the most fundamental rights to protect and defend himself, his family, and their home. The majority's opinion lacks any analysis of the State's burdens, Defendant's preemptive rights, and the prejudice he has suffered in their denial.

¶ 54 In *State v. Bridges*, 178 N.C. 733, 738, 101 S.E.2d 29, 32 (1919), officers were lawfully serving an arrest warrant. The defendant secreted himself and waited outside and behind a corner to fire upon the officers. *Id.* at 739, 101 S.E.2d at 32 ("[A]nd you further find that the witness, . . . , after going to the house, intentionally and purposely pointed his pistol at the defendant Bridges, and that Bridges, under these circumstances, apprehended and had reasonable grounds to apprehend either that he was in danger of great bodily harm, or in danger of the loss of his life, you will then find that he had a legal right to use such force as was necessary, or apparently necessary, to repel the assault of . . . and protect himself, and

the necessity of dong so was real or apparent . . ., viewing all the facts and circumstances as they reasonably appeared to Bridges at the time the shot was fired."). Lying in wait "refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Allison*, 298 N.C. 135, 147, 257 S.E.2d 417, 425 (1979).

¶ 55 No testimony showed Defendant had any prior association, connection, or animus towards the neighbors across the street or to the armed and unruly crowd that gathered in front of his home and threatened him. After being startled by a threatening situation, with a massed, armed crowd at the edge of the yard, who displayed weapons and shouted racial epithets, Defendant called 911, retrieved his shotgun and walked downstairs to his garage to search for his teenage son.

¶ 56 The jury's instructions on lying in wait did not require the State to disprove nor require the jury to consider and rectify Defendant's rights to self-defense, defense of his family, and his habitation in the light most favorable to Defendant or to place the burden on the State to overcome Defendant's defenses and presumptions. *See id.* This preserved error of submitting lying in wait without proper instructions was prejudicial to Defendant as a basis to support his conviction.

E. *State v. Stephens*

¶ 57 This Court, with two members of this panel, recently examined self-defense in *State v. Stephens*, __ N.C. App. __, __, 853 S.E.2d 488, 496 (2020). The jury was improperly instructed on an individual's right to self-defense. The jury in *Stephens* was not allowed to rectify the defendant's rights to self-defense when there was a dispute over whether he was the first aggressor. *Id.* at __, 488 S.E.2d at 492. The defendant, in *Stephens*, lawfully carried a weapon as he entered someone's property, whose owners had released a dog that had killed his child's pet. *Id.* Defendant put on facts, which viewed in the light most favorable to him, asserted the property owner illegally retrieved a weapon and repeatedly fired that weapon at him, hitting him and his clothing. *Id.*

¶ 58 Here, the State asserted Defendant had acted with aggression by arming himself inside his own home with his family present in the face of armed threats outside. This notion is contrary to our unbroken binding precedent. Our State has long held a defendant who armed himself in anticipation of a fight, and failed to avoid the fight, was not the aggressor. *State v. Tann*, 57 N.C. App. 527, 531, 291 S.E.2d 824, 827 (1982).

¶ 59 To support a murder conviction under the theory of lying in wait, the jury must be instructed, find, and conclude the evidence, when viewed

in the light most favorable to Defendant, fell under one of the exceptions articulated in N.C. Gen. Stat. § 14-51.2 (c). However, despite Defendant's preserved request and objection, and trial court's clear and express duty to instruct on all the evidence and the State's burden, the trial court failed to instruct the jury on these requirements. The jury was instructed over Defendant's express objections on a theory that did not allow them to consider the evidence in the light most favorable to Defendant.

¶ 60 The jury failed to rectify Defendant's presumptive rights to self-defense, defense of others, and defense of his habitation under N.C. Gen. Stat. §§ 14-51.3(a) and 14-51.2 while he was located inside of his home with his family from beginning to end. No evidence tends to show Defendant hid, lured the intruder, set a trap, nor did anything to support a conviction under a theory of lying in wait, while he was within his own home with his family with a shotgun. Defendant told the crowd he was armed and to leave his yard. Defendant testified the television was on and the room was lit. No evidence shows Defendant had "concealed himself in his darkened garage." Even if true, neither has any relevance to Defendant's claim of and entitlement to proper instructions on self-defense, defense of others, and habitation. Defendant's conviction is preserved error, prejudicial, and must be vacated.

III. Conclusion

¶ 61 Defendant's challenge to the trial court's instruction on lying in wait was expressly preserved. The trial court's decision to submit lying in wait as a basis to support a conviction of first-degree murder while Defendant was wholly inside his home with his family as an armed intruder was approaching their home is erroneous. The jury instructions the trial court provided were prejudicial to vacate the lying in wait to support his conviction of first-degree murder. The trial court's judgment on that ground is error, is prejudicial to Defendant, and is properly vacated. Nothing precludes or prejudices Defendant's rights to seek an ineffective assistance of counsel claim for his trial counsel's requests and active participation in the formulation of the jury instructions regarding premeditation and deliberation and defenses thereto during the charge conference, and counsel's failure to preserve any such prejudicial error for appellate review. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
RONALD JASON GIBSON

No. COA20-219

Filed 16 March 2021

1. Motor Vehicles—felony hit and run—sufficiency of the evidence—fatal crash on highway

In a prosecution for felony hit and run, the State presented sufficient evidence, even though circumstantial, from which the jury could infer that defendant, who drove a van with an open trailer behind it and made sudden driving maneuvers while yelling and gesturing at two motorcyclists which led to one motorcycle crashing, knew or reasonably should have known that his vehicle was involved in an accident that resulted in serious injury or death.

2. Criminal Law—jury instructions—flight—after felony hit and run—not element of offense—evidentiary support

In a trial for felony hit and run, the trial court did not err by instructing the jury it could consider defendant's flight after an accident on a highway as evidence of defendant's guilt. Flight was not an essential element of felony hit and run, and there was evidence to support the instruction where defendant, after his sudden driving maneuvers caused a motorcycle to crash, sped away at over 100 miles an hour and took steps to conceal his involvement in the crash.

Appeal by Defendant from judgments entered 12 August 2019 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 27 January 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State-Appellee.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Ronald Jason Gibson appeals from judgments entered upon jury verdicts of guilty of two counts of felony hit and run and one count of reckless driving. Defendant argues that the trial court erred by

(1) failing to dismiss the two counts of felony hit and run for insufficient evidence and (2) instructing the jury on flight. We discern no error.

I. Procedural History

¶ 2 Defendant was indicted on two counts of felony hit and run, one count of aggressive driving, one count of reckless driving, and attaining habitual felon status. Defendant was tried by a jury and convicted of both counts of felony hit and run and one count of reckless driving; he was acquitted of a second count of reckless driving, which was submitted to the jury as a lesser-included offense of aggressive driving. Defendant pled guilty to having attained habitual felon status. The trial court sentenced Defendant as a prior record level II offender to two consecutive prison sentences of 83 to 112 months. Defendant timely gave oral notice of appeal in open court.

II. Factual Background

¶ 3 The State's evidence tended to show the following: On Thursday, 1 June 2017 at around 3:30 pm, William Sumrell was driving his motorcycle on I-40 with his fiancée, Sarah Bell, in the seat behind him. They were traveling with their friend Glenn Alphin, who was driving his own motorcycle. Sumrell was able to communicate by in-helmet intercom with Bell and by CB radio with Alphin. Sumrell and Alphin were in regular contact, coordinating their lane changes and other driving safety measures. It was a hot, sunny day.

¶ 4 West of Winston-Salem, I-40 was reduced to one lane because of road construction, causing traffic on I-40 to be "real backed up." Once Sumrell and Alphin got through the congested construction area, they returned to a normal highway speed of about 70 miles per hour. Sumrell was about four car lengths ahead of Alphin. Sumrell testified that they were riding in a staggered configuration, with Sumrell closer to the center of the highway and Alphin closer to the edge, "[i]n case . . . I have to slam on brakes or something, he has a way to get out of the way. Has an exit out, so he's not running up under me."

¶ 5 Sumrell and Alphin agreed to pass a "semi"–an eighteen wheeled tractor-trailer truck–which was travelling in the right lane of the two westbound lanes. After they had passed the semi but before they could pull back into the right lane, a black car moved up fast behind them. They remained in the left lane as the black car switched to the right lane in front of the semi and moved on.

¶ 6 As they again were about to move back into the right lane, a white van, driven by Defendant, towing an open-topped U-Haul trailer pulled

up quickly behind them. Defendant's van and trailer then cut into the right lane, in front of the semi and beside Alphin. Sumrell testified,

> I could see in my mirror the driver's hand was all outside the car or the vehicle doing something. And I asked [Alphin], I said, "what in the world?" And he said, "this guy come by me flipping me a bird and shouting." I said, "okay."
>
> So, the next thing I know, here comes the van beside me. And he did the same thing to me, hanging out the window, and shouting, and flipping me off, flipping [Bell] off, and spitting at us.

¶ 7 As Defendant moved past Sumrell, Alphin moved into the right lane, behind Defendant's trailer and in front of the semi. Sumrell testified that as he prepared to move into the right lane once Defendant had moved far enough ahead, Defendant "come across my lane about mid-way and slammed on the brakes." When Defendant's van and trailer cut in front of Sumrell, "[i]t was real close, so it was less than ten feet." Sumrell saw Defendant in the driver's side mirror of the van, "looking in the mirror, looking at me laughing." Sumrell expounded that Defendant

> come about halfway across in the middle of the lane. It doesn't slow down coming across the lane, and then slammed on brakes. I put on my brakes to stop or slow down to try to avoid and get on over, when his brake lights went off and came right back on again.

¶ 8 At this point, Sumrell was riding at about 70 miles per hour. Sumrell further testified,

> After [Defendant] first came across and hit the brakes, I hollered for [Bell] to hang on. And we had got slowed down enough to almost miss him, the brakes went off and came back on again, which caused my tire to hit the back of the trailer, which caused us to turn, and cause us to wreck.

Sumrell clarified that although he could not be sure there was contact between his motorcycle and the trailer, he "believe[d] that there actually was[,]" that he "remember[ed] a sudden thud, and hit, and then the bike went down."

¶ 9 Sumrell came to a stop on his stomach in the right lane of I-40. Although he was able to roll over to avoid getting hit by the semi that

he had passed, he was not able to get up due to his injuries. Sumrell had road rash on both arms, abrasions on his back, shoulder, foot, and knees, and one arm had flesh rubbed off of it almost to the bone. He had a broken wrist and toe. He had surgery on his hand, wrist, thumb, and finger, and the injuries required the insertion of a plate, pins, and screws. He was hospitalized for a week and attended physical therapy for two to three months thereafter. While in the trauma center, Sumrell was told that Bell had died in the crash. Sumrell was treated for mental health issues as result of the loss of his fiancée.

¶ 10 Alphin testified that he and Sumrell were driving their motorcycles in a staggered formation, meaning "the person in front of you is on the left. And the person in the back is on the right. You try to give about two to three seconds between each one, so that if something does happen, you have some time to react and you're not crowding." After passing the semi, Alphin told Sumrell to get over. He then told him to stop as the black car came up behind them, cut over to the right lane, and then passed them.

¶ 11 Alphin then saw Defendant "hanging outside the window, flipping me off, coming up at high rate of speed behind me." Defendant "cut me off between me and the eighteen-wheeler. I don't know how close he came to the eighteen-wheeler, but I think it was pretty close." When Defendant got beside Alphin, "he's got his head out the window, he's hollering at me, he's giving me the finger. I turned my radio wide open. I did not say anything to him at all. I just said, '[Sumrell], let this guy go on by . . . he's crazy. Let him go.' " "When he got up beside [Sumrell] and [Bell], he poked his head out. He's got his hand out the window giving him the finger, hollering at him."

