287 N.C. App.—No. 2 Pages 222-395

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 26, 2023

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

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OF
NORTH CAROLINA

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[1]Resigned 31 December 2022. [2]Term ended 31 December 2022. [3]Term ended 31 December 2022. [4]Sworn in 1 January 2023.
[5]Sworn in 1 January 2023. [6]Sworn in 1 January 2023.

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COURT OF APPEALS

CASES REPORTED

FILED 29 DECEMBER 2022

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Notice of appeal—timeliness—fourteen-day period—Defendant timely appealed the revocation of his probation where he filed his written notice of appeal within the fourteen-day period allowed by Appellate Rule 4. Although the trial court rendered its decision at the hearing on 30 April 2021, the entry of the order was delayed until 24 May 2021 when it was filed with the clerk of court; therefore, defendant's filing of his written notice of appeal on 25 May 2021 (one day after entry of the order) was timely. **State v. Boyette, 270.**

Petition for writ of certiorari—record on appeal—failure to include judgment—Defendant's petition for a writ of certiorari challenging the trial court's order of attorney fees, which defendant alleged was issued months after his criminal trial and without notice or the opportunity to be heard, was denied because defendant failed to include the attorney fees judgment in the record on appeal. **State v. Hester, 282.**

APPEAL AND ERROR—Continued

Preservation of issues—constitutional argument—waiver—plain error review— In a prosecution for multiple drug-related charges, where several police officers testified that defendant remained silent during a search of his vehicle, defendant waived appellate review—including plain error review—of his argument that the testimony's admission violated his Fifth Amendment rights, given that defendant did not raise this constitutional objection at trial. Even if plain error review had been available on appeal, defendant failed to show that, but for the testimony, the jury probably would have reached a different verdict. **State v. Wilkins, 343.**

Preservation of issues—criminal defendant's right to competency hearing—statutory—constitutional—waiver—In a prosecution for multiple drug-related charges, where the trial court entered a pretrial order requiring the State to submit defendant for a competency evaluation but where the evaluation never took place, defendant failed to preserve for appellate review his argument that the court erred in proceeding to trial without the evaluation or a competency hearing. Defendant waived his statutory right to a competency hearing (under N.C.G.S. § 15A-1002) by failing to assert it at trial, and he conceded on appeal that his nonwaivable constitutional right to a competency hearing was not at issue. Further, defendant's main argument on appeal—that the statutory right should be treated as nonwaivable in cases where a trial court orders an evaluation or otherwise inquires into a defendant's competency—was rejected. **State v. Wilkins, 343.**

Preservation of issues—special jury instruction—failure to submit request in writing—In a prosecution for felonious speeding to elude arrest, where defense counsel orally requested that the jury be instructed that the specific duty the officer was performing was to arrest defendant for discharging a firearm into an occupied vehicle, the request was for a deviation from the pattern jury instruction and therefore qualified as a request for a special instruction. Because the request for a special instruction was made orally rather than submitted in writing, the issue was not preserved for appellate review. Further, defendant waived plain error review by failing to allege plain error. **State v. McVay, 293.**

Preservation of issues—variance between indictment and jury instructions—plain error not alleged—In a prosecution for solicitation to commit first-degree murder, defendant failed to preserve for appellate review his argument that the trial court erred by denying his motion to dismiss, which defendant premised on his assertion that there was a fatal variance between the indictment language and the jury instructions. Where defendant's argument amounted to a jury instruction challenge, but he failed to allege plain error on appeal after having not objected to the alleged error at trial, the issue was subject to dismissal. **State v. Norris, 302.**

CITIES AND TOWNS

Condemnation—direct constitutional claims—subject matter jurisdiction—failure to exhaust administrative remedies—adequate state remedy—In an action raising direct claims under the state constitution, in which plaintiffs alleged that defendant city violated their rights to equal protection and due process by condemning plaintiffs' properties and marking them for demolition, the trial court lacked subject matter jurisdiction to hear the claims because plaintiffs had not exhausted their administrative remedies first, and they had an adequate state remedy available to them under N.C.G.S. §§ 160A-430 and 160A-393 (allowing, respectively, direct appeal of the city's decision to the city council and certiorari review by the superior court). **Askew v. City of Kinston, 222.**

privilege are "disputes between the parties to the action" and therefore fall under the jurisdiction of the court where the underlying foreign suit is pending, pursuant to N.C.G.S. § 1F-6. **Wright Constr. Servs., Inc. v. Liberty Mut. Ins. Co., 386.**

EASEMENTS

Abandonment—fence—lack of use—unequivocal act showing clear intention to abandon—In an easement dispute, there were no genuine issues of material fact as to whether plaintiff had abandoned the disputed easement where there was no evidence of any unequivocal act by plaintiff showing a clear intention to abandon the easement. Although the former owner of the servient estate had constructed a fence across the easement (to address a potential issue between the dogs living on both properties) and plaintiff had not used the easement for a long time, these facts, standing alone, were insufficient to meet the criteria for abandonment. **Carolyn Louise Gunn Testamentary Tr. v. Bumgardner, 231.**

Obstruction of easement—permanent injunction—balancing of equities—trial court's discretion—In an easement dispute, the Court of Appeals noted the inconsistency in the case law in cases involving the obstruction of an easement and announced two principles: first, that a trial court may, in its discretion, enter a permanent injunction prohibiting a party from obstructing another party's easement (and is not required to balance the equities or consider the hardships to the parties); second, that the trial court may, in its discretion, consider the balance of the equities or the relative hardship to the parties in fashioning a permanent injunction if the court finds it appropriate to do so. Here, where the trial court issued a permanent injunction ordering defendants to remove any trees, shrubs, or fencing interfering with the easement, the Court of Appeals vacated the permanent injunction and remanded the matter to ensure that the trial court would have the opportunity to apply the principles announced in the opinion. **Carolyn Louise Gunn Testamentary Tr. v. Bumgardner, 231.**

Scope—unambiguous language—ingress and egress—pedestrians and vehicles—An easement's language providing "a non-exclusive and perpetual easement for the purposes of ingress and egress to and from" plaintiff's property unambiguously permitted plaintiff's use of the easement by any common means of transportation that could travel along the easement, including by pedestrians and vehicles. The 18-foot width of the easement also supported this conclusion. Extrinsic factors pointed to by defendants, such a telephone pole, roadside curb, and other obstructions making it difficult or impractical for vehicles to use the easement, did not render the easement's language ambiguous. **Carolyn Louise Gunn Testamentary Tr. v. Bumgardner, 231.**

EVIDENCE

Authentication—child protective services records—public records—need for live witness testimony—misapprehension of the law—At a hearing on a mother's motion to modify child custody based on allegations that the father sexually abused the children, the trial court—acting under an apparent misapprehension of the law—abused its discretion by excluding a set of Child Protective Services (CPS) records on grounds that no witness was present to authenticate them, without first determining whether they constituted public records under Evidence Rule 902(4), which does not require authentication by live witness testimony. Because it was unclear from the hearing transcript whether the court excluded the records

solely on its flawed authentication basis or whether it had also considered the documents' admissibility as public records under Rules 902(4) or 803(8), the matter was remanded for a new hearing so that the court could review the CPS records and so that the parties could present full arguments on their admissibility. **Kozec v. Murphy, 241.**

Lay opinion testimony—identification of defendant in surveillance footage— In a prosecution for discharging a weapon into an occupied property and inflicting serious injury, the trial court did not abuse its discretion in admitting lay opinion testimony by three officers identifying defendant as the shooter in the surveillance footage of the crime. Given that the officers had had previous encounters with defendant before viewing the footage, that defendant's appearance had changed between the night of the crime and defendant's trial, and that the quality of the surveillance video itself was poor, there was a rational basis for concluding that the officers were more likely than the jury to correctly identify defendant as the individual shown in the footage. **State v. Taylor, 333.**

Solicitation to commit murder—drawings and notes of weapons—testimony from people on defendant's "kill list"—more probative than prejudicial—In a trial for solicitation to commit first-degree murder, the trial court did not err by admitting a collection of defendant's drawings and notes depicting the comic book villain the Joker as well as a variety of weapons, or by admitting testimony from eleven of the thirteen people on defendant's "Kill List" and from a relative of a twelfth person on the list. Both types of evidence were admissible under Evidence Rule 403 where, even though they undeniably posed a risk of prejudice to defendant, they were nonetheless more probative than unfairly prejudicial regarding defendant's state of mind and the specificity of defendant's plan to hurt real people. **State v. Norris, 302.**

Solicitation to commit murder—drawings and notes of weapons—testimony from people on defendant's "kill list"—relevance—In a trial for solicitation to commit first-degree murder, the trial court did not err by admitting a collection of defendant's drawings and notes depicting the comic book villain the Joker as well as a variety of weapons, or by admitting testimony from eleven of the thirteen people on defendant's "Kill List" and from a relative of a twelfth person on the list. Both types of evidence were admissible as being relevant under Evidence Rules 401 and 402 because they shed light on defendant's state of mind at the time of his message exchange with his girlfriend, with whom he discussed wanting to kill people, and on whether he possessed the specific intent to have solicited her to commit first-degree murder. **State v. Norris, 302.**

FIREARMS AND OTHER WEAPONS

Discharging a weapon into an occupied property inflicting serious injury—defendant as perpetrator—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss two counts of discharging a weapon into an occupied property inflicting serious injury, where the evidence included surveillance footage showing a man approaching the victim's home until he disappeared off-screen; debris flying on-screen moments later; and the man returning to his vehicle and driving off while pointing an object at the home twice, making a flash appear on-screen each time. The surveillance footage—along with several .40 caliber rounds recovered near the home and police testimony identifying defendant as the man shown in the footage—all supported a reasonable inference that defendant

fired the shots that struck the victim. Although another man could be seen on video pointing a gun at the house, the footage suggested that the gun failed to fire at all. **State v. Taylor, 333.**

Possession at a demonstration—specific location an essential element—statement of charges insufficient—amendment improper—Defendant's conviction under N.C.G.S. § 14-277.2(a) for possession of a firearm at a protest over the removal of a Confederate monument at a county courthouse was vacated where the misdemeanor statement of charges lacked an essential element of the offense because it described defendant's conduct as occurring "at a demonstration" but failed to state the specific type of location. Supplementary materials—including incident reports that gave the address and described the location as being on the side of a road—did not sufficiently specify that the firearm possession occurred at a private health care facility or public place as required by statute. Since the original pleading was defective for failure to include an essential element, the trial court erred by allowing the State to amend the statement of charges at trial; only amendments that do not change the nature of the offense are permissible. **State v. Reavis, 322.**

HOMICIDE

Solicitation to commit first-degree murder—sufficiency of evidence—The State presented substantial evidence of each element of solicitation to commit first-degree murder to overcome defendant's motion to dismiss, including that defendant counseled, enticed, or induced his girlfriend to commit a crime in a lengthy message exchange over social media by mentioning multiple times that he intended to kill and that, as his sidekick, she would also have to hurt and kill. Further, even though defendant's girlfriend did not know he had a "Kill List," the crime of solicitation does not require that the solicitor communicate all the details of the plan to the listener, and the evidence was sufficient to show that he intended to solicit her to commit first-degree murder through premeditation and deliberation. **State v. Norris, 302.**

LANDLORD AND TENANT

Implied warranty of habitability—failure to inspect gas furnace—fit and habitable condition—In an action brought by plaintiff tenant against defendant landlord after being severely injured in a gas explosion that occurred in the rental house, the trial court erred by granting summary judgment in favor of defendant on plaintiff's breach of implied warranty of habitability claim. Plaintiff forecast sufficient evidence that the defective gas pipe that caused the explosion was observable upon reasonable inspection and raised a genuine issue of material fact regarding whether defendant's failure to inspect or maintain any part of the premises in the more than eleven years that plaintiff and his family lived in the house met defendant's obligations under the city housing code and the Residential Rental Agreements Act to maintain the premises in a fit and habitable condition. **Terry v. Pub. Serv. Co. of N.C., Inc., 362.**

Residential Rental Agreements Act claim—breach of duty of care—failure to inspect gas furnace—The trial court erred by granting summary judgment in favor of defendant landlord on plaintiff tenant's claim under the Residential Rental Agreements Act (RRAA), which plaintiff asserted after being severely injured by a natural gas explosion that occurred in the rental house. Plaintiff's evidence raised a genuine issue of material fact regarding whether defendant breached the statutory duty of care to maintain the premises in a fit and habitable condition by failing to adequately maintain the natural gas furnace and piping in the house. **Terry v. Pub. Serv. Co. of N.C., Inc., 362.**

N.C. COURT OF APPEALS
2023 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	9 and 23
February	6 and 20
March	6 and 20
April	10 and 24
May	8 and 22
June	5
August	7 and 21
September	4 and 18
October	2, 16, and 30
November	13 and 27
December	11 (if needed)

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

ASKEW v. CITY OF KINSTON

[287 N.C. App. 222, 2022-NCCOA-900]

JOSEPH ASKEW; CHARLIE GORDON WADE III;
AND CURTIS WASHINGTON, PLAINTIFFS
v.
CITY OF KINSTON, A MUNICIPAL CORPORATION, DEFENDANT

No. COA22-407

Filed 29 December 2022

Cities and Towns—condemnation—direct constitutional claims—subject matter jurisdiction—failure to exhaust administrative remedies—adequate state remedy

In an action raising direct claims under the state constitution, in which plaintiffs alleged that defendant city violated their rights to equal protection and due process by condemning plaintiffs' properties and marking them for demolition, the trial court lacked subject matter jurisdiction to hear the claims because plaintiffs had not exhausted their administrative remedies first, and they had an adequate state remedy available to them under N.C.G.S. §§ 160A-430 and 160A-393 (allowing, respectively, direct appeal of the city's decision to the city council and certiorari review by the superior court).

Appeal by Plaintiffs from order entered 29 September 2021 by Judge Joshua Willey in Lenoir County Superior Court. Heard in the Court of Appeals 30 November 2022.

Ralph Bryant Law Firm, by Ralph T. Bryant, Jr., for Plaintiffs-Appellants.

Hartzog Law Group LLP, by Dan M. Hartzog, Jr., and Katherine Barber-Jones, for Defendant-Appellee.

COLLINS, Judge.

¶ 1 Plaintiffs Joseph Askew and Curtis Washington bring this action against Defendant City of Kinston alleging violations of their constitutional rights to equal protection and due process resulting from Defendant's decision to condemn and mark for demolition three properties in Kinston, North Carolina. Plaintiffs appeal an order granting Defendant's motion for summary judgment and dismissing Plaintiffs' claims with prejudice.[1]

1. Plaintiff Charlie Gordon Wade III voluntarily dismissed his complaint without prejudice prior to the order granting summary judgment in favor of Defendant.

Because Plaintiffs did not exhaust their administrative remedies before filing this direct constitutional action in superior court, the trial court lacked subject matter jurisdiction to hear Plaintiffs' claims. Accordingly, we vacate the trial court's order and remand the matter to the trial court to dismiss Plaintiffs' claims without prejudice for lack of subject matter jurisdiction.

I. Factual Background

¶ 2 Plaintiffs contest Defendant's decision to condemn and mark for demolition three properties in Kinston, North Carolina: 110 North Trianon Street and 607 East Gordon Street, owned by Askew,[2] and 610 North Independence Street, owned by Washington.

A. The Condemnation Process[3]

¶ 3 Under N.C. Gen. Stat. § 160A-426, a building inspector has the authority to declare a building unsafe upon determining that the building is "especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes." N.C. Gen. Stat. § 160A-426(a). If the owner of a building that has been condemned as unsafe fails to take prompt corrective action, the inspector must notify the owner:

> (1) That the building or structure is in a condition that appears to meet one or more of the following conditions:
>
> a. Constitutes a fire or safety hazard.
>
> b. Is dangerous to life, health, or other property.
>
> c. Is likely to cause or contribute to blight, disease, vagrancy, or danger to children.

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2. Askew's son was the record owner of these properties when they were first condemned. Ownership was transferred to Askew by deed recorded 24 January 2019.

3. Citing the need for "a coherent organization of statutes that authorize local government planning and development regulation," the General Assembly repealed Article 19 of Chapter 160A of the General Statutes and added Chapter 160D in 2019. An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, §§ 2.1.(a), 2.3, 2019 N.C. Sess. Laws 424, 439 (effective 1 Jan 2021). Chapter 160D "collect[s] and organize[s] existing statutes," and is not intended to "eliminate, diminish, enlarge, [or] expand the authority of local governments . . . ." *Id.* § 2.1.(e)-(f). Article 19 of Chapter 160A remained in effect at all relevant times in this case. *Id.* at 547, § 3.2.

> d. Has a tendency to attract persons intent on criminal activities or other activities which would constitute a public nuisance.
>
> (2) That a hearing will be held before the inspector at a designated place and time, not later than 10 days after the date of the notice, at which time the owner shall be entitled to be heard in person or by counsel and to present arguments and evidence pertaining to the matter; and
>
> (3) That following the hearing, the inspector may issue such order to repair, close, vacate, or demolish the building or structure as appears appropriate.

Id. § 160A-428.

> If, upon a hearing held pursuant to the notice prescribed in G.S. 160A-428, the inspector shall find that the building or structure is in a condition that constitutes a fire or safety hazard or renders it dangerous to life, health, or other property, he shall make an order in writing, directed to the owner of such building or structure, requiring the owner to remedy the defective conditions by repairing, closing, vacating, or demolishing the building or structure or taking other necessary steps [within a time period] as the inspector may prescribe . . . .

Id. § 160A-429.

¶ 4 "Any owner who has received an order under G.S. 160A-429 may appeal from the order to the city council by giving notice of appeal in writing to the inspector and to the city clerk within 10 days following issuance of the order." *Id.* § 160A-430. "The city council shall hear and render a decision in an appeal within a reasonable time. The city council may affirm, modify and affirm, or revoke the order." *Id.* "In the absence of an appeal, the order of the inspector shall be final." *Id.*

¶ 5 N.C. Gen. Stat. § 160A-393, provides for review in the nature of certiorari by the superior court of the quasi-judicial decisions of decision-making boards under Chapter 160A, Article 19, which includes the condemnation process and the city council's consideration of orders issued pursuant to N.C. Gen. Stat. § 160A-429. *See id.* § 160A-393(a)-(b).

¶ 6 On certiorari review, "the court shall ensure that the rights of petitioners have not been prejudiced" because the decision being appealed

was, inter alia, "[i]n violation of constitutional provisions," or "[a]rbitrary or capricious." *Id.* § 160A-393(k)(1). If the court concludes that the decision was made in error, "then the court may remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error." *Id.* § 160A-393(l)(3).

B. Condemnation of Askew's Properties

¶ 7 In 2017, Defendant's city inspectors generated a list of over 150 properties that were unoccupied and would be subject to condemnation under North Carolina law. Inspectors then narrowed the list to 50 properties to prioritize for the condemnation and demolition process based on the following criteria:

a. Dilapidated, blighted, and/or burned properties;

b. Residential (noncommercial) properties;

c. Vacant/unoccupied properties;

d. Properties in proximity to a public use, such as a school or a park;

e. Properties fronting on or in close proximity to a heavily travelled road;

f. Properties in proximity to other qualifying properties (ie, forming part of a "cluster" of dilapidated properties); and

g. Properties in an area of police concern.

In September 2017, the city council reviewed and approved the inspectors' criteria and finalized the list of properties to prioritize for condemnation. The list of 50 properties included 110 North Trianon Street and 607 East Gordon Street.

¶ 8 110 North Trianon Street was condemned as dangerous to life on 28 November 2017 because of liability to fire, bad condition of the walls, decay, and unsafe wiring. After a hearing on 9 April 2018, the building inspector issued an order to abate, directing Askew to "remedy the defective conditions within 120 days from the date of this Order, by: Repairing the building or Demolishing the building and clearing the lot of all debris." The order informed Askew of his right to appeal the order to the city council "by giving notice to the [Building Inspector] and the City Clerk within 10 days . . . ." Askew did not appeal this order.

¶ 9 The building inspector re-inspected 110 North Trianon Street on 6 November 2018 and recommended "[m]oving forward with the condemnation process," noting that "[t]here has not been an observable improvement to the condition of the property." Askew requested to be heard by the city council on 20 November 2018 and was heard at the 7 January 2019 city council meeting. The city council treated Askew's request as an appeal and, after hearing from Askew, decided to proceed with the condemnation process. Askew announced that he intended to appeal and that he would sue in federal court. There is no evidence in the record that Askew petitioned the superior court for certiorari. The condemnation process is now complete with respect to this property.

¶ 10 607 East Gordon Street was condemned as dangerous to life because of liability to fire, bad condition of the walls, decay, unsafe wiring, and house damage from fire on 28 November 2017. After a hearing on 9 April 2018, the building inspector issued an order to abate, directing Askew to "remedy the defective conditions [in three phases] within 60 days from the date of this Order, for the first phase, 120 days for the second phase and 120 days for the third phase by: Repairing the building or Demolishing the building and clearing the lot of all debris." The order informed Askew of his right to appeal the order to the city council "by giving notice to the [Building Inspector] and the City Clerk within 10 days . . . ." Askew did not appeal this order.

¶ 11 The building inspector re-inspected 607 East Gordon Street on 16 July and 20 November 2018 and noted that "[p]lans have been provided for the repair," that "[p]ermits have been issued for the repair or demolition," and that "[t]here has been an observable improvement to the condition of the property." On both occasions, the building inspector recommended "[g]ranting the owner [additional time] to obtain the necessary permits and begin repair or demolition." On 5 April 2019, the building inspector re-inspected 607 East Gordon Street and concluded that "Askew has failed to stabilize the structure or protect the building from water damage that continues to cause rot and decay. It is my opinion that the dangerous conditions listed on the original condemnation order still exist." The condemnation process is now complete with respect to this property.

C. Condemnation of Washington's Property

¶ 12 610 North Independence Street was condemned as dangerous to life because of liability to fire, bad condition of the walls, decay, and roof collapsing on 15 November 2018. After a hearing on 21 June 2019, the building inspector issued an order to abate, directing Washington to

"remedy the defective conditions within 120 days from the date of this Order, by: Repairing the building or Demolishing the building and clearing the lot of all debris." The order informed Washington of his right to appeal the order to the city council "by giving notice to the [Building Inspector] and the City Clerk within 10 days . . . ." Washington did not appeal this order. The condemnation process is now complete with respect to this property.

II. Procedural History

¶ 13 Plaintiffs initially filed a complaint against Defendant in federal court in January 2019, alleging "violations of their [Fourteenth] amendment, substantial due process, equal protection rights, discrimination, disparity and condemnation of a historical home." *Askew v. City of Kinston*, No. 4:19-CV-13-D, 2019 WL 2126690, at *1 (E.D.N.C. May 15, 2019). Plaintiffs' federal complaint was dismissed in May 2019 for lack of subject matter jurisdiction. *Id.* at *4.

¶ 14 Plaintiffs then commenced this action by filing a complaint in Lenoir County Superior Court in June 2019, alleging violations of their rights to equal protection and due process under the North Carolina Constitution and seeking a declaratory judgment, injunctive relief, and damages in excess of $25,000. Defendant filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the rules of civil procedure, which the trial court denied. Defendant then filed an answer to the complaint, generally denying the material allegations and asserting twelve affirmative defenses, including that "Plaintiffs' claims are barred, in whole or in part, by their failure to exhaust administrative remedies, and/or satisfy the administrative prerequisites to the filing of this action." Defendant moved for summary judgment in July 2021, reiterating that "Plaintiffs have failed to establish any evidence that . . . Plaintiffs have no adequate alternative remedies, [or] that Plaintiffs exhausted their administrative remedies." After a hearing, the trial court entered a written order on 29 September 2021 granting Defendant's motion for summary judgment on all claims. Plaintiffs timely appealed to this Court.

III. Discussion

¶ 15 Plaintiffs argue that the trial court erred by granting summary judgment in favor of Defendant on Plaintiffs' substantive due process and equal protection claims. Defendant argues, inter alia, that Plaintiffs' direct constitutional claims are barred because Plaintiffs failed to exhaust their administrative remedies and Plaintiffs had an adequate remedy provided by statute.

A. Subject Matter Jurisdiction

¶ 16 Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). "A party may not waive jurisdiction, and a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882 (2000) (citations omitted). An action is properly dismissed for lack of subject matter jurisdiction when the plaintiff has failed to exhaust its administrative remedies. *Flowers v. Blackbeard Sailing Club*, 115 N.C. App. 349, 352-53, 444 S.E.2d 636, 638-39 (1994). "[W]here the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979) (citations omitted).

B. Exhaustion of Administrative Remedies

¶ 17 Plaintiffs have brought equal protection and substantive due process claims under North Carolina Constitution Article I, Section 19, which states:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art. I, § 19.

¶ 18 It is an essential element of a direct claim under the North Carolina Constitution that the plaintiff have no other legal remedy available. *Swain v. Elfland*, 145 N.C. App. 383, 390, 550 S.E.2d 530, 536 (2001). However, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). "[T]o be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Craig ex. rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339-40, 678 S.E.2d 351, 355 (2009). Additionally, "an adequate remedy must provide the

possibility of relief under the circumstances." *Id.* at 340, 678 S.E.2d at 355. "The party claiming excuse from exhaustion bears the burden of alleging both the inadequacy and the futility of the available administrative remedies." *Abrons Fam. Prac. and Urgent Care, PA v. N.C. Dep't of Health and Hum. Servs.*, 370 N.C. 443, 451, 810 S.E.2d 224, 231 (2018) (citation omitted).

1. Adequacy and Futility

¶ 19 Plaintiffs allege that "there is no adequate remedy at state law to redress the deprivation of plaintiffs' rights . . . ." However, N.C. Gen. Stat. §§ 160A-430 and 160A-393 provide Plaintiffs both "the opportunity to enter the courthouse and present [their] claim" and "the possibility of relief" contemplated in *Craig*, through direct appeal to the city council and certiorari review by the superior court.

¶ 20 Plaintiffs allege that they have "been injured by the City of Kinston's action of condemning their property, and/or placing their property on the list for demolition, and/or ordering the demolition of their property, and/or placing their property on a schedule for imminent demolition"; that the decision to demolish Plaintiffs' property was "based upon plaintiff's race"; and that Defendant's "refusal to remove plaintiff's property from the list of properties to be demolished is arbitrary and capricious." These injuries are within the scope of the city council's review on direct appeal and the superior court's review on certiorari. *See* N.C. Gen. Stat. § 160A-430 (authorizing the city council to hear an appeal without limitation); N.C. Gen. Stat. § 160A-393(k)(1) (authorizing the superior court to review a decision-making board's quasi-judicial decisions for constitutional violations). Plaintiffs primarily seek to enjoin Defendant from demolishing Plaintiffs' properties. This relief is within the city council's authority on direct appeal – the council may revoke a condemnation order. *Id.* § 160A-430. This relief is also within the superior court's authority on certiorari review – the court may remand to the governing board with instructions to remove Plaintiffs' property from the demolition list. *See id.* § 160A-393(l)(3).

¶ 21 Because the statutes authorize the city council and the superior court to review Plaintiffs' injuries and grant the relief Plaintiffs seek, the statutory scheme provides Plaintiffs with "the opportunity to enter the courthouse doors and present [their] claim" and "the possibility of relief," and therefore provides an adequate remedy. *See Craig*, 363 N.C. at 339-40, 678 S.E.2d at 355. Furthermore, Plaintiffs do not allege that exhaustion would be futile. Accordingly, Plaintiffs are not excused from exhausting their administrative remedies. *See Abrons*, 370 N.C. at 451, 810 S.E.2d at 231.

2. Exhaustion

¶ 22 The record evidence does not support the conclusion that Plaintiffs exhausted their administrative remedies before filing the present complaint under the North Carolina Constitution; Plaintiffs do not argue otherwise.

¶ 23 With respect to 110 North Trianon Street, Askew attended a hearing and was issued an order to abate, pursuant to N.C. Gen. Stat. § 160A-429. Askew did not give notice of appeal in writing to the inspector and to the city clerk as required by N.C. Gen. Stat. § 160A-430. Nevertheless, the city council treated Askew's November 2018 request to be heard as an appeal, which it heard and denied in January 2019. There is no evidence in the record that Askew petitioned for certiorari to the superior court.

¶ 24 With respect to 607 East Gordon Street and 610 North Independence Street, Askew and Washington attended respective hearings and were issued orders to abate, pursuant to N.C. Gen. Stat. § 160A-429. Plaintiffs did not give written notice of appeal to the inspector and to the city clerk as required by N.C. Gen. Stat. § 160A-430. In the absence of appeal, the orders to abate are final. N.C. Gen. Stat. § 160A-430.

¶ 25 Because Plaintiffs did not exhaust their administrative remedies with respect to any of the properties at issue, the trial court lacked jurisdiction to hear Plaintiffs' direct constitutional claims. *Flowers*, 115 N.C. App. at 352-53, 444 S.E.2d at 638-39.

IV. Conclusion

¶ 26 Because Plaintiffs did not exhaust their administrative remedies before filing this direct constitutional action in superior court, the trial court lacked subject matter jurisdiction to hear Plaintiffs' direct constitutional claims. Accordingly, we vacate the trial court's order and remand the matter to the trial court to dismiss Plaintiffs' claims without prejudice for lack of subject matter jurisdiction.

VACATED AND REMANDED WITH INSTRUCTIONS.

Judges ARROWOOD and JACKSON concur.

CAROLYN LOUISE GUNN TESTAMENTARY TRUST, BY AND THROUGH CYNTHIA M. ROWLEY, TRUSTEE, PLAINTIFF

v.

CAROLYN ELISE BUMGARDNER, AND EUGENE TISELSKY, DEFENDANTS

No. COA22-230

Filed 29 December 2022

1. Easements—abandonment—fence—lack of use—unequivocal act showing clear intention to abandon

In an easement dispute, there were no genuine issues of material fact as to whether plaintiff had abandoned the disputed easement where there was no evidence of any unequivocal act by plaintiff showing a clear intention to abandon the easement. Although the former owner of the servient estate had constructed a fence across the easement (to address a potential issue between the dogs living on both properties) and plaintiff had not used the easement for a long time, these facts, standing alone, were insufficient to meet the criteria for abandonment.

2. Easements—scope—unambiguous language—ingress and egress —pedestrians and vehicles

An easement's language providing "a non-exclusive and perpetual easement for the purposes of ingress and egress to and from" plaintiff's property unambiguously permitted plaintiff's use of the easement by any common means of transportation that could travel along the easement, including by pedestrians and vehicles. The 18-foot width of the easement also supported this conclusion. Extrinsic factors pointed to by defendants, such a telephone pole, roadside curb, and other obstructions making it difficult or impractical for vehicles to use the easement, did not render the easement's language ambiguous.

3. Easements—obstruction of easement—permanent injunction —balancing of equities—trial court's discretion

In an easement dispute, the Court of Appeals noted the inconsistency in the case law in cases involving the obstruction of an easement and announced two principles: first, that a trial court may, in its discretion, enter a permanent injunction prohibiting a party from obstructing another party's easement (and is not required to balance the equities or consider the hardships to the parties); second, that the trial court may, in its discretion, consider the balance of the equities or the relative hardship to the parties in fashioning a

permanent injunction if the court finds it appropriate to do so. Here, where the trial court issued a permanent injunction ordering defendants to remove any trees, shrubs, or fencing interfering with the easement, the Court of Appeals vacated the permanent injunction and remanded the matter to ensure that the trial court would have the opportunity to apply the principles announced in the opinion.

Appeal by defendants from order entered 27 October 2021 by Judge Carla Archie in Gaston County Superior Court. Heard in the Court of Appeals 7 September 2022.

Whitaker & Hamer, PLLC, by Aaron C. Low, for plaintiff-appellee.

Villmer Caudill, PLLC, by Bo Caudill, for defendants-appellants.

DIETZ, Judge.

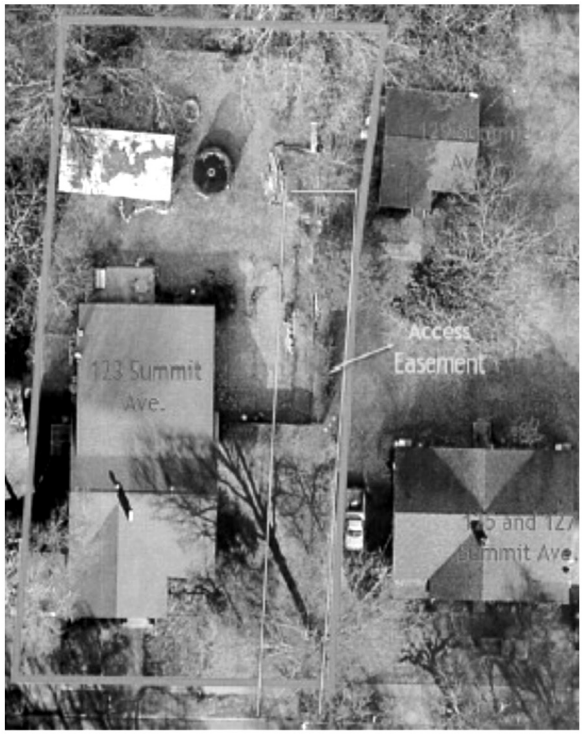
¶ 1 Defendants Carolyn Elise Bumgardner and Eugene Tiselsky appeal the entry of partial summary judgment, and a corresponding permanent injunction, requiring them to remove a fence and other obstructions blocking an easement for ingress and egress across their property.

¶ 2 As explained below, we hold that the trial court properly entered partial summary judgment concerning the existence and scope of the easement, and we affirm that portion of the court's order. We vacate the permanent injunction and remand for the trial court to conduct further proceedings as set forth below.

Facts and Procedural History

¶ 3 The following recitation of facts represents Defendants' version of events, viewed in the light most favorable to them. *See Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

¶ 4 Along Summit Avenue in Mount Holly there are three homes as shown in the aerial photograph below:



¶ 5 Defendants Carolyn Elise Bumgardner and Eugene Tiselsky own the home at 123 Summit Avenue. Plaintiff Carolyn Louise Gunn Testamentary Trust owns the cottage located at 129 Summit Avenue, behind a duplex home at 125 and 127 Summit Avenue. Carolyn Rucker (formerly Carolyn Louise Gunn), the beneficiary of the trust, lives in the cottage. Rucker has special needs.

¶ 6 In 1998, Leann Wheeler purchased the 123 Summit Avenue property now owned by Defendants from the Hilderbran family. At the time, Kenneth Hilderbran also owned the cottage at 129 Summit Avenue. As part of the sale, Wheeler granted Hilderbran an easement across her property for ingress and egress to the cottage at 129 Summit Avenue:

> NOW THEREFORE, Wheeler, while retaining absolute ownership of said property, for and in consideration of the premises, does hereby give and grant

> unto Hilderbran, his heirs and assigns a non-exclusive and perpetual easement for the purposes of ingress and egress to and from the aforesaid property of Hilderbran across the property of Wheeler, said easement being more particularly described as Exhibit B attached hereto.

¶ 7 Hilderbran later sold the cottage at 129 Summit Avenue to Plaintiff and Carolyn Rucker moved into the cottage.

¶ 8 Shortly after the sale of the cottage to Plaintiff, Barbara Gilbert approached Wheeler to discuss an issue involving Wheeler's dog. Gilbert was Carolyn Rucker's sister and the owner of the duplex in front of the cottage at 125 and 127 Summit Avenue. Gilbert was not a trustee of Plaintiff, the testamentary trust that owned the cottage for Rucker's benefit.

¶ 9 Gilbert explained to Wheeler that she was worried Wheeler's dog would have problems with Rucker's dog. Gilbert proposed installing a fence that would separate Wheeler's property from the cottage property.

¶ 10 Wheeler agreed and retained a surveyor to identify the property line on which to build the fence. The survey revealed that "when the properties had been split, they had not set the property line well and it ran through the corner of the cottage." As a result, Wheeler agreed to sell a small portion of property to Plaintiff so that the cottage was entirely on Plaintiff's property and the fence could be built along the new property line separating Wheeler's property from the cottage.

¶ 11 In an affidavit, Wheeler testified that, at the time she put up the fence between the properties, Barbara Gilbert promised Wheeler that she would "redo the duplex property"—meaning the 125 and 127 Summit Avenue property in front of the cottage that Gilbert currently owned—"and put the easement access on it instead of 123 Summit" because the easement was "for her sister."

¶ 12 During the time that Wheeler owned the property at 123 Summit Avenue, Plaintiff did not use the easement across the property, which was obstructed by the fence. At one point, Wheeler saw that someone "posted a house sign at the end of the duplex driveway to direct the pizza delivery and EMT's" to use the duplex driveway to access the cottage or deliver items to Carolyn Rucker.

¶ 13 Wheeler further testified that when she later sold her property to a new owner, she remembered Barbara Gilbert's promise to "redo" the easement and place it on the duplex property and realized that she

"never followed up on that promise because the easement was still on" her property. Wheeler told the new owner "to reach out to resolve the issue."

¶ 14 The new owner, Donna Skipper, testified in an affidavit that when she bought the property, she knew it was subject to an easement and that "Leann Wheeler informed me that the fence obstructing a portion of the Easement which runs between 123 Summit Avenue and 129 Summit Avenue may need to be moved and offered to have it removed before closing." Skipper also testified that she talked to Plaintiff (through the then-trustee of the trust) and "understood" that if Carolyn Rucker "ever needed us to move the fence to let vehicles access 129 Summit Avenue, then I would be willing to do so." Skipper later sold the property to Defendants and testified that, while conducting a "walkthrough" of the property with Defendants, she showed them "where the Easement was located and explained to them that the Easement was for vehicle access to 129 Summit Avenue."

¶ 15 After Defendants bought the property, Carolyn Rucker used the easement from time to time, either by walking along the easement to access the cottage, or by inviting relatives to drive onto the easement to pick her up when she needed transportation. This led to a dispute over the existence and scope of the easement.

¶ 16 In 2017, Plaintiff filed this action, alleging that Defendants "erected a fence, trees, and shrubbery" that prevented the use and enjoyment of the easement on the property. Plaintiff sought a permanent injunction compelling removal of "the barriers of a fence, trees, and shrubbery" as well as monetary damages.

¶ 17 Initially, on cross-motions for partial summary judgment, the trial court entered partial summary judgment in favor of Plaintiff, stating that Plaintiff's motion "is allowed with respect to the plaintiff's first cause of action for injunctive relief and the plaintiff is entitled to judgment as a matter of law with respect to this claim." Defendants appealed and this Court dismissed the appeal, holding that the trial court's partial summary judgment order did not contain sufficient findings to constitute a permanent injunction. *Carolyn Louise Gunn Testamentary Tr. v. Bumgardner*, 276 N.C. App. 277, 2021-NCCOA-90.

¶ 18 On remand, Plaintiff filed a new motion for summary judgment and a motion for clarification of the trial court's earlier order. After a hearing, the trial court denied Plaintiff's motion for clarification but again granted partial summary judgment in favor of Plaintiff in a new order

with more details of the scope of the resulting permanent injunction. The order stated:

> 3. That the Plaintiff's Motion for Summary Judgment as to the First Cause of Action for Injunctive Relief is GRANTED as follows:
>
> a. The Court hereby issues a permanent injunction that prohibits the Defendants from blocking ingress and egress to the easement by the Plaintiff's beneficiary or any of her invitees;
>
> b. The Court hereby issues a permanent injunction requiring Defendants to remove any trees, shrubs, or fencing that are prohibiting or interfering with ingress or egress of the easement by vehicles within 60 days from the date of hearing, which is by December 10, 2021. Defendants do not have to remove any property out of the easement over which they have no control, including the telephone pole that may be on the easement.

Defendants timely appealed.

Analysis

I. Abandonment of the easement

¶ 19 **[1]** Defendants first argue that the trial court erred by granting partial summary judgment, and entering the resulting permanent injunction, because there are genuine issues of material fact with respect to whether Plaintiff abandoned the easement.

¶ 20 An easement may be abandoned "by unequivocal acts showing a clear intention to abandon and terminate the easement." *Skvarla v. Park*, 62 N.C. App. 482, 486–87, 303 S.E.2d 354, 357 (1983). "The essential acts of abandonment are the intent to abandon and the unequivocal external act by the owner of the dominant tenement by which the intention is carried to effect." *Id.* Importantly, the "lapse of time in asserting one's claim to an easement, unaccompanied by acts and conduct inconsistent with one's rights, does not constitute waiver or abandonment of the easement." *Id.* Particularly relevant to this case, we held in *Skvarla* that a "fence, because it was erected by the owner of the servient tenement, was not evidence of abandonment" even though the fence had existed for "a long time," during which the dominant estate could not use the easement. *Id.*

¶ 21 Here, viewing all the evidence in the light most favorable to Defendants, there is no forecast of trial evidence that creates any genuine issues of material fact concerning abandonment. The undisputed evidence in the affidavits establishes that Leann Wheeler, the owner of the servient estate, constructed the fence across the easement. Wheeler, in her affidavit submitted by Defendants, acknowledges that she constructed the fence to address a potential issue between Wheeler's dog and Rucker's dog.

¶ 22 Wheeler communicated with Barbara Gilbert, Rucker's sister, about the fence and Gilbert "promised" that, at some point in the future, she would "redo" the easement by moving it onto the duplex property that Gilbert owned. But there is no evidence in the record that Gilbert—who was not a trustee of Plaintiff—had any authority to bind the trust. Thus, Gilbert's statements are not evidence of any "unequivocal acts showing a clear intention to abandon and terminate the easement" by the easement holder. *Id.* Moreover, Wheeler's affidavit indicates that Gilbert chose not to move the easement. When Wheeler sold the 123 Summit property, she later "realized that I had never followed up on that promise because the easement was still on 123 Summit."

¶ 23 Finally, although Defendants have presented affidavit testimony establishing that Plaintiff and its predecessors in title rarely—and for many years never—used the easement to access the property, this "lapse of time in asserting one's claim to an easement" cannot create an issue of fact concerning abandonment unless accompanied by unequivocal acts and conduct demonstrating the intent to terminate the easement. *Id.* At most, Defendants have shown that Plaintiff was content not to use the easement for many years and instead access the property through permissive use of the duplex property. That fact, standing alone, is insufficient to meet the criteria for abandonment. *Id.* Accordingly, the trial court did not err by granting partial summary judgment on the issue of abandonment.

II. Scope of the easement

¶ 24 **[2]** Defendants next challenge the trial court's grant of partial summary judgment on the scope of the easement. Defendants contend that, although the easement provides a right of ingress and egress it "does not clarify the manner of access permitted (e.g., whether such access includes vehicles or commercial vehicles or is limited to pedestrian access to and from the nearest public street)."

¶ 25 The scope of an express easement "is controlled by the terms of the conveyance if the conveyance is precise as to this issue." *Swaim*

v. Simpson, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786–87 (1995). Here, the easement provides "a non-exclusive and perpetual easement for purposes of ingress and egress to and from" the cottage property at 129 Summit Avenue. This Court has observed that the "term ingress/egress" is not ambiguous. *Sauls v. Barbour*, 273 N.C. App. 325, 335, 848 S.E.2d 292, 300 (2020). "Ingress and egress" means the "right to use land to enter and leave another's property." *Ingress-and-Egress Easement*, *Black's Law Dictionary* (11th ed. 2019).

¶ 26 As a result, this language unambiguously permits use of the easement by any common means of transportation that can travel along the easement, including both pedestrian and vehicle use. This is further supported by the width of the easement, which Defendants acknowledge is approximately 18 feet. This Court has recognized that an easement of this size reflects an intent to be used for vehicles and not solely by pedestrians. *Benson v. Prevost*, 277 N.C. App. 405, 2021-NCCOA-208, ¶ 19.

¶ 27 Defendants point to a number of extrinsic factors—for example, that the easement terminates at a location on the cottage property that would "make it difficult, if not impossible, for vehicles to park on or maneuver over the easement without coming onto Defendants' unencumbered property." But that does not render the easement's scope ambiguous. If Plaintiff or its invitees cross onto Defendants' unencumbered property while using the easement, that gives rise to a separate property issue. Similarly, Defendants argue that there is now a telephone pole, a roadside curb, and other obstructions that make it impractical to use vehicles on the easement. Again, this does not render the easement language ambiguous, which is a question that we address solely by reference to the language of the conveyance. *Swaim*, 120 N.C. App. at 864, 463 S.E.2d at 786–87.

¶ 28 We therefore hold that the trial court properly entered partial summary judgment on the issue of scope of the easement.

III. Entry of permanent injunction

¶ 29 **[3]** Finally, Defendants argue that the trial court erred by entering the permanent injunction. Specifically, Defendants contend that entry of a permanent injunction requires a balancing of relevant equities and, here, the trial court did not make findings concerning the key equitable questions such as the "value of the easement" and the "cost of compliance" with the injunction.

¶ 30 This Court's case law on this issue is wildly inconsistent. There is a line of cases dealing with traditional property encroachment that

rejects any need to balance the equities and instead holds that, if an encroachment and continuing trespass are established, the law entitles the property owner to a permanent injunction to have the encroachment removed. *See*, *e.g.*, *Bishop v. Reinhold*, 66 N.C. App. 379, 384, 311 S.E.2d 298, 301 (1984); *Williams v. S. & S. Rentals, Inc.*, 82 N.C. App. 378, 384, 346 S.E.2d 665, 669 (1986); *Graham v. Deutsche Bank Nat. Tr. Co.*, 239 N.C. App. 301, 307, 768 S.E.2d 614, 618 (2015); *see also* Olivia Weeks, *The Law Is What It Is, But Is It Equitable: The Law of Encroachments Where the Innocent, Negligent, and Willful Are Treated the Same*, 39 Camp. L. Rev. 287 (2017).

¶ 31 At the same time, there are cases dealing with removal of trees, fences, and even whole buildings that are in violation of a restrictive covenant. These cases, some from our Supreme Court, hold that the use of a permanent injunction is within the trial court's discretion and "depends upon the equities between the parties." *Ingle v. Stubbins*, 240 N.C. 382, 390, 82 S.E.2d 388, 395 (1954); *Crabtree v. Jones*, 112 N.C. App. 530, 534, 435 S.E.2d 823, 825 (1993); *Fed. Point Yacht Club Ass'n, Inc. v. Moore*, 233 N.C. App. 298, 318, 758 S.E.2d 1, 13 (2014). There is also an encroachment case from this Court, dealing with a fence constructed across a property line, in which the Court held that "it was within the trial court's discretion to consider whether the injunctive relief sought was an appropriate remedy." *Mathis v. Hoffman*, 212 N.C. App. 684, 687, 711 S.E.2d 825, 826 (2011).

¶ 32 Ultimately, harmonizing all of this inconsistent case law may be a task only our Supreme Court can accomplish. The best this Court can do is to announce a rule for cases like this one, involving obstruction of an easement, that stays consistent with as much of this case law as possible. Doing so, we arrive at two key principles: First, our case law permits a trial court, in its discretion, to enter a permanent injunction prohibiting a party from obstructing another party's easement. When doing so, the trial court is not *required* to balance the equities or consider the relative hardships to the parties. Second, and again in the trial court's discretion, the court *may* consider the balance of the equities or the relative hardship of the parties in fashioning a permanent injunction if the court finds it appropriate to do so.

¶ 33 Having announced these two principles, we turn to the trial court's ruling in this case. After determining that Plaintiff was entitled to summary judgment, the trial court's order states that "Plaintiff is entitled to a permanent injunction that prohibits Defendants from blocking ingress and egress to the easement by the Plaintiff's beneficiary or any of her invitees" and that "Plaintiff is entitled to a permanent injunction requiring

Defendants to remove any trees, shrubs, or fencing that are prohibiting or interfering with ingress or egress of the easement."

¶ 34 We cannot be sure from the trial court's language that the court applied the principles we announced here—that is, that the court understood it had discretion to balance the equities or consider the relative hardships of the parties but chose instead to simply order the immediate removal of the obstructions to the easement.

¶ 35 Because "balancing of equities is clearly within the province of the trial court," *Crabtree*, 112 N.C. App. at 534, 435 S.E.2d at 825, and because this Court has not previously considered how to harmonize our case law for this type of easement case, we vacate the permanent injunction and remand to ensure that the trial court has an opportunity to apply the rule set out today. On remand, before again entering a permanent injunction, the trial court may consider whether to balance the equities or assess the relative hardships of the parties in determining whether a permanent injunction is appropriate and what the scope of that injunction should be.

Conclusion

¶ 36 We affirm the trial court's entry of partial summary judgment but vacate the entry of the permanent injunction and remand for further proceedings.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges COLLINS and CARPENTER concur.

KOZEC v. MURPHY

[287 N.C. App. 241, 2022-NCCOA-902]

ROBERT RICHARD KOZEC, JR., PLAINTIFF
v.
KRISTEN ANNE MURPHY, DEFENDANT

No. COA22-433

Filed 29 December 2022

Evidence—authentication—child protective services records—public records—need for live witness testimony—misapprehension of the law

At a hearing on a mother's motion to modify child custody based on allegations that the father sexually abused the children, the trial court—acting under an apparent misapprehension of the law—abused its discretion by excluding a set of Child Protective Services (CPS) records on grounds that no witness was present to authenticate them, without first determining whether they constituted public records under Evidence Rule 902(4), which does not require authentication by live witness testimony. Because it was unclear from the hearing transcript whether the court excluded the records solely on its flawed authentication basis or whether it had also considered the documents' admissibility as public records under Rules 902(4) or 803(8), the matter was remanded for a new hearing so that the court could review the CPS records and so that the parties could present full arguments on their admissibility.

Appeal by Plaintiff from order entered 12 October 2021 by Judge J. Brian Ratledge in Wake County District Court. Heard in the Court of Appeals 16 November 2022.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for plaintiff-appellant.

Schiller & Schiller, PLLC, by David G. Schiller, for defendant-appellee.

MURPHY, Judge.

¶ 1 In its hearing on Mother's motion to modify a permanent child custody order, the trial court abused its discretion by not first reviewing various child protective services documents, already submitted along with an affidavit as a part of the sealed court file pursuant to a prior N.C.G.S. § 7B-302(a1) order, before denying Father's request to enter the

documents as part of his evidence. Further, based upon the statements of the trial court and arguments by counsel, it is unclear as to whether the trial court's exclusion of these documents was limited to an authentication basis or extended to exclusion under either North Carolina Rule of Evidence 803(8) or 902(4). We vacate and remand for the trial court to hold a new hearing on Mother's motion to modify permanent child custody that affords both parties the opportunity to present argument on the documents' admissibility in conjunction with the trial court's simultaneous review of the documents.

BACKGROUND

¶ 2 This case arises out of the trial court's 12 October 2021 *Order Modifying Permanent Child Custody* ("the Order") of the minor children of Plaintiff-Appellant Robert Kozec ("Father") and Defendant-Appellee Kristen Murphy ("Mother").

¶ 3 The parties were never married but are the parents of two children, of whom Mother was provided legal and physical custody and of whom Father was granted visitation by a permanent custody order entered 6 February 2013. On 3 November 2016, Mother filed a motion to modify custody and sought emergency suspension of all contact between Father and the children. The trial court entered a *Temporary Emergency Custody Order* on 7 December 2016, suspending Father's visitation and ordering he have no contact with the children. On 13 June 2017, Father filed a *Petition for Writ of Certiorari* requesting that we review this order, which a panel of this Court allowed on 5 July 2017; the panel in an unpublished opinion subsequently vacated the order because it constituted a custody modification that "d[id] not make the substantial change of circumstances and its effect upon the children clear." *See Kozec v. Murphy* ("*Kozec I*"), 261 N.C. App. 115, 2018 WL 3978150, *1-*3 (Aug. 21, 2018) (unpublished) (citation and marks omitted).

¶ 4 On 22 August 2018, one day after we filed the decision in *Kozec* I but more than a week before the mandate of our decision issued, Mother filed an *Ex Parte Motion for Emergency Custody*, seeking to suspend Father's visitation with the minor children and prevent him from having any communication with them, based on various allegations of changed circumstances that created an imminent risk of physical harm to the minor children if Father was allowed to continue visiting and communicating with them. Mother's 22 August 2018 motion relied heavily on allegations made by a therapist, Ms. Mary Jernigan, who had started seeing the children approximately two months prior and who initiated child protective services investigations in both Wake and Johnston counties

after those two months. That same day, the trial court entered an *ex parte* emergency custody order, but it did not have jurisdiction over the matter until *Kozec I*'s mandate issued, resulting in us vacating the 22 August 2018 emergency order on 29 August 2018. On 10 September 2018, the trial court entered an *ex parte* emergency order, and Mother's 22 August 2018 motion to modify child custody was set for a "return hearing" on 18 September 2018. Mother filed an *Amended Motion to Modify Custody* on 17 September 2018, which contained some of the same allegations included in her 2016 motion seeking emergency custody, in addition to allegations regarding matters occurring since entry of the 2016 order that we vacated in *Kozec I*. After the return hearing, the trial court entered a *Temporary Custody Order and Notice of Hearing* on 30 October 2018, awarding sole legal and physical custody to Mother.

¶ 5 On 3 April 2019, the trial court entered an *Order and Preliminary Injunction* that allowed the parties' counsel, but not the parties, to access the children's medical and mental health records that were ordered to be made available on the "[eleventh] [f]loor of the Wake County Courthouse in the Family Court Office." The parties' counsel were permitted to "review those records but [could] not make copies, take photographs or otherwise reproduce the records and remove them from the Wake County Courthouse." However, when the attorney serving as Father's counsel was permitted to withdraw from representing Father, he informed the trial court that Father would need access to certain records "to adequately prepare for a pending [o]rder to [s]how [c]ause to be heard at a later date." The trial court entered a *Protective Order* on 21 August 2019, which concluded that "allowing [Father] access to the children's private treatment records is ill-advised and not in their best interest" and ordered that Father could choose to call the children's therapists as fact witnesses who would be constrained by a limiting instruction so as to prevent the specific divulging of the confidential treatment information of the minor children.

¶ 6 On 27 December 2019, the trial court entered a *Temporary Order for Child Custody (Review Hearing)*, concluding "[t]he terms of the Temporary Custody Order entered [30 October 2018] shall remain in full force and effect and shall not be modified. [Mother] shall retain sole legal and physical custody."

¶ 7 Mother's motion to modify permanent child custody was heard on 14 and 15 June 2021. During the modification hearing, the trial court denied Father's motion to admit several Wake County Child Protective Services records ("the CPS Records"), including investigations and assessments conducted by the agency relating to the parties' minor

children. CPS Records were subpoenaed by Mother and the documents were placed under seal by the trial court's *Amended Protective Order* entered 5 February 2018. Under the *Amended Protective Order*, the trial court ordered the CPS Records to be provided to the parties' counsel for their review. Subject to the provisions of N.C.G.S. § 7B-302(a1), the trial court classified the CPS Records as "relevant and necessary to the trial in this matter and [as being] unavailable from any other source" such that their disclosure to counsel was permitted. By its 5 February 2018 order, the trial court placed significant limits on counsel's review and copying of the documents.

¶ 8 After denying, without consideration of the "relevant" sealed documents, Father's motion to admit the CPS Records into evidence during the 14 and 15 June 2021 hearing, the trial court announced its ruling on Mother's motion to modify, which it later memorialized in the Order entered 12 October 2021. The Order, *inter alia*, finds as fact that Father sexually abused his own children, decrees that Mother shall have sole legal and physical custody, and bars Father from having contact with the minor children. Father timely appeals the Order.

ANALYSIS

¶ 9 Father urges us to "vacate and reverse [the Order] and remand for a new trial where *all* the relevant evidence (including the evidence previously and erroneously excluded) is considered by the trial court before determining if a modification of the permanent custody order is warranted." Father argues the trial court erred in excluding the CPS Records he attempted to offer into evidence and the findings of fact in the Order were, as a result of the documents' exclusion, made under a misapprehension of law that requires us to vacate the Order.

¶ 10 " 'A trial court may order the modification of an existing child custody order if the [trial] court determines that there has been a substantial change of circumstances affecting the child's welfare and that modification is in the child's best interests.' " *Peeler v. Joseph*, 263 N.C. App. 198, 201 (2018) (quoting *Spoon v. Spoon*, 233 N.C. App. 38, 41 (2014) (citation omitted)). "Our court reviews a trial court's decision to modify an existing custody order for[] '(1) whether the trial court's findings of fact are supported by substantial evidence[] and (2) whether those findings of fact support its conclusions of law.' " *Id.* "[W]hether changed circumstances exist is a conclusion of law" that we review *de novo*. *Thomas v. Thomas*, 233 N.C. App. 736, 739 (2014) (citation omitted); *see also Peeler*, 263 N.C. App. at 201. "[C]ourts must consider and weigh all evidence of changed circumstances which [a]ffect or will affect the best

interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child." *Hibshman v. Hibshman*, 212 N.C. App. 113, 121 (2011) (citation and marks omitted).