¶ 12 Alphin started moving over to the right lane when he saw Defendant's van and trailer "cut hard to the left." Alphin thought the trailer was going to hit Sumrell's motorcycle at that point because "it was that close." Then Defendant "hit the brakes." Alphin testified, "I was running about sixty-five, seventy. And I almost passed them –- . . . I came right up -- when he hit the brakes, I had to hit mine . . . and I saw the brake lights." When Defendant hit the brakes, Sumrell hit his brakes to keep from hitting the U-Haul trailer. Alphin saw Bell fly off the side of the motorcycle and Sumrell going down with the motorcycle.

¶ 13 When Alphin looked up after the crash, Defendant's "van had come to a slow speed. . . . All of a sudden, the van takes off at a high rate of speed." Alphin saw the semi and other cars stopping behind him, so he pursued Defendant to get his license plate number. Defendant continued

on I-40 with Alphin following on his motorcycle. Defendant "was going in-and-out of traffic at high rates of speed. We got over a hundred miles an hour."

¶ 14 Once Alphin caught up to Defendant, Defendant "[l]ooks at me, he smiles, takes his hand off the wheel, he gives me the finger." Defendant then swerved his van and trailer into Alphin's lane twice. Alphin took out his pistol and shot Defendant's tire to keep Defendant from swerving the van at him again.

¶ 15 Alphin called 911 and gave the license plate number of Defendant's van and trailer to the Highway Patrol. Alphin continued to follow Defendant onto I-77, intending to keep Defendant in sight until he was apprehended. But Alphin was advised by the highway patrol officer on the line to turn around and return to the scene of the accident, which he did.

¶ 16 At the time of the crash, Timothy Snook was driving west on I-40 behind the semi. He was about to pass the semi when the motorcycles driven by Sumrell and Alphin passed him in the left lane. He was again about to pass the semi when Defendant, in the white van with the trailer, passed on his left. Defendant's trailer was weaving badly. Snook described the trailer as "open" and not high enough to obstruct vision from the van. He initially stayed behind the semi for fear that he might be hit by the van's weaving trailer.

¶ 17 After passing Snook, Defendant's van also passed the semi and moved into the right lane in front of the semi. Snook then moved into the left lane directly behind the motorcycles to pass the semi. Snook saw that, as Defendant's van passed the motorcyclists on their right, Defendant leaned out of the driver's side window and made the rude gesture at the motorcyclists. In doing so, he stuck his entire arm out of the window. He also stuck his face out of the window and Snook could see his mouth moving, although he could not hear what Defendant was saying. The motorcyclists did not gesture back at Defendant.

¶ 18 Snook saw Defendant's van suddenly swerve left in front of the motorcyclists and saw the van's brake lights come on. Snook saw smoke from the tires of Sumrell's motorcycle due to its brakes being applied. Snook testified that "[t]here was no distance" between Defendant's trailer and Sumrell's motorcycle, and that "[t]here was no choice for that motorcycle." Snook saw Sumrell and Bell go "flying and flipping," and land on the highway. Sumrell's motorcycle went flying in pieces off to the shoulder of the highway and up an embankment. Snook saw Defendant's van speed up, and Alphin's motorcycle giving chase.

¶ 19 Dwayne Haskins was the driver of the semi. Haskins recalled the motorcycles and then the van and trailer passing him, and the motorcycle making contact with the van's trailer, causing both people on the motorcycle to fall onto the roadway. Electronic logs automatically recorded by his semi showed that at the time of the crash, Haskins applied his air brakes and stopped in seven seconds from a speed of 65 miles per hour. While he was braking, Haskins was able to pull his truck off the right edge of I-40 into the emergency lane to avoid hitting the motorcyclists lying in the roadway. The electronic logs showed that Haskins applied his air brakes at 3:57 pm EST.

¶ 20 After stopping his truck, Haskins approached both Sumrell and Bell. Sumrell was able to speak but Bell, who was bleeding from her nose and mouth, was non-responsive. Her breathing was "raspy." Haskins, a former EMT, had someone call 911, and he monitored Bell's breathing until EMS arrived. Bell died within minutes of being taken to the emergency room. Haskins talked to the police officers at the scene and gave them a written statement which reflected that Sumrell's motorcycle and Defendant's trailer had made contact.

¶ 21 Records from Defendant's cellular telephone provider showed that at 3:58:38 p.m., a call was made from Defendant's phone to 911; the call lasted 8 seconds. Defendant's phone then made another call to another number that lasted 10 minutes. The 911 records show the operator answered the call from Defendant's phone and stayed on the line 54 seconds but received no information.

¶ 22 At 4:15 p.m., Defendant pulled into the Towlin Mill One Stop, located at the second exit on I-77 north of I-40. One Stop sells gasoline and groceries, has a restaurant, and rents U-Haul trailers. Defendant, his dog, the van, and the trailer appeared on a video camera at One Stop; the van clearly had a flat tire.

¶ 23 Rick Dowdle, a part-time contractor for U-Haul, was at One Stop when Defendant arrived. When Dowdle asked Defendant what had happened to the tire, Defendant replied that the tire had blown out on I-40. After being told that no one at One Stop could change his tire, Defendant called AAA.

¶ 24 Chris Pritchard, who worked for a towing company that contracts with AAA, was called to One Stop to change Defendant's tire. While talking with Defendant, Defendant asked Pritchard how far it was to Stony Point, and how he could get there without going on the interstate highway.

¶ 25 After changing the tire, Pritchard called his wife and learned of the crash involving the motorcycle on I-40. After seeing a description of the van on social media, and believing he had just changed the tire of a vehicle involved in the fatal crash, Pritchard called law enforcement and provided them with the license tag number of the van. The investigating law enforcement officer got Defendant's name from AAA. Law enforcement was unable to locate Defendant at an address associated with his telephone number, although they found a box on the porch at that address that had been delivered with Defendant's name on it.

¶ 26 On 2 June 2017, law enforcement was contacted by Defendant's attorney. Upon speaking with the attorney, they were told that Defendant's van was at an address in Banner Elk. Officers went to that address and located the van, but not Defendant. Defendant turned himself in to law enforcement on 3 June. The U-Haul trailer had been returned to the U-Haul company.

III. Discussion

A. Sufficient Evidence

¶ 27 **[1]** Defendant first argues that the trial court erred by denying Defendant's motion to dismiss the two charges of felony hit and run, because the State failed to present substantial evidence that Defendant knew, or reasonably should have known, a wreck happened and someone was killed or seriously injured. We disagree.

¶ 28 To survive a motion to dismiss for insufficient evidence, the State is required to present substantial evidence of "(1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense." *State v. Johnson*, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citation omitted). "Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (quotation marks and citations omitted). In reviewing a trial court's denial of a motion to dismiss, we consider the evidence "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004) (citation omitted). "If the evidence presented is circumstantial, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (quotation marks and citations omitted). "Circumstantial evidence may . . . support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citation omitted).

We review a trial court's denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

¶ 29 Pursuant to N.C. Gen. Stat. § 20-166(a), "[t]he driver of any vehicle who knows or reasonably should know: (1) [t]hat the vehicle which he or she is operating is involved in a crash; and (2) [t]hat the crash has resulted in serious bodily injury . . . or death to any person; shall immediately stop [their] vehicle at the scene of the crash" and "remain" until authorized to leave, with a willful violation of this requirement punishable as a Class F felony. N.C. Gen. Stat. § 20-166(a) (2019). " 'Serious bodily injury' is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-32.4 (2019).

¶ 30 The evidence presented at trial, although circumstantial, was sufficient to persuade a rational juror to accept a conclusion that Defendant knew, or reasonably should have known, that the vehicle he was driving was involved in a crash and that someone was killed or seriously injured as a result. Taken in the light most favorable to the State, the evidence tends to show the following: Defendant was driving a white van towing a U-Haul trailer that was "open" and not high enough to obstruct vision from the van. When Defendant passed Snook, Defendant's trailer was weaving badly so Snook stayed behind the semi because he feared he might be hit by Defendant's weaving trailer. Defendant moved into the right lane, squeezing between Alphin's rear tire and the front of the semi. When Defendant passed Alphin, Defendant made a rude gesture out the window as he went by. Similarly, when Defendant passed Sumrell and Bell, Defendant was hanging out of his window, yelling and spitting at Sumrell and Bell, and making obscene gestures in their direction.

¶ 31 As Defendant pulled ahead of Sumrell and Bell, Defendant abruptly swerved into their lane, directly in front of Sumrell and Bell, and "slammed on his brakes." Sumrell "saw [Defendant] in the [driver's side] mirror" of the van, "looking in the mirror, looking at me laughing." Defendant's van and trailer quickly reduced speed directly in front of Sumrell and Bell, forcing Sumrell to apply his brakes so hard that the friction between the pavement and the rubber of the motorcycle's tires generated black smoke.

¶ 32 Sumrell was able to slow down almost enough to miss the trailer, but Defendant released the brakes and then hit them again. This caused

Sumrell's tire to hit the back of the U-Haul or caused his motorcycle to lay down. During Sumrell's attempt to avoid the U-Haul, Bell was thrown from the back of the motorcycle, then Sumrell hit the pavement and slid across the interstate into the right lane. His motorcycle ended up on or beyond the shoulder of the right west-bound lane of I-40.

¶ 33 Immediately after the crash, Defendant's van slowed down. Then, all of a sudden, it took off at a high rate of speed. Approximately one minute after the crash, Defendant called 911 but then did not leave any information. Defendant continued on I-40, cutting in and out of traffic at speeds of up to and above 100 miles per hour, with Alphin following on his motorcycle. When Alphin caught up to Defendant, Defendant again made a rude gesture at Alphin and swerved his van and trailer into Alphin's lane twice. Alphin took out his pistol and shot Defendant's tire to keep Defendant from swerving at him again. When Defendant exited the highway to get his tire fixed, he did not mention to either Dowdle or Pritchard how his tire became flat, and he asked Pritchard for directions to Stony Point without traveling on the highway.

¶ 34 From this evidence the jury could reasonably infer the following: Defendant intentionally swerved his van and trailer directly in front of Sumrell and Bell, while they were on a motorcycle traveling at a speed of 70 miles per hour on the highway; Defendant intentionally "slammed" on his brakes, released them, and then hit them a second time; Defendant was able to maneuver in and out of traffic and, thus, knew where his van and trailer were positioned relative to other vehicles on the road, including Sumrell's motorcycle and Haskin's semi; Defendant was able to see what was going on behind his van and trailer; Defendant caused Sumrell to brake hard to try and avoid the U-Haul; Defendant caused Sumrell's motorcycle to hit the U-Haul or lose control because of the sudden need to brake; Sumrell and Bell flew off the motorcycle and onto the highway in 70-mile-per-hour traffic; Sumrell sustained serious injuries requiring hospitalization, surgery, and continued therapy as a result of the crash; Bell died from injuries sustained as a result of the crash; Defendant slowed down immediately after the crash because he was aware the crash occurred; Defendant then suddenly sped away from the scene of the crash, weaving in and out of traffic at speeds up to and over 100 miles per hour, to avoid getting caught; and Defendant continued to try and avoid detection by not disclosing the cause of his flat tire and trying to avoid going back on the highway. The evidence was sufficient to persuade a rational juror to accept a conclusion that Defendant knew, or reasonably should have known, that the vehicle he was driving was involved in a crash and that someone was killed or seriously injured as a result.