¶ 11 However, "[t]he dispositive issue here—the trial court preventing [Father] from presenting certain evidence—is an evidentiary issue." *Cash v. Cash*, 284 N.C. App. 1, 2022-NCCOA-403, ¶ 14. Although Father identifies a potential conflict in our caselaw as to whether a *de novo* or an abuse of discretion standard applies to evidentiary issues, we apply the more onerous standard and consider whether the trial court abused its discretion by excluding the CPS Records.[1] "A trial court abuses its discretion when it acts under a misapprehension of law." *Id.* (citations omitted).

¶ 12 As to the documents at the heart of the dispositive issue raised by this appeal, at the modification hearing, the trial court denied Father's motion to admit the CPS Records on the basis that Father did not have "any[one] to come and . . . authenticate or, as [Mother's counsel] aptly put it, cross-examine maybe what is or isn't in the report." This basis was erroneous as it appears it was rooted in a misapprehension of law that child protective services records must be authenticated by live witness testimony even where they may qualify as public records under Rule 902(4). Under Rule 902(4), "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required" for the following records:

> (4) Certified Copies of Public Records.—A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.

N.C.G.S. § 8C-1, Rule 902(4) (2021); *see id.* § 8C-1, Rule 1005 (2021) ("The contents of an official record, or of a document authorized to be

1. In *State v. Clemons*, 274 N.C. App. 401, 409-12 (2020) (citations omitted), we discussed the conflict in the context of our review of a "decision regarding authentication" and stated, "[b]ased on . . . our extensive caselaw explicitly applying de novo review on issues of authentication, we conduct de novo review of whether the evidence at issue here was properly authenticated." However, in this case, we do not make a determination about which standard of review *should* apply because the result would be the same under either standard.

recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 . . . ."). We therefore hold that a trial court acts under a misapprehension of law and abuses its discretion where it excludes documents on the basis that there is no live witness present to authenticate them without first determining whether they fall under Rule 902(4).

¶ 13 Here, even when Father's counsel reiterated during the hearing that the documents were CPS Records embraced under Rule 902(4) and do not require authentication by live witness testimony, the trial court noted its past understanding was that child protective services records and other public records require that "somebody . . . authenticate[] the[] records or [say,] '[y]eah, this is what it says to be.' " The trial court, in finishing with Father's counsel's argument, characterized the origin of its reasoning: "So it's not your argument, okay, that's the *policy*." By excluding the CPS Records based on this apparent policy without first determining they were not records that may be authenticated by certification under Rule 902(4), the trial court acted under a misapprehension of law.

¶ 14 Mother's initial response—that Father allegedly did not have the affidavit to present to the trial court during the hearing because he did not subpoena the CPS Records—does not alter our conclusion. Mother contends "the [trial] court [] did not actually have the authenticating affidavit before it" and "[Father] should not now be heard to complain that the trial judge would not admit evidence that the trial judge did not have before him based upon an authenticating affidavit that was also not before him." We are not convinced. Pursuant to the non-traditional offer of proof employed by the trial court here, the authenticating affidavit certifying the CPS Records as public records is properly before us on appeal. Based on when the affidavit was signed and when Wake County Child Protective Services was ordered to produce the CPS Records pursuant to the *Amended Protective Order* entered 5 February 2018, the Record demonstrates the affidavit was supplied with the CPS Records and existed long before the June 2021 hearing on Mother's motion. There was no indication at the hearing that Father did not have the affidavit to present to the trial court nor that the decision excluding the CPS Records was due to Father lacking the affidavit. Indeed, as our holding emphasizes, *supra* ¶¶ 12-13, the trial court did not consider the affidavit *at all* because it believed live witness testimony was necessary to authenticate the CPS Records and did not review the sealed documents.

¶ 15 As to the prejudice to Father from the exclusion of the CPS Records, such prejudice may be relevant in our analysis if we were determining

whether the trial court correctly applied the law that it did not misapprehend. But our inquiry in the case *sub judice* is focused on a misapprehension of law that is the basis of the trial court's exclusion of evidence. Where a trial court acts under a misapprehension of law in excluding evidence, it commits an abuse of discretion, and this abuse of discretion must be remedied by vacating and remanding for the parties to have a full opportunity to be heard upon trial court's corrected apprehension of the applicable law. *See*, *e.g.*, *Cash*, 2022-NCCOA-403 at ¶¶ 15-27. We hold that such an abuse of discretion occurred here with the trial court's erroneous requirement that the CPS Records must be authenticated by live witness testimony even if the documents qualified as public records under Rule 902(4). However, this is not the end our inquiry on appeal.

¶ 16 Mirroring his contentions below regarding the admissibility of the documents, Father argues the CPS Records should have been considered by the trial court as they are embraced by the public records exception to the hearsay rule provided by Rule 803(8). The trial court had indicated it was skeptical of Father's assertions that the CPS Records fell under the hearsay exception in Rule 803(8) and qualified as public records that may be authenticated by certification under Rule 902(4). *See* N.C.G.S. § 8C-1, Rule 803(8) (2021); N.C.G.S. § 8C-1, Rule 902(4) (2021). The trial court ultimately did not contain a stated rationale in its written order excluding the CPS Records, which stated, "[Father], in his case in chief, moved for admission of the [CPS Records], which had been previously subpoenaed by [Mother] for a prior hearing in this matter. . . . [Mother] objected to the introduction of these records, and the Court sustained [Mother's] objection." As such, given that the Record is unclear as to whether the trial court excluded the CPS Records as hearsay not falling under Rule 803(8) or as not constituting certified public records that can be authenticated by affidavit under Rule 902(4), we remand for Mother and Father to have the opportunity to present argument on these issues.

¶ 17 The trial court misapprehended the law and abused its discretion by excluding the CPS Records. Additionally, as it is unclear from the hearing transcript whether the trial court ultimately excluded the CPS Records solely on this basis or also on the bases that the records do not constitute public records under either Rule 803(8) or Rule 902(4), we remand for both parties to have full opportunity to present argument as to the documents' admissibility, along with the trial court's simultaneous review, under these or any of our other Rules of Evidence. Because we vacate and remand on this issue, we need not reach Father's other argument on appeal.

CONCLUSION

¶ 18 As its exclusion of the CPS Records was based on the misapprehension of law that public records—such as relevant child protective services records in a child custody modification proceeding—must be authenticated by live witness testimony, the trial court abused its discretion in excluding these records. We therefore vacate the Order and remand for the trial court to consider the admissibility of the CPS Records under North Carolina Rules of Evidence 803(8) and 902(4) as well as any other relevant evidence rules. On remand, the trial court should hold a new hearing on Mother's motion to modify the child custody order and both parties shall have the opportunity to present argument on the documents' admissibility.

VACATED AND REMANDED.

Judges DIETZ and COLLINS concur.

STATE OF NORTH CAROLINA
v.
LUIS ERNESTO AGUILAR, DEFENDANT

No. COA21-786

Filed 29 December 2022

1. Search and Seizure—motion to suppress—denial—rationale for ruling

In denying defendant's motion to suppress, the trial court adequately provided a rationale for its ruling where the trial court's statements from the bench during the hearing and during a later session of open court, coupled with the relevant conclusion of law, made clear what the court had concluded: that the officers had probable cause to conduct the warrantless search of defendant's vehicle based on the totality of the circumstances despite the police canine's failure to alert during a sniff search around the vehicle.

2. Search and Seizure—motion to suppress—warrantless search of vehicle—failure of canine to alert—totality of circumstances

The trial court's denial of defendant's motion to suppress evidence of contraband found during a warrantless search of his vehicle

was affirmed where the totality of the circumstances—including the reliable information from confidential informants, which was confirmed by the observations of experienced narcotics investigators—supported the conclusion that it was objectively reasonable to believe that defendant's vehicle contained narcotics, even though a police canine failed to alert on the vehicle.

Appeal by Defendant from judgment entered 1 June 2021 by Judge Nathan H. Gwyn III in Union County Superior Court. Heard in the Court of Appeals 8 June 2022.

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

Gilda C. Rodriguez for defendant.

MURPHY, Judge.

¶ 1 Our review of a denial of a motion to suppress is strictly limited to determining whether the trial court's underlying findings of fact are supported by competent evidence, in which case they are conclusively binding on appeal, and whether those factual findings in turn support the court's ultimate conclusions of law. We affirm the trial court's denial of Defendant's motion to suppress.

BACKGROUND

¶ 2 Defendant Ernesto Luis Aguilar appeals from his convictions, pursuant to a plea agreement, for trafficking by possession and transportation heroin that was 14 grams or more but less than 28 grams. On appeal, Defendant contends the trial court erred by denying his motion to suppress because officers lacked probable cause as required to justify the warrantless search of his vehicle.

¶ 3 On the morning of 29 January 2020, Lieutenant Ben Baker with the Union County Sheriff's Office received information from an informant, confidential source of information #1 ("CSI #1"),[1] known to have provided reliable tips in past illegal narcotics investigations. This information was a particularized tip that Robert Storc, who was under investigation

1. There are two confidential sources of information that provided tips to officers here: (1) CSI #1, who provided information regarding Robert Storc; and (2) confidential source of information #2 ("CSI #2"), who provided information regarding Mike Moreno, allegedly a local drug dealer with which the investigators were previously familiar.

for the sale of narcotics, would later that day be driving his dark colored Honda Accord and purchasing heroin from a supplier at a specified location, which was later changed to the Burger King parking lot in Monroe.

¶ 4 Later on 29 January 2020, members of the Union County Sheriff's Office and Monroe Police Department were conducting surveillance on Storc regarding the tip. Detective Ian Gross of the Union County Sheriff's Office watched Storc from the parking lot of a Buffalo Wild Wings in Monroe, which was across the street from the Burger King. Set up just across Highway 74 and equipped with binoculars, Detective Gross had a clear line of sight of Storc and other vehicles at Burger King. Around noon, Detective Gross observed Storc drive around the Burger King parking lot several times, park in different spots, and settle on a spot in the west side of the lot. Approximately five to ten minutes later, a grey Honda Accord, which Detective Gross believed to be either a 2010 or 2012 model based on previously owning a similar vehicle, parked near Storc. Detective Gross testified that the grey Honda Accord was driven by a "white or Hispanic male" with "short or bald hair" and that the vehicle had a paper license tag with plastic factory rims. Detective Gross claims Storc walked over to the grey Honda Accord, talked with the driver for a couple minutes, and returned to his vehicle. Detective Gross did not see Storc return to his own Honda Accord with anything in his hands.

¶ 5 Neither Storc nor the driver of the grey Honda were seen entering the Burger King and, shortly after the encounter, they left the parking lot separately and traveled westbound on Highway 74. Officers lost track of the grey Honda Accord but followed Storc to the parking lot of the Target approximately two miles down Highway 74 in Monroe and took Storc into custody where they found "a golf ball size" of what appeared to be heroin in his pocket. Storc allegedly then admitted who supplied him the heroin. Detective Brantley Birchmore of the Monroe Police Department, who was assisting in the investigation, claimed Storc said he just got the heroin from a man at a Burger King driving a grey Honda, but the supplements Detective Birchmore wrote following Storc's arrest did not include such an admission.

¶ 6 Seemingly coincidentally, as Storc was being taken into custody, CSI #2 told Detective Daniel Stroud of the Union County Sheriff's Office that Mike Moreno, a drug dealer known to law enforcement in Monroe, was about to purchase heroin at his house from someone driving a grey Honda Accord with a South Carolina paper tag. After receiving the information, some of the officers left the Target parking lot and drove to Moreno's house, which was about four to five miles or seven to ten

minutes away. From the parking lot of a nearby funeral home, Detective Gross observed Moreno's house for approximately three to five minutes before he noticed a grey Honda Accord with a paper tag parking in front of the house, and he communicated over police radio that he believed it to be the same vehicle that he had seen in the Burger King parking lot. Detective Gross then saw a white or Hispanic male leave the house and walk towards the grey Honda.

¶ 7 When the grey Honda drove away, officers followed it to the Fiesta Mart where they stopped the vehicle and found Defendant, a light-skinned bald Hispanic male, as the driver. The canine unit on scene conducted a sniff search around the grey Honda but did not alert on the car. However, based on the totality of the circumstances, such as the tips provided by two unrelated confidential informants and officers' observations that confirmed these specific tips, officers believed they had probable cause and proceeded to search the vehicle. Defendant was then arrested after officers found heroin while searching the car.

¶ 8 On 1 June 2020, the Union County Grand Jury indicted Defendant for trafficking by possession and transportation 28 grams or more of heroin. Defendant moved to suppress the evidence found during the search of his vehicle on the basis that officers lacked probable cause. Defendant's *Motion to Suppress* was heard at the 8 March 2021 Criminal Session of Union County Superior Court. On 18 March 2021, the trial court announced its decision to deny the motion, and Defendant gave notice of his intention to appeal. The trial court's written order denying Defendant's *Motion to Suppress* was signed 18 March 2021 and entered 1 April 2021.

¶ 9 On 1 June 2021, a superseding charging document was filed in which Defendant was charged by information of trafficking by possession and transportation heroin that was 14 grams or more but less than 28 grams. Although expressly reserving the right to appeal the suppression order, Defendant pleaded guilty to both charges at the 1 June 2021 Criminal Session of Union County Superior Court. The trial court entered a *Judgement and Commitment Order* and sentenced Defendant to a consolidated active sentence of 90 to 120 months. Defendant timely appeals. *See* N.C.G.S. § 7A-27(b) (2021); N.C.G.S. § 15A-979(b) (2021); N.C.G.S. § 15A-1444(a2) (2021).

ANALYSIS

¶ 10 Defendant urges us to reverse the trial court's denial of his *Motion to Suppress* on the basis that officers lacked probable cause to search his vehicle.

¶ 11 Our review of the "denial of a motion to suppress 'is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Tripp*, 381 N.C. 617, 2022-NCSC-78, ¶ 12 (quoting *State v. Cooke*, 306 N.C. 132, 134 (1982)). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Ashworth*, 248 N.C. App. 649, 651 (citation and marks omitted), *disc. rev. denied*, 369 N.C. 190 (2016). "Findings of fact not challenged on appeal 'are deemed to be supported by competent evidence and are binding on appeal.' " *Tripp*, 2022-NCSC-78 at ¶ 12 (quoting *State v. Biber*, 365 N.C. 162, 168 (2011)). "Even when challenged, a trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *Id.* (quoting *State v. Buchanan*, 353 N.C. 332, 336 (2001) (citation omitted)). Meanwhile, " '[c]onclusions of law are reviewed de novo and are subject to full review.' " *Id.* at ¶ 13 (quoting *Biber*, 365 N.C. at 168).

A. Findings of Fact

¶ 12 Defendant challenges only two of the trial court's 28 findings of fact. Specifically, Defendant contends Finding 6 and Finding 15 are not supported by competent evidence. The trial court's remaining findings of fact are not challenged and therefore are deemed to be supported by competent evidence and binding on appeal. *See id.* at ¶ 12 (quoting *Biber*, 365 N.C. at 168). We review Defendant's challenges to Findings 6 and 15 below.

1. Finding of Fact 6

¶ 13 Finding 6 reads,

> That approximately five to [ten] minutes after Storc's Honda parked, a grey Honda Accord, 2011 or 2012 model, with factory plastic rims, and no window tint driven by a white or Hispanic male, short hair or bald, pulled into the Burger King parking lot and parked on the same west side parking lot at Burger King.

Defendant claims the finding is not supported by competent evidence because "Gross did not have a clear view of the driver of the grey Honda as the trial court's finding implied" and thus the finding "erroneously portrayed what Gross was able to see while he was parked across the street from the Burger King." Defendant points to the fact that Detective

Gross "testified that he 'could not make that person out at the time.' " According to Defendant, "Gross reiterated that he could not see the driver while surveilling the Burger King when he testified that he 'could[] [not] see into [the grey Honda] but [he] could see that the driver was still seated in the driver's seat.' " Defendant contends that "[e]xactly when Gross was able to see the driver of the grey Honda that was at the Burger King parking lot was not revealed in his testimony or the supplemental report he completed for this case."

¶ 14 In response, the State argues, "[t]here was competent evidence that Detective Gross could make out the physical features of the driver of the grey Honda." According to the State, Detective Gross "could clearly make out the physical features of the driver as a white or Hispanic male with short or bald hair, but did not know the actual identity of the driver." The State thus contends, "[t]he fact that the Detective did not know the identity of the driver does not negate competent evidence that he could see the driver's physical features that ultimately matched Defendant's appearance." We agree with the State.

¶ 15 The Record reveals that Finding 6 is supported by competent evidence. As Defendant notes, Finding 6 was based on the testimony of Detective Gross, a detective with the Union County Sheriff's Office who claimed to have participated in and made arrests in "probably 100 or more" narcotics investigations. The testimony relevant to Finding 6 is reproduced below:

> [DETECTIVE GROSS:] So that day I observed the black Honda that was driven by Mr. Stor[c] circle the building several times, park in different spots and finally came to rest on the west side of that parking lot, of the Burger King parking lot.
>
> [THE STATE:] Was -- so you said he was moving around, driving around. Was that significant to you?
>
> [DETECTIVE GROSS:] It was.
>
> [THE STATE:] Why?
>
> [DETECTIVE GROSS:] So typically with any kind of drug transaction that we've witnessed and that I've been a part of the person that's purchasing the narcotics will move around in order to see who's following them. Sometimes it's just out of pure nervousness, but they will move around. But typically somebody that goes to a restaurant or anywhere, they go there,

they park, they go in, they come out. It's not something that they normally do.

[THE STATE:] Now, just a little bit more about that day in particular. About what time of day was this?

[DETECTIVE GROSS:] It was approximately noon.

[THE STATE:] Can you describe the weather conditions for that day?

[DETECTIVE GROSS:] It was clear, no rain.

[THE STATE:] Okay. And you stated you were across the street. Were you able to see with your own eyes?

[DETECTIVE GROSS:] No. I had to -- I could see the parking lot but in order to see everything clearly I used a set of binoculars.

[THE STATE:] Okay. And so tell me exactly what you saw in regards to Robert Stor[c] in that Burger King.

[DETECTIVE GROSS:] So after the vehicle parked on the west side of the lot, I don't recall exactly how many, maybe 5 to 10 minutes another vehicle, a gr[e]y in color Honda Accord, maybe a 2010, 2012 model pulled up on the same side of the parking lot, parked, and was driven by a white or Hispanic male. I could not make that person out at the time. At that time I watched Mr. Stor[c] get out of his vehicle and go to the driver's side of the gr[e]y Honda.

[THE STATE:] Okay. And then what happened when he went to the driver's side of the gr[e]y Honda?

[DETECTIVE GROSS:] Mr. Stor[c] stopped and talked with the driver approximately a minute, maybe two, and then went back to his vehicle.

[THE STATE:] Okay. Can you describe the -- well, first of all, was there anything about that interaction that stood out to you?

[DETECTIVE GROSS:] Just the fact that there was a meeting in a parking lot of obviously the target of that investigation, Mr. Stor[c], for a brief amount of time, which is consistent with a drug transaction.

[THE STATE:] Now, could you see what was going on within the gr[e]y Honda Accord that had pulled up beside Robert Stor[c]'s black Honda Accord?

[DETECTIVE GROSS:] I couldn't see into it but I could see that the driver was still seated in the driver's seat.

[THE STATE:] And you said that you -- you said that the driver was either a white or Hispanic male, but could you make out any other discerning characteristics about him?

[DETECTIVE GROSS:] Just short or bald hair.

[THE STATE:] Now, can you also further describe that gr[e]y Honda Accord that Stor[c] got into or went up to at the Burger King?

[DETECTIVE GROSS:] Yes. So like I said, again, I think it was a 2010 or 2012 model, somewhere about there.

[THE STATE:] How do you know that?

[DETECTIVE GROSS:] The reason I say that is I actually owned one of those –

[THE STATE:] Okay.

[DETECTIVE GROSS:] -- previously, so --

[THE STATE:] I'm sorry. Go ahead and describe the car.

[DETECTIVE GROSS:] So the vehicle had the plastic rims and stood out. You know, the -- I couldn't tell from that point what the tag was, just because I couldn't see the tag on the vehicle as it was parked there.

[THE STATE:] Could you tell if it was like a paper tag or like a metal tag?

[DETECTIVE GROSS:] So I was able to tell that it was a paper tag once both parties separated and the vehicles left the parking lot.

[THE STATE:] Were you able to see the numbers on the paper tag?

> [DETECTIVE GROSS]: No, ma'am.
>
> [THE STATE:] Okay. Also about that car, did it have like dark tinted windows?
>
> [DETECTIVE GROSS:] No. The windows were clear.

Detective Gross's testimony of what he observed at the Burger King is consistent with Finding 6 because Gross could make out the characteristics of the grey Honda Accord—that it was an early-2010's model with factory plastic rims and no window tint—and features of the driver—that he was white or Hispanic with bald or short hair—as he entered the parking lot about five to ten minutes after Storc's Honda Accord parked there. That Detective Gross could not make out the *identity* of the driver of the grey Honda Accord as someone with which he was familiar in his narcotics investigations does not mean his testimony describing the vehicle and driver's features was not competent evidence, as Detective Gross was clear and direct about the limited features of the driver he observed. Furthermore, to the extent that Defendant challenges Finding 6 based on the argument that it "implied" Detective Gross had a "clear view" of the driver in the grey Honda Accord, we are unpersuaded because neither the "clear view" language or anything like it appears in Finding 6. Even if Defendant is correct that Detective Gross did not have a clear view and could not see into the grey Honda Accord once it parked in the Burger King parking lot, challenged findings of fact " 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *Tripp*, 2022-NCSC-78 at ¶ 12 (quoting *Buchanan*, 353 N.C. at 336). We therefore conclude Finding 6 is supported by competent evidence and binding on appeal because a reasonable mind might accept Detective Gross's testimony as adequate to support the finding. *See Ashworth*, 248 N.C. App. at 651.

2. Finding of Fact 15

¶ 16 Finding 15 reads, "[t]hat while standing in the parking lot of [Target] Storc told Birchmore that he got the dope from a guy at the Burger King." Defendant claims the finding is not supported by competent evidence because "[i]t was not until a year later, in preparation for the motion to suppress hearing, that Birchmore communicated [] Storc's admission to the prosecutor handling [Defendant's] case" and "Birchmore's belated recollection of Storc's admission was not supported by the documentation Birchmore produced while the events were fresh in his mind a year earlier . . . ." We are not convinced.

¶ 17 The Record reveals that Finding 15 is supported by competent evidence. Detective Birchmore testified that he is a detective with the

Monroe Police Department who has participated in and made arrests in 50 to 100 narcotics investigations. Finding 15 is entirely consistent with Detective Birchmore's testimony during the hearing. Although the supplements that Detective Birchmore prepared did not mention that Storc "got the dope from a guy at the Burger King," Detective Birchmore testified at the hearing that he knew Storc "had made a comment about meeting a male at Burger King to receive dope, which ended up being heroin[,]" but that he "could[] [not] remember exactly how [Storc] worded it." We therefore conclude Finding 15 is supported by competent evidence and binding on appeal because a reasonable mind might accept Detective Birchmore's testimony as adequate to support the finding, despite Detective Birchmore not including Storc's incriminating statement in the supplements he prepared after Storc and Defendant's arrests. *See Ashworth*, 248 N.C. App. at 651. That Detective Birchmore did not include Storc's statement in his supplements goes, at most, to the credibility of Detective Birchmore and the weight of his testimony—determinations reserved for the trial court. *See State v. Fields*, 268 N.C. App. 561, 568 (2019) (citations and marks omitted) ("[T]he trial court determines the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, the trial court determines which inferences shall be drawn and which shall be rejected.").

B. Conclusions of Law

¶ 18 **[1]** Defendant also argues that these findings do not support the trial court's ultimate conclusion of law that officers had probable cause to search his vehicle. Additionally, Defendant argues that "the trial court erred by failing to provide its rationale in the conclusions of law for denying the motion to suppress." Defendant relies heavily on *State v. Faulk*, 256 N.C. App. 255 (2017), as he claims, "[i]n this case, like in *Faulk*, the trial court only had one relevant conclusion of law and did not provide its rationale for denying [Defendant's] motion to suppress—neither from the bench nor in the suppression order." Citing *State v. Baskins*, 247 N.C. App. 603 (2016), Defendant requests that "this case [] be remanded for conclusions of law that provide a rationale for the trial court's ruling on [Defendant's] motion to suppress."

¶ 19 At the outset, we first address whether the trial court erred by allegedly failing to provide a rationale for its ruling with the single conclusion of law in the order denying Defendant's *Motion to Suppress*, as such an error would require that we remand to allow the trial court to make additional findings of fact and conclusions of law. *See*, *e.g.*, *State v. McFarland*, 234 N.C. App. 274, 284-85 (2014) ("[T]he trial court failed

to make adequate conclusions of law to justify its decision to deny [the] defendant's motion to suppress . . . . Therefore, we must remand to allow the trial court to make appropriate conclusions of law based upon the findings of fact."); *see also State v. Neal*, 210 N.C. App. 645, 656 (2011) (citation and marks omitted) ("Where there is prejudicial error in the trial court involving an issue or matter not fully determined by that court, the reviewing court may remand the cause to the trial court for the appropriate proceedings to determine the issue or matter without ordering a new trial."). We are not persuaded that the trial court failed to provide a rationale for denying Defendant's *Motion to Suppress*.

¶ 20 In *Faulk*, we concisely explained the trial court's duty to set forth findings of fact and conclusions of law when ruling on a motion to suppress:

> When ruling on a motion to suppress following a hearing, "[t]he judge must set forth in the record his findings of facts and conclusions of law." [N.C.G.S.] § 15A-977(f) (2015). While this statute has been interpreted by the North Carolina Supreme Court to require findings of fact "only when there is a material conflict in the evidence[,]" *State v. Bartlett*, 368 N.C. 309, 312 . . . (2015), our Court has explained that "it is still the trial court's responsibility to make the conclusions of law." [*McFarland*, 234 N.C. App. at 284].
>
> "Generally, a conclusion of law requires 'the exercise of judgment' in making a determination, 'or the application of legal principles' to the facts found." [] *McFarland*, 234 N.C. App. at 284 . . . (quoting *Sheffer v. Rardin*, 208 N.C. App. 620, 624 . . . (2010)). When a trial court fails to make all the necessary determinations, *i.e.*, findings of fact resolving disputed issues of fact and conclusions of law applying the legal principles to the facts found, "[r]emand is necessary because it is the trial court that is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, *and*, *then based upon those findings*, *render a legal decision*, *in the first instance*, as to whether or not a constitutional violation of some kind has occurred." [*Baskins*, 247 N.C. App. at 610] (emphasis added) (internal [] marks and citation omitted); *see also State v. Salinas*, 366 N.C. 119, 124 . . . (2012) (holding that remand was

> necessary for additional findings of fact that resolved the conflicts in evidence).

Faulk, 256 N.C. App. at 262-63; *see* N.C.G.S. § 15A-977(f) (2021). Relying on our review of "a similar order denying a defendant's motion to suppress" in *Baskins*, we remanded *Faulk* to the trial court to "make necessary conclusions of law concerning [the] [d]efendant's motions to suppress." *See Faulk*, 256 N.C. App. at 263, 265 (citing *Baskins*, 247 N.C. App. at 609-11). The *Baskins* written order contained the following sole conclusion of law regarding the validity of the traffic stop:

> The temporary detention of a motorist upon probable cause to believe he has violated a traffic law (such as operating a vehicle with expired registration and inspection) is not inconsistent with the Fourth Amendment's prohibition against unreasonable searches and seizures, even if a reasonable officer would not have stopped the motorist for the violation. [citation omitted] [Detective] O'Hal was justified in stopping [the] [d]efendant['s] vehicle.

Baskins, 247 N.C. App. at 610. We explained in *Baskins* that "[t]his conclusion consists of a statement of law, followed by the conclusion that Detective O'Hal was 'justified' in initiating the stop" and that "does not specifically state that the stop was justified based upon any specific violation of a traffic law." *Id.* Citing *McFarland*, 234 N.C. App. at 283-84, we held that this sole conclusion of law did not make any conclusion about whether "Detective O'Hal was justified in initiating the stop based upon either the alleged registration violation or the alleged inspection violation . . . ." *Baskins*, 247 N.C. App. at 610-11.

¶ 21 Similarly, in *Faulk*, the order's sole conclusion of law stated, in its entirety,

> [t]hat [N.C.G.S. §] 15A-401(E) was not applicable to the arrest of [the defendant] in the State of Maryland and the arrest and subsequent search was not a violation of the Fourth and Fourteenth Amendments of the United States Constitution, therefore, the motion to suppress filed by the [d]efendant in this matter on [5 July 2016] is hereby denied.

Faulk, 256 N.C. App. at 264. Employing slightly different reasoning than we did in *Baskins*, we explained in *Faulk*, "[w]hile the undisputed evidence and facts found by the trial court support the denial of the motion,

the order lacks any conclusion applying legal principles to those facts, *i.e.*, it omits an appropriate determination in the first instance" as to "why [the] [d]efendant's warrantless arrest while in a private home . . . did not violate [the] [d]efendant's Fourth and Fourteenth Amendment rights." *Id.* We also found, as to the defendant's later filed motion to suppress, that "[b]ecause the evidence relevant to the search warrant was undisputed, the trial court was not required to make findings of fact to support its denial of the 14 July 2016 motion." *Id.* at 265. However, even though findings were not required, we held "the trial court's failure to provide its rationale from the bench, coupled with the omission of *any* mention of the motion challenging the search warrant, preclude[d] meaningful appellate review of that ruling." *Id.* (emphasis added). We emphasized that it "is the trial court's duty to apply legal principles to the facts, even when they are disputed." *Id.*

¶ 22 Defendant claims the case *sub judice* is like *Faulk* because "the trial court only had one relevant conclusion of law and did not provide its rationale for denying [his] motion to suppress[.]" We disagree. Here, the trial court's statements from the bench during the hearing on Defendant's *Motion to Suppress* and during a later session of open court on 18 March 2021, coupled with the relevant conclusion of law in the written order entered 1 April 2021, provided the court's rationale for denying the motion.

¶ 23 Notably, on appeal, Defendant completely ignores the trial court's statements from the bench during the 11 March 2021 hearing. These statements inform the trial court's later statements on 18 March 2021 that Defendant selectively quotes in his brief to suggest the trial court did not provide the rationale for its ruling.

¶ 24 Specifically, after allowing the parties to present arguments and evidence at the suppression hearing, as memorialized in a transcript over 100 pages in length, the trial court noted that it would "take it all under advisement" and "probably do [its] own research" before ruling on Defendant's *Motion to Suppress*. The State argued at the hearing that "[t]he canine didn't alert. But it did[] [not] even matter because we had so much other information that gave them probable cause to believe that [] Defendant had drugs within that car." The trial court made clear that its focus was on whether the caselaw has held that a negative canine hit on a vehicle means officers lacked probable cause to search despite other facts and circumstances to the contrary. This is shown in the exchange between Defendant's counsel and the State at the end of the hearing.

¶ 25 Answering Defendant's counsel's contention that "the facts of the dog not alerting is not in either one of th[e] cases" the State relied on during the hearing, the State explained, "I looked for a case like that. There's not a case because I believe if you've got probable cause, you've got probable cause." Defendant's counsel quickly replied, "I would argue that the fact that we can't find a case where the drug dog did not alert and they still searched illustrates there was no probable cause and most every other officer would know that there's no probable cause to search the car." The trial court then indicated it would review the cases cited by the parties and would "probably do [its] own research . . . ." The State then stated that it "wasn't able to find a case [saying] that the absence of a dog alert negates any other probable cause" and that "just because the dog did[] [not] alert does[] [not] negate all the other probable cause that they had." Defendant's counsel had the last word at the hearing, seeming to suggest that the lack of a positive canine hit necessarily compels the conclusion that officers did not have probable cause. Given this lengthy exchange on the issue raised by Defendant's *Motion to Suppress*, our search for the rationale for the trial court's ruling as announced in open court on 18 March 2021 and explained by written order entered 1 April 2021 cannot be complete without considering the context of what was said during the suppression hearing. These statements show the ruling was that officers had probable cause based on the totality of the circumstances—as laid out in four pages of findings—despite the canine failing to alert during a sniff search of the vehicle.

¶ 26 Furthermore, the statement announcing the denial of Defendant's *Motion to Suppress*—when considered in its entirety—shows the court exercised its judgment and applied the totality of the circumstances test for probable cause:

> The Court's going to deny your motion, but I do want to put this on the record, that the Court struggled with the fact that the dog didn't hit on the car. And I don't mean this sarcastic or any ill will toward the Government, but when a dog has a positive alert it's the gospel we're supposed to take and it's the gospel. And when the dog has a negative alert, we're supposed to -- it seems like we're supposed to ignore that. But based on everything, the totality of everything I would have had to -- the not hitting would have had to outweigh all the other stuff based on -- based on the cases I've read there was nothing on point, obviously y'all know. But the appellate court, where

> you like it or not, they are very lenient toward these dogs and their behaviors, whether it's issues or positives and nothing's found. So that's the Court's ruling. But I want you -- I wanted it to be on the record the things that I had problems with.

The trial court clearly explained the rationale for why it denied Defendant's *Motion to Suppress* concerning evidence officers found after searching the vehicle because the court exercised its judgment in applying the law to the facts and concluding that "based on . . . the totality of everything . . . the [canine] not hitting [did not] outweigh all the other stuff . . . ." These statements from the bench were confirmed by order entered 1 April 2021.

¶ 27 In that order, the trial court made 28 findings of fact that described the totality of circumstances on which the court based its decision and that we held *supra* are binding on appeal:

> 1. That on [29 January 2020] Detective Ben Baker ("Baker"), Detective Ian Gross ("Gross"), Detective Jonathan Presson ("Presson"), and Detective Jason Stroud ("Stroud"), all with the Union County Sheriff's [Office] Narcotics Division and Detective Brantley Birchmore ("Birchmore") with the Monroe Police Department Narcotics Unit, conducted a drug interdiction surveillance operation at Burger King located on Highway 74 and Secrest Shortcut Road in Monroe, Union County, North Carolina ("Burger King"). All members involved in the drug interdiction surveillance operation each had years of experience and many hours training in narcotics investigations.
>
> 2. That Baker received information from a confidential source of information (CSI #1) that Robert Storc would be driving his dark colored Honda Accord and meeting a heroin source of supply at the Burger King, and this information was conveyed to all members involved in the drug interdiction surveillance operation.
>
> 3. That the CSI #1 was a reliable source of information in that they had given Baker reliable information regarding drug investigations many times over the years. That the CSI was a career informant, whose

information led police to make many arrests over fifteen years at the local and federal level.

4. That on [29 January 2020] at approximately 12:00pm, Gross parked his gold Chrysler minivan at the Buffalo Wild Wings located on Hwy 74 across from the Burger King, where he was able to see the parking lot area of the Burger King and used binoculars to see more clearly [the] vehicles in the parking lot[.]

5. That Gross observed a black Honda Accord driven by Robert Storc circle the Burger King parking lot several times, park in different spots, and finally park in a spot to the west side of the parking lot at Burger King.

6. That approximately five to [ten] minutes after Storc's Honda parked, a grey Honda Accord, 2011 or 2012 model, with factory plastic rims, and no window tint driven by a white or Hispanic male, short hair or bald, pulled into the Burger King parking lot and parked on the same west side parking lot at Burger King.

7. That Storc got out of his vehicle and went to the driver's side of the grey Honda Accord, spoke to the male driver for approximately one to two minutes and then returned to his vehicle. Gross did not notice anything in Storc's hands.

8. That neither Storc nor the male driver of the grey Honda Accord went inside Burger King or went through the drive-thru at Burger King. That the male driver of the grey Honda Accord never exited his vehicle at the Burger King.

9. That based on Gross's training and experience, the CSI #1 information, he opined that a drug transaction had occurred between Storc and the driver of the grey Honda Accord in the parking lot of Burger King.

10. That both Storc's vehicle and the grey Honda Accord left the parking lot of Burger King and traveled westbound on Highway 47 and Gross relayed that information to all Detectives involved in the drug interdiction surveillance via police radio.

11. That Gross noticed when the grey Honda Accord left the Burger King parking lot, a paper license tag was on the grey Honda Accord.

12. That the other officers involved in the surveillance followed both Storc's vehicle and the grey Honda Accord, but lost the grey Honda Accord in traffic.

13. That officers followed Storc's vehicle into the parking lot of Target located on Highway 74, approximately two and [a] half miles from the Burger King, where Storc backed into a parking space in front of Rack Room Shoes adjacent to Target.

14. That Storc was removed from the vehicle, patted down and arrested by Birchmore. Approximately nine to [ten] grams of a substance believed to be heroin was located in the front right pocket of Storc's jeans.

15. That while standing in the parking lot of Target/Rack Room Shoes Storc told Birchmore that he got the dope from a guy at the Burger King.

16. That while in the parking lot of Target/Rack Room Shoes, Stroud received information from an independent confidential source of information (CSI #2) that was not involved in the investigation to this point, that a source of supply of heroin which was driving a grey Honda Accord with a South Carolina paper tag was delivering heroin to Michael Marino, known to law enforcement as Mike Mike, at Marino's residence located on West Park Drive in Monroe, which was approximately four to five miles and approximately seven to ten minute drive from the Target parking lot. Marino was known to law enforcement as a heroin drug trafficker due to many dealings with him in the past, and law enforcement where he lived due to previous surveillance of his residence.

17. That CSI #2 was reliable in that Stroud had used this confidential source of information approximately twenty to thirty times and those times Stroud had found him/her to be reliable.

18. That Gross went to Marino's residence located on West Park Drive, and parked in the back parking lot

of a funeral home located next to West Park Drive, where he was able to view Marino's residence.

19. That Gross noticed the same grey Honda Accord with a paper license tag that he had seen in the parking lot of Burger King approximately fifteen to twenty minutes earlier, parked in front of Marino's residence, along with Marino's black Chrysler 300 parked in front of the residence.

20. That Gross saw a white or Hispanic male leave Marino's residence and walk toward the grey Honda Accord parked in front of Marino's residence, "either get into the driver's seat or go near the vehicle".

21. That approximately three to five minutes after Goss arrived at Marino's residence, the grey Honda Accord left Marino's residence and traveled toward Franklin Street.

22. That Stroud also went to Marino's residence located on West Park Drive, an approximate 10-minute drive from the Target/Rack Room Shoes parking lot on Elizabeth Avenue, which is across the street from Marino's residence.

23. That Stroud noticed a grey Honda Accord parked in front of Marino's residence and shortly after Stroud's arrival on Elizabeth Avenue, the grey Honda Accord left, turning on Elizabeth Avenue heading toward Franklin Street. That Stroud used binoculars and saw the driver ([the] only occupant of the vehicle) of the grey Honda Accord, stocky build Hispanic male, clean shaven, broad jaw, wearing a dark shirt and a black toboggan.

24. That Gross, Stroud and several other officers involved in the drug interdiction surveillance followed the grey Honda Accord, where it traveled on Franklin Street, turned right on Morgan Mill Road and continued to travel on Walk Up to the area of Riverside Drive or Castle Drive, Monroe, and then turned left onto Castle Drive and immediate right into the parking lot of Fiesta Mart, and parked on the south side of the parking lot beside the building.

> 25. That the area where Fiesta Mart is located is a known drug trafficking area, that Monroe Police Department has worked several drug cases and surveillance in that area.
>
> 26. That the vehicle was stopped and the driver removed from the vehicle. That the driver did not say anything and appeared "very stoic and calm".
>
> 27. That Presson conducted an air sniff around the grey Honda Accord with his [canine], [which] . . . did not alert on the grey Honda Accord.
>
> 28. That Gross, Birchmore and Stroud identified the person that was removed from the grey Honda Accord as [Defendant]. That [] [D]efendant is a light skinned, bald Hispanic male.

Based on its findings of fact, the trial court made the following conclusions of law:

> 1. This matter is properly before the Court; and the Court has jurisdiction over the respective parties and over the subject matter of this action.
>
> 2. Based upon a totality of the circumstances the Court concludes that [] Defendant's motion to suppress for lack of probable cause be denied.

These conclusions of law and findings of fact, along with the trial court's statements during the hearing on 11 March 2021 and during the announcement of the denial of Defendant's *Motion to Suppress* on 18 March 2021, sufficiently explain the court's rationale in resolving the sole issue implicated by the motion and addressed at the suppression hearing: whether officers had probable cause to search Defendant's vehicle based on the totality of the circumstances. This separates the case *sub judice* from *Baskins* and *Faulk*.

¶ 28 Unlike in *Baskins*, where the trial court intimated that its denial of the defendant's motion to suppress challenging the basis for his traffic stop was due to officers observing the defendant commit a traffic violation but did not indicate the particular alleged violation that justified the stop, here the trial court indicated that, despite the negative canine hit, observations from surveilling officers and information from reliable confidential sources were sufficient to establish probable cause to search Defendant's vehicle. Our decision in *Faulk* that remanded due

to the sole conclusion of law in the order stated that neither a particular statutory provision nor the defendant's constitutional rights were violated is likewise distinguishable because the trial court here explained that probable cause supported the search based upon the totality of the circumstances in the findings. As such, we hold that appellate review of the order is indeed possible and no remand is necessary. We therefore consider whether the trial court's findings of fact support its ultimate conclusion of law that officers had probable cause to search Defendant's vehicle based upon the totality of the circumstances. *See Tripp*, 2022-NCSC-78 at ¶ 12.

¶ 29 **[2]** "The Fourth Amendment [to] the United States Constitution and Article [I], Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures." *State v. Parker*, 277 N.C. App. 531, 2021-NCCOA-217, ¶ 25 (citation and marks omitted), *disc. rev. denied*, 860 S.E.2d 917 (Mem) (2021). "Typically, a warrant is required to conduct a search unless a specific exception applies." *Id.* (citation and marks omitted). "For example, the motor vehicle exception provides that the search of a vehicle on a public roadway or public vehicular area is properly conducted without a warrant as long as probable cause exists for the search." *Id.* (citation and marks omitted). "Probable cause is generally defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty of an unlawful act." *Id.* (citation and marks omitted)). In the context of the motor vehicle exception,

> [a] police officer in the exercise of his duties may search an automobile without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

State v. Degraphenreed, 261 N.C. App. 235, 241 (2018) (citation and marks omitted).

¶ 30 Defendant challenges the trial court's ultimate conclusion of law by arguing that, "[i]n the absence of a positive alert from the [canine], there was no probable cause to search the vehicle." As such, we must determine whether the conclusion that there was probable cause—based on the then-existing facts and circumstances being sufficient to support a reasonable belief that Defendant's vehicle carried contraband

materials—is supported by trial court's findings of fact. *See id.*; *Tripp*, 2022-NCSC-78 at ¶ 12. "The existence of probable cause is a commonsense, practical question that should be answered using a totality-of-the-circumstances approach." *State v. McKinney*, 361 N.C. 53, 62 (2006) (citation and marks omitted).

¶ 31 Here, the binding findings of fact reveal several circumstances that, even in the absence of a positive alert from the canine, support a reasonable belief that Defendant's vehicle carried contraband materials. The evidence showed (i) a credible confidential source provided reliable information that Storc was going to the Burger King to get heroin; (ii) Storc met a grey Honda with paper tags driven by a man matching Defendant's description at the Burger King parking lot; (iii) neither Storc nor the other driver went into Burger King and instead had a one to two minute interaction in the car that Detective Gross testified as being consistent with a drug transaction; (iv) when law enforcement stopped Storc shortly after leaving Burger King, they found heroin in his pocket; (v) at the same time, another credible confidential source provided reliable information that Moreno, a known drug trafficker, was being supplied with heroin by a male in a grey Honda with paper tags; (vi) law enforcement immediately went to Moreno's house and saw what they believed to be the same grey Honda with paper tags parked that was driven by the same white or Hispanic man they saw at Burger King; (vii) law enforcement followed and stopped the grey Honda driven by Defendant, which was the same vehicle at the Burger King and Moreno's house; and (viii) Defendant is a bald Hispanic male. Based on these facts regarding reliable information from confidential sources confirmed by observations of experienced narcotics investigators, it was objectively reasonable to believe that Defendant's vehicle contained contraband materials such as the heroin found on Storc.

¶ 32 Furthermore, Defendant has cited no case, either before the trial court or on appeal, holding that officers *cannot* have probable cause to search a vehicle if a canine search is conducted and the canine fails to alert. Nor did we find such a case. Defendant cites cases that found probable cause existed where there was a positive alert for narcotics by a specially trained canine, *see*, *e.g.*, *State v. Washburn*, 201 N.C. App. 93, 100 (2009), *disc. rev. denied*, 363 N.C. 811 (2010), but the only case Defendant cites mentioning a failure to alert is a United States Supreme Court case that simply mentioned the reality in policing that "[i]f a dog on patrol fails to alert to a car containing drugs, the mistake *usually* will go undetected because the officer will not initiate a search." *Florida v. Harris*, 568 U.S. 237, 245 (2013) (emphasis added). Indeed, this

statement seems to imply that officers occasionally *do* search a vehicle after a canine fails to alert, seemingly based on other circumstances. *Id.*

¶ 33 Nevertheless, whether probable cause existed is a practical question that should be answered based on the totality of the circumstances present in the particular case. *See McKinney*, 361 N.C. at 62; *Harris*, 568 U.S. at 244 ("We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach."). We therefore hold that the circumstances in this case supported a reasonable belief that Defendant's vehicle carried narcotics. Accordingly, the trial court's ultimate conclusion of law that officers had probable cause to search Defendant's vehicle was not erroneous, as it is supported by the circumstances laid out in the trial court's findings of fact that are binding on appeal.

CONCLUSION

¶ 34 As the findings of fact support the trial court's ultimate conclusion of law, that officers had probable cause to search Defendant's vehicle based upon the totality of the circumstances, the trial court did not err in denying Defendant's *Motion to Suppress*.

AFFIRMED.

Judges DIETZ and WOOD concur.

STATE OF NORTH CAROLINA
v.
GLENN SPENCER BOYETTE, JR., DEFENDANT

No. COA21-612

Filed 29 December 2022

1. Appeal and Error—notice of appeal—timeliness—fourteen-day period

Defendant timely appealed the revocation of his probation where he filed his written notice of appeal within the fourteen-day period allowed by Appellate Rule 4. Although the trial court rendered its decision at the hearing on 30 April 2021, the entry of the order was delayed until 24 May 2021 when it was filed with the clerk of court; therefore, defendant's filing of his written notice of appeal on 25 May 2021 (one day after entry of the order) was timely.

2. Probation and Parole—revocation proceeding—admission of evidence—exclusionary rule

The appellate court rejected defendant's arguments that the trial court erred by not suppressing evidence that was allegedly obtained in violation of the Fourth and Fourteenth Amendments, because the exclusionary rule does not apply in probation revocation proceedings.

Judge JACKSON concurring as to part A and concurring in result only as to part B.

Appeal by Defendant from judgments entered 30 April 2021 by Judge Daniel A. Kuehnert in Caldwell County Superior Court. Heard in the Court of Appeals 10 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kayla D. Britt, for the State.

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

MURPHY, Judge.

¶ 1 Rule 4 of the North Carolina Rules of Appellate Procedure authorizes appeal in criminal cases via written notice of appeal filed with the

Clerk of Court. Such written notice may be filed at any time between (1) the date of the rendition of the judgment or order and (2) the fourteenth day after entry of the judgment or order. Where a written order exists, the date of entry of the judgment or order is when the judge's written order is filed with the Clerk of Court. Here, the trial court's order was filed by the Clerk of Court on 24 May 2021. The next day, on 25 May 2021, Defendant filed his written notice of appeal. Since Defendant filed his written notice of appeal within the fourteen-day period allowed by Rule 4, Defendant's appeal was timely, and we deny the State's *Motion to Dismiss Appeal*.

¶ 2 Evidence procured in contravention of the Fourth and Fourteenth Amendments is not subject to the exclusionary rule at probation revocation hearings, and we reject Defendant's arguments that the trial court erred by not suppressing evidence allegedly obtained in violation of his constitutional rights.

BACKGROUND

¶ 3 On 16 July 2015, Defendant, pursuant to a plea arrangement, pled guilty to possession of stolen goods and manufacturing methamphetamine. On 3 September 2015, Defendant received a sentence of 73 to 100 months, suspended for 60 months of supervised probation, for the manufacturing methamphetamine charge. The same day, the trial court sentenced Defendant to a consecutive term of 6 to 8 months for the possession of stolen goods charge, which was also suspended for 60 months of supervised probation.

¶ 4 Around 1:40 a.m. on 25 May 2020, two Sheriff's deputies, Corporal Robbins and Sergeant Knupp, were at the Yadkin Valley Fire Department on Highway 268 when they saw a yellow Ford pickup truck drive past them toward the Wilkes County Line. Approximately 10 to 15 minutes later, they saw the truck come back with a lawnmower in the bed. The officers thought it was unusual for someone to pick up a lawnmower so early in the morning, and they began following the truck in separate patrol cars. They followed Defendant in his truck for about 5 to 8 minutes, and Cpl. Robbins initiated a traffic stop after the truck crossed the middle line and went 55 mph in a 35 mph zone.

¶ 5 After stopping the Defendant at the Hillbilly Trading Post, Cpl. Robbins approached Defendant and retrieved his driver's license. Sgt. Knupp checked Defendant's information because Cpl. Robbins was having difficulty with his radio. While Sgt. Knupp was checking Defendant's information, Cpl. Robbins conducted a "free-air sniff" of the truck with his K-9. The dog completed two circles around the truck; and, although

he sniffed "intense[ly]" in a few places, he never alerted. During the free-air sniff, Sgt. Knupp was told by dispatch that Defendant was on probation and had a suspended license, and Sgt. Knupp relayed this information to Cpl. Robbins. Sgt. Knupp also confirmed Defendant's probation status, found Defendant was subject to warrantless searches, and informed Cpl. Robbins of that information. Cpl. Robbins then went back to Defendant and told him he was subject to warrantless searches, which Defendant confirmed.

¶ 6 Cpl. Robbins asked Defendant to exit the vehicle and frisked him for weapons. No weapons were found on Defendant's person. Cpl. Robbins then searched the vehicle while Defendant stood with Sgt. Knupp. In the vehicle, Cpl. Robbins found a single-shot shotgun, two glass smoking pipes, a straw, and two plastic baggies containing a "crystal substance." The North Carolina State Crime Lab results later revealed the crystal substance was methamphetamine. Neither Sgt. Knupp nor Cpl. Robbins recalled whether Defendant was the registered owner of the truck.[1]

¶ 7 Subsequently, on 17 and 27 May 2020, Defendant's probation officer filed probation violation reports with the trial court, alleging Defendant had violated the revocation-eligible condition of probation not to commit a criminal offense and indicating Defendant was found in possession of a firearm and methamphetamine. The alleged probation violations came before the trial court for hearing on 30 April 2021. At the hearing, the trial court revoked Defendant's probation in both cases and activated his suspended sentences but modified them to run concurrently. Defendant gave written notice of appeal on 25 May 2021; and, on 25 April 2022, the State filed a *Motion to Dismiss Appeal*, arguing Defendant's appeal was untimely.

ANALYSIS

¶ 8 On appeal, Defendant contends the trial court erred by not suppressing the evidence found during the search of the truck. The State's *Motion to Dismiss Appeal*, however, claims Defendant failed to timely appeal. Accordingly, we first address the State's *Motion to Dismiss Appeal* and then whether the trial court erred by not suppressing the evidence found in the search of the truck.

1. At some point during the stop, both officers asked Defendant about the lawnmower and other tools in the back of the pickup. Defendant said they were his, and the officers did not proceed with an investigation.

A. State's *Motion to Dismiss Appeal*

¶ 9 **[1]** The North Carolina Rules of Appellate Procedure provide:

> Any party entitled by law to appeal from a judgment or order of a [S]uperior or [D]istrict [C]ourt rendered in a criminal action may take appeal by: (1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the [C]lerk of [S]uperior [C]ourt and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order . . . .

N.C. R. App. P. 4(a) (2021). According to the relevant portion of N.C.G.S. § 15A-1347, a defendant has the right to appeal "[w]hen a [S]uperior [C]ourt judge, as a result of finding . . . a violation of probation, activates a sentence or imposes special probation." N.C.G.S. § 15A-1347(a) (2021). Also, in a criminal case, a "[j]udgment is entered when [a] sentence is pronounced." N.C.G.S. § 15A-101(4a) (2021). The State argues that, in a probation-revocation case, judgment is entered when the trial court orally announces it is activating a suspended sentence.

¶ 10 "Compliance with the requirements for entry of notice of appeal is jurisdictional." *State v. Oates*, 366 N.C. 264, 266 (2012) (citing *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197-98 (2008)). "We review issues relating to subject matter jurisdiction de novo." *Id.* (citing *Harris v. Matthews*, 361 N.C. 265, 271 (2007)).

¶ 11 In support of its argument, the State relies on our opinion in *State v. Yonce*. In that case, a defendant was sentenced to 15 to 18 months imprisonment, which the trial court suspended in favor of supervised probation for five years. *State v. Yonce*, 207 N.C. App. 658, 659 (2010), *disc. rev. denied*, 365 N.C. 80 (2011). A little over five months into his probation, the defendant's probation officer filed violation notices. *Id.* On 27 October 2008, a violation hearing was held. *Id.* at 660. The trial court found the defendant had willfully violated the terms and conditions of his probation but gave the defendant until 1 December 2008 to come into compliance and scheduled a review hearing on 8 December 2008. *Id.* The trial court also found that,

> if [the] [d]efendant fully complied with the monetary payment provisions of the original judgments by 1 December 2008, his active [prison] sentences should not be put into effect. On the other hand, if [the] [d]efendant failed to "be in full and complete compliance" on 8 December 2008, his prison sentences should be activated immediately.

Id. At the review hearing, the trial court "ordered that [the] [d]efendant begin serving his active sentences." *Id.* at 661. On 12 December 2008, the defendant gave notice of his appeal, which "allude[d] to the 8 December 2008 order," but his arguments on appeal "primarily focused on the 27 October 2008 order." *Id.* at 661-63. After noting that N.C.G.S. § 15A-101 prescribed that judgment is entered when the sentence is pronounced, we reasoned the "[trial court] entered a final judgment when [the judge] ordered that [the] [d]efendant's 'sentences [be put] into effect' on 27 October 2008." *Id.* at 663. We then held,

> [s]ince [the] [d]efendant did not note his appeal to this Court until 12 December 2008, a date substantially more than fourteen days following the entry of [the trial court]'s order [on 27 October 2008], this Court lacks jurisdiction over [the] [d]efendant's challenge to the revocation of his probation as embodied in [the trial court]'s order and has no authority to consider [the] [d]efendant's challenge to that decision.

Id.

¶ 12 Here, the trial court found Defendant had willfully violated his conditions of probation by being in possession of a firearm and methamphetamine, and it pronounced the activation of Defendant's suspended sentences at the end of the probation violation hearing on 30 April 2021. While it is true N.C.G.S. § 15A-101 purports to dictate that judgment is entered when the sentence is pronounced, in *State v. Oates*, our Supreme Court explained that Rule 4 of the North Carolina Rules of Appellate Procedure governs appeals in criminal cases. *See Oates*, 366 N.C. at 268. The Court continued,

> we believe Rule 4 authorizes two modes of appeal for criminal cases. The Rule permits oral notice of appeal, but only if given at the time of trial . . . . Otherwise, notice of appeal must be in writing and filed with the clerk of court. Such written notice may be filed at any time between the date of the rendition of the judgment or order and the fourteenth day after entry of the judgment or order. Here, the suppression order was rendered on 15 December 2009 when the trial judge stated, "I'm going to enter the order suppressing," thereby deciding the issue before him. The order was entered on 22 March 2010 when the clerk of the superior court in Sampson County filed the judge's

> written order in the records of the court. As a result, the span within which the State could have filed its written notice of appeal extended from 15 December 2009 until 5 April 2010. The State's 22 December 2009 appeal was timely.

Id. (citations omitted). The State's motion is controlled by *Oates* and not our earlier holding in *Yonce*. The trial court rendered its decision at the hearing on 30 April 2021. The order was entered, however, on 24 May 2021 when the order was filed with the Clerk of Court. Like in *Oates*, where the delayed entry of the order extended the time to appeal, the delayed entry in this case also extended the time Defendant had to appeal. As a result, the filing of Defendant's notice of appeal on 25 May 2021—one day after the entry of the order—was timely. We therefore deny the State's *Motion to Dismiss Appeal*.