¶ 35 Defendant's challenge to the sufficiency of the evidence essentially rests upon his contention that the evidence could have shown that Defendant could not have seen behind his van and trailer or that there may not have been contact between Sumrell's motorcycle and Defendant's trailer. Thus, Defendant argues, there was insufficient evidence that Defendant knew or reasonably should have known that the vehicle he was operating was involved in a crash or that the crash has resulted in serious bodily injury.

¶ 36 As Defendant acknowledges, however, contact is not required by our statutes in order for an accident to occur. *See* N.C. Gen. Stat. § 20-4.01 (4c) (2019) (A "crash" is defined as "[a]ny event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load. The terms collision, accident, and crash and their cognates are synonymous.") Moreover, it is well settled that the weight and credibility to be afforded the evidence is a matter for determination by the jury rather than a reviewing court. *State v. Moses*, 350 N.C. 741, 767, 517 S.E.2d 853, 869 (1999). Furthermore, even if Defendant could not have seen behind the trailer and even if there was no contact between the motorcycle's front tire and the U-Haul, the circumstantial evidence was nonetheless sufficient to persuade a rational juror to accept a conclusion that Defendant knew, or reasonably should have known, that the vehicle he was driving was involved in a crash and that someone was killed or seriously injured as a result. Defendant's challenge to the sufficiency of the evidence to support his conviction lacks merit. Accordingly, the trial court did not err by denying Defendant's motion to dismiss the charges.

B. Jury Instruction

¶ 37 **[2]** Defendant next argues that the trial court erred by giving the following jury instruction on flight, in accordance with N.C.P.I.—Crim. 104.35:

> The State contends (and the defendant denies) that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of the circumstance is not sufficient, in itself, to establish defendant's guilt.

Defendant argues that allowing the jury to consider flight as evidence of Defendant's consciousness of guilt is inappropriate in the context of a hit and run charge under N.C. Gen. Stat. § 20-166(a), because "leaving

the scene of the offense, which could be considered flight under the challenged instruction, is an essential element of felony hit and run."

¶ 38 We review the trial court's decision to instruct a jury on flight de novo. *State v. Davis*, 226 N.C. App. 96, 98, 738 S.E.2d 417, 419 (2013).

¶ 39 "[A]n instruction on flight is justified if there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *State v. Blakeney*, 352 N.C. 287, 314, 531 S.E.2d 799, 819 (2000) (quotation marks and citations omitted). "Flight is defined as leaving the scene of the crime and taking steps to avoid apprehension." *State v. Bagley*, 183 N.C. App. 514, 520, 644 S.E.2d 615, 620 (2007) (quotation marks and citation omitted). Accordingly, "[m]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991) (citation omitted). Furthermore, "an action that was not part of [a d]efendant's normal pattern of behavior . . . could be viewed as a step to avoid apprehension." *State v. Hope*, 189 N.C. App. 309, 319, 657 S.E.2d 909, 915 (2008) (quotation marks and citation omitted).

¶ 40 First, we disagree with Defendant's assertion that flight is an essential element of felony hit and run under N.C. Gen. Stat. § 20-166(a). According to section 20-166(a), "[t]he driver of any vehicle who knows or reasonably should know: (1) [t]hat the vehicle which he or she is operating is involved in a crash; and (2) [t]hat the crash has resulted in serious bodily injury . . . or death to any person; shall immediately stop his or her vehicle at the scene of the crash" and "remain" until authorized to leave, with a willful violation of this requirement punishable as a Class F felony. N.C. Gen. Stat. § 20-166(a). Accordingly, to establish this offense, the State must show the following: (1) Defendant was driving a vehicle; (2) Defendant knew or reasonably should have known that the vehicle was involved in a crash; (3) Defendant knew or reasonably should have known that the crash resulted in serious bodily injury to or the death of another; (4) Defendant did not immediately stop his vehicle at the scene of the crash; and (5) Defendant's failure to stop was willful. *Id.* In contrast to "flight" in the legal sense, the driver's motive for failing to immediately stop at the crash scene is immaterial. Indeed, a hit and run occurs even if the departing driver is completely without fault in the collision and not subject to "apprehension." *See State v. Smith*, 264 N.C. 575, 577, 142 S.E.2d 149, 151 (1965) ("Absence of fault on the part of the driver is not a defense to the charge of failure to stop."). As to this point of law, Defendant's argument is overruled.

¶ 41 Next, to the extent that Defendant argues that the evidence did not support a flight instruction, we also disagree. Immediately after the crash, Defendant slowed down momentarily and then sped up. He sped away from the crash at over 100 miles per hour, weaving in and out of traffic. Although he dialed 911 and remained on the line for 8 seconds, he failed to speak to the 911 operator. While attempting to get his tire fixed, he avoided a direct question about what had happened to his tire by stating only that it had blown out on I-40. He then asked for directions to Stony Point that did not require traveling on the interstate highway. These facts constitute sufficient "steps to avoid apprehension" to support an instruction on flight. *Cf. State v. Harvell*, 236 N.C. App. 404, 412, 762 S.E.2d 659, 664-65 (2014) (discerning no error in giving flight instruction where the defendant ran from the house he had broken into and was discovered fifteen minutes later on a nearby "dirt road that was . . . 'not a road that people use for traffic' "). Defendant's conduct went well beyond a mere "fail[ure] to immediately stop at the scene of the crash," as required for the offense of hit and run. *Braswell*, 222 N.C. App. at 182, 729 S.E.2d at 702. Accordingly, the trial court did not err by instructing the jury on flight.

IV. Conclusion

¶ 42 The trial court did not err by denying Defendant's motion to dismiss the charges of felony hit and run as the State presented sufficient evidence that Defendant knew, or reasonably should have known, that the vehicle he was driving was involved in a crash and that someone was killed or seriously injured as a result. The trial court did not err by instructing the jury on flight as flight is not an essential element of felony hit and run and the evidence supported a flight instruction.

NO ERROR.

Judges INMAN and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
MICHAEL MAYO MACKE

No. COA20-293

Filed 16 March 2021

1. Search and Seizure—vehicle checkpoint—programmatic purpose—reasonableness of procedures

In a driving while impaired case, the trial court properly denied defendant's motion to suppress after finding, based on sufficient evidence, that the vehicle checkpoint at which defendant was determined impaired, served a valid programmatic purpose—to check for valid driver's licenses and evidence of impairment—and that the procedures used to carry out the checkpoint were reasonable.

2. Constitutional Law—right to travel—vehicle checkpoint—N.C.G.S. § 20-16.3A

In a driving while impaired case, a vehicle checkpoint conducted pursuant to N.C.G.S. § 20-16.3A did not violate defendant's constitutional right to freely travel where the checkpoint was established for a valid public safety reason—to check for legitimate driver's licenses and evidence of impairment.

3. Constitutional Law—equal protection—vehicle checkpoint—N.C.G.S. § 20-16.3A

In a driving while impaired case in which defendant was stopped at a vehicle checkpoint, the statute authorizing the checkpoint, N.C.G.S. § 20-16.3A, did not preclude defendant from raising an equal protection challenge, but nonetheless defendant's right to equal protection of the laws was not violated.

Appeal by defendant from judgment entered 3 December 2019 by Judge William A. Wood II in Macon County Superior Court. Heard in the Court of Appeals 24 February 2021.

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

Grace, Tisdale & Clifton, P.A., by Michael A. Grace, for defendant-appellant.

TYSON, Judge.

¶ 1 Michael Mayo Macke ("Defendant") appeals from a judgment entered upon his guilty plea. We affirm.

I. Background

¶ 2 Troopers from the North Carolina State Highway Patrol ("NCSHP") conducted a checkpoint on "Depot Street" in Macon County, on the evening of 26 August 2016, as a part of a statewide initiative of high-profile traffic monitoring. Officers selected this location on "Depot Street" because of good visibility and sufficient room for vehicles to safely pull off the road.

¶ 3 The troopers stopped every vehicle that approached to request a driver's license and to observe for signs of impairment. The troopers conducted the checkpoint from 11:10 p.m. to 1:30 a.m. Troopers followed the procedures set forth on the NCSHP Checking Station Authorization Form.

¶ 4 Around 11:42 p.m., a black Cadillac SUV driven by Defendant approached the checkpoint. Trooper Jonathan Gibbs approached the vehicle to ask Defendant for his driver's license. As Defendant was looking for his driver's license another car pulled behind Defendant's car. Trooper Gibbs asked Defendant to pull over to the side of the road to continue looking.

¶ 5 After pulling over, Defendant provided his driver's license. Trooper Gibbs noticed "an odor of alcohol coming from [Defendant]'s breath and could see that he had red glassy eyes." Trooper Gibbs asked Defendant if he had any alcohol to drink and Defendant responded, "he had a few about five hours ago." Trooper Gibbs then asked Defendant to step out of his vehicle and go to the front right passenger's side of the vehicle.

¶ 6 When Defendant exited the vehicle, he was unsteady on his feet and used the vehicle to support himself as he was walking around the vehicle. While performing the Walking and Turn test, he missed placing his heel-to-toe four times and used his arms to balance one time on the way out; he performed the turn inconsistent with instructions; and, upon the return, he missed placing his heel-to-toe three times, stepped off the line one time, and took ten steps instead of the nine steps as instructed.

¶ 7 While performing the One Leg Stand Test, Defendant was unable "to keep his foot up longer than three seconds, swayed left and right while balancing, used both arms for balance, and was hopping." Defendant was unable to touch the tip of his nose with the tip of his finger in the

Finger to Nose test. Finally, while performing the Romberg Balance Test, Defendant swayed back and forth two or more inches and estimated 49 seconds instead of 30 seconds as instructed.

¶ 8 Trooper Gibbs reported while Defendant was in the patrol car being transported to jail, Defendant stated he had about $2,000 in cash on him and offered it to Trooper Gibbs if the officer would let him go. Defendant submitted to the Intox EC/IR II intoximeter, which registered a blood alcohol reading of .10.

¶ 9 Defendant was indicted for offering a bribe and driving while impaired on 14 May 2018. Defendant filed a motion to suppress evidence from the checkpoint, arguing the checkpoint violated his Fourth Amendment rights and NCSHP departmental guidelines. Defendant also argued N.C. Gen. Stat. § 20-16 (2019) was facially invalid and violated the "fundamental right to travel"; violated "Defendant's Constitutional right to equal protection of the laws pursuant to the Privileges or Immunities Clause and the Equal Protection Clause, which are guaranteed by the Fourteenth Amendment to the United States Constitution" on 28 October 2019.

¶ 10 Defendant also filed a motion to dismiss based upon vindictive prosecution on 18 November 2019. The trial court denied both motions. The trial court noted Defendant's objections to the motion to suppress. Defendant pleaded guilty to driving while impaired. The charge of offering a bribe was dismissed. Defendant was sentenced to a term of 120 days in custody, which was suspended. He was placed on 18 months of unsupervised probation. Defendant's driver's license was revoked and he was ordered to pay costs, fees, and fines totaling $1,085.00. Defendant appeals the preserved denial of his motion to suppress.

II. Jurisdiction

¶ 11 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 15A-979(b) (2019).

III. Issues

¶ 12 Defendant argues: (1) the creation and operation of the checkpoint was not a valid exercise of the State's police power; (2) N.C. Gen. Stat. § 20-16.3A violates the fundamental right to travel pursuant to the Privileges or Immunities Clause; (3) N.C. Gen. Stat. § 20-16.3A violates the Equal Protection Clause; and, (4) in light of the unconstitutionality of N.C. Gen. Stat. § 20-16.3A the trial court erred in denying his motion to suppress.

IV. Standard of Review

¶ 13 Our Supreme Court has held:

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. However, when . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

V. Programmatic Purpose

¶ 14 **[1]** Defendant contends the checkpoint did not serve a valid programmatic purpose, was an invalid exercise of the State's police power, and constituted an unreasonable search in violation of Defendant's rights under the Fourth and Fourteenth Amendments. U.S. Const. amend. IV & XIV.