B. Evidence Found in the Search of the Truck

¶ 13 **[2]** Defendant provides three arguments in support of his contention the evidence found during the search of the truck should have been suppressed by the trial court: (1) the search of the truck by Cpl. Robbins was not supported by reasonable suspicion and therefore violated the Fourth Amendment; (2) the search of the truck was not authorized by N.C.G.S. § 15A-1343(b)(14); and (3) Defendant did not consent to the search of his truck.

¶ 14 However, as each of these arguments incorrectly assumes that the exclusionary rule applies during probation revocation proceedings, they are all without merit.[2] In 1982, our Supreme Court held "that evidence which does not meet the standards of the [F]ourth and [F]ourteenth [A]mendments to the United States Constitution may be admitted in a probation revocation hearing." *State v. Lombardo*, 306 N.C. 594, 602 (1982). In addition, N.C.G.S. § 15A-1345 states, in relevant part, "[f]ormal rules of evidence do not apply at the [probation revocation] hearing . . . ." N.C.G.S. § 15A-1345(e) (2021); *see also State v. Murchison*, 367 N.C. 461, 464 (2014) (marks and citations omitted) ("[O]ur Rules of Evidence, other than those concerning privileges, do not apply in proceedings for sentencing, or granting or revoking probation."). Thus, regardless of

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2. While Defendant's brief only cursorily refers to the Fourth Amendment in the course of these arguments, the caselaw he cites and the underlying rationale of his arguments are necessarily based on the Fourth Amendment exclusionary rule. Furthermore, Defendant acknowledges in a container paragraph for the section containing all three arguments that he is arguing the search "violated his rights under the United States and North Carolina Constitutions."

whether the search would have passed constitutional muster if offered as the basis for the admission of evidence at a trial on the new offenses, the trial court did not err by admitting the evidence at Defendant's probation revocation hearing.

CONCLUSION

¶ 15 Our Supreme Court has made it clear that defendants in a criminal proceeding may file written notice of appeal within fourteen days of a trial court's order being filed in the records of the court by the Clerk of Court. Defendant did so, and we deny the State's *Motion to Dismiss Appeal*. Furthermore, at a probation revocation hearing, the Fourth Amendment's exclusionary rule for evidence does not apply. Accordingly, the trial court did not abuse its discretion by admitting the evidence obtained in the search of the truck.

NO ERROR.

Judge CARPENTER concurs.

Judge JACKSON concurs as to part A and concurs in result only as to part B.

STATE OF NORTH CAROLINA
v.
BOBBY LESHAWN BYRD

No. COA22-527

Filed 29 December 2022

Search and Seizure—search warrant application—affidavit—probable cause—nexus between cellphone and home invasion

The trial court properly denied defendant's motion to suppress evidence found on his cellphone where the warrant application's supporting affidavit established probable cause for the search by demonstrating a nexus between the cellphone and an armed home invasion, based on the following details: the victim described a red and black suitcase that had been stolen from his home; the victim's neighbor described a dark late-model Lexus with chrome rims that was parked near the home at the time of the invasion; the neighbor later positively identified the vehicle; that same vehicle had been

used to transport defendant to the hospital later in the night of the home invasion; the registered owner of the Lexus consented to having her car searched, which led to the discovery of the stolen suitcase and defendant's white cellphone; the car's owner explained to law enforcement that she had loaned out her car earlier in the day, that she did not know what the car had been used for, that defendant was her cousin, and that defendant owned a white cellphone that was missing.

Appeal by Defendant from order entered 29 July 2021 by Judge James Ammons in Johnston County Superior Court. Heard in the Court of Appeals 16 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John F. Oates, Jr., for the State-Appellee.

Drew Nelson for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Bobby Leshawn Byrd appeals the trial court's order denying his motion to suppress evidence obtained during the search of his cellphone. Defendant argues that probable cause did not support issuing a warrant to search the cellphone. We affirm the trial court's order.

I. Background

¶ 2 Defendant was arrested on 7 October 2018 and subsequently indicted for first degree burglary, first degree kidnapping, robbery with a dangerous weapon, conspiracy to commit those offenses, and having attained violent habitual felon status. Prior to trial, Defendant moved to suppress all evidence obtained from the search of his cellphone. The motion to suppress came on for hearing on 26 July 2021. The trial court heard arguments and considered the search warrant application, which included the affidavit of Detective R. L. Ackley.

¶ 3 The facts as alleged in Ackley's affidavit tended to show that, on the night of 13 September 2018, deputies from the Johnston County Sheriff's Department responded to a call regarding a suspicious vehicle and shooting investigation. Upon arriving in the area, a deputy was flagged down by Zachary McNeill, who stated that he was the victim of a home invasion. McNeill said that two unknown black men kicked in the door to his mobile home, fired multiple shots into his home, bound McNeill's hands, covered his face, and hit him in the head with a pistol. After

approximately one hour had passed, and once McNeill no longer heard the men's voices, McNeill fled out the front door of his home. McNeill reported that the men stole an Xbox, cash, clothing, and a distinct red and black Tourister suitcase that had been gifted to McNeill by his employer.

¶ 4 One of McNeill's neighbors heard gunshots coming from McNeill's home and drove to investigate the disturbance. The neighbor noticed an older-model, dark colored Lexus with chrome rims parked near McNeill's home, and he provided deputies with a description of the car and the driver. That same night, in a separate incident, Defendant was shot in the leg while at a Comfort Inn and then transported to the hospital in an older-model dark Lexus with chrome rims. Ackley was made aware of the similarity between the car observed near McNeill's home and the car that transported Defendant to the hospital, and he obtained a photo of the car that transported Defendant to the hospital. McNeill's neighbor reviewed the photo, and immediately identified the car as the same one he saw parked near McNeill's home. Ackley seized the car and contacted its registered owner, Latasha Surles. Surles consented to a search of her car, a 1998 black Lexus 400 with chrome rims. Law enforcement searched the Lexus, and they found a white LG cellphone and a red and black Tourister suitcase. Surles was later interviewed by law enforcement, wherein she stated that Defendant, who is her cousin, owns a white LG cellphone that was missing. She explained that she loaned her Lexus to a man named Elias Sanders on the night of the home invasion, but that she did not know what Sanders "used her vehicle for or who was with him."

¶ 5 Following the parties' arguments, the trial court entered a written order denying Defendant's motion to suppress. The case came on for trial on 6 October 2021, and Defendant again moved to reconsider the denial of the motion to suppress. The trial court denied Defendant's motion. The jury found Defendant guilty of first degree burglary, first degree kidnapping, robbery with a firearm, and of being a violent habitual felon. The trial court sentenced Defendant to the mandatory term of life in prison without parole. Defendant gave proper oral notice of appeal in open court.

II. Discussion

¶ 6 Defendant argues that the trial court improperly denied his motion to suppress the evidence collected from the cellphone because the search warrant was not supported by probable cause. Specifically, Defendant argues that the affidavit in support of the warrant failed to allege sufficient facts to show a nexus between Defendant's cellphone and the home invasion. We disagree.

¶ 7 This Court reviews a trial court's denial of a motion to suppress to determine "whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Wiles*, 270 N.C. App. 592, 595, 841 S.E.2d 321, 325 (2020) (citation omitted). Unchallenged findings of fact are binding on appeal. *State v. Fizovic*, 240 N.C. App. 448, 451, 770 S.E.2d 717, 720 (2015). A trial court is only required to make a finding of fact "when there is a material conflict in the evidence," *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015), and this Court may consider such undisputed evidence when determining whether the trial court's conclusions of law are supported. *State v. Wiggins*, 210 N.C. App. 128, 138, 707 S.E.2d 664, 672 (2011). We review the trial court's conclusions of law de novo. *Wiles*, 270 N.C. App. at 595, 841 S.E.2d at 325.

¶ 8 The Fourth Amendment provides: "The right of the people to be secure in their . . . effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. However, "what the Constitution forbids is not all searches and seizures, but *unreasonable* searches and seizures." *State v. Ladd*, 246 N.C. App. 295, 301, 782 S.E.2d 397, 401 (2016) (quotation marks and citations omitted). "[A] search occurs when the government invades reasonable expectations of privacy to obtain information." *State v. Perry*, 243 N.C. App. 156, 167, 776 S.E.2d 528, 536 (2015) (citation omitted). In order to determine whether an individual possesses a reasonable expectation of privacy, this Court must consider whether (1) "the individual manifested a subjective expectation of privacy" and (2) "society is willing to recognize that expectation as reasonable." *Id.* (quotation marks and citation omitted).

¶ 9 The Supreme Court of the United States has acknowledged that substantial privacy concerns are implicated in the search of a cellphone, holding that law enforcement must first obtain a warrant in order to search the contents of a cellphone—even when a cellphone is seized in a search incident to a lawful arrest. *Riley v. California*, 573 U.S. 373 (2014); *see Ladd*, 246 N.C. App. at 302, 782 S.E.2d at 402 (holding that officers "must generally secure a warrant before searching a cell phone seized incident to arrest" as "serious privacy concerns arise in the context of searching digital data"). A valid search warrant must be based on probable cause, and our courts examine the totality of the circumstances to determine whether such probable cause exists. *State v. Worley*, 254 N.C. App. 572, 576, 803 S.E.2d 412, 416 (2017). Probable cause means

that our courts "must make a practical, common-sense decision based on the totality of the circumstances, whether there is a fair probability that evidence will be found in the place to be searched." *Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416 (quotation marks, brackets, and citations omitted). This Court has held that affidavits "must establish a nexus between the objects sought and the place to be searched." *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (citations omitted).

¶ 10 Here, the trial court made the following relevant, unchallenged findings of fact to support the denial of Defendant's motion to suppress:

> 8. On 13 September 2019, officers responded to a suspicious vehicle complaint on Pine Level Road in Smithfield, North Carolina.
>
> 9. During the investigation into the suspicious vehicle, Zachary McNeil[l] advised officers of a home invasion.
>
> 10. Mr. McNeil[l] advised that two unknown black males entered his house, tied him up, ransacked his house, and stole items from his home.
>
> 11. The stolen items included one thousand dollars, men's clothing, and a red and black Tourister suitcase.
>
> 12. An independent witness advised officers that he saw an older modeled, dark in color Lexus with chrome rims leaving the scene of the home invasion.
>
> 13. Later that morning, a black male was brought to the emergency room of Johnston Memorial Hospital with a gunshot wound. The black male was brought to the hospital in a dark in color Lexus with chrome rims.
>
> 14. The officers' investigation led them to a 1998 black Lexus 400 with the license plate number EJT-1456.
>
> 15. A picture of the Lexus was taken and shown to the witness who saw the car, who identified the car as the car he saw leaving the scene of the home invasion.
>
> 16. Detective Ackley then seized the car and interviewed the owner.
>
> 17. The owner of the Lexus provided Detective Ackley consent to search the car.

> 18. While searching the car, Detective Ackley found a white in color LG phone and a red and black Tourister suitcase.
>
> . . . .
>
> 20. The search warrant affidavit provides considerable information regarding the Affiant's knowledge of how evidence can be stored and hidden on cell phones.
>
> 21. The Affiant listed the item to be searched as the LG white in color cell phone found in the 1998 black Lexus.

¶ 11 These unchallenged findings of fact support the trial court's conclusion of law that the search warrant was based on probable cause because these findings show that: McNeill reported that he was the victim of a home invasion and that, among other things, a distinct red and black Tourister suitcase was stolen from his home; a neighbor provided eyewitness testimony that he saw an older-model, dark Lexus with chrome rims near McNeill's home at the time of the invasion; that same neighbor later positively identified the 1998 black Lexus 400 with chrome rims as the same vehicle that left the scene of the home invasion; Defendant was taken to the hospital in a dark in color Lexus with chrome rims; and the white LG cellphone was discovered in the Lexus, along with the specific red and black Tourister suitcase that was taken from McNeill's home. These findings show the requisite nexus between Defendant's white LG cellphone and the home invasion. *See McCoy*, 100 N.C. App. at 576, 397 S.E.2d at 357.

¶ 12 Moreover, the trial court's conclusion of law is further supported by the undisputed facts established by Surles' interview with law enforcement. *Wiggins*, 210 N.C. App. at 138, 707 S.E.2d at 672. Surles explained that: she was the owner of the Lexus; she loaned the car to Elias Sanders during the morning hours of 13 September 2018; and Defendant was her cousin and the owner of a white LG cellphone that was missing as of the time of the interview. After Surles provided consent to search the car, law enforcement found both the white LG cellphone and the distinct red and black Tourister suitcase in the car. Under the totality of the circumstances, these facts show a nexus between Defendant's white LG cellphone and the home invasion. *Worley*, 254 N.C. App. at 576, 803 S.E.2d at 416; *McCoy*, 100 N.C. App. at 576, 397 S.E.2d at 357.

III. Conclusion

¶ 13 As the evidence here supports the findings of fact, and the findings of fact support the trial court's conclusion of law that "[t]he search warrant of the seized cell phone was based on sufficient probable cause," we affirm the trial court's denial of Defendant's motion to suppress. *Wiles*, 270 N.C. App. at 595, 841 S.E.2d at 325.

AFFIRMED.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
DAVID JEROME HESTER, DEFENDANT

No. COA22-227

Filed 29 December 2022

1. Appeal and Error—petition for writ of certiorari—record on appeal—failure to include judgment

Defendant's petition for a writ of certiorari challenging the trial court's order of attorney fees, which defendant alleged was issued months after his criminal trial and without notice or the opportunity to be heard, was denied because defendant failed to include the attorney fees judgment in the record on appeal.

2. Constitutional Law—effective assistance of counsel—implied concession of guilt—lesser-included offenses

In defendant's prosecution for crimes arising from a series of break-ins at a nonoperational power plant—felony breaking or entering, felony larceny after breaking or entering, felony possession of stolen goods, and respective lesser-included offenses—defense counsel's concession during closing argument that defendant was at the plant ("caught") without permission and possessed the plant's stolen keys (which "don't just grow from the ground") constituted an implied admission of guilt as to two lesser-included offenses and required defendant's consent. Because there was no evidence in the record that defendant consented to counsel's admission of guilt, the case was remanded to the trial court for an evidentiary hearing on the matter.

STATE v. HESTER

[287 N.C. App. 282, 2022-NCCOA-906]

Appeal by Defendant from judgments entered 11 June 2021 by Judge Michael A. Stone in Duplin County Superior Court. Heard in the Court of Appeals 18 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State.

Christopher J. Heaney for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant David Jerome Hester appeals from judgments entered upon jury verdicts finding him guilty of felony breaking or entering, felony larceny, and felony possession of stolen goods following a series of break-ins at a nonoperational power plant (the "plant") in Duplin County, North Carolina. Defendant contends his trial counsel violated his constitutional rights in three distinct ways: (1) conceding Defendant's guilt without his consent; (2) prejudicially indicating to the jury he did not believe Defendant's testimony maintaining his innocence; and (3) after reaching an "absolute impasse" as to tactical decisions, disregarding Defendant's directives. After careful review, we remand to the trial court for an evidentiary hearing to determine whether Defendant knowingly consented to his counsel's admissions of guilt and dismiss Defendant's remaining claims without prejudice to filing a motion for appropriate relief below.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 The evidence of record discloses the following:

¶ 3 In the early morning of 13 December 2017, police found Defendant with his girlfriend, April Crisp, and his acquaintance, Jamie Wiggs, inside a warehouse within the plant. Although the plant was not in operation, the warehouse contained various industrial tools and equipment.

¶ 4 Michael Houston, a former employee familiar with the plant and its contents, visited the plant two or three times a week to ensure its security. During a visit on 6 November 2017, he found evidence indicating someone had broken into the plant and the warehouse: the perimeter fence had been cut, the office door had been pried open, several rooms were in disarray, and numerous items were missing including computers, radios, cell phones, and keys to areas of the plant. Mr. Houston reported this break-in and theft to his supervisors and police.

¶ 5 A few weeks later, Mr. Houston reported another plant break-in. A forklift fuel tank, pipe threaders, and other equipment were missing, and he found carts loaded with other items ready to be hauled away. After this alleged break-in, Mr. Houston and one of the plant owners installed deer, security cameras inside the warehouse to capture any movement. The cameras were programmed to send a text message along with photos to the plant owner's cell phone when movement triggered the cameras.

¶ 6 The plant owner received a text early in the morning of 13 December 2017, notifying him that the cameras had captured movement, and the photos revealed people inside the warehouse. He called the Duplin County Sheriff's Office, and around 1:25 a.m., Patrol Sergeant Kennedy and Deputy Raynor were dispatched to the plant along with State Trooper Edwards. The officers found Defendant, Ms. Crisp, and Mr. Wiggs inside the warehouse. They also discovered bolt cutters outside the warehouse and, on a chain securing the front gate, a blue lock, which did not belong to the power plant.

¶ 7 An investigator and detective from the Duplin County Sheriff's Office obtained warrants to search the two trucks parked at the plant that night, one of which was Defendant's white 2004 Dodge Ram pickup. In Defendant's truck bed, the detectives found a tap and die set, grinding blades, welding leads, machinery parts, pressure gauges, first aid supplies, and red bolt cutters. They also found multiple pairs of work gloves and an assortment of keys—labeled, for example, "small gate," fuel yard," "storage building," and "front gate," while other keys had "danger signs" attached to them—in the cab of the truck.

¶ 8 A grand jury indicted Defendant on three counts each of felony breaking and entering, felony larceny after breaking and entering, and felony possession of stolen goods as well as ancillary counts of habitual felon status and habitual breaking or entering for the alleged break-ins at the plant on 5-6 November, 10-11 November, and 12-13 December 2017. Defendant pleaded not guilty to all charges.

¶ 9 Defendant's case came on for trial on 7 June 2021. Mr. Houston testified that: (1) the tagged keys found in Defendant's truck belonged to the plant; (2) the gloves found in Defendant's truck were the exact type the plant used for welding; and (3) other items found in Defendant's truck were the type of items used at the plant. However, neither the property manager nor Mr. Houston could produce an updated, itemized list of the property in the plant, and some items Mr. Houston described as missing—a large toolbox, a pipe threader, calibration tools, handheld

radios, a battery charger, and computer hard drives—were not found in Defendant's Dodge pickup truck.

¶ 10 Throughout the trial, defense counsel had ongoing trouble with his hearing. After the State rested, Defendant's counsel requested a *Harbinger* inquiry because Defendant had decided to testify in his defense, and the trial court engaged with Defendant about his decision. Before testifying, Defendant told the trial court that his counsel "can't hear well evidently" and that his counsel did not ask several of the questions of the witnesses which Defendant had requested. The trial court responded, "That's fine. Thank you, sir," but did not investigate further.

¶ 11 Defendant testified and maintained his innocence, explaining that on the night he and Ms. Crisp were found at the plant, he coasted into the property because his truck was having mechanical problems. He could not restart his truck because the battery was dead, so he called Mr. Wiggs to help jump-start his car. Once Mr. Wiggs arrived, the three entered the plant looking for jumper cables. At some point, Ms. Crisp apparently dropped her ring under a forklift, so Mr. Wiggs and Defendant moved the forklift to look for it. As a commercial truck driver and part-time welder, Defendant kept tools in his truck, including sets of keys, a first aid kit, and graphite metal grinding wheels. He testified he never placed any of the plant's property into his truck and had no knowledge of how the plant keys wound up there.

¶ 12 Defense counsel opened his closing argument addressing the jury, "Let me level with you. I agree it's not good to be caught in the act while being in somebody else's building without consent." Throughout his argument, defense counsel repeatedly characterized Defendant as being "caught" and "in the act."

¶ 13 Before the case was submitted to the jury, the State dismissed the two counts of felony possession associated with the 5-6 and 10-11 November break-ins. The jury found Defendant guilty of one count each of felony breaking or entering, felony larceny after breaking and entering, and felony possession of stolen goods associated with the 12-13 December plant break-in but not guilty of the same charges associated with the other two break-ins on 5-6 and 10-11 November. Defendant entered an *Alford* plea to habitual felon status. The State dismissed the habitual breaking and entering ancillary indictments. The trial court arrested judgment on the felony possession of stolen goods charge and sentenced Defendant to 97 to 129 months in prison. Defendant gave oral notice of appeal from the criminal judgments.

II. ANALYSIS

A. Attorney's Fees Entered against Defendant

¶ 14 **[1]** Defendant filed a petition for writ of *certiorari* with this Court on 20 May 2022, challenging the attorney's fees entered after Defendant gave oral notice of appeal from the criminal judgments and months after trial because the trial court did not provide Defendant notice or the opportunity to be heard on the issue of attorney's fees as required by *State v. Friend*, 257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018).

¶ 15 Although the trial court entered criminal judgments against Defendant on 11 June 2021, the trial court did not personally address attorney's fees with Defendant at trial and did not enter an order for attorney's fees at that time. Instead, the trial court apparently entered judgment for attorney's fees over three months later, on 20 September 2021. But because Defendant did not include the attorney's fees judgment in the record on appeal and did not supplement the record with the judgment pursuant to our Rules of Appellate Procedure, N.C. R. App. P. 9(d), 11(c) (2022), we cannot review the judgment, and we deny Defendant's petition for review of this issue.

B. Defense Counsel Conceded Defendant's Guilt

¶ 16 **[2]** Defendant offers three separate arguments contending his counsel's actions at trial violated his constitutional rights. We review each of Defendant's alleged violations of a constitutional right *de novo*. *State v. Garner*, 252 N.C. App. 393, 400, 798 S.E.2d 755, 760 (2017). Upon *de novo* review, we consider the matter anew and freely substitute our own judgment for that of the trial court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

1. Implied Admissions of Lesser-Included Offenses

¶ 17 Defendant first argues that his counsel conceded his guilt without his consent by referring to Defendant as being "caught" or "in the act" five times throughout the closing argument in violation of *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985). In particular, Defendant contends his counsel's admission that Defendant possessed the stolen keys from the plant and was inside the warehouse without consent directly contradicted Defendant's testimony and amounted to a concession of Defendant's guilt on all charges associated with the 12-13 December plant break-ins, or, at the very least, the lesser-included offenses of misdemeanor breaking or entering and misdemeanor possession of stolen goods. We conclude that, by conceding Defendant was at the plant without permission and possessed the plant's stolen keys, defense counsel

admitted Defendant's guilt as to one count of misdemeanor breaking or entering and one count of misdemeanor possession of stolen goods. Such admissions by counsel required Defendant's consent.

¶ 18 "A criminal defendant suffers a per se violation of his constitutional right to effective assistance of counsel when his counsel concedes the defendant's guilt to the jury without his prior consent." *State v. McAllister*, 375 N.C. 455, 456, 847 S.E.2d 711, 712 (2020) (citing *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08). A constitutional violation exists whether the admission is express or implied. *Id.* at 475, 847 S.E.2d at 723. "Admitting a fact is not equivalent to an admission of guilt." *Id.* at 469, 847 S.E.2d at 720 (citation omitted). And "defense counsel can admit an element of a charge without triggering a *Harbison* violation." *State v. Arnette*, 276 N.C. App. 106, 2021-NCCOA-42, ¶¶ 42, 45. Requesting that the jury find a defendant not guilty cannot serve to negate trial counsel's previous admissions. *See State v. Cholon*, 284 N.C. App. 152, 2022-NCCOA-415, ¶ 26.

¶ 19 Unlike other types of ineffective assistance of counsel claims reviewed pursuant to *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), a defendant whose counsel commits *Harbison* error is not required to demonstrate prejudice to obtain relief. *Harbison*, 315 N.C. at 179-80, 337 S.E.2d at 507 ("[W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed."). No showing of prejudice is required, in large part, because a concession without consent violates a defendant's "absolute right to plead not guilty—a decision that must be made knowingly and voluntarily by the defendant himself and only after he is made aware of the attendant consequences of doing so." *McAllister*, 375 N.C. at 463, 847 S.E.2d at 716 (citing *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507).

¶ 20 Recently, in *State v. McAllister*, our Supreme Court applied *Harbison* to a context in which defense counsel *impliedly* admitted the defendant's guilt during his closing argument. 375 N.C. at 473, 847 S.E.2d at 722. The defendant in *McAllister* was charged with four crimes—assault on a female, rape, sexual offense, and assault by strangulation. *Id.* at 472-73, 847 S.E.2d at 722. During closing argument, counsel stated, "You heard him admit that things got physical. You heard him admit that he did wrong. God knows he did." *Id.* at 473, 847 S.E.2d at 722. Counsel further asserted that the defendant was "being honest" in his videotaped interview with law enforcement when he admitted to smacking, grabbing, backhanding, and pushing the victim. *Id.* at 473-74, 847 S.E.2d at 722-23. Counsel did not address the assault on a female charge during closing, but he repeatedly mentioned the other three, more severe charges. *Id.* at

474, 847 S.E.2d at 722-23. Finally, defense counsel asked the jury to find the defendant not guilty on the three more severe charges yet made no such request for the charge of assault on a female. *Id.* The Court held defense counsel impliedly admitted defendant's guilt on this count, resulting in *Harbison* error, by: (1) vouching for the truth of the defendant's interview statements; (2) interjecting his personal opinion to imply the defendant lacked justification in his use of force towards the victim; and (3) omitting the charge of assault on a female from the list of charges for which he asked the jury to find the defendant not guilty. *Id.*

¶ 21 Here, Defendant was charged with three separate instances of three crimes—felony breaking or entering, felony larceny after breaking or entering, and felony possession of stolen goods—and respective lesser-included offenses. Felonious breaking or entering has three elements: that a defendant (1) breaks or enters; (2) a building; (3) with the intent to commit a felony or larceny therein. *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992); N.C. Gen. Stat. § 14-54(a) (2021). Non-felonious breaking or entering differs in that it need not be done with the intent to commit a felony so long as the breaking or entering was wrongful, without any claim of right. § 14-54(b). Felony larceny after breaking and entering has four elements: that a defendant (1) takes and carries away another person's property; (2) without that person's consent; (3) from a building after breaking and entering; and (4) knowing that he was not entitled to deprive the victim of the item's use. *State v. Redman*, 224 N.C. App. 363, 365-66, 736 S.E.2d 545, 548 (2012); N.C. Gen. Stat. § 14-72(b)(2) (2021). Felony possession of stolen goods also has four elements: that a defendant (1) possessed personal property; (2) which was stolen pursuant to a breaking or entering; (3) knowing or having reasonable grounds to believe the property was stolen pursuant to a breaking or entering; and (4) acted with a dishonest purpose. *State v. McQueen*, 165 N.C. App. 454, 459, 598 S.E.2d 672, 676 (2004); N.C. Gen. Stat. § 14-71.1 (2021). Misdemeanor possession of stolen goods differs from felonious possession only in that the State need not prove that the property was stolen pursuant to a breaking or entering. *See* § 14-72(a).

¶ 22 Defense counsel described Defendant as "caught" or "in the act" several times during closing argument:

> Let me level with you. I agree *it's not good to be caught in the act* while being in somebody else's building *without consent*.
>
> It ain't good to identify yourself to then *er caught on camera* while *you* are in somebody else's building *without consent*.

. . . .

> And that happened because they were *caught in the act* and they searched the trucks. One of them being Mr. Hester's truck, a 2004 Dodge Ram.
>
> . . . .
>
> And when it comes to the December, the last incident where *he was in the act*, it was in the warehouse, they're bringing three charges; felony breaking and entering, felony larceny after breaking and entering, and felony possession of stolen goods.
>
> . . . .
>
> I agree with you, *it looks pretty bad* for the December 12th, 13th offense, when you are in a warehouse *caught*, bundled up in the wintertime, and identify yourself on camera. That *looks pretty bad*. But does that prove—does that—anything else?

(Emphasis added). Then defense counsel addressed the "elephant in the room, the keys," which "appear[ed] to belong to the power plant," quipping "keys don't grow from the ground and they don't materialize as in Star Trek." In closing, defense counsel urged the jurors not to "shut [their] eyes to what [they] saw" but ultimately requested a not guilty verdict on all counts.