¶ 15 The Supreme Court of the United States, the North Carolina Supreme Court, and this Court have held the Fourth Amendment's reasonableness standard for a search or seizure is to be based upon either consent or individualized suspicion. *See Terry v. Ohio*, 392 U.S. 1, 20-21, 20 L. Ed. 2d 889, 905-06 (1968); *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012); *State v. Veazey*, 191 N.C. App. 181, 184, 662 S.E.2d 683, 686 (2008). The Supreme Court of the United States has recognized an exception to this requirement for roadside checkpoints without consent or an individualized suspicion, provided the purpose of the checkpoint is legitimate and the procedures surrounding the checkpoint are reasonable. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561-62, 49 L. Ed. 2d 1116, 1130-31 (1976).

¶ 16 Our Court has held: "a checkpoint with an invalid primary purpose, such as checking for illegal narcotics, cannot be saved by adding a lawful secondary purpose to the checkpoint, such as checking for intoxicated drivers." *Veazey*, 191 N.C. App. at 185, 662 S.E.2d at 686. To evaluate the legitimacy of a checkpoint, a two-part inquiry is required.

¶ 17 "First, the court must determine the primary programmatic purpose of the checkpoint." *Id.* The checkpoint must be aimed at addressing a "specific highway safety threat" and not for general crime control. "[C]heckpoints primarily aimed at addressing immediate highway safety threats can justify the intrusions on drivers' Fourth Amendment privacy interests occasioned by suspicionless stops." *Id.* If the police have a general crime control aim, an individualized suspicion must exist. *Id.* (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42, 148 L. Ed. 2d 333, 343-44 (2000) (checkpoint with a primary purpose of finding illegal narcotics held unconstitutional)). The Supreme Court of the United States stated valid "specific highway safety threats" to support legitimate checkpoints include finding intoxicated drivers, checking for valid driver's licenses, and verifying vehicle registrations. *Michigan State Police v. Sitz*, 496 U.S. 444, 455, 110 L. Ed. 2d 412, 423 (1990); *Delaware v. Prouse*, 440 U.S. 648, 663, 59 L. Ed. 2d 660, 673-74 (1979).

¶ 18 "Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint, that does not mean the stop is automatically, or even presumptively, constitutional. It simply means that the court must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances." *Veazey*, 191 N.C. App. at 185-86, 662 S.E.2d at 686-87 (citation omitted). A court must weigh "[(1)] the gravity of the public concerns served by the seizure, [(2)] the degree to which the seizure advances the public interest, and [(3)] the severity of the interference with individual liberty." *Id.* at 186, 662 S.E.2d at 687 (citing *Illinois v. Lidster*, 540 U.S. 419, 427-28, 157 L. Ed. 843, 852-53 (2004)).

¶ 19 The State presented testimony of Troopers Jonathan Gibbs and David Williams at the hearing on the motion to suppress. They testified they and several other officers conducted a traffic checkpoint with the prior approval of their superior officer on the day of the offense. Trooper Williams testified to how the checkpoint was set up, the procedures and duration of the checkpoint, how the stops would be conducted, and why they had changed locations. During the checkpoint, a patrol car had its blue lights active at all times.

¶ 20 Trooper Williams further testified how the checkpoint location changed approximately every thirty minutes to avoid identification of the checkpoint on the mobile direction application Waze. Through Troper Williams' testimony, the State showed the troopers' compliance with the NCSHP policy on traffic checkpoints, and the prior authorization for the checking station. This testimony was admitted into evidence without Defendant's objection.

¶ 21 Based on this and other evidence presented at the hearing, the trial court denied Defendant's motion to suppress. The trial court found the purpose of the checkpoint was "to check each driver for a valid driver's license and evidence of impairment." The trial court concluded: (1) this was a valid and constitutional programmatic purpose; (2) the checkpoint was subject to a detailed plan and not spontaneous; (3) the location and time span were reasonable; (4) the interference with the public was minimal; and, (5) Defendant's rights were not violated by the manner in which the checkpoint was conducted.

¶ 22 Defendant asserts the troopers changing the location of the checkpoint throughout the evening is not a programmatic purpose. However, this change was planned prior to and was contained in the authorization of the plan by Trooper Williams' supervisors. Unlike the facts in *State v. Rose*, 170 N.C. App. 284, 291-97, 612 S.E.2d 336, 341-44 (2005), cited by Defendant, wherein officers admitted there was not an established plan before the checkpoint was set up and narcotics detectives were involved in the operation of the checkpoint, here, the troopers stopped every vehicle that entered the checkpoint, as the plan outlined. No narcotics officers or drug dogs were present on the scene, and no drug test kits were implemented on the scene. Troopers moved to another location based upon a plan after a set duration.

¶ 23 Based upon the troopers' testimony, the trial court properly determined the programmatic purpose of the checkpoint was to check for a valid driver's license and for evidence of impairment. The court further found these purposes were valid programmatic purposes, which were reasonable under the circumstances. The trial court correctly made all requisite findings necessary to support its ultimate conclusion. The trial court did not err in denying Defendant's motion to suppress on the basis of the checkpoint's programmatic purpose. Defendant's argument is overruled.

VI. Right to Travel

¶ 24 **[2]** Defendant argues N.C. Gen. Stat. § 20-16.3A violates the right to travel pursuant to the Privileges or Immunities Clause. U.S. Const. amend. XIV, § 1. Our Supreme Court held: "The police power of the State is broad enough to sustain the promulgation and fair enforcement of laws designed to restore the right of safe travel by temporarily restricting all travel, other than necessary movement reasonably excepted from the prohibition." *State v. Dobbins*, 277 N.C. 484, 499, 178 S.E.2d 449, 458 (1971) (city declaring a state of emergency and imposing a city-wide curfew with specified exceptions for emergencies and necessary travel is a valid exercise of the police power).

¶ 25 The checkpoint at issue was established with the express purpose of finding and deterring traffic violations and impaired drivers, both of which are valid public safety concerns. This authority was established by our General Assembly in N.C. Gen. Stat. § 20-16.3A, which authorizes the creation of traffic checkpoints for such purposes. A traffic checkpoint, with a purpose to discover and deter traffic violations, which does not stop travel altogether and only delays travel for a few moments, does not violate the right to free travel. N.C. Gen. Stat. § 20-16.3A is presumed to be constitutional, and Defendant has failed to show a violation of his constitutional rights. *Id.*

¶ 26 The trial court did not err in holding the checkpoint did not violate Defendant's constitutional right to freely travel and properly denied Defendant's motion to suppress on this basis.

VII. Equal Protection

¶ 27 **[3]** Defendant argues N.C. Gen. Stat. § 20-16.3A is drafted to make it difficult to establish the discriminatory intent required to show a violation of the Equal Protection Clause. U.S. Const. amend. XIV, § 1.

¶ 28 Defendant cites N.C. Gen. Stat. § 20-16.3A(d), which provides: "The placement of checkpoints should be random or statistically indicated, and agencies shall avoid placing checkpoints repeatedly in the same location or proximity. This subsection shall not be grounds for a motion to suppress or a defense to any offense arising out of the operation of a checking station." N.C. Gen. Stat. § 20-16.3A(d). Defendant asserts N.C. Gen. Stat. § 20-16.3A(d) disallows any and all challenges to equal protection in violation of the Equal Protection Clause. U.S. Const. amend. XIV, § 1.

¶ 29 The previous subsection of the same statute, N.C. Gen. Stat. § 20-16.3A(c), provides: "Law enforcement agencies may conduct any type of checking station or roadblock as long as it is established and operated in accordance with the provisions of the United States Constitution and the Constitution of North Carolina." Contrary to Defendant's assertions, N.C. Gen. Stat. § 20-16.3A(d) allows a defendant to challenge a checkpoint under both the Constitution of the United States and the North Carolina Constitution.

¶ 30 The trial court did not err in holding the checkpoint did not violate Defendant's constitutional right to equal protection of the laws and by denying Defendant's motion to suppress. Defendant's arguments are overruled.

VIII. Constitutionality

¶ 31 Here, as before the trial court, Defendant asserts N.C. Gen. Stat. § 20-16.3A is unconstitutional, the checkpoint was unlawful, and the trial court erred in denying his motions to suppress and dismiss. As we have held the checkpoint had a valid programmatic purpose, the statute did not violate Defendant's right to free travel. The statute did not violate Defendant's rights under the Privileges or Immunities and the Equal Protection Clauses of the Fourteenth Amendment. U.S. Const. amend. XIV, Defendant's argument is dismissed.

IX. Conclusion

¶ 32 The trial court property concluded the checkpoint had a valid programmatic purpose. N.C. Gen. Stat. § 20-16.3A does not violate Defendant's right to free travel nor the Equal Protection Clause. The trial court properly denied Defendant's motion to suppress. The judgment entered upon Defendant's guilty plea is affirmed. *It is so ordered.*

AFFIRMED.

Judges COLLINS and WOOD concur.

STATE OF NORTH CAROLINA
v.
RODNEY STOKLEY, JR.

No. COA20-177

Filed 16 March 2021

1. Kidnapping—second-degree—removal—not inherent to commission of accompanying robbery

In a trial for offenses arising from a home invasion and armed robbery, the State presented sufficient evidence to support a conviction for second-degree kidnapping where defendant gestured with a gun at the victim to move, they went into another room, and the victim was told to get down on the floor. The movement of the victim occurred before the victim was robbed and was not an essential part of the robbery. Further, the victim's removal exposed him to greater danger by putting him in close proximity when defendant shot the victim's roommate.

2. Kidnapping—second-degree—jury instructions—omission of confinement—basis alleged in indictment

In a trial for offenses arising from a home invasion and armed robbery, the trial court's error in instructing the jury on a theory of second-degree kidnapping that was not alleged in the indictment—whereas defendant was charged with the offense based on confinement, the instructions referred to restraint or removal—did not rise to plain error where there was no reasonable possibility that, absent the error, a different verdict would have been reached, given the substantial evidence against defendant under any theory.

Judge MURPHY concurring in result only.

Appeal by defendant from judgments entered 30 July 2019 by Judge Wayland J. Sermons, Jr. in Pasquotank County Superior Court. Heard in the Court of Appeals 12 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Richard J. Constanza for defendant-appellant.

TYSON, Judge.

¶ 1 Rodney Stokley, Jr. ("Defendant") appeals from judgments entered after a jury returned verdicts finding him guilty of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and second-degree kidnapping. Defendant seeks this Court's review of the ruling on his motion to dismiss the charge of second-degree kidnapping, and to award a new trial for unpreserved plain error in the jury instructions. We find no error.

I. Background

¶ 2 Clinton Saunders ("Saunders") was playing video games in his dark bedroom and was wearing noise-canceling headphones on 11 December 2017. Earlier that evening, Damon Williams ("Williams"), Rasheem Williams ("Rasheem") and Rodney Stokley ("Defendant") planned to rob Saunders' roommate, Jordan Baeza ("Baeza"). As Saunders played video games, a tall, unidentified man, later identified as Defendant, came into Saunders' room, brandished a gun, and motioned for him to move. Saunders walked to the living room, "assuming that is where I was supposed to go" with his hands up. Saunders testified, "[h]e told me to get on the ground, so I just laid face down."

¶ 3 Saunders was not tied up or placed in restraints. He recalled two men were inside the house with him at the time. One man was already in the living room, and the other man was behind him, holding a gun. Nothing was taken or removed from Saunders at the time he was taken from his bedroom into the living room or immediately thereafter.

¶ 4 Soon after Saunders had laid onto the floor, Baeza entered the house from the garage and said, "D.J. what the hell?" Defendant was hovering over Saunders, pointing the gun at him, and then pointed the gun at Baeza. Defendant looked at Baeza and said, "What's up, buddy?" and told Baeza to get onto the floor. Saunders testified he heard one of the perpetrators say, "Where is it, where is it[?]" and heard footsteps walking around the house.

¶ 5 Saunders testified he heard Baeza tell the men that Saunders had nothing to do with this and to not hurt him. The perpetrators responded they would not harm Saunders. Initially, Baeza got onto the kitchen floor, but then attempted to escape. As he fled, Defendant shot Baeza in the back.

¶ 6 Saunders heard the gunshot, felt the heat from the discharge, and could "hear blood coming out." Baeza testified Defendant spoke to him after he had shot him. While this was occurring, Baeza told the robbers where he kept his money. Williams began "ransacking" Baeza's room and took his wallet. Someone rifled through Saunders' pockets and took his cellphone. The intruders left the residence. Saunders realized Baeza had been shot and drove him to the hospital, where Baeza underwent several surgeries.

¶ 7 Police officers took initial statements from Baeza and Saunders at the hospital. In a later interview, Baeza told police it was Defendant, who had shot him. Baeza came to this conclusion after looking at Defendant's Facebook social media page. Baeza testified he was "One-hundred percent" sure that Defendant had shot him.

¶ 8 Defendant was arrested on 2 January 2018 and charged with assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, first-degree kidnapping, and second-degree kidnapping.

¶ 9 The Pasquotank County Grand Jury returned true bills of indictment charging Defendant with the offenses listed above on 26 February 2018. The second-degree kidnapping indictment alleged Defendant "unlawfully, willfully, and feloniously did kidnap Clinton Saunders . . . by unlawfully confining him without his consent and for

the purpose of facilitating the commission of a felony, Robbery with a Dangerous Weapon."

¶ 10 Williams entered into a plea bargain with the State. He pled guilty to assault with a deadly weapon with intent to kill inflicting serious injury and was placed on supervised probation for 48 months. One condition of this probation required him to testify for the State at Defendant's trial.

¶ 11 Williams testified his nickname is D.J. and that he had invited Rasheem to join him to "get some money" from Baeza. Rasheem then invited Defendant to join them. Williams knew both of these men prior to this event. He drove Rasheem and Defendant to Baeza's home the night of the robbery. Williams testified he dropped Rasheem and Defendant off prior to entering Baeza's driveway, "[b]ecause we were trying to find a way in" the house to "rob him."

¶ 12 Defense counsel argued both kidnapping charges should be dismissed, contending the victims were not restrained to a degree over that inherent during the underlying robbery. The trial court dismissed the charge of first-degree kidnapping related to Baeza but the trial court denied dismissing the second-degree kidnapping charge related to Saunders.

¶ 13 Defendant testified in his own defense. He denied having any involvement in the kidnapping, robbery and shooting. He asserted he was attending a memorial service for a deceased family member when the robbery and shooting occurred.

¶ 14 The trial court instructed the jury on second-degree kidnapping. The trial court did not instruct the jury on the confinement theory of kidnapping, as was alleged in the indictment. Defense counsel failed to raise an objection to this omission.

¶ 15 The jury found Defendant guilty of second-degree kidnapping, assault with a deadly weapon inflicting serious injury, and robbery with a dangerous weapon. Defense counsel moved to arrest judgment on the conviction for second-degree kidnapping of Saunders, and renewed the arguments previously made. The trial court denied the motion and proceeded to sentencing.

¶ 16 Defendant was sentenced to 29 to 47 months of imprisonment for assault with a deadly weapon inflicting serious injury and 73 to 100 months of imprisonment to run consecutively to the assault sentence for robbery with a dangerous weapon. For second-degree kidnapping, Defendant was sentenced to 29 to 47 months imprisonment, which was suspended, Defendant was placed on supervised probation for 36

months, to commence after he completed the terms of active imprisonment. Defendant entered notice of appeal in open court.

II. Jurisdiction

¶ 17 This Court possesses jurisdiction from an appeal from a final judgment entered in a criminal case following a jury's return of guilty verdicts. N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issues

¶ 18 Defendant argues the trial court erred in denying his motion to dismiss the charge of second-degree kidnapping, after the State failed to show Saunders was subjected to restraint other than what was inherent in the underlying robbery. Defendant also argues, without objection and preservation, the trial court committed plain error when instructing the jury on second-degree kidnapping. He asserts the instructions allowed the jury to return a conviction based on theories other than what was alleged in the indictment.

IV. Second-Degree Kidnapping

A. Standard of Review

¶ 19 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). In evaluating the sufficiency of the evidence, the reviewing court examines the evidence in the light most favorable to the State, giving the State all reasonable inferences. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000). This Court must determine whether substantial evidence supports each element of the offense and that the defendant committed the offense. *State v. Jones*, 110 N.C. App. 169, 177, 429 S.E.2d 597, 602 (1993), *disc. review denied*, 336 N.C. 612, 447 S.E.2d 407 (1994). Substantial evidence is defined as evidence a reasonable mind might accept as adequate to form a conclusion. *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

B. Analysis

¶ 20 **[1]** Defendant argues the conviction for second-degree kidnapping should be reversed because none of the actions supporting that offense were separate and apart from the accompanying robbery. Defendant asserts his actions amounted to a mere technical asportation of Saunders, who was not exposed to any greater danger than what occurred during the underlying robbery.

¶ 21 The State acknowledges, "[T]his is a very tangled area of the law. The Courts are all over the place."

> [T]here is consistency in the Courts' opinions where the evidence tended to show that a victim was bound and physically harmed by the robbers during the robbery. Clearly that type of restraint creates the kind of danger and abuse the kidnapping statute was designed to prevent. The case law does not provide a bright line rule for situations where a victim is merely ordered to move to another location while the robbery is taking place, but is not bound or physically harmed.

State v. Payton, 198 N.C. App. 320, 327-28, 679 S.E.2d 502, 506-07 (2009) (internal citations and quotation marks omitted).

¶ 22 Kidnapping in North Carolina is statutorily defined as:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> . . .
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person

> kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39(a)-(b) (2019).

1. State v. Fulcher

¶ 23 Our Supreme Court announced the rule concerning prosecutions for kidnapping and other offenses that involve the victim being restrained to some degree in *State v. Fulcher*:

> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. G. S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. . . . [W]e construe the word "restrain" . . . to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

State v. Fulcher, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978) (Lake, Sr. J).

¶ 24 "Restraint or removal is inherently an element of some felonies, such as armed robbery." *State v. Raynor*, 128 N.C. App. 244, 250, 495 S.E.2d 176, 180 (1998). In cases involving armed robbery, "the restraint, confinement or removal required of the crime of kidnapping, has to be something more than that restraint inherently necessary for the commission of [armed robbery]." *Id.* Consistent with the holding in *Fulcher*, our Supreme Court later added: "To permit separate and additional punishment where there has been only a technical asportation, inherent in the other offense perpetrated, would violate a defendant's constitutional protection against double jeopardy." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981).

2. State v. Boyce

¶ 25 The facts before us are similar to those in *State v. Boyce*, 361 N.C. 670, 651 S.E.2d 879 (2007). In *Boyce*, the defendant forced his way into the victim's house, chased her through her home, and pulled her back into the house by her shirt as she tried to escape. The defendant threat-

ened the victim at gunpoint and only left after she gave him a check for two hundred dollars. Our Supreme Court reiterated, "[w]hen . . . the kidnapping offense is a whole separate transaction, completed before the onset of the accompanying felony, conviction for both crimes is proper." *Id.* at 673, 651 S.E.2d at 881. Because the defendant prevented her escape, "[t]his restraint and removal was a distinct criminal transaction that facilitated the accompanying felony offense and was sufficient to constitute the separate crime of kidnapping under North Carolina law." *Id.* at 674, 651 S.E.2d at 882.

3. State v. Stokes

¶ 26 Our Supreme Court further explored double jeopardy issues in the context of a kidnapping and armed robbery prosecution in *State v. Stokes*, 367 N.C. 474, 756 S.E.2d 32 (2014). The Court noted:

> When we consider whether kidnapping and armed robbery charges may be sustained simultaneously, we look to whether the victim was *exposed to greater danger* than that inherent in the commission of the underlying felony or whether the victim was subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.

Id. at 481, 756 S.E.2d at 37 (emphasis supplied) (citations and quotation marks omitted).

¶ 27 Here, Saunders was restrained and removed at gunpoint from one place to another prior to the shooting and robbery of Baeza. His removal and restraint occurred to further the perpetrators' goal of keeping Saunders and eventually Baeza in one location while they searched for money. Defendant continued to point a gun at Saunders and Baeza until he had shot Baeza and the robbers had finished ransacking the home. After the perpetrators searched the home, they stole Saunders' cellphone and Baeza's wallet, and left Saunders to care for the wounded Baeza. Saunders' asportation from one room to another room in his home occurred against his will at gunpoint, and the perpetrators did not take anything from Saunders at that time.

4. State v. Payton

¶ 28 In *Payton*, the victims were subjected to a home-invasion burglary and armed robbery. 198 N.C. App. at 320, 679 S.E.2d at 502. One victim noticed her jewelry had been disturbed. *Id.* at 321, 679 S.E.2d at 503. The victims exited the bathroom and discovered three perpetrators walking toward them, and one was holding the victim's kaleidoscope. *Id.* The

victims were ordered into a bathroom, and immediately asked where money was kept. *Id.* The victims told the perpetrators they had money in the women's purses downstairs. *Id.* Two robbers went to find their purses, while the third remained outside the bathroom door. *Id.* This Court reversed the defendant's kidnapping convictions, finding the restraint and removal of the victims was "an inherent part of the robbery and did not expose the victims to a greater danger than the robbery itself." *Id.* at 328, 679 S.E.2d at 507.

¶ 29 Unlike the victims in *Payton*, Saunders was not immediately robbed when he was restrained and removed from one room to another at gunpoint. While Saunders was on the floor, Defendant continued to hold him at gunpoint, shot Baeza, and then rifled through Saunders' pockets and robbed him of his cellphone. The gunshot was so close, Saunders testified he could feel the heat from the discharge and hear Baeza's blood trickling. Saunders' asportation had already occurred, he was confined, restrained, and his movements were restricted prior to and in a clear break apart from the armed robbery. The removal was distinct from his confinement in the living room, and Saunders was exposed to "greater danger" by the shooting of Baeza which took place prior to the armed robbery of Saunders' cellphone and Baeza's wallet. *Stokes*, 367 N.C. at 481, 756 S.E.2d at 37.

V. Kidnapping: Reversed

¶ 30 "To permit separate and additional punishment where there has been only a technical asportation, inherent in the other offense perpetrated, would violate a defendant's constitutional protection against double jeopardy." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981).

¶ 31 In *Irwin*, the defendant was convicted of first-degree kidnapping after the State's evidence supported a finding an accomplice forced one victim at knifepoint to walk from her position near the cash register to the back of the store. *Id.* During this time, shots were fired at a second victim near the front of the store. The second victim died as a result of his injuries. *Id.* at 97, 282 S.E.2d at 443. The first victim was not touched or further restrained. *Id.* at 103, 282 S.E.2d at 446. Our Supreme Court held the "movement occurred in the main room of the store," and the first victim's "removal to the back of the store was an inherent and integral part of the attempted armed robbery." *Id.* "To accomplish defendant's objective of obtaining drugs it was necessary that [the victim] go to the back of the store to the prescription counter and open the safe." *Id.* Our Supreme Court held the victim's "removal was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense." *Id.*

¶ 32 The movement of the victim in *Irwin* was essential to the robbery because the victim was required to open the safe. *Id.* Unlike the case before us, the movement of Saunders was not inherent or essential to complete the robbery.