¶ 23 Coloring defense counsel's statements as an acknowledgement of the undisputed fact that Defendant was in the warehouse at the plant on the night of 13 December, the State argues defense counsel did not admit Defendant's guilt of the charged offenses, expressly or impliedly, during closing argument. That Defendant was inside the warehouse on 12-13 December was not disputed at trial; Defendant admitted he entered the plant warehouse, and police found him there. But Defendant never conceded in his testimony that he was there without consent. Beyond Defendant's presence in the plant, defense counsel's repeated characterization of Defendant as "caught" and "in the act" at the plant implied he was there unlawfully, without consent of its owners. Defendant also denied putting any plant property in his truck and testified he "didn't know" how the keys got there. He never admitted he had actual or constructive possession of the keys. Yet, defense counsel referred to the keys as the "elephant in the room," which "don't grow from the ground" and "don't materialize as in Star Trek" and conceded the keys found in Defendant's truck "appear[ed] to belong to the power plant."

¶ 24 As in *McAllister*, defense counsel in this case undermined Defendant's credibility by casting doubt on his testimony at trial, interjected his personal opinion that Defendant had been caught "in the act," and made implied admissions of Defendant's guilt as to the lesser-included crimes of misdemeanor breaking or entering and misdemeanor possession of stolen goods. *See McAllister*, 375 N.C. at 474, 847 S.E.2d at 722-23; *State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004) ("For us to conclude that a defendant permitted his counsel to concede his guilt to a lesser-included crime, the facts must show, at a minimum, that defendant *knew* his counsel were going to make such a concession. Because the record does not indicate defendant *knew* his attorney was going to concede his guilt to second-degree murder, we must conclude defendant's attorney made this concession without defendant's consent, in violation of *Harbison*." (emphasis in original)). *Cf. State v. Gainey*, 355 N.C. 73, 92-93, 558 S.E.2d 463, 476 (2002) (holding no concession of guilt because of "the consistent theory of the defense that defendant was not guilty"); *State v. Greene*, 332 N.C. 565, 572, 422 S.E.2d 730, 734 (1992) (holding no admission of guilt where "[t]he clear and unequivocal argument was that the defendant was innocent of all charges"). And like counsel in *McAllister*, defense counsel only challenged the State's evidence for the charges associated with the first two alleged break-ins, not the third, for which he was convicted. *See McAllister*, 375 N.C. at 474, 847 S.E.2d at 722-23.

¶ 25 As in *Harbison* and *Matthews*, defense counsel's admissions to the lesser-included crimes of misdemeanor breaking or entering and misdemeanor possession of stolen goods amount to *Harbison* error. *See Harbison*, 315 N.C. at 178-81, 337 S.E.2d at 506-08 (remanding for a new trial where defense counsel explicitly admitted the defendant's guilt during closing argument and requested the jury convict him of the lesser crime without the defendant's consent); *Matthews*, 358 N.C. at 109, 591 S.E.2d at 540 ("*Harbison* requires that the decision to concede guilt to a lesser included crime 'be made exclusively by the defendant.' " (quoting *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507)). Defense counsel's ultimate request to the jury for a not guilty verdict on all counts cannot negate his admissions of Defendant's guilt for those misdemeanor crimes. *See Cholon*, ¶ 26.

¶ 26 Recognizing the *McAllister* Court's admonition that a "finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence," *McAllister*, 375 N.C. at 476, 847 S.E.2d at 724, we conclude this case presents such an occurrence. Defense counsel's comments about the keys and Defendant's presence at the warehouse without

consent constitute the "functional equivalent of an outright admission of the defendant's guilt as to" the crimes of misdemeanor breaking or entering and misdemeanor possession of stolen goods. *Id.* at 475, 847 S.E.2d at 723 (citation omitted). While perhaps a valid trial strategy, such admissions required Defendant's consent. *Id.*, 847 S.E.2d at 723-24; *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507 ("This Court is cognizant of situations where the evidence is so overwhelming that a plea of guilty is the best trial strategy. However, the gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands.").

2. No Record Evidence Defendant Consented to Admissions

¶ 27 Having determined defense counsel implicitly admitted Defendant's guilt to two misdemeanor crimes, we must next consider whether Defendant consented to the admissions. After the State rested, defense counsel indicated to the trial court that the defense would "most likely not" present any evidence. However, following a break for lunch, defense counsel informed the trial court that his client wished to testify and asked the trial court "to engage in the *Harbinger* (sic) inquiry to make sure that the defendant understands the risks he faces in choosing to testify." The trial court distinguished between *Harbinger* and *Harbison* and then apprised Defendant of his right to remain silent and not *testify*. Before he testified, Defendant expressed concern that his counsel had difficulty with his hearing and failed to ask witnesses questions he requested. The trial court responded, "That's fine. Thank you, sir" but did not investigate further. Notwithstanding this exchange about Defendant's choice to testify, neither defense counsel nor the trial court engaged with Defendant about his right to consent to any admission by his counsel pursuant to *Harbison*, though Defendant maintained his innocence throughout trial. *See Harbison*, 315 N.C. at 177, 180, 337 S.E.2d at 506-07 (holding prejudicial error where counsel requested that the jury find the defendant guilty of manslaughter instead of first-degree murder but "the defendant steadfastly maintained that he acted in self-defense").

¶ 28 "[A]n on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt during closing argument," but such a colloquy is not the "sole measurement of consent." *State v. Thompson*, 359 N.C. 77, 120, 604 S.E.2d 850, 879 (2004) (citation omitted). Our Supreme Court has "made clear that the absence of any indication in the record of defendant's consent to his counsel's admissions will not—by itself—lead us to 'presume defendant's lack of consent.' " *McAllister*, 375 N.C. at 477, 847 S.E.2d at 725 (citations omitted).

¶ 29 Therefore, we remand to the trial court for an evidentiary hearing as soon as practicable for the sole purpose of determining whether Defendant knowingly consented in advance of his counsel's admissions of guilt to misdemeanor breaking or entering and misdemeanor possession of stolen goods. *See id.*; *Cholon*, ¶¶ 28-29 (remanding for an evidentiary hearing to determine whether the defendant knowingly consented to his counsel's admissions). On remand, the trial court shall make findings of fact and conclusions of law and enter an order. *See McAllister*, 375 N.C. at 477, 847 S.E.2d at 725.

C. Defendant's Remaining Claims

¶ 30 In the event the trial court determines Defendant consented to his counsel's admissions on remand, and thus no *Harbison* error exists, Defendant also argues: (1) for the same reasons outlined above, defense counsel violated his Sixth Amendment right to counsel by prejudicially indicating to the jurors he did not believe Defendant was innocent, contradicting Defendant's testimony, and undermining Defendant's credibility; and (2) after Defendant and his counsel reached an "absolute impasse" about tactical decisions, defense counsel disregarded, intentionally or because of a hearing impairment, his directives about examining witnesses. These claims may be rendered moot by the trial court's determination of the *Harbison* issue on remand, and in any event cannot be decided on the record before us. We therefore dismiss Defendant's remaining claims without prejudice to him filing a motion for appropriate relief below. *See State v. Floyd*, 369 N.C. 329, 341, 794 S.E.2d 460, 468 (2016); *State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985).

III. CONCLUSION

¶ 31 For the reasons set forth above, we remand to the trial court for an evidentiary hearing regarding Defendant's *Harbison* claim, and we dismiss Defendant's remaining claims without prejudice to Defendant filing a motion for appropriate relief.

REMANDED IN PART; DISMISSED IN PART.

Judges COLLINS and JACKSON concur.

STATE v. McVAY

[287 N.C. App. 293, 2022-NCCOA-907]

STATE OF NORTH CAROLINA
v.
QUENCY ANDRE McVAY, DEFENDANT

No. COA22-241

Filed 29 December 2022

1. Motor Vehicles—speeding to elude arrest—lawful performance of officer's duties—motion to dismiss

In a prosecution for felonious speeding to elude arrest, the State presented sufficient evidence that a police officer was lawfully performing his duties—when attempting to stop defendant's vehicle—to survive defendant's motion to dismiss. The officer was lawfully authorized to pursue and stop defendant when he witnessed defendant fail to stop at a stop sign and when defendant subsequently began driving recklessly, and the indictment's allegation that the officer was attempting to arrest defendant for discharging a weapon into an occupied vehicle was mere surplusage that must be disregarded.

2. Appeal and Error—preservation of issues—special jury instruction—failure to submit request in writing

In a prosecution for felonious speeding to elude arrest, where defense counsel orally requested that the jury be instructed that the specific duty the officer was performing was to arrest defendant for discharging a firearm into an occupied vehicle, the request was for a deviation from the pattern jury instruction and therefore qualified as a request for a special instruction. Because the request for a special instruction was made orally rather than submitted in writing, the issue was not preserved for appellate review. Further, defendant waived plain error review by failing to allege plain error.

Appeal by Defendant from judgment entered 15 July 2021 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

MURPHY, Judge.

¶ 1 Defendant Quency Andre McVay argues the trial court erred by denying his motion to dismiss for insufficiency of evidence and by denying Defendant's jury instruction request. As we explain in further detail below, the trial court did not err in denying Defendant's motion to dismiss, and Defendant's jury instruction request was not preserved for our review.

BACKGROUND

¶ 2 On 21 November 2016, Officer Calvin Davis of the Charlotte-Mecklenburg Police Department was parked at an intersection in his patrol car and received a call from a dispatcher to be on the lookout for a "[w]hite sedan . . . possibly a Honda" driven by a black male with a black female passenger because the driver had shot into another vehicle. This information was based upon a prior call to the 911 operator. The caller indicated "a young African American" driving a "white or a white silver Nissan" had shot at his car. Shortly after receiving the dispatch call, at about 10:00 p.m., Davis observed a "white sedan moving at a high rate of speed" drive through a stop sign and pass his parked vehicle.

¶ 3 Davis began to follow the white sedan, which continued at a high rate of speed, and saw it drive through several more stop signs. At this point, Davis initiated his blue lights and siren, but the white sedan continued to drive at a high rate of speed and Davis gave chase. Two more officers joined the pursuit, and they chased the white sedan for approximately ten minutes through residential areas at speeds ranging from 55 to 90 miles per hour. The white sedan eventually was blocked by, and stopped in front of, a stopped train at a railroad crossing. Defendant showed his hands out the window of the sedan and yelled that "the only reason [he was] running is because [he is] wanted by the U.S. Marshals." Defendant and the female passenger, Jami Landis, exited the vehicle and were arrested.

¶ 4 On 5 December 2016, a Mecklenburg County Grand Jury indicted Defendant for felonious speeding to elude arrest, discharging a firearm into a vehicle in operation, and possession of a firearm by a felon. The indictment stated that Defendant was "fleeing and attempting to elude a law enforcement officer" and Davis was "in the lawful performance of [his] duties, arresting the suspect for [an] outstanding warrant and discharging [a] weapon into an occupied vehicle." On 10 April 2017, Defendant was also indicted for attaining habitual felon status. The separate indictments were joined for trial at the 5 March 2018 Criminal

Session of Mecklenburg County Superior Court, the Honorable Lisa C. Bell presiding. At trial, Defendant moved to dismiss the charges for insufficient evidence, arguing that there was no evidence to suggest that the officers were attempting to arrest Defendant for his outstanding warrants or properly discharging their duties, nor evidence that Defendant was found in possession of a firearm. The trial court granted Defendant's motion as to the outstanding warrants and denied the rest of the motion.

¶ 5 At the charge conference, Defense Counsel orally requested that the jury be instructed that the specific duty that Davis was performing was to arrest Defendant for discharging a firearm into an occupied vehicle. The State objected and requested that the trial court use only the pattern jury instruction verbiage. The trial court sustained the State's objection and instructed the jury that, to satisfy the duty element of the offense, it must find "[D]efendant was fleeing and/or attempting to elude law enforcement officers who were in their lawful performance of their duty." The jury found Defendant guilty of felonious speeding to elude arrest and attaining habitual felon status.

¶ 6 Defendant was not present for part of the trial beginning on 8 March 2018 and was not present for the verdict. As a result, the trial court entered a prayer for judgment continued. On 29 July 2019, in accordance with N.C.G.S. § 15A-932(a)(1), the State dismissed the charges against Defendant, with leave to reinstate them at a later time, because the prosecutor believed he could not be readily found. Defendant was later located, and, on or about 28 June 2021, the charges were reinstated in accordance with N.C.G.S. § 15A-932(d). N.C.G.S. § 15A-932(d) (2021). On 15 July 2021, judgment was entered on the jury verdict and the trial court sentenced Defendant to an active term of imprisonment of 90 to 120 months. Defendant timely appeals.

ANALYSIS

¶ 7 On appeal, Defendant argues (A) "the trial court erred by denying the motion to dismiss when there was insufficient evidence that Officer Davis was lawfully performing his duties when attempting to stop [Defendant]"; and (B) "the trial court erred by denying [Defendant's] request to instruct the jury on the duty the officer was performing at the time he attempted to stop [Defendant]."

A. Defendant's Motion to Dismiss

¶ 8 **[1]** On appeal, Defendant argues that, because the arrest was warrantless and not supported by probable cause to arrest based on the surviving theory in the indictment, Davis was not lawfully performing his

duties. Specifically, Defendant contends that, per the language of the indictment, Davis arrested Defendant for discharging a weapon into an occupied vehicle. Defendant cites *State v. Thompson*, 281 N.C. App. 291, 2022-NCCOA-6, ¶ 19, to assert that whether the officer was lawfully performing his duties depends on what the State alleges in the indictment. As Davis received only a generic description of the white sedan and its drivers and identified neither Defendant nor Landis before pursuing them, Defendant argues the facts and circumstances were not such that would "warrant a prudent man" to believe Defendant had shot into an occupied vehicle. Without this requisite belief, Davis did not have probable cause to conduct the warrantless arrest and, in turn, was not lawfully performing his duties when Defendant failed to stop his vehicle.

¶ 9 The State argues that the indictment's allegation of Defendant discharging a weapon goes beyond the essential elements of the crime charged (speeding to elude arrest), and therefore may be treated as surplusage immaterial to the question of guilt. Citing *State v. Noel*, 202 N.C. App. 715, *disc. rev. denied*, 364 N.C. 246 (2010), the State contends that it was not required to prove Davis was "arresting [Defendant] for . . . discharging [a] weapon into an occupied vehicle"; rather, the State was required only to present evidence that "tended to show Officer Davis had been performing *some* lawful duty when [Defendant] fled him." *See Noel*, 202 N.C. App. at 720-21. The State asserts that Davis was lawfully authorized to pursue Defendant and issue a citation when he witnessed Defendant commit a traffic infraction and that the authority "escalated to an imperative" when Defendant began to drive through the city at dangerous speeds. The State contends that the trial court's denial of the motion to dismiss was proper.

¶ 10 "The denial of a motion to dismiss for insufficient evidence is a question of law, . . . which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 522 (2007) (citing *State v. Vause*, 328 N.C. 231, 236 (1991); *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 478 (2005)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Shepard*, 172 N.C. App. at 478 (citation omitted). "Taking the evidence in the light most favorable to the State, if the [R]ecord here discloses substantial evidence of all material elements constituting the offense for which the accused was tried, then this court must affirm the trial court's ruling on the motion." *State v. Stephens*, 244 N.C. 380, 383 (1956).

¶ 11 "To survive a motion to dismiss, the State must offer substantial evidence of each essential element of the offense and substantial evidence that [the] defendant is the perpetrator." *State v. Lee*, 348 N.C. 474, 488

(1998) (citation omitted). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108 (1986) (citations omitted). Under N.C.G.S. § 20-141.5(a), "[t]he essential elements of . . . speeding to elude arrest . . . are: (1) operating a motor vehicle (2) on a street, highway, or public vehicular area (3) while fleeing or attempting to elude a law enforcement officer (4) who is in the lawful performance of his duties." *State v. Mulder*, 233 N.C. App. 82, 89 (2014) (citing N.C.G.S. § 20-141.5(a)).

¶ 12 As Defendant's arrest was warrantless, Defendant is correct in asserting that the arrest must have been supported by probable cause. Under N.C.G.S. § 15A-401(b)(1), "[a]n officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense . . . in the officer's presence." N.C.G.S. § 15A-401(b)(1) (2021). "An arrest is *constitutionally* valid whenever there exists probable cause to make it." *State v. Chadwick*, 149 N.C. App. 200, 202, *disc. rev. denied*, 355 N.C. 752 (2002) (citation and marks omitted). " 'Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a [prudent] man in believing the accused to be guilty[.]' " *State v. Zuniga*, 312 N.C. 251, 259 (1984) (quoting *State v. Shore*, 285 N.C. 328, 335 (1974)). In *Zuniga*, our Supreme Court provided, "[t]o establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." *Zuniga*, 312 N.C. at 259 (citation and marks omitted); *see also Thompso*n, 2022-NCCOA-6 at ¶ 17 (citation and marks omitted) ("[P]robable cause does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required. A probability of illegal activity, rather than a prima facie showing of [it], is sufficient."). However, Defendant's next assertion—that Davis needed and lacked the indicted theory of probable cause—is not persuasive.

¶ 13 When an indictment includes the essential elements of a crime being charged, those "[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Birdsong*, 325 N.C. 418, 422 (1989) (citation and marks omitted). In *State v. Teel*, the defendant was arrested for and convicted of fleeing to elude arrest and reckless driving. *State v. Teel*, 180 N.C. App. 446, 447 (2006). In that case, the indictment did not specifically describe the lawful duties the officers were performing at the time of the defendant's flight. *Id.* at 448. We considered whether the trial court erred when it

"denied [the] defendant's motion to dismiss the charge of [] fleeing to elude arrest because the indictment did not describe the lawful duties the officers were performing at the time of [the] defendant's flight." *Id.* at 447-48. In holding that the trial court did not err, we provided:

> [T]he offense of fleeing to elude arrest is not dependent upon the *specific* duty the officer was performing at the time of the arrest. Therefore, [it] is not an essential element of the offense of fleeing to elude arrest, as defined in [N.C.G.S.] § 20-141.5, and [is] not required to be set out in the indictment.

Id. at 449.

¶ 14 The facts of *Teel* parallel the present case. Defendant was arrested after fleeing to elude arrest and was indicted for that offense. The indictment set out that Davis arrested Defendant for "discharging [a] weapon into an occupied vehicle"; but, per *Teel*, the specific duty that Davis was performing at the time of arrest was not an essential element of fleeing to elude arrest and was not required to be stated in the indictment. *Id.* The State is correct that "specification of the officer's duty is surplusage that is immaterial to the question of guilt" and therefore "provides no basis for reversing [Defendant's] conviction." *State v. Rankin*, 371 N.C. 885, 889 (2018).

¶ 15 Per N.C.G.S. § 20-518(b)(1), it is unlawful for a driver to fail to fully stop at an intersection with a stop sign. *See* N.C.G.S. § 20-518(b)(1) (2021). Davis witnessed Defendant drive through such a juncture without stopping. Under the facts and circumstances known to Davis, he had objective probable cause to believe Defendant had committed a traffic infraction. It was within his purview to follow and stop Defendant and issue a citation. *See State v. Philips*, 149 N.C. App. 310, 316, *appeal dismissed*, 355 N.C. 499 (2002) (quoting N.C.G.S. § 15A-302(b)) ("[An] officer 'may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction.' "). Moreover, per N.C.G.S. §§ 20-140(b) and (d), one is guilty of reckless driving if he drives a vehicle in such a way that likely endangers other people or property. *See* N.C.G.S. §§ 20-140(b), (d) (2021). Davis pursued Defendant, who drove through stop signs at speeds of up to 90 miles per hour in residential zones, likely endangering other persons. Considering the facts and circumstances known to Davis, we conclude that he had probable cause to believe Defendant was committing a crime—specifically, reckless driving—and it was within Davis's authority to make a warrantless arrest. *See Philips*, 149 N.C. App. at 316 (quoting N.C.G.S. § 15A-401(b)(1) (1999)).

¶ 16 The State presented substantial evidence that Davis had probable cause to arrest Defendant for fleeing to evade arrest and was engaged in the "lawful performance of his duties" under N.C.G.S. § 20-141.5(a). The indictment provided that Defendant was "fleeing and attempting to elude a law enforcement officer[,]" and Davis was in the "lawful performance of his duties[.]" The indictment contained the essential elements of the crime charged under N.C.G.S. § 20-141.5(b).[1] *See Birdsong*, 325 N.C. at 422. Per *Teel*, Davis's arrest of Defendant for shooting at an unoccupied vehicle was surplusage and therefore immaterial to the question of Defendant's guilt. *Teel*, 180 N.C. App. at 449.

¶ 17 In his reply brief, Defendant contends that, while *Teel* may excuse the State from alleging the specific duty Davis was performing in the indictment, per *State v. Silas*, 360 N.C. 377 (2006), Defendant's reliance on allegations set out in the indictment (specifically, that Davis arrested Defendant for shooting into an unoccupied vehicle) prejudiced Defendant. In *Silas*, the trial court allowed the State to orally amend the indictment by changing the alleged intended felony to conform to the evidence at trial. *Silas*, 360 N.C. 377. Our Supreme Court held, "[t]here is no requirement that an indictment . . . contain specific allegations of the intended felony[.] . . . However, if an indictment does specifically allege the intended felony, . . . allegations may not be amended." *Id.* at 383. Citing this holding, Defendant asserts that, although the indictment included language that may not be necessary for a valid indictment, the State is bound by that language because Defendant relied on it as the State's theory of the case and formulated his defense around it. But here, unlike in *Silas*, nothing in the Record demonstrates that the State requested, or the trial court allowed, the indictment to be amended to conform to the evidence at trial.

¶ 18 In *State v. Noel*, which was decided four years after *Silas*, we held that immaterial variance between the allegations in an indictment and the evidence offered will not constitute fatal variance. *Noel*, 202 N.C. App. at 721. In that case, the evidence supported the material allegation that the officer was performing his legal duties as a government employee at the time of arresting the defendant, and the additional allegation as to the exact duty being performed was surplusage which must be disregarded. *Id.* (citation and marks omitted) ("The indictment charged the essential elements of the crime . . . . Proof was offered to support the

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1. We note that Defendant was indicted pursuant to N.C.G.S. § 20-141.5(b), which provides that a violation under N.C.G.S. § 20-141.5(a) shall be a Class H Felony if two or more enumerated factors were present at the time of the violation. N.C.G.S. § 20-141.5(b) (2021).

material allegation . . . . The additional allegation . . . [was] surplusage and must be disregarded."). As such, the variance between the additional allegation in the indictment and the proof offered was immaterial. *Id.*

¶ 19 As in *Noel*, in this case the indictment's allegation of shooting at an unoccupied vehicle was mere surplusage, and the evidence offered supported the allegation that Davis was performing his legal duties when he arrested Defendant. As surplusage, the additional allegation must be disregarded, and the State is not required to prove it. Defendant was not prejudiced by relying on the indictment, and the trial court did not err in denying his motion to dismiss.

B. Defendant's Requested Instruction

¶ 20 **[2]** Defendant argues that Davis did not have probable cause to arrest Defendant for shooting into an occupied vehicle, and as such he was not lawfully performing his duties in attempting to stop Defendant. Defendant contends that the trial court's erroneous denial of the requested instruction was prejudicial and requires a new trial.

¶ 21 "Where a defendant has properly preserved [his] challenge to jury instructions, an appellate court reviews the trial court's decisions regarding jury instructions de novo." *State v. Richardson*, 270 N.C. App. 149, 152 (2020) (citation omitted). "An instruction about a material matter must be based on sufficient evidence." *State v. Osorio*, 196 N.C. App. 458, 466 (2009 (citation omitted). "Failure to give the requested instruction where required is a reversible error." *State v. Reynolds*, 160 N.C. App. 579, 581 (2003) (citation omitted), *disc. rev. denied*, 358 N.C. 548 (2004). "Failure to charge on a subordinate—not a substantive—feature of a trial is not reversible error in the absence of request for such instruction." *State v. Hunt*, 283 N.C. 617, 623 (1973) (citation and marks omitted).

¶ 22 Upon a party's request of a charge instruction on a subordinate matter of the trial, the trial court's failure to charge on that matter may constitute reversible error. *See Hunt*, 283 N.C. at 623. "A request for a . . . deviation from the pattern jury instruction [would] qualify as a special instruction and would [need] to be submitted to the trial court in writing." *State v. Brichikov*, 281 N.C. App. 408, 2022-NCCOA-33, ¶ 17 (citing *State v. McNeill*, 346 N.C. 233, 240 (1997) ("We note initially that [the] defendant's proposed [deviation from the pattern] instructions were tantamount to a request for special instructions.")), *aff'd on other grounds*, 2022-NCSC-140. "[A] trial court's ruling denying requested special instructions is not error where the defendant fails to submit his request for instructions in writing." *Id.* (citation and marks omitted); *see State*

v. Starr, 209 N.C. App. 106, 113 (citation and marks omitted) ("[W]here . . . [the] [d]efendant fail[ed] to submit his request for instructions in writing, the trial court's ruling denying [the] requested instructions is not error . . . ."), *aff'd as modified*, 365 N.C. 314 (2011).

¶ 23 Defendant did not submit in writing a request for instructions regarding the specific duty Davis was performing; Defendant requested orally that this specific instruction be included. Per *Brichikov* and *McNeill*, this request was for a special instruction; and, because it was not submitted in writing, this issue was not preserved for our review.

¶ 24 If an instructional issue is unpreserved in a criminal case, we may review the trial court's decision for plain error, but only if "the defendant [] *specifically and distinctly contend*[*s*] that the alleged error constitutes plain error." *See State v. Lawrence*, 365 N.C. 506, 516 (2012) (emphasis added) (citations and marks omitted). Defendant did not "specifically and distinctly" allege plain error. Accordingly, this issue is not preserved for plain error review, and we cannot address it on appeal. *State v. Truesdale*, 340 N.C. 229, 233 (1995) ("[The] [d]efendant has failed specifically and distinctly to contend that the trial court's instruction . . . constituted plain error. Accordingly, he has waived his right to appellate review of this issue.").

CONCLUSION

¶ 25 The Record discloses substantial evidence of each element of felonious speeding to elude arrest, and the trial court did not err in denying Defendant's motion to dismiss. Defendant's instruction request was not preserved for appellate review.

NO ERROR.

Judges DILLON and INMAN concur.

STATE v. NORRIS

[287 N.C. App. 302, 2022-NCCOA-908]

STATE OF NORTH CAROLINA
v.
JACOB THOMAS NORRIS, DEFENDANT

No. COA20-908

Filed 29 December 2022

1. Homicide—solicitation to commit first-degree murder—sufficiency of evidence

The State presented substantial evidence of each element of solicitation to commit first-degree murder to overcome defendant's motion to dismiss, including that defendant counseled, enticed, or induced his girlfriend to commit a crime in a lengthy message exchange over social media by mentioning multiple times that he intended to kill and that, as his sidekick, she would also have to hurt and kill. Further, even though defendant's girlfriend did not know he had a "Kill List," the crime of solicitation does not require that the solicitor communicate all the details of the plan to the listener, and the evidence was sufficient to show that he intended to solicit her to commit first-degree murder through premeditation and deliberation.

2. Appeal and Error—preservation of issues—variance between indictment and jury instructions—plain error not alleged

In a prosecution for solicitation to commit first-degree murder, defendant failed to preserve for appellate review his argument that the trial court erred by denying his motion to dismiss, which defendant premised on his assertion that there was a fatal variance between the indictment language and the jury instructions. Where defendant's argument amounted to a jury instruction challenge, but he failed to allege plain error on appeal after having not objected to the alleged error at trial, the issue was subject to dismissal.

3. Evidence—solicitation to commit murder—drawings and notes of weapons—testimony from people on defendant's "kill list"—relevance

In a trial for solicitation to commit first-degree murder, the trial court did not err by admitting a collection of defendant's drawings and notes depicting the comic book villain the Joker as well as a variety of weapons, or by admitting testimony from eleven of the thirteen people on defendant's "Kill List" and from a relative of a twelfth person on the list. Both types of evidence were admissible as being relevant under Evidence Rules 401 and 402 because they

shed light on defendant's state of mind at the time of his message exchange with his girlfriend, with whom he discussed wanting to kill people, and on whether he possessed the specific intent to have solicited her to commit first-degree murder.

4. Evidence—solicitation to commit murder—drawings and notes of weapons—testimony from people on defendant's "kill list"—more probative than prejudicial

In a trial for solicitation to commit first-degree murder, the trial court did not err by admitting a collection of defendant's drawings and notes depicting the comic book villain the Joker as well as a variety of weapons, or by admitting testimony from eleven of the thirteen people on defendant's "Kill List" and from a relative of a twelfth person on the list. Both types of evidence were admissible under Evidence Rule 403 where, even though they undeniably posed a risk of prejudice to defendant, they were nonetheless more probative than unfairly prejudicial regarding defendant's state of mind and the specificity of defendant's plan to hurt real people.