¶ 33 In *State v. Ripley*, the defendant and accomplices forced a motel clerk to return to the check-in counter while they, at gunpoint, added victims entering the motel by forcing them to lie upon the floor for the duration of the robbery. *State v. Ripley*, 360 N.C. 333, 334-35, 626 S.E.2d 289, 290-91 (2006). Our Supreme Court held "defendant's actions constituted only a mere technical asportation of the victims which was an inherent part of the commission of robbery with a dangerous weapon." *Id.* at 341, 626 S.E.2d at 294 (internal quotations omitted).

¶ 34 The facts in *Ripley* differ from the case before us. The victims in *Ripley*, were held at gunpoint in one room while the perpetrators attempted their robbery. *Id.* In this case, Saunders was alone in his dark bedroom and consumed in playing games with headphones, and Defendant forced him to move through the home into the living room at gunpoint. Saunders was further held at gunpoint while Defendant inquired about the money, shot Baeza, searched the house, and robbed both victims.

¶ 35 In *Ripley*, our Supreme Court recognized a victim exposed to a greater danger may support a separate kidnapping conviction, but that determination was "unnecessary" to its conclusion. *Id.* In contrast, Saunders was exposed to a greater danger by being in close proximity when Baeza was shot.

¶ 36 The trial court correctly denied Defendant's motion to dismiss the second-degree kidnapping charge. We find no error in the Defendant's conviction for second-degree kidnapping in addition to the conviction for robbery with a dangerous weapon.

VI. Plain Error

A. Standard of Review

¶ 37 **[2]** Defense counsel failed to raise an objection to the omission of a jury instruction on "confinement." Because Defendant did not object to the jury instructions, this Court reviews unpreserved instructional errors using the plain error standard of review. *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012). Establishing plain error requires proof that the error was fundamental and had a probable impact on the jury's guilty verdict. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). For plain error to be found, it must be probable, not just possible, that absent

the instructional error, the jury would have returned a different verdict. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

B. Analysis

1. Disjunctive Factors

¶ 38 The second-degree kidnapping indictment alleged Defendant kidnapped Saunders by "unlawfully confining him" for the purpose of committing robbery with a dangerous weapon. The trial court instructed the jury that the Defendant would be guilty of second-degree kidnapping if they concluded:

> First, the defendant unlawfully restrained the person. That is, restricted his freedom of movement or removed a person from one place to another.
>
> Second, that the person did not consent to the restraint or removal. Consent induced by fraud or fear is not consent.
>
> Third, that the defendant removed or restrained that person for the purpose of facilitating his commission of the felony or robbery with a dangerous weapon.
>
> Fourth, that this restraint or removal was a separate and complete act, independent of and apart from the robbery with a dangerous weapon.

¶ 39 The first element of kidnapping requires the State to prove Defendant "confine[d], restrain[ed], or remove[d]" the victim. N.C. Gen. Stat. § 14-39(a). These are discrete legal terms, having different meanings, and are stated disjunctively. "This Court has held that where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. 'or'), the application of the statute is not limited to cases falling within both classes, but will apply to cases falling within either of them." *State v. Small*, 201 N.C. App. 331, 341, 689 S.E.2d 444, 450 (2009) (alteration, citations and internal quotation marks omitted). Proof of either "confined," "restrained," or "removed," satisfies the statute.

¶ 40 "As used in [N.C. Gen. Stat. §] 14-39, the term 'confine' connotes some form of imprisonment within a given area, such as a room, a house or a vehicle." *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351. "The term 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force,

threat or fraud, without a confinement." *Id.* Our Supreme Court further explains a victim, "by the threatened use of a deadly weapon, is restricted in his freedom of motion, is restrained within the meaning of this statute." *Id.*

¶ 41 A removal requires some asportation of the victim, although a specific distance or duration is not required. *Id.* at 522, 243 S.E.2d at 351 (citations omitted).

2. Indictment Differing from Jury Instructions

¶ 42 Defendant relies on *State v. Bell* to support his contention the indictment and jury instruction were in error. In *Bell*, the issue before this Court was whether the trial court erred in a jury instruction that differed from the indictment. "The indictment against defendant . . . alleged both confinement and restraint, but did not allege removal." *State v. Bell*, 166 N.C. App. 261, 263, 602 S.E.2d 13, 15 (2004). The trial court instructed the jury "they could convict defendant on the theory of either restraint or removal." *Id.* The jury found the defendant guilty, but the verdict form did not indicate which theory the jury found. *Id.* "Our Supreme Court has held that such a variance between the indictment and the jury charge constitutes error. Whether this error constitutes plain error depends on the nature of the evidence introduced at trial." *Id.* (citations omitted).

¶ 43 In *Bell*, this Court explained this error is highly fact sensitive and based on which theory is misrepresented and what the facts tend to show. *Id.* This Court explains further:

> In *State v. Gainey*, the indictment charged on the theory of removal, but the judge instructed the jury on the theories of restraint and removal. *State v. Gainey*, 355 N.C. 73, 94, 558 S.E.2d 463, 477, *cert. denied*, 537 U.S. 896, 154 L.Ed.2d 165 (2002). Our Supreme Court held that "[t]he evidence in the case *sub judice* is not highly conflicting," and found there to be no plain error. *Id.* at 94-95, 558 S.E.2d at 477-78.

Id. at 263-64, 602 S.E.2d at 15. In *Bell*, the evidence of how the victim was restrained or removed was highly disputed, and this Court held the instructional error constituted plain error. *Id.* at 265, 602 S.E.3d at 16.

¶ 44 The facts before us are similar to the facts in *Gainey*. Defendant was indicted under one theory and convicted of second-degree kidnapping after the jury received instructions on other theories, rather than just those alleged in the indictment.

¶ 45 The State presented evidence tending to show Saunders' confinement, restraint and removal by Defendant. Defendant illegally entered Saunders' home, entered his bedroom and motioned at gunpoint for Saunders to move from his bedroom to the living room. Defendant followed Saunders to the living room while still holding him under gunpoint. That action alone meets the statutory definition of "confine." *See Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351. Defendant stood over Saunders with a gun pointed at him prior to and throughout the duration of the shooting of Baeza and the armed robbery of Saunders. This removal and restraint included all the meanings of confine. *Id.*

¶ 46 Defendant does not show a probability that a reasonable jury would have found Saunders was removed and restrained but was not confined. As noted above, "[t]he term 'restrain' while *broad enough to include a restriction upon freedom of movement by confinement*, connotes also such a restriction, by force, threat or fraud, without a confinement." *Id.* (emphasis supplied).

¶ 47 Substantial evidence supports Defendant's conviction for kidnapping under the theory of confinement, restraint, or removal. The trial court should have properly instructed the jury on confinement, but the failure to instruct on "confinement" under these facts does not rise to the level of plain error. "We cannot conclude that had the trial court instructed the jury that the defendant had to 'confine' the victim to be guilty . . . this would have tilted the scales in favor of defendant." *Gainey*, 355 N.C. at 95, 558 S.E.2d at 478.

¶ 48 It is not probable that absent the instructional error, the jury would have returned a different verdict. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Defendant has failed to show probability of a different result under plain error review in the jury instruction as given to award a new trial. "The evidence shows that defendant confined, restrained and removed the victim . . . there is no reasonable basis for us to conclude that any different combination of the terms 'confine,' 'restrain' or 'remove' . . . would have altered the result." *Gainey*, 355 N.C. at 95, 558 S.E.2d at 478.

VII. Conclusion

¶ 49 The trial court correctly denied Defendant's motion to dismiss the second-degree kidnapping charge. The jury properly concluded beyond a reasonable doubt that Saunders' restraint was separate and distinct from the armed robbery, and that he was exposed to "greater danger" in addition to what occurred during the robbery from his person with a dangerous weapon. *Stokes*, 367 N.C. at 481, 756 S.E.2d at 37.

¶ 50 Defendant has failed to show plain error in the jury instruction to warrant a new trial. Defendant received a fair trial, free from prejudicial errors he preserved and argued. *It is so ordered.*

NO ERROR.

Judge HAMPSON concurs.

Judge MURPHY concurs in result only.

MURPHY, Judge, concurring in result only.

¶ 51 While I arrive at the same result as the Majority in upholding Defendant's convictions for robbery with a dangerous weapon and second-degree kidnapping, I write separately to note my vehement disagreement with the Majority's discussion of removal, restraint, and confinement that it relies on in holding "No Error."[1] *Supra* at ¶ 49-50.

¶ 52 Kidnapping is defined in part as follows:

> (a) Any person who shall unlawfully *confine*, *restrain*, *or remove* from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .

1. Under prior naming practices of this Court, I would have referred to my vote as "dissenting in part, and concurring in the judgment." *See Lippard v. Holleman*, 844 S.E.2d 591, 611 (N.C. App.) (McGee, C.J., *concurring in part, dissenting in part, and concurring in the judgment*), *appeal dismissed*, *disc. rev. denied*, 847 S.E.2d 882 (N.C. 2020). However, through its recent order in *Lippard*, 847 S.E.2d 882 (N.C. 2020), our Supreme Court has made clear that although a judge of this Court is opposed to the reasoning and analysis of a majority opinion, it is not proper to entitle the same as a dissent and such an opinion does not confer an appeal of right in accordance with N.C.G.S. § 7A-30(2). *See* N.C.G.S. § 7A-30 (2019) ("[A]n appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case: . . . . (2) In which there is a dissent when the Court of Appeals is sitting in a panel of three judges."). To the extent that I misconstrue the Supreme Court's recent order regarding the applicability of N.C.G.S. § 7A-30(2), I dissent.

> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; . . .
>
> . . .
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). . . . If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C.G.S. § 14-39(a)-(b) (2019) (emphasis added). Under N.C.G.S. § 14-39(a), the State is required to prove a victim was "confine[d], restrain[ed], or remove[d]" by a defendant. As the Majority correctly notes, "[t]hese are discrete legal terms, having different meanings, and are stated disjunctively." *Supra* at ¶ 39. The Majority, however, conflates removal with confinement and restraint throughout its Double Jeopardy analysis and upholds Defendant's punishments for convictions of robbery with a dangerous weapon and second-degree kidnapping. *Supra* at ¶ 25, 31-32, 44-47. Most glaringly, the Majority inappropriately mixes the theory of confinement with the theory of removal in its discussion of *State v. Irwin* and *State v. Boyce*. *Supra* at ¶ 25, 30-32. This analysis is not supported by the statutes, caselaw, dicta, or, most importantly, past analyses of the application of plain error in binding precedent from this Court and our Supreme Court.

¶ 53 The Majority unconvincingly attempts to distinguish this case from *State v. Irwin*, where our Supreme Court held the trial court erred in denying the defendant's motion to dismiss the kidnapping charge. *Supra* at ¶ 30-32; *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981), *not followed as dicta on other grounds*, *State v. Greene*, 329 N.C. 771, 408 S.E.2d 185 (1991). In *Irwin*, although the defendant was indicted on kidnapping the victim on the theory of removal and restraint, the Supreme Court only analyzed the facts under the removal theory as it was the only theory provided by the trial court for the jury's consideration. *Id.* at 101, 282 S.E.2d at 445 ("[The] [d]efendant assigns as error the trial court's denial of his motion to dismiss the charge of kidnapping. This assignment has merit. The indictment charges [the] defendant with kidnapping [the victim] by removing her from one place to another and restraining her for the purpose of facilitating an armed robbery. The trial judge instructed the jury on the element of removal only, thus withdrawing the issue of restraint from jury consideration. Our discussion, there-

fore, will be limited to the meaning of the phrase 'remove from one place to another' as used in [N.C.G.S. §] 14-39(a)."). The victim was forced at knifepoint to walk toward the back of the store to obtain drugs from the prescription counter. *Id.* at 103, 282 S.E.2d at 446. "During this time two shots were fired by [the] defendant at the front of the store, causing [his accomplice] to flee. [The victim] was not touched or further restrained. All movement occurred in the main room of the store." *Id.* Our Supreme Court held this removal "was an inherent and integral part of the attempted armed robbery[]" because it was necessary "[t]o accomplish [the] defendant's objective of obtaining drugs . . . ." *Id.*

¶ 54 The Majority holds this case is different from *Irwin* because Defendant's *removal* of Saunders was not necessary to complete the convicted armed robbery, and therefore was not an inherent part of the robbery. *Supra* at ¶ 32. However, the indictment here provides Defendant kidnapped Saunders only by "unlawfully confining him"; whereas, the defendant in *Irwin* was indicted on removal and restraint and convicted on only the theory of removal. Based on the language in the indictment, our focus must remain on whether the circumstances surrounding the victim's confinement, not his removal from the bedroom, was inherent in the convicted armed robbery.

¶ 55 In *State v. Boyce*, the defendant broke into the victim's home, chased her, and prevented the victim's escape by dragging her back into her home before the onset of the robbery with a dangerous weapon. *State v. Boyce*, 361 N.C. 670, 671, 651 S.E.2d 879, 880-81 (2007). The defendant was indicted for kidnapping on the theories of confinement, restraint, and removal. *Id.* at 671-72, 651 S.E.2d at 881. Our Supreme Court held the restraint and removal were separate from the accompanying felony "and was sufficient to constitute the separate crime of kidnapping under North Carolina law." *Id.* at 674, 651 S.E.2d at 882. However, the defendant in *Boyce* was indicted for kidnapping based on confinement, restraint, and removal. *Id.* at 671-72, 651 S.E.2d at 881. Here, we cannot rely on the holding in *Boyce* even if the evidence supports a consideration that Saunders was removed prior to his confinement because Defendant was only indicted on a theory of confinement and therefore confinement is the only appropriate theory to consider for the motion to dismiss.

¶ 56 Later, in its analysis of plain error, the Majority reasons "[t]his removal and restraint included all the meanings of confine." *Supra* at ¶ 45. However, the Majority again strays from the issue before us of whether the jury probably would have returned a different verdict had they been instructed only on confinement. *See State v. Lawrence*, 365 N.C. 506, 507, 723 S.E.2d 326, 327 (2012). Confinement does not equate to removal.

Removal is a distinct term that differs from restraint and confinement. *See State v. Fulcher*, 294 N.C. 503, 522-23, 243 S.E.2d 338, 351 (1978) (holding removal does not require movement for a substantial distance, and " 'confine' connotes some form of imprisonment within a given area . . . . The term 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement."). These differences were clearly contemplated by the General Assembly given its use of the different terms to identify theories of kidnapping within N.C.G.S. § 14-39(a). *See State v. Small*, 201 N.C. App. 331, 342, 689 S.E.2d 444, 450 (2009) ("The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute."); *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) ("It is well established that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.").

¶ 57 Equating removal to confinement, as the Majority has, goes against our binding precedent and jurisprudence. In numerous kidnapping cases we, along with our Supreme Court, have engaged in a plain error analysis regarding the theories of kidnapping. *See State v. Tucker*, 317 N.C. 532, 536-37, 346 S.E.2d 417, 420 (1986) (holding plain error where the jury was instructed on restraint, a theory not charged in the indictment); *State v. Lucas*, 353 N.C. 568, 588, 548 S.E.2d 712, 726 (2001) (holding error, but not plain error, where the trial court failed to instruct on the theory of confinement alleged in the indictment but rather instructed the jury on the theory of removal), *overruled in part on other grounds*, *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006); *State v. Clinding*, 92 N.C. App. 555, 562-63, 374 S.E.2d 891, 895 (1989) (holding no plain error where the indictment alleged removal and confinement but the jury was instructed on restraint); *State v. Smith*, 162 N.C. App. 46, 51-53, 589 S.E.2d 739, 743-744 (2004) (holding plain error where the indictment alleged removal but the trial court instructed the jury on confinement, restraint, or removal). If the Majority was correct, then there would be no difference between confinement, restraint, and removal under N.C.G.S. § 14-39(a), and plain error analysis would be unnecessary when a trial court instructs the jury on a theory not alleged in the indictment. Accordingly, given the Majority's conflation of removal, restraint, and confinement, I cannot concur with its analysis and reasoning.

¶ 58 While I could not disagree more with the Majority's chosen path in reaching the result of no error and no plain error, I also conclude the trial court did not err in denying Defendant's motion to dismiss and erred, but did not commit plain error in instructing the jury on removal and restraint where the indictment only referred to confinement.

¶ 59 The Majority has accurately presented the facts of this case and the standards of review. *Supra* ¶ 2-16, 19, 37. As for Defendant's motion to dismiss, the evidence taken in the light most favorable to the State demonstrates that not only was Saunders the victim of the indicted and convicted armed robbery whereby his pockets were rifled through and his cell phone was taken as the assailants left, he was also a victim of an earlier attempted robbery whereby the assailants confined him on the floor while they attempted to discern the location of Baeza's large sums of money and take the money by force.

¶ 60 There was substantial evidence the armed robbery of Saunders' cell phone was a distinct crime from the earlier attempted armed robbery of Baeza's large sums of money. During this initial attempted armed robbery, Saunders was "confin[ed] . . . without his consent and for the purposes of facilitating the commission of a felony, [r]obbery with a [d]angerous [w]eapon" as indicted. The import of N.C.G.S. § 14-39(a)(2) is that the confinement was done in facilitating any felony and, although the initial attempted armed robbery seeking Baeza's large sums of money was not completed, it may serve as the predicate felony for second-degree kidnapping as indicted. *See State v. Cole*, 199 N.C. App. 151, 160, 681 S.E.2d 423, 429 ("[A] defendant need not be convicted of the underlying felony in order to be convicted of kidnapping."), *disc. rev. denied*, 363 N.C. 658, 686 S.E.2d 679 (2009), *cert. denied*, 368 N.C. 605, 780 S.E.2d 833 (2015). Nothing in the trial court's unchallenged jury instructions limited the jury's consideration of kidnapping to the confinement during the later armed robbery of Saunders' cell phone from his pocket. In the light most favorable to the State, substantial evidence was offered as to the commission of the second-degree kidnapping during a separate attempted armed robbery from the convicted armed robbery. Under these circumstance, Defendant's punishment for convictions of both robbery with a dangerous weapon and second-degree kidnapping under the theory of confinement do not violate Double Jeopardy and the trial court did not err in denying his motion to dismiss.

¶ 61 Turning to Defendant's argument as to plain error, I agree the trial court's instruction was in error and did not accurately track the grand jury's indictment. Our courts have been presented with this issue several times and, in considering whether the error amounts to plain error, we

must first determine whether "the jury probably would have returned a different verdict had the error not occurred." *Lawrence*, 365 N.C. at 507, 723 S.E.2d at 327. Here, this issue is complicated by the consideration of confinement and the potential impact on Defendant's right to be free from Double Jeopardy. As discussed above, there was substantial evidence from which the jury could determine Defendant confined Saunders during the first attempted armed robbery of Baeza's money, as well as the subsequent armed robbery of Saunders' cell phone from his pocket. This evidence defeats the proposition "the jury probably would have returned a different verdict" had the trial court properly instructed the jury only on confinement. *Id*. Further, in an attempt to show a probably different verdict had the error not occurred, Defendant argues his alibi testimony demonstrates the State's case was not overwhelming. Defendant's reliance on this evidence is misplaced as the jury rejected his alibi defense when it found him guilty of armed robbery, a conviction not substantively challenged on appeal. The trial court's error does not amount to plain error as the evidence here does not permit us to conclude "the jury probably would have returned a different verdict had the error not occurred." *Id*.

¶ 62 I respectfully concur in the result only.

STATE OF NORTH CAROLINA
v.
DALLAS ROBERT WALTERS

No. COA20-440

Filed 16 March 2021

1. Appeal and Error—preservation of issues—challenges to sufficiency of the evidence—criminal cases

Defendant's act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review. Thus, defendant's motion to dismiss drug trafficking charges based upon a defect in the chain of custody preserved the issue of the insufficiency of the evidence.

2. Drugs—possession—sufficiency of evidence—flight from police—drugs found along flight path

Where police found two bags of heroin on the driver's side of the roadway along the three-to-five-mile route on which defendant

fled in his vehicle but the State failed to present evidence connecting defendant to the heroin, there was insufficient evidence to convict defendant of trafficking heroin by possession and transportation. The scales, baggies, and syringes found inside his vehicle raised only a suspicion of his connection to the heroin.

Appeal by defendant from judgment entered 11 February 2020 by Judge Claire V. Hill in Union County Superior Court. Heard in the Court of Appeals 24 February 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott Slusser, for the State.

Richard Croutharmel for defendant-appellant.

TYSON, Judge.

¶ 1 Dallas Robert Walters ("Defendant") appeals from judgment entered upon a jury's conviction of two counts of trafficking heroin. We reverse the trial court's denial of Defendant's motion to dismiss and remand.

I. Background

¶ 2 Union County Sheriff's deputies were waiting at a shopping center parking lot in Monroe on 12 December 2018. Defendant was known by the officers to be driving while his license was revoked. The officers were present to conduct surveillance on Defendant. The record does not disclose the basis upon which officers were investigating Defendant or how they knew he would be there at that time and place.

¶ 3 The officers waited for a specific black Honda Accord vehicle driven by Defendant. The Honda Accord was not registered to Defendant, but he arrived at the shopping center driving the vehicle with a passenger riding in the front seat. Several officers attempted to stop Defendant's car with their vehicles' lights and sirens activated.

¶ 4 Defendant remained inside the vehicle, weaved around the police cars, and drove away. Detective Gross was located outside of his car with his gun drawn and narrowly avoided being hit by Defendant's car.

¶ 5 Defendant fled from the parking lot onto Highway 37. Officers gave pursuit, which persisted for three to five miles. The vehicles reached speeds of ninety to one hundred miles per hour. Defendant hit the rear of a pickup truck, wrecking the vehicle, and ending the car chase.

¶ 6 After the collision, Defendant's vehicle veered off the highway. Defendant fled from the scene on foot. After a short chase, he was apprehended.

¶ 7 Officers searched Defendant's vehicle and recovered a backpack containing digital scales, syringes, and small plastic bags. Between thirty and forty-five minutes after the chase ended and while Defendant was in custody, officers found two small plastic bags containing a "black tar substance" on the side of the highway roughly one hundred yards from where the car chase had begun in the shopping center parking lot. One plastic bag contained 1.69 grams of heroin, and the other contained 2.97 grams of heroin.

¶ 8 The bags of heroin were found along the route Defendant had taken during the chase on the driver's side of the road, but they were located "completely off of the roadway." None of the officers testified they saw Defendant, or his passenger throw anything from the car.

¶ 9 Defendant made a motion to dismiss the two charges of trafficking heroin at the conclusion of the State's evidence. Defendant argued a defect existed in the chain of custody of the evidence. He moved to dismiss the charges of trafficking by possession and by transportation as they purportedly arose from "the same act."