5. Criminal Law—prosecutor's closing argument—defendant's character—insinuation that defendant planned a mass shooting

In closing arguments at a trial for solicitation to commit first-degree murder, the trial court did not err in failing to intervene during the prosecutor's closing argument where none of the statements were so grossly improper as to constitute reversible error. The prosecutor's characterization of the evidence and comment on defendant's apparent lack of remorse, while unfavorable to defendant regarding his intent to commit the offense, were supported by a reasonable interpretation of the evidence, and the prosecutor's summary of the relevant law on solicitation was accurate. The prosecutor's statements invoking mass shootings and suggesting that defendant intended to kill his victims with a similar type of action, while improper, when considered in context were not prejudicial or so grossly improper as to merit reversal.

Appeal by Defendant from judgment entered 12 March 2020 by Judge William A. Wood II in Randolph County Superior Court. Heard in the Court of Appeals 30 November 2021.

Attorney General Joshua H. Stein, by Senior Policy & Strategy Counsel Steven A. Mange, for the State.

Kimberly P. Hoppin for defendant-appellant.

MURPHY, Judge.

¶ 1 While in high school, Defendant Jacob Thomas Norris admired the Joker, a comic book villain and fictional mass murderer. One day, after confessing via social media to his then-girlfriend, Patty,[1] that he was entertaining homicidal thoughts with respect to a number of his peers, Defendant asked her whether she wanted to kill people as well. Patty, concerned by the conversation, reported what Defendant had said to her mom—who, in turn, reported the conversation to law enforcement and school authorities. Defendant was subsequently discovered with a collection of notes and drawings indicating he wanted to harm or kill at least thirteen specific peers.

¶ 2 Defendant was tried for soliciting Patty to commit first-degree murder. At trial, the State's closing arguments included multiple comments about mass shootings. The jury convicted Defendant, who now timely appeals. On appeal, Defendant argues the trial court erred in (A) denying his motion to dismiss for insufficient evidence; (B) denying his motion to dismiss for fatal variance with the indictment; (C) admitting irrelevant evidence under Rules 401 and 402 of our Rules of Evidence; (D) admitting evidence substantially more prejudicial than probative under Rule 403 of our Rules of Evidence; and (E) failing to, ex mero motu, strike the State's grossly improper remarks during closing arguments. For the reasons stated below, we dismiss the case in part; hold in part that the trial court did not err; and, finally, hold in part that, although the trial court erred, it did not commit prejudicial error.

BACKGROUND

¶ 3 Early in 2018, Defendant Jacob Thomas Norris began dating Patty while both were students at the same high school. During their relationship—most of which consisted of exchanging messages via Snapchat[2]—Patty learned of Defendant's fascination with the Joker, a murderous comic book villain. Defendant and Patty, who shared a milder interest in

1. We use a pseudonym for Defendant's romantic interest throughout this opinion to protect her identity and for ease of reading.

2. At trial, the State asked Patty, "What is Snapchat for us old folks?" For the benefit of the "old folks," Patty explained that "you can either like send pictures and like little messages or you can talk like regular texting on a cell phone and you can video chat or regular voice call on there."

the Joker, referred to one another with pet names referencing the Joker and his romantic partner in crime, Harley Quinn, during the brief course of their relationship.

¶ 4 On 29 January 2018, Defendant and Patty exchanged a series of messages in which Defendant expressed having homicidal thoughts and a desire for Patty to join him in acting on them:

> [Defendant:] I have something to say.
>
> [Patty:] Yeah?
>
> [Defendant:] When you say you want to be my Harley, my true Harley, that you don't know what's going to happen when we call ourselves Joker and Harley.
>
> [Patty:] What?
>
> [Defendant:] You said you want to be my true Harley meaning you would have to hurt people.
>
> [Patty:] What are you getting at? Like I'm getting an idea now but not the full picture.
>
> [Defendant:] You know how Joker and Harley kill people? That's what I'm getting at.
>
> [Patty:] Yeah. Do you want to do something like that?
>
> [Defendant:] Get it no[w]. Yes.
>
> [Patty:] Do you want to do that specifically?
>
> [Defendant:] You don't want that, do you? If you do, don't -- if you don't, I understand.
>
> [Patty:] I'm just asking.
>
> [Defendant:] But do you want that?
>
> . . . .
>
> [Patty:] I can't quite say I do. I have a side of me that does.
>
> . . . .
>
> [Defendant:] So, no. I told you I'm a sociopath.
>
> . . . .
>
> [Defendant:] You see me differently now, don't you?

[Patty:] Since we're asking questions that come deep from our minds, I have one for you and everything is up to you because I respect everything you say and feel.

[Defendant:] Shoot.

[Patty:] Do you know what polyamorous is?

[Defendant:] I'll Google it. Hold on.

[Patty:] No, let me tell you.

[Defendant:] Shoot.

[Patty:] But do you have any idea what it is?

[Defendant:] No, never heard of it.

[Patty:] Do you know what monogamous is?

[Defendant:] Never heard of it.

[Patty:] Okay.

[Defendant:] So going to tell me?

[Patty:] Monogamous is when two people date/marry, and it's only two people. Polyamorous is when there are more than two people date one another.

[Defendant:] What are you trying to say?

[Patty:] Just hear me out. Okay? Don't just assume anything because it most likely will not be true.

[Defendant:] Okay.

[Patty:] So I feel as I am polyamorous myself because I've always liked more than one person. Not right now though. It's just strictly you, I promise. But I truly do feel as though I am this way. I have a video of information on polyamorous if you're interested in hearing more about it so you understand it better, but I wanted to run this by you because I want your opinion and thoughts and I thought now is the perfect time to ask you since we are both asking things that only both of us would understand each other in more ways and, no, I do not see you differently. It just caught me off guard.

> [Defendant:] So do you or do you not want to be my Harley?
>
> [Patty:] I am your Harley. Just you understand your Harley.
>
> [Defendant:] I understand.
>
> [Patty:] Or accept this part of her.
>
> [Defendant:] Is this the gentle part?
>
> [Patty:] Of what I'm saying?
>
> [Defendant:] Yes.
>
> [Patty:] How much do you accept?
>
> [Defendant:] The whole package.
>
> . . . .
>
> [Patty:] Thank you. Thank you for dealing with me, seeing me as how I am accepting me for who I am as a person. I know I already ask so much of you and you have no idea how thankful I am that you are here in my life and love me for who I am. I don't think any words could ever tell me enough of what you are and mean to me. I don't know what I did to get you in my life but whatever it was I would do it again over and over and over. No matter how many times I would constantly do it so you came into my life. I have a feeling you're going to be my one. I can just feel it. Now I'll gladly be your Harley Quinn till the day I die.[3]

After the exchange, Patty, concerned about what Defendant had expressed, showed the messages to her mother, who reported the conversation to law enforcement. The day after the conversation, Patty and her mother also reported the exchange to the school resource officer ("SRO"), the principal, and the guidance counselor.

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3. For formatting purposes, the dialogue reproduced in the text of the opinion above is the conversation between Defendant and Patty as read aloud by Patty for the jury at trial. As minor alterations exist between the transcribed version of the conversation above and the conversation as presented in the exhibits, we turn the attention of any reader wishing to examine the original Snapchat conversation to Record Supplement pages 1 through 11.

¶ 5 On 31 January 2018, the principal and SRO met with Defendant, who admitted to sending the messages, told them he was a sociopath, and expressed that he found death funny. At the time of the meeting, the SRO did not believe Defendant had committed any crime. However, the same day, the SRO visited Defendant's home, where there were multiple guns and knives; and, on a second visit one month later, Defendant's father provided the SRO a collection of notes documenting Defendant's violent ideations concerning his peers. Among these notes were two papers entitled "Test Subjects" and "Kill List"—which, as their titles imply, named individuals Defendant appeared to have marked for human experimentation and homicide, respectively. The list entitled "Test Subjects" included the cities where the individuals lived, and the "Kill List" included a method of, and reason for, killing each of the thirteen individuals it named. There was also a document called "Joker Toxin" that identified the prices of various poisons.

¶ 6 Upon the school official's discovery of Defendant's notes, Defendant was suspended and, later, indicted for solicitation to commit murder. The indictment read as follows:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above [] [D]efendant unlawfully, willfully and feloniously did solicit [Patty] to commit the felony of Murder, [N.C.G.S. §] 14-17, of persons known to the defendant, to wit: [first and last initials used for each individual]. [] [D]efendant intending [sic] to murder persons named in a list he created and in his possession and entitled "Kill List."

¶ 7 At trial, the State presented evidence of the above. In addition to testimony from Patty, the principal, and the SRO, among others, the State offered—and the trial court admitted, over Defendant's objections—testimony from eleven of the thirteen people whose names appeared on the "Kill List," as well as the mother of a twelfth person appearing on the list and a collection of notes and drawings by Defendant concerning the Joker. During closing arguments, the State remarked that Patty was "terrified[] [b]ecause [her] significant other was asking [her] to go kill people . . . ." It also remarked that Defendant "had the means to carry out [his] threats" and that there was "a diagram of [the] school."[4] Finally, the State also suggested there was a link between the allegations

4. The "diagram of [the] school" refers to one of Defendant's drawings, which the principal testified resembled a map of Defendant's high school.

against Defendant and "current events," presumably in reference to the frequent, high-profile mass shootings taking place in the years immediately preceding Defendant's trial:

> Now, I'm not going to talk about current events and what's going on everywhere, but you are not required to empty your brains of everything you know about these situations. . . .
>
> . . . . When you all go back there you can educate yourselves and talk about the Joker. An emblem of evil. The most twisted character there is. Mass murderer. Crime sprees. Hurting other people. That's the evil that this man . . . embraced. And once you do that, as completely as he did, there's no stepping back. There's no stepping back.

¶ 8 After closing arguments, the jury found Defendant guilty of solicitation to commit first-degree murder on 12 March 2020, and the trial court gave him an active sentence of 58 to 82 months. Defendant timely appealed.

ANALYSIS

¶ 9 On appeal, Defendant argues the trial court erred in (A) denying his motion to dismiss for insufficient evidence; (B) denying his motion to dismiss for fatal variance with the indictment; (C) admitting irrelevant evidence under Rules 401 and 402 of our Rules of Evidence; (D) admitting evidence substantially more prejudicial than probative under Rule 403 of our Rules of Evidence; and (E) failing to, ex mero motu, strike the State's grossly improper remarks during closing arguments.

A. Motion to Dismiss: Insufficient Evidence

¶ 10 **[1]** Defendant first argues the trial court erred in denying his motion to dismiss for insufficient evidence.

> We review denial of a motion to dismiss criminal charges *de novo*, to determine whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. The trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court does not

> weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.

State v. Spruill, 237 N.C. App. 383, 385 (2014) (citations omitted), *disc. rev. denied*, 368 N.C. 258 (2015). Here, there is no contention that there was insufficient evidence of Defendant's identity; accordingly, we review de novo whether the State presented sufficient evidence of each element of the alleged crime.

¶ 11 Concerning the offense of solicitation, we have remarked that

> [t]he gravamen of the offense of soliciting lies in counseling, enticing or inducing another to commit a crime. Solicitation is complete when the request to commit a crime is made, regardless of whether the crime solicited is ever committed or attempted.
>
> To hold a defendant liable for the substantive crime of solicitation, *the State must prove a request to perform every essential element of the underlying crime.*

State v. Crowe, 188 N.C. App. 765, 768-69 (citations omitted), *cert. denied*, *disc. rev. denied*, 362 N.C. 364 (2008). Thus, where the underlying offense is first-degree murder, "the State must prove that [the] defendant counseled, enticed, or induced another to commit . . . '(1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation.' " *Id.* at 769 (quoting *State v. Peterson*, 361 N.C. 587, 595 (2007), *cert. denied*, 552 U.S. 1271, 170 L. Ed. 2d 377 (2008)).

¶ 12 Defendant offers two primary contentions with respect to sufficiency of the evidence: first, that the evidence does not support Defendant having *solicited*—that is, "counseled, enticed, or induced," *id.*—Patty to commit a crime; and, second, that Defendant could not have solicited Patty to commit *first-degree murder* because Patty was not aware of the specific people on Defendant's "Kill List."

¶ 13 As to Defendant's first contention, our Supreme Court has stated that solicitation is "an attempt to conspire" so that "the solicitor plans, schemes, suggests, encourages, and incites the solicitation." *State v. Mann*, 317 N.C. 164, 171-72 (1986); *see State v. Smith*, 269 N.C. App. 100, 101 (2019) (quoting 2 Wayne R. Lafave, *Substantive Criminal Law* § 11.1, at 264 (3d ed. 2018) ("For the crime of solicitation to be completed, it is only necessary that the actor, with intent that another person commit a crime, have enticed, advised, incited, ordered or otherwise

encouraged that person to commit a crime."). Such is the case here. Defendant reiterated that he intended to kill at least three times as Patty sought clarification during their Snapchat conversation: first, he hinted at what was "going to happen when [they] call[ed] [them]selves Joker and Harley"; second, when Patty expressed confusion, he elaborated that "[his] true Harley . . . would have to hurt people"; and, finally, he outright stated that "Joker and Harley kill people[.]" Moreover, Defendant's communication fits comfortably within applicable definitions of "entice": "[t]o lure or induce[.]" *Entice*, Black's Law Dictionary (9th ed. 2009); *see also Crowe*, 188 N.C. App. at 769 (emphasis added) ("[T]he State must prove that [the] defendant counseled, *enticed*, or induced another to commit [the underlying crime].").

¶ 14 The second contention fails as well. "Solicitation is a specific-intent crime, and the offense is complete upon the request." *State v. Smith*, 269 N.C. App. 100, 101 (2019) (citations omitted). For the State to demonstrate the underlying mens rea in a solicitation case, it is not necessary for it to show the solicitor fully communicated the details of his or her plan to the listener; rather, "[t]he *solicitor conceives the criminal idea* and furthers its commission via another person by suggesting to, inducing, or manipulating that person." *Mann*, 317 N.C. at 171 (emphasis added). As we noted in *Mann*, " 'the solicitor, working his will through one or more agents, manifests an approach to crime more intelligent and masterful than the efforts of his hireling' " such that "the solicitor is morally more culpable than a conspirator; he keeps himself from being at risk, hiding behind the actor" he solicited. *Id.* at 172 (quoting Wechsler, Jones, and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 Colum. L. Rev. 571, 621-22 (1961)); *see also* Joshua Dressler, *Cases and Materials on Criminal Law* 798 (3rd ed. 2003) (emphasis added) ("Solicitation is a controversial crime because *the offense is complete as soon as the solicitor asks, entices, or encourages* another to commit the target offense. As observed in *Mann*, a solicitation may consist of nothing more than an attempt to conspire with another to commit an offense, which essentially makes solicitation a double inchoate offense.").

¶ 15 Here, as long as Defendant's "Kill List" tended to demonstrate to the jury that the killings he proposed to Patty were, as they existed in his *own* mind, unlawful, malicious, and specifically intended after a measure of premeditation and deliberation, the evidence was sufficient to survive a motion to dismiss. And, in this case, the "Kill List" evidenced each of these elements. Indeed, Defendant's conveyance of his desire

to kill others fits the general malice requirement, and his having asked Patty to kill necessarily contemplates the killings he asked her to perform being premeditated and deliberated.[5] *See State v. McBride*, 109 N.C. App. 64, 68 (1993) (marks omitted) (citing *State v. Reynolds*, 307 N.C. 184, 191 (1982)) ("There is[] . . . a [] kind of malice which is defined as nothing more than that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."). Defendant's motion to dismiss for insufficient evidence was properly denied.

B. Motion to Dismiss: Fatal Variance

¶ 16 **[2]** Next, Defendant argues that the trial court erred in denying his motion to dismiss because the indictment fatally varied from the jury instruction at trial. The indictment alleged that Defendant "solicit[ed] [Patty] to commit the felony of Murder, [N.C.G.S. §] 14-17, of persons known to [] [D]efendant, to wit: C.P., C.D., M.C., C.C., C.E., C.E., A.H., N.B., D.B., H.D., L.G., D.B., C.S." The jury, meanwhile, was instructed the State had to prove "Defendant solicited, that is urged or tried to persuade another . . . to murder another person" and that "Defendant intended that the person he solicited murder the alleged victim." Defendant contends the variance between the indictment and the instruction warrant reversal on appeal.

¶ 17 However, Defendant's argument appears to be little more than an allegation of instructional error clothed as fatal variance. Fatal variance

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5. This is, of course, to say nothing of what was, in the light most favorable to the State, the meticulous planning of killings and other acts of violence reflected in Defendant's notes and drawings presented at trial—which included, but were not limited to, a recipe for a toxin with which to "poison [the] water supply" and concept art of a Joker-themed combat suit.

However, we separately note our wariness of the use of what may otherwise be considered Defendant's artistic expression or self-care journaling for this purpose. While creating new laws governing the permissibility of certain categories of evidence is a task for the political branches of our government, we note for the General Assembly's consideration that other states have limited or considered limiting the use of defendants' creative expression as evidence in cases where the literal truth of the expression is dubious. *See, e.g.*, An Act to Add Section 352.2 to the Evidence Code, Relating to Evidence (effective Jan. 1, 2023) (to be codified at 2022 Cal. Stat. 973) ("In any criminal proceeding where a party seeks to admit as evidence a form of creative expression, the court, while balancing the probative value of that evidence against the substantial danger of undue prejudice[,] . . . shall consider[] that[] . . . the probative value of such expression for its literal truth or as a truthful narrative is minimal unless that expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available."); *see also* S.B. S7527, 244th Leg. Session (N.Y. 2022) (awaiting vote by N.Y. State Assembly).

occurs when a discrepancy existed between the language in the indictment and the evidence at trial. *See State v. Glenn*, 221 N.C. App. 143, 147 (2012) ("A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged."); *State v. Watson*, 272 N.C. 526, 527 (1968) (quoting *State v. Jackson*, 218 N.C. 373, 376 (1940)) (" 'It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegation and proof must correspond.' "). While occasional analyses in our caselaw have discussed jury instructions in relation to fatal variance, none have fully untethered a fatal variance analysis from discussion of the evidence itself in the way Defendant attempts to do here. *See*, *e.g.*, *State v. Turner*, 98 N.C. App. 442, 448 (1990) ("[W]e believe that the State's evidence does support the trial court's instruction; however, the indictment does not."); *State v. Charleston*, 248 N.C. App. 671, 678 (2016) (marks omitted) ("Generally, an impermissible variance has occurred when, although the State's evidence might support the trial court's instruction, the indictment does not.").

¶ 18 Our caselaw contains a mechanism for contesting the accuracy of jury instructions; that mechanism is alleging instructional error. *Carrington v. Emory*, 179 N.C. App. 827, 829 (2006) ("A trial court must instruct the jury on the law with regard to every substantial feature of a particular case."). And, where a defendant alleges on appeal that instructional error occurred after having not objected at trial, he must specifically allege plain error to invoke our review. N.C. R. App. P. 10(a)(4) (2022) (emphasis added) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is *specifically and distinctly* contended to amount to plain error."); *State v. Collington*, 375 N.C. 401, 411 (2020) (marks omitted) ("The purpose of Rule 10(a)(4) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. Indeed, even when the plain error rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court."). Defendant did not seek our review for plain error, and we will not entertain an improperly appealed instructional error argument simply because it arrived within the Trojan horse of a fatal variance heading in Defendant's brief. We dismiss this challenge.

C. Rules 401 and 402

¶ 19 **[3]** Defendant next argues the trial court erred in admitting evidence that was irrelevant under Rules 401 and 402 of our Rules of Evidence. He bases this argument on the admission of two groups of evidence: (1) a collection of drawings and notes depicting the Joker and a variety of weapons, and (2) testimony from eleven of the thirteen people on the "Kill List" and a relative of the twelfth. "Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456 (2010).

¶ 20 " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2021). "The value of the evidence need only be slight." *State v. Roper*, 328 N.C. 337, 355, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d. 232 (1991). Moreover, "[i]n order to be relevant, evidence need not bear directly on the question in issue if it is helpful to understand the conduct of the parties, their motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *State v. Miller*, 197 N.C. App. 78, 86, *disc. rev. denied*, 363 N.C. 586 (2009).

¶ 21 Here, both groups of evidence—the drawings and the testimony—are relevant. The drawings would help the jury determine Defendant's state of mind and evaluate whether the proposed crime, as he imagined it, met the requirements for solicitation. *See supra* at ¶ 14. This is especially pertinent in a case where, as here, a jury may have understood Defendant's proposition as a joke or otherwise been skeptical about his sincerity without a fuller glimpse into his state of mind at the time of his discussion with Patty. Furthermore, the testimony was relevant to show that the people described on Defendant's "Kill List" were real and to further demonstrate that he had the requisite specific intent to have solicited Patty to commit first-degree murder. As a result, the admission of the two groups of evidence was proper.

D. Rule 403

¶ 22 **[4]** Defendant further argues the drawings and testimony discussed with respect to Rules 401 and 402, if relevant, had "probative value [that was] substantially outweighed by the danger of unfair prejudice" under Rule 403. *See* N.C.G.S. § 8C-1, Rule 403 (2021) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). "A trial judge's decision under

Rule 403 regarding the relative balance of probative weight and potential for prejudice will only be overturned for an abuse of discretion." *State v. Hyman*, 153 N.C. App. 396, 401-02 (2002), *cert. denied*, 357 N.C. 253 (2003). "[W]here the trial court is given discretion to make a decision and exercises that discretion, we may only reverse that decision if the appellant shows that the decision was not the result of a reasoned choice." *State v. Jordan*, 128 N.C. App. 469, 475, *disc. rev. denied*, 348 N.C. 287 (1998).

¶ 23 At the threshold, we note that both groups of evidence—Defendant's Joker-related notes and drawings and the testimony of the individuals on the "Kill List"—created an undeniable risk of prejudice to Defendant. We have little doubt that exposure to detailed records of Defendant's violent thoughts, especially when paired with live testimony from the young men and women those thoughts concerned, would have stirred the emotions of the jurors in this case. Nonetheless, the existence of *some* prejudice will not warrant exclusion under Rule 403; rather, "[r]elevant evidence is admissible, despite its prejudicial effect, unless the evidence is *unfairly* prejudicial." *State v. Moseley*, 338 N.C. 1, 33 (1994) (emphasis added), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). Our Supreme Court, for example, has held that a trial court erred under Rule 403, not when evidence would inflame the jury in the general sense, but instead when its probative value is so comparatively negligible that it would "tend *solely* to inflame the jurors." *State v. Hennis*, 323 N.C. 279, 284 (1988) (emphasis added).

¶ 24 Moreover, whether evidence was unfairly prejudicial is a circumstantial judgment that depends on the context of its presentation. Of photographic evidence, for example, our Supreme Court has said the following:

> The test for excess is not formulaic: there is no bright line indicating at what point the number of crime scene or autopsy photographs becomes too great. The trial court's task is rather to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation. What a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies—these are all factors the trial court must examine in determining the illustrative value of photographic evidence and in

> weighing its use by the [S]tate against its tendency to prejudice the jury.

Id. at 285.

¶ 25 Here, although the State only actually used the two groups of evidence cursorily—each segment of testimony involving a person on the "Kill List" lasted less than four transcript pages, many far less—the *danger* of unfair prejudice resulting from the State's indication it was going to introduce the notes and drawings and have almost all of the individuals named on the "Kill List" testify was, at the times Defendant objected, substantial. However, because the trial court chose to admit both groups of evidence on reasonable bases offered by the State—including the drawings' tendency to illustrate Defendant's mental state, the witness's tendency to demonstrate that the "Kill List's" stated victims were real people, and the State's assurance that the interviews would be "really quick"—we cannot say the trial court's admission of the evidence rose to the level of an abuse of discretion. While we find it likely that the jury's passions were stirred by the drawings and testimony, the evidence served a probative function arguably above and beyond inflaming them.

E. Failure to Intervene

¶ 26 **[5]** Finally, Defendant argues the trial court erred in failing to intervene ex mero motu during three sections of the State's closing argument: (1) when the State characterized the evidence presented in a manner that conformed to its narrative at trial; (2) when the State remarked that Patty did not need to know of the "Kill List" for Defendant to be found guilty of solicitation to commit murder; (3) when the State allegedly demeaned Defendant's character by insinuating that his flat affect indicated a lack of remorse; and (4) when the State allegedly appealed to the jury's sympathies discussing the evil nature of the Joker and alluding to the national prevalence of mass shootings.

¶ 27 "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117 (2002).

> [W]hen defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so

> grossly improper as to impede the defendant's right to a fair trial.

State v. Huey, 370 N.C. 174, 179 (2017). While "we have long recognized that prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom[,]" *id.* at 180 (marks omitted), it remains the case that "an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record" during closing arguments. N.C.G.S. § 15A-1230(a) (2021).

¶ 28 Furthermore, a defendant appealing based on the trial court's failure to intervene ex mero motu "has the burden to show a reasonable possibility that, had the errors in question not been committed, a different result would have been reached at the trial." *State v. Goins*, 377 N.C. 475, 2021-NCSC-65, ¶ 11 (marks omitted). "When evaluating the prejudicial effect of an improper closing argument, we examine the statements in context and in light of the overall factual circumstances to which they refer." *Id.* at ¶ 13 (marks omitted). In so doing, "we look to the evidence presented at trial and compare it with what the jury actually found[,]" as "[i]ncongruity between the two can indicate prejudice in the conviction." *Huey*, 370 N.C. at 185; *see also Goins*, 2021-NC-65 at ¶ 16 (basing a finding that improper statements did not prejudice the defendant, in part, on the jury's re-examination of a piece of evidence during deliberations).

1. Characterization of the Evidence

¶ 29 Defendant argues the State improperly characterized the evidence by indicating that Patty was terrified that Defendant was urging her to kill people, that Defendant had the means to carry out an attack on the targets identified on his "Kill List," that Defendant's father knew about the list and did not take appropriate action, and that one of the people named on the list had specifically called Defendant a "chicken." None of these were "so grossly improper as to impede [] [D]efendant's right to a fair trial." *Huey*, 370 N.C. at 179.

¶ 30 As mentioned previously, the elements of solicitation to commit first-degree murder are that Defendant counseled, enticed, or induced another to commit an unlawful killing with malice and the specific intent to kill formed after some measure of premeditation and deliberation. *See supra* at ¶ 11. Assuming, as we must, that the jury correctly applied the instructions provided to it with respect to the charge at issue, neither the father's purported inaction nor whether the Defendant had specifically

been called "chicken" would have had any logical relationship to the elements of the offense. *See State v. Prevatte*, 356 N.C. 178, 254 (2002) ("Jurors are presumed to follow a trial court's instructions."), *cert. denied*, 538 U.S. 936, 155 L. Ed. 2d 631 (2003). These comments, therefore, did not impede Defendant's right to a fair trial—let alone prejudice him.

¶ 31 Defendant's ability to act on his "Kill List" and Patty's response bear a clearer relationship to the elements of the offense, as they tend to lend credibility to the State's contention that Defendant had the requisite intent. However, in both of these cases, the characterizations were, at worst, unfavorable interpretations of the evidence presented at trial. With respect to the actionability of the "Kill List," Defendant argues that he could not have taken action because "[Defendant's] father secured or removed all weapons [from his home] when asked to do so." However, the State's argument most plausibly refers to the actionability of the "Kill List" at the time of the solicitation, *after* which the weapons in the home were removed. Furthermore, with respect to the object of Patty's fear, Patty described herself as "terrified" and expressed that she "wanted out of it, too, and [] wanted to go and talk to someone as soon as possible." While perhaps uncharitable to Defendant, this statement could fairly be interpreted as Patty being frightened by Defendant seeking her participation in his plans.

2. Summation of the Law

¶ 32 Defendant also argues the trial court erred by failing to intervene when the State remarked that Patty did not need to know of the "Kill List" for Defendant to be found guilty of solicitation to commit murder. However, for the reasons discussed in Part A of our analysis, *see supra* at ¶ 14, this is a correct statement of the law of solicitation, and the trial court did not err.