¶ 10 The jury convicted Defendant of trafficking in heroin by transportation, trafficking in heroin by possession, two counts of assault with a deadly weapon on a government official, eluding arrest with greater than three aggravating factors, and resisting a public officer. Defendant's sentences for trafficking in heroin by transportation and trafficking in heroin by possession were consolidated for judgment. Defendant was sentenced to an active sentence of 70 to 93 months with 39 days credit for pre-trial detention.

¶ 11 Defendant's convictions for two counts of assault with a deadly weapon of a government official, eluding arrest with greater than three aggravating factors, and resisting a public officer were consolidated for judgment. Defendant was sentenced to an active sentence of 25 to 39 months to run consecutive to his sentence for the trafficking convictions. Defendant appealed.

II. Jurisdiction

¶ 12 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

III. Preservation

¶ 13 **[1]** The State argues Defendant failed to preserve the issue for appellate review when he moved to dismiss the charges based upon a defect in the chain of custody, rather than for insufficiency of the evidence.

¶ 14 "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, *stating the specific grounds for the ruling the party desired* the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (emphasis supplied); *see State v. Hamilton*, 351 N.C. 14, 20-21, 519 S.E.2d 514, 519 (1999) (("On appeal, defendant, for the first time, argues testimony was offered for impeachment purposes. Because defendant failed to make this argument at trial, he cannot swap horses between courts in order to get a better mount[.]") (internal quotation marks and alterations omitted) (citing *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount.")).

¶ 15 "In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at trial." N.C. R. App. P. 10(a)(3).

¶ 16 Our Supreme Court recently held Rule 10(a)(3) does not require a defendant to assert a specific ground for a motion to dismiss for insufficiency of evidence. *State v. Golder*, 374 N.C. 238, 245-46, 839 S.E.2d 782, 788 (2020). "Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." *Id.*

¶ 17 The Supreme Court further stated, "under Rule 10(a)(3) and our case law, defendant's simple act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review." *Id.* at 246, 839 S.E.2d at 788. Based upon our Supreme Court's recent holding in *Golder*, Defendant preserved the argument on appeal. *See id.*

IV. Standard of Review

¶ 18 "We review the trial court's denial of a motion to dismiss *de novo*. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Battle*, 253 N.C. App. 141, 143, 799 S.E.2d 434, 436, *writ denied*, *review denied*, 369 N.C. 756, 799 S.E.2d 872 (2017) (internal citation and quotation marks omitted).

¶ 19 In ruling upon a motion to dismiss for insufficiency of the evidence,

> the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. All evidence, competent or incompetent, must be considered. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. In its analysis, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

State v. Bradshaw, 366 N.C. 90, 92-93, 728 S.E.2d 345, 347 (2012) (internal citation and quotation marks omitted).

¶ 20 "It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue." *Battle*, 253 N.C. App. at 144, 799 S.E.2d at 437 (internal quotations and citations omitted). If the evidence proves "only a suspicion of possession," and fails to show evidence substantial enough to submit the case to the jury, the motion to dismiss must be granted. *State v. Acolatse*, 158 N.C. App. 485, 486, 581 S.E.2d 807, 808 (2003); *see State v. Chavis*, 270 N.C. 306, 306-09, 154 S.E.2d 340, 341-43 (1967).

V. Sufficiency of the Evidence

¶ 21 **[2]** In his sole argument on appeal, Defendant does not challenge the trial court's ruling on his chain of custody argument, which he abandons, but argues the trial court erred by denying his motion to dismiss the charges of trafficking heroin by transportation and possession. Defendant asserts the State presented insufficient evidence tending to show he possessed the two bags of heroin found on the side of the road. We agree.

¶ 22 The offense of trafficking heroin "has two elements: (1) knowing possession (either actual or constructive) of (2) a specified amount of heroin." *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987); *see also* N.C. Gen. Stat. § 90-95(h)(4)(b) (2019).

¶ 23 Possession of a controlled substance may be actual or constructive. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002).

¶ 24 The Supreme Court of North Carolina has held "constructive possession is sufficient" to prove a defendant possessed a controlled substance. *McLaurin*, 320 N.C. at 146, 357 S.E.2d at 638. "Constructive possession occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the substance." *Acolatse*, 158 N.C. App. at 488, 581 S.E.2d at 810 (internal quotes and citations omitted).

¶ 25 "[U]nless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Tisdale*, 153 N.C. App. 294, 297, 569 S.E.2d 680, 682 (2002). Here, Defendant had no drugs, currency, weapon on his person or in his vehicle, and was not physically present at the site where the drugs were found. The State must demonstrate "other incriminating circumstances" to raise an inference of constructive possession. *Id.*

¶ 26 The State asserts Defendant's flight from the parking lot, the drug paraphernalia found in Defendant's car, and the fact that the drugs were packaged in such a way that is consistent with illegal drug sales is sufficient evidence of circumstances to infer Defendant's constructive possession in the light most favorable to the State.

¶ 27 The State did not lay a foundation for the reason the officers were at the shopping center parking lot observing Defendant and did not in any manner, either from him or his vehicle, connect Defendant to the heroin recovered. Other than the fact that the two bags of heroin were recovered on the side of the roadway along the three-to-five-mile route of the chase, no evidence was presented to connect Defendant to the heroin recovered.

A. *State v. Chavis*

¶ 28 Our Supreme Court held a motion for judgment of nonsuit should have been allowed even where the "evidence raise[d] a strong suspicion as to defendant's guilt[.]" *Chavis*, 270 N.C. at 311, 154 S.E.2d at 344. In *Chavis*, officers observed the defendant wearing a gray felt hat and followed him closely for several blocks. The officers lost sight of the defendant for "two or three seconds" and later searched him. *Id.* at 307, S.E.2d at 342. During the search, the defendant was not wearing a hat nor in possession of any contraband. *Id.* Thirty minutes later, officers found a hat of the same kind the defendant had been observed wearing with marijuana in its crown. *Id.* Our Supreme Court held the State failed to show sufficient evidence of constructive possession to sustain the defendant's conviction. *Id.*

B. *State v. Acolatse*

¶ 29 In *Acolatse*, officers chased the defendant on foot and saw him make a throwing motion toward some bushes. *Acolatse*, 158 N.C. App. at 488, 581 S.E.2d at 810. While the officers failed to find drugs in those bushes, they recovered drugs from a nearby roof, which was located "in a different direction from the bushes." *Id.* at 490, 581 S.E.2d at 811. This Court held that money found on the defendant "in denominations consistent with the sale of controlled substances" and the defendant's throwing motion observed by the officers were not sufficient "other incriminating circumstances" to infer constructive possession to survive a motion to dismiss. *Id.* at 489, 581 S.E.2d at 810.

C. *State v. Henry*

¶ 30 In *State v. Henry*, cited by the State, the police officer observed the suspect with a closed and clinched fist during a traffic stop. *State v. Henry*, 237 N.C. App. 311, 314, 765 S.E.2d 94, 97 (2014). Following a scuffle, the officer found the contraband in an area where the scuffle had taken place. *Id.* at 320, 765 S.E.2d at 101. Our Court held the "close juxtaposition" was sufficient to survive the motion to dismiss. *Id.*

¶ 31 Here, unlike *Henry*, the State failed to show Defendant was ever in such "close juxtaposition" to the recovered heroin. He merely drove by the site where the heroin was found during the three-to-five-mile chase. *Id.*

¶ 32 The State failed to show any evidence concerning the length of time the heroin was on the side of the road or condition of the packaging. The State also failed to show any connection between the heroin and

Defendant, or between the heroin and the items recovered from the search of the Honda Accord.

¶ 33 When the evidence is viewed in the light most favorable to the State, the bags of heroin were found on the driver's side of the road approximately one hundred yards from the area where the car chase started. Inside Defendant's vehicle, officers found scales, baggies, and syringes. Officers did not observe Defendant throw anything from the window while driving during the chase. Defendant was not in control of the area where the drugs were found, and there is no evidence connecting the bags of heroin to Defendant or to the vehicle he was driving. Without further incriminating circumstances to raise an inference of constructive possession, the State has failed to demonstrate substantial evidence that Defendant possessed the controlled substance.

¶ 34 Following *Chavis* and *Acolatse*, and distinguishing *Henry*, we hold the State failed to present substantial evidence of trafficking heroin by possession and transportation to survive a motion to dismiss. The evidence presented was a "mere scintilla," and only raised the suspicion of Defendant's connection to the heroin. *Battle*, 253 N.C. at 144, 799 S.E.2d at 437. The trial court erred in denying Defendant's motion to dismiss.

VI. Conclusion

¶ 35 With the issue preserved for appellate review, and after viewing the evidence in the light most favorable to the State, this evidence is not substantial evidence tending to show Defendant constructively possessed the heroin. The trial court erred by denying Defendant's motion to dismiss the charges of trafficking heroin by transportation and trafficking heroin by possession.

¶ 36 Defendant's convictions for two counts of assault by a deadly weapon on a government official, eluding arrest with greater than three aggravating factors, and resisting a public officer were not appealed. The consolidated judgment and sentence entered thereon remains undisturbed.

¶ 37 The trial court's judgment is reversed on the consolidated charges of trafficking heroin by possession and trafficking heroin by transportation. This matter is remanded to the trial court for entry of an order granting Defendant's motion to dismiss and for any required resentencing. *It is so ordered.*

REVERSED AND REMANDED.

Judges COLLINS and WOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 MARCH 2021)

CRAWFORD v. TOWN OF SUMMERFIELD 2021-NCCOA-73 No. 20-328	Guilford (19CVS5975)	Affirmed
CROSLAND v. PATRICK 2021-NCCOA-74 No. 19-713-2	Mecklenburg (15E2702)	Affirmed
IN RE B.T. 2021-NCCOA-75 No. 20-366	Pitt (18JA62)	Vacated and Remanded
IN RE J.N. 2021-NCCOA-76 No. 20-296	Forsyth (18J56) (18J57)	Vacated and Remanded
IN RE S.O. 2021-NCCOA-77 No. 20-348	Beaufort (18JA4)	Affirmed
NICHOLS v. UNITED PAINTING SERVS. 2021-NCCOA-78 No. 20-443	N.C. Industrial Commission (16-760689)	Affirmed
STATE v. BENNER 2021-NCCOA-79 No. 19-879	Davidson (17CRS50138) (17CRS50165)	NO ERROR IN PART AND DISMISSED IN PART.
STATE v. GREEN 2021-NCCOA-80 No. 20-394	New Hanover (17CRS57366-68)	Dismissed
STATE v. GUERRERO-AVILA 2021-NCCOA-81 No. 20-297	New Hanover (17CRS51521-22)	Affirmed
STATE v. HARRIS 2021-NCCOA-82 No. 19-1124	Durham (16CRS53549-50)	No Error
STATE v. KENNINGTON 2021-NCCOA-83 No. 20-419	Wayne (19CRS50117)	Affirmed

STATE v. MILLER 2021-NCCOA-84 No. 20-225	Forsyth (18CRS52962-63)	No Error.
STATE v. ROBINSON 2021-NCCOA-85 No. 20-429	Onslow (17CRS55741)	No Error
STATE v. SHEPARD 2021-NCCOA-86 No. 19-1012	Carteret (16CRS055856) (17CRS000844)	No plain error
STATE v. WATTS 2021-NCCOA-87 No. 20-158	Columbus (11CRS52181-84)	APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI GRANTED; NO ERROR.
TAYLOR v. TAYLOR 2021-NCCOA-88 No. 20-426	Randolph (16CVD2533)	Vacated and Remanded.
UNITED CMTY. BANK v. WAKEFIELD MISSIONARY BAPTIST CHURCH 2021-NCCOA-89 No. 20-335	Wake (19CVS9973)	Dismissed