3. Demeaning Defendant's Character

¶ 33 Defendant next argues the trial court erred by failing to intervene when the State demeaned his character by suggesting he lacked remorse. However, the only point in the transcript to which Defendant directs our attention for this proposition is a single instance in which the State described Defendant as "[v]ery matter-of-fact." Even assuming such a mundane turn of phrase qualifies as demeaning Defendant, this characterization was supported—almost verbatim—by testimony presented at trial. In this regard, then, the trial court also did not err.

4. Statements on the Joker and Mass Shootings

¶ 34 The last occasion on which Defendant argues the trial court erred by failing to intervene ex mero motu is when the State appealed to the jury's sympathies by describing the nature of the Joker and insinuating that Defendant was planning a mass shooting:

> Now, I'm not going to talk about current events and what's going on everywhere, but you are not required to empty your brains of everything you know about these situations. . . .
>
> . . . . When you all go back there you can educate yourselves and talk about the Joker. An emblem of evil. The most twisted character there is. Mass murderer. Crime sprees. Hurting other people. That's the evil that this man . . . embraced. And once you do that, as completely as he did, there's no stepping back. There's no stepping back.

In addition to the specific occasion above, Defendant also points out three other occasions during closing arguments when the State referenced mass shootings:

> [Patty and her mother went] to the police department because they [knew] something bad may occur. They want[ed] to prevent a mass shooting.
>
> . . . .
>
> If I call you and say hey, let's go kill some people -- because that's exactly what he's saying here, let's go kill some of these people. I call you and I mean it, and I have that malice in my heart because I felt like people had bullied me. Isn't that how mass shootings start?
>
> . . . .
>
> Well, shootings at school, that never happens. [The principal] doesn't need to be worried about that. That never happens in the United States. No reason for him to be concerned about that.
>
> . . . .
>
> [Patty] didn't know who they were going to be. That's how mass shootings operate. You may not know who

> all the victims are. The important thing is he solicited to murder.

¶ 35 Our Supreme Court has found the State's improper remarks to be reversible error under similar circumstances. In *State v. Jones*, for example, the North Carolina Supreme Court held that the trial court abused its discretion "when it overruled [the] defendant's timely objection to the prosecutor's references to the Columbine school shooting and the Oklahoma City bombing[,]" two high-profile mass killings. *Jones*, 355 N.C. at 131, 133. The Court reasoned that

> [t]he impact of the statements in question, which conjure up images of disaster and tragedy of epic proportion, is too grave to be easily removed from the jury's consciousness, even if the trial court had attempted to do so with instructions. Moreover, the offensive nature of the remarks exceeds that of other language that has been tied to prejudicial error in the past.

Id. at 132. Based on this reasoning, we are persuaded that, at least to some degree, the remarks were improper, as they were clearly designed to instill in the jury the idea that Defendant's conviction would prevent another in a string of nationally salient acts of mass violence.

¶ 36 However, unlike in *Jones*, where the issue was whether the trial court abused its discretion in overruling the defendant's objection to the State's improper comments at trial, *id.* at 137, Defendant's contention is that the trial court failed to intervene ex mero motu. The basic impropriety of the State's comment, then, is only the first prong of the analysis, to be followed by a determination of "whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *Huey*, 370 N.C. at 179. As to this second prong, we remain unconvinced. If the jury accepted that Defendant sincerely intended to kill the thirteen people named on his "Kill List"—which the verdict indicates was the case—whether that intent would have been acted upon in the form of a typical mass shooting or some other act of violence would have been immaterial to the elements of the crime; the question posed was whether Defendant solicited Patty to commit first-degree murder in some form, not whether he solicited her to commit first-degree murder via mass shooting in particular. In other words, the State's invocation of high-profile mass shootings would have painted in the juror's minds only one of many scenarios which could just as legitimately have supported the verdict.

¶ 37 Furthermore, we disagree with Defendant's contention that he was prejudiced by the remarks. In attempting to establish prejudice, Defendant correctly points out that "the State raised the . . . specter of mass shootings and school shootings where these were not even discussed . . . and were not relevant to the narrow questions to be decided by the jury." However, this alone does not establish prejudice, especially when "we examine the statements in context and in light of the overall factual circumstances to which they refer." *Goins*, 2021-NCSC-65 at ¶ 13 (marks omitted). The comments, while improper, took place during a closing argument consistently grounded in the concrete, factual details discussed at trial, not an emotional appeal to the jury. Furthermore, there were multiple items of physical evidence and segments of testimony evidencing Defendant's intent, and the act of solicitation itself was established by a written record of messages. Against such great evidentiary weight, we remain unconvinced that the State's improper comment prejudiced Defendant.

¶ 38 As such, even though these comments were improper, the trial court's failure to intervene does not constitute reversible error.

CONCLUSION

¶ 39 The evidence at trial was sufficient to convict Defendant of solicitation to commit first-degree murder, notwithstanding Defendant's contentions that his actions did not qualify as solicitation and the fact that Patty was unaware of specific targets. Defendant's nominal fatal variance argument was, in substance, an unpreserved allegation of instructional error at trial, and he failed to specifically seek our review for plain error, thus abandoning the argument. Furthermore, all evidence contested on appeal was both relevant and not substantially more prejudicial than probative. Finally, the State's remarks during closing arguments, despite being improper, were neither prejudicial nor so grossly improper that they denied Defendant his right to a fair trial.

NO ERROR IN PART; DISMISSED IN PART; NO PREJUDICIAL ERROR IN PART.

Judges DIETZ and WOOD concur.

STATE v. REAVIS

[287 N.C. App. 322, 2022-NCCOA-909]

STATE OF NORTH CAROLINA
v.
JESSICA REAVIS, DEFENDANT

No. COA21-561

Filed 29 December 2022

Firearms and Other Weapons—possession at a demonstration—specific location an essential element—statement of charges insufficient—amendment improper

Defendant's conviction under N.C.G.S. § 14-277.2(a) for possession of a firearm at a protest over the removal of a Confederate monument at a county courthouse was vacated where the misdemeanor statement of charges lacked an essential element of the offense because it described defendant's conduct as occurring "at a demonstration" but failed to state the specific type of location. Supplementary materials—including incident reports that gave the address and described the location as being on the side of a road—did not sufficiently specify that the firearm possession occurred at a private health care facility or public place as required by statute. Since the original pleading was defective for failure to include an essential element, the trial court erred by allowing the State to amend the statement of charges at trial; only amendments that do not change the nature of the offense are permissible.

Judge INMAN concurring in the result only.

Appeal by Defendant from judgment entered 13 July 2020 by Judge R. Allen Baddour, Jr., in Chatham County Superior Court. Heard in the Court of Appeals 22 March 2022.

Attorney General Joshua H. Stein, by Solicitor General Ryan Y. Park and Solicitor General Fellow Zachary W. Ezor, for the State.

Dobson Law Firm, PLLC, by Jeffrey L. Dobson, and The Vernon Law Firm, A Professional Association, by John W. Moss, for defendant-appellant.

MURPHY, Judge.

¶ 1 To be valid, a criminal pleading must contain allegations supporting every essential element of the offense with which a defendant is

charged. Moreover, where a statute indicates that a defendant's actions must take place at a specific type of location to support criminal liability, a defendant's actions having taken place at that type of location is an essential element of the offense. Here, Defendant has been charged under N.C.G.S. § 14-277.2(a), which criminalizes possession of a firearm at a "parade, funeral procession, picket line, or demonstration upon any private health care facility or upon any public place owned or under the control of the State . . . ." N.C.G.S. § 14-277.2(a) (2021). As Defendant's conduct occurring either at a hospital or on public land is an essential element of N.C.G.S. § 14-277.2(a) and the statement of charges—even taken together with relevant supplementary materials pursuant to N.C.G.S. § 15A-924(a)(5)—did not specify on what type of land Defendant's conduct took place, we vacate her conviction.

BACKGROUND

¶ 2 This case arises out of an altercation at a protest over the removal of a Confederate monument at the historic Hillsborough courthouse on 5 October 2019. That day, protestors objecting to the statue's removal and counter-protestors favoring the removal both congregated on-site, leading law enforcement to closely monitor the area in the event conflict arose. Consequently, officers in marked patrol cars would ride through the area every ten to fifteen minutes to ensure the high tensions between the two groups did not give way to violence. During one of these periodic patrols, an officer discovered Defendant Jessica Reavis, whom he recognized as a frequent attendee of the courthouse demonstrations, standing with a group of protesters holding Confederate flags while gesticulating at a group of counter-protestors. As she did so, the officer noticed what appeared to be a concealed firearm at her waist. Fearing the potential consequences of Defendant's being armed if the confrontation between the two groups were to turn violent, the officer returned to his command center and alerted his colleagues of the situation. Subsequently, a team of officers approached and arrested Defendant.

¶ 3 Prior to her trial before the Chatham County District Court, Defendant and the District Court were provided with a *Misdemeanor Statement of Charges* alleging that she "did unlawfully and willfully possess a dangerous weapon while participating in, affiliated with, or present as a spectator at a demonstration" under N.C.G.S. § 14-277.2. Alongside the *Misdemeanor Statement of Charges*, Defendant and the District Court were also provided with an *Incident/Investigation Report* documenting several officers' accounts of the incident. In relevant part, the report provided that the "[l]ocation of [the] [i]ncident" was "40 East St, Pittsboro, NC 27312"; that the type of location was a "[h]ighway/

[r]oad/[a]lley/[s]treet/[s]idewalk"; and that the "[c]rime/[i]ncident(s)" prompting the report's creation were "[d]isorderly [c]onduct[,]" "[c]arrying [a] [c]oncealed weapon," and "[w]eapon at parades ETC[.]" The "[n]arrative" portion of the report included brief descriptions of the reporting officers' interactions with Defendant on the date of the incident; and, in that portion, the reporting officers described, at various points, Defendant's weapon possession as occurring "on the protest side of the road" and "20 yards from East Street[.]"[1] On 10 January 2020, Defendant was found guilty of possessing a weapon at a demonstration before the District Court and sentenced to fifteen days in the custody of the Sheriff, which was suspended for six months of unsupervised probation on the condition that Defendant "[s]urrender [her] firearms [and] not further violate the law[.]"

¶ 4 After receiving her sentence at District Court, Defendant sought a trial de novo before the Chatham County Superior Court pursuant to N.C.G.S. § 15A-1431(b). *See* N.C.G.S. § 15A-1431(b) ("A defendant convicted in the [D]istrict [C]ourt before the judge may appeal to the [S]uperior [C]ourt for trial de novo with a jury as provided by law."). Prior to trial, Defendant filed several motions, including a *Motion for Change of Venue*, a *Motion to Dismiss Charges*, a *Motion to Dismiss for Unconstitutional Prosecution*, and a *Motion to Dismiss for Unconstitutional Vagueness*, all of which were denied. At the close of all evidence, Defendant again moved to dismiss the charge on the basis that the *Misdemeanor Statement of Charges* was fatally defective for failing to specify that the possession took place "either at a public health facility or a publicly owned place controlled by the State or local government as required[.]" In response, the State moved to amend the *Misdemeanor Statement of Charges* under N.C.G.S. § 15A-922(f) to specify the unlawful firearm possession occurred at a public place. The Superior Court allowed the State's motion and, once again, denied Defendant's.

¶ 5 On 22 April 2021, Defendant was found guilty and sentenced to forty-five days in the custody of the Sheriff, which was suspended for twelve months of supervised probation on the condition that she not possess or control any firearm in North Carolina. Defendant timely appeals.

¶ 6 During the pendency of the appeal, we entered an order asking the trial court whether the aforementioned police report had, in fact, been

1. Defendant was also described as having been "escorted [] into the Dunlap Building[,]" but only in the course of her arrest.

furnished to Defendant prior to her District Court trial. The order stated, in relevant part, as follows:

> The Superior Court entered judgment following a jury verdict finding Defendant guilty of possessing a pistol at a demonstration in violation of N.C.G.S. [§] 14-277.2. The Record indicates that the State provided Jeff Dobson, Defendant's counsel in the Chatham County Superior Court, a copy of the police report in this case. However, the record is silent as to whether Defendant or Defendant's counsel received the police report before her trial in the Chatham County District Court, where this case originated. It further appears that Mr. Dobson may not have been trial counsel for Defendant in the District Court.
>
> The original jurisdiction to try this petty misdemeanor was in the District Court. N.C.G.S. [§] 7a-272(a) (2021). Defendant was convicted in District Court on 10 January 2020 and entered notice of appeal to Superior Court. The Superior Court only obtained jurisdiction of this matter through the operation of N.C.G.S. 7A-271(a)(5). N.C.G.S. [§] 7A-271(a)(5) (2021). As a result, we must not only determine the jurisdiction of the Superior Court, but also that of the District Court at the time the District Court trial occurred. While the State has [appended] a copy of a document labeled 'Weapon Charges + Jessica + Thalia' to its brief, no such document exists in the record, nor is there any indication whether this document was the police report the State asserted was provided to Mr. Dobson. Both of the below questions are factual in nature and are necessary to determine the jurisdiction of the lower courts and this Court. Accordingly, the matter is remanded to the Superior Court, Chatham County, for findings of fact on the following two questions:
>
> 1) Is the above-referenced document, attached to the State's Brief as Appendix 9-17, the police report which was provided to Mr. Dobson as referenced at T 18:11-14?

> 2) Was the police report provided to Defendant and/or Defendant's counsel prior to the State putting on any evidence in her District Court trial?

(Record citations omitted.) On 11 May 2022, the trial court replied with an order finding the following:

> Having it been heard on the 7th day of April 2022, . . . this court finds, by the agreement of all parties, that:
>
> (1) The police report attached to the State's Brief as Appendix 9-17 is, in fact, the same police report which was provided to Mr. Dobson as referenced at T 18:11-14; and
>
> (2) The police report was provided to both Defendant and her counsel prior to trial in District Court and again prior to trial in Superior Court.

ANALYSIS

¶ 7 On appeal, Defendant argues the trial court erred by denying her *Motion for Change of Venue*, *Motion to Dismiss for Unconstitutional Prosecution*, and *Motion to Dismiss for Unconstitutional Vagueness*, as well as by denying her motion to dismiss for defects in the *Misdemeanor Statement of Charges* and permitting the State to amend it at the close of all evidence. The State, meanwhile, argues that the *Misdemeanor Statement of Charges* was valid as originally filed; and, in the alternative, that any defects in the statement of charges were cured via amendment at trial. As we agree the charging document was defective and its amendment improper, Defendant's remaining arguments are moot, and we vacate her conviction.

¶ 8 At the threshold, we note that the two arguments at issue in this case—whether the statement of charges was valid *ab initio* and whether the trial court erred in permitting the State to amend the statement of charges—collapse into a single issue just beneath the surface of their respective analyses. Under N.C.G.S. § 15A-924(a)(5),

> [a] criminal pleading must contain[] . . . [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(a)(5) (2021). Although special rules—which we will discuss later in this opinion, *see infra* ¶ 10—apply to our construction of statements of charges under this statutory scheme, the above substantive requirement applies to a criminal pleading "[w]hether by statement of charges or by indictment[.]" *State v. Dale*, 245 N.C. App. 497, 502 (2016). Where a charging document does not identify every essential element of the offense in compliance with N.C.G.S. § 15A-924(a)(5), we must vacate a defendant's conviction. *See State v. Barnett*, 223 N.C. App. 65, 72 (2012); *State v. Harris*, 219 N.C. App. 590, 598 (2012).

¶ 9 Like the initial validity of a criminal pleading, the permissibility of amending a criminal pleading at trial depends on whether the amendment would affect an essential element of the offense. The North Carolina Supreme Court has noted that, especially with respect to misdemeanor statements of charges, the State retains liberal power to amend criminal pleadings at trial; however, the amendment may not alter the "nature of the offense . . . ." *State v. Capps*, 374 N.C. 621, 628 (2020) (emphasis added) ("The General Assembly gave prosecutors the freedom to amend criminal pleadings at any stage of proceedings *if doing so does not change the nature of the charges* or is otherwise authorized by law."). Moreover, where the essential elements of an offense are affected by an amendment, the nature of the offense is changed. *State v. Bryant*, 267 N.C. App. 575, 578 (2019) (emphasis added) ("When the prosecutor amended the citation in question from larceny to shoplifting, she changed the nature of the offense charged. Larceny and shoplifting are separate statutory offenses *requiring proof of different elements*."); *see also State v. Carlton*, 232 N.C. App. 62, 66-67 (2014) ("[G]iven the significantly distinct elements of these two crimes, we are compelled to conclude that amending the citation to charge Defendant under [N.C.G.S.] § 14-290—rather than under [N.C.G.S.] § 14-291—would change the nature of the offense charged."). Thus, if a criminal pleading is originally defective with respect to an essential element, the State's amendment of the pleading to include the missing element is impermissible, as doing so would change the nature of the offense. Here, then, if the *Misdemeanor Statement of Charges* was incomplete with respect to an essential element, Defendant would be correct in arguing both that the statement of charges was deficient *ab initio* and that the trial court erred in permitting the State to amend it.

¶ 10 Bearing the foregoing in mind, we now must determine whether, upon conducting a de novo review, the State's failure to specify that the alleged offense occurred at a public place affects an essential element of the offense. *See Dale*, 245 N.C. App. at 502 ("Challenges to the validity

of [a criminal pleading under N.C.G.S. § 15A-924(a)(5)] may be raised at any stage in the proceedings and we review the challenge *de novo*."). In so doing, we are cognizant of the fact that, "[w]hen the [criminal] pleading [at issue] is a . . . statement of charges[,] . . . both the statement of the crime and any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant must be used in determining whether the pleading is sufficient" to have identified the essential elements of the crime.[2] N.C.G.S. § 15A-924(a)(5) (2021). Here, the Superior Court has confirmed that the police report included in the Record alongside Defendant's *Misdemeanor Statement of Charges* was both before it for consideration and furnished

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2. The State argues that, beyond the consideration of supplementary materials authorized by N.C.G.S. § 15A-924(a)(5), "the rules governing amendments to indictments are far less flexible" than those governing amendments to statements of charges. As a result, it contends, "the amendment was permissible." And, indeed, the statutes governing the respective pleadings state very different amendment rules. *See* N.C.G.S. § 15A-923(e) (2021) ("A bill of indictment may not be amended."); N.C.G.S. § 15A-922(f) (2021) ("A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged."). However, we have been clear that, "[t]o be sufficient, any charging instrument, whether an indictment, arrest warrant, or otherwise, must allege all essential elements of the crime sought to be charged." *State v. Madry*, 140 N.C. App. 600, 601 (2000) (citing N.C.G.S. § 15A–924(a)(5) (1999)). This requirement is grounded in N.C.G.S. § 15A-924(a)(5), which establishes the acceptable floor for the contents of *all* criminal pleadings, not just indictments. *See generally* N.C.G.S. § 15A-924(a)(5) (2021). To the extent our current caselaw permits the amendment of indictments in circumstances similar to those in which it permits the amendment of statements of charges, the explanation is that our caselaw has evolved in a manner that contrasts with an intuitive reading of the sentence "[a] bill of indictment may not be amended." N.C.G.S. § 15A-923(e) (2021). However, it remains the case that, statutorily, neither an indictment nor a statement of charges may be amended in a manner that changes the nature of the offense. *See State v. Barber*, 281 N.C. App. 99, 2021-NCCOA-695, ¶ 29 ("An amendment to an indictment is permissible so long as the amendment does not substantially change the nature of the charge as alleged in the indictment."), *disc. rev. denied*, 871 S.E.2d 518 (N.C. 2022); N.C.G.S. § 15A-922(f) (2021) ("A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged.").

We note the possibility that the State, in arguing for this distinction, may be drawing on our jurisprudence discussing the *jurisdictional* component of criminal pleadings. In *State v. Jones*, for example, the defendant, who failed to object at trial, argued on appeal that the trial court lacked jurisdiction because the criminal pleading—in that case, a citation—did not allege every element of the offense. *State v. Jones*, 255 N.C. App. 364, 369-70 (2017). We held the trial court did not err, reasoning that, because constitutional concerns with criminal pleadings are exclusive to indictments, "the failure to comply with [N.C.G.S.] § 15A-924(a)(5) . . . is not a *jurisdictional* defect." *Id.* at 371 (emphasis in original). Here, however, where Defendant objected at trial and bases her argument on the *statutory* insufficiency of the *Misdemeanor Statement of Charges*, the failure to fulfill the elemental requirement of N.C.G.S. § 15A-924(a)(5) would constitute reversible error.

to Defendant at all relevant times prior her appeal; however, even assuming, *arguendo*, the police report was a supplementary document of the type contemplated by N.C.G.S. § 15A-924(a)(5), the statement of charges did not contain each essential element.[3]

¶ 11 The offense with which Defendant was charged was N.C.G.S. § 14-277.2: carrying a weapon at a parade, funeral procession, picket line, or demonstration. Under N.C.G.S. § 14-277.2(a),

> [i]t shall be unlawful for any person participating in, affiliated with, or present as a spectator at any parade, funeral procession, picket line, or demonstration upon any private health care facility or upon any public place owned or under the control of the State or any of its political subdivisions to willfully or intentionally possess or have immediate access to any dangerous weapon.

N.C.G.S. § 14-277.2(a) (2021).[4] While our existing caselaw does not address the essential elements of N.C.G.S. § 14-277.2(a), we have held with respect to analogous statutes that the location of a defendant's conduct is essential to the offense. Specifically, in *State v. Huckelba*, we observed that, where firearm possession was prohibited on educational

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3. As we were not briefed on the scope of N.C.G.S. § 15A-924(a)(5), we find it improvident—and, for the reasons discussed below, unnecessary, *see infra* ¶¶ 12-16—to decide at this point whether "any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant" encompasses documents before the trial court. N.C.G.S. § 15A-924(a)(5) (2021). Indeed, the full sentence in which the above phrasing appears suggests that "information showing probable cause which was considered by the judicial official" simply refers to information that informed, *ex ante*, the decision of the magistrate judge or other judicial official to authorize the issuance of the document. N.C.G.S. § 15A-924(a)(5) (2021) ("When the pleading is a criminal summons, warrant for arrest, or magistrate's order, or statement of charges based thereon, both the statement of the crime and any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant must be used in determining whether the pleading is sufficient to meet the foregoing requirement."). While we expressly adopt neither this position nor the State's position that supplementary documents under N.C.G.S. § 15A-924(a)(5) refer to documents considered by the trial court, we observe for the benefit of future consideration that the issue is both unclear based on the language of the statute and, as yet, undiscussed in our jurisprudence.

Suffice it to say, given the reliance of our forthcoming analysis on the police report, the *Misdemeanor Statement of Charges* in this case would not, standing alone, contain every element of the offense charged as required under our established caselaw. *See infra* ¶¶ 12-16; *see also Barnett*, 223 N.C. App. at 72; *Harris*, 219 N.C. App. at 598.

4. While the other subsections of N.C.G.S. § 14-277.2 include exceptions to the general rule set out in N.C.G.S. § 14-277.2(a), none of them are relevant to our discussion of this issue. *See generally* N.C.G.S. § 14-277.2 (2021).

property pursuant to N.C.G.S. § 14-269.2, whether the location of the conduct was, in fact, educational property was an essential element of the offense. *See State v. Huckelba*, 240 N.C. App. 544, 567 ("The indictment charged all of the essential elements of the crime: that Defendant knowingly possessed a Ruger pistol on educational property—High Point University."), *rev'd on other grounds*, 368 N.C. 569, 780 S.E.2d 750 (2015). We also went on to clarify that, while the charging document need not have specified an address, it must have charged that the property on which the offense occurred *was* educational property. *See id.* ("We agree with the State that the physical address for High Point University listed in the indictment is surplusage because the indictment already described the 'educational property' element as 'High Point University.' Because the indictment properly contained all of the essential elements of the crime, Defendant has failed to establish any fatal variance in her indictment.").

¶ 12 Applying *Huckleba* here, we do not find that the statement of charges, even together with the police report, contained sufficient information to indicate that Defendant's conduct took place in the statutorily specified location—that is, "upon any private health care facility or upon any public place owned or under the control of the State or any of its political subdivisions . . . ." N.C.G.S. § 14-277.2(a) (2021) Defendant argues that the statement of charges itself lacks any reference to the location of the alleged offense. The State, meanwhile, does not contest the absence of the offense's location from the statement of charges; rather, it argues the supplementary information in the police report supplies the missing element. Specifically, the State contends that the indictment supplied the missing element by describing the "[l]ocation of [the] [i]ncident" as "40 East St, Pittsboro, NC 27312," further detailing the type of location as a "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk[,]" and specifying that the police responded to that location. We also separately observe that the police report describes Defendant's weapon possession as occurring "on the protest side of the road" and "20 yards from East Street[.]"

¶ 13 Under these facts, we agree with Defendant that the criminal pleading was insufficient with respect to an essential element. In *Huckleba*, the sufficiency of the charging document was derived from the fact that, while the incorrect address it supplied was unnecessary to indicate the type of location where the events occurred, the fact it specifically alleged that Defendant's actions took place "on educational property"—and further specified the "educational property" to be "High Point University"—satisfied the locational element. *Id.* We see a similar pattern emerge in our charging document jurisprudence with respect to

first- and second-degree burglary: even in cases where reviewing courts have held an indictment sufficient despite including an incorrect address, the essential element that the offense took place in a dwelling house is always otherwise present. *See*, *e.g.*, *State v. McCormick*, 204 N.C. App. 105, 111 (2010) (emphasis added) ("[T]he indictment alleges that [the] defendant *'did break and enter the dwelling house* of Lisa McCormick located at 407 Ward's Branch Road, Sugar Grove Watauga County'; however, the evidence adduced at trial indicated that the house number was 317 instead of 407."); *State v. Davis*, 282 N.C. 107, 113 (1972) (emphasis added) ("The indictment alleges that the defendant 'did unlawfully . . . break and enter the dwelling house of Nina Ruth Baker located at 840 Washington Drive, Fayetteville, North Carolina.' . . . . Miss Baker testified that she lived at 830 Washington Drive. There was no controversy as to the location of her residence, and the allegation that [the] defendant 'did unlawfully . . . break and enter the dwelling house of Nina Ruth Baker in Fayetteville, North Carolina,' would have been sufficient."); *see also State v. Cook*, 242 N.C. 700, 702 (1955) (noting that a then-existing burglary statute "contain[ed] the following essential elements: (1) an unlawful breaking or entering (2) of the dwelling house of another (3) with the intent to commit a felony or other infamous crime therein").

¶ 14 This pattern in our caselaw highlights the different functions of the address and the locational element in a charging document. The precise address of a defendant's conduct, while advisable to include, *see State v. Melton*, 7 N.C. App. 721, 724 (1970), primarily operates to apprise the defendant of the conduct of which she is accused. *See State v. Sellers*, 273 N.C. 641, 650 (1968) ("[A] building must be described as to show that it is within the language of the statute and so as to identify it with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense."). On the other hand, indicating the *type* of location involved—a dwelling house in first- and second-degree burglary, educational property in *Huckleba*, and public land here—operates to supply an essential element of the offense. Both adequate notice to a defendant *and* a description of the essential elements of an offense are necessary for an indictment to be valid. *See Davis*, 282 N.C. at 113 ("The description of the house in this case was adequate to bring the indictment within the language of the statute. This house was *also* identified with sufficient particularity as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense.") And, while the same language can often accomplish both purposes, the presence of one does not always guarantee the presence of the other.

¶ 15 Here, although the details in the police report contain an address and briefly describe the location as a "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk[,]" neither of these details indicate, directly or implicitly, that Defendant's conduct took place "upon any private health care facility or upon any public place owned or under the control of the State or any of its political subdivisions" without resort to sources outside the statement of charges and police report. N.C.G.S. § 14-277.2(a) (2021). The address provided is not accompanied by a name or description any more detailed than "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk"; if the address belonged to a public place, it would only be discovered through reference to an external database rather than through reference to the documents actually provided to Defendant. Similarly, nothing in the disjunctive use of "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk" indicates any more than the statement of charges itself that the events described occurred at a public place.[5] Finally, the description of Defendant's firearm possession as occurring "on the protest side of the road" and "20 yards from East Street," while illustrative, again indicates nothing about the public or private nature of the area without reference to external information.

¶ 16 Without any allegations in the charging document supporting an essential element of the offense—that Defendant's conduct took place "upon any private health care facility or upon any public place owned or under the control of the State or any of its political subdivisions"—the *Misdemeanor Statement of Charges* in this case lacked an essential element of N.C.G.S. § 14-277.2(a). N.C.G.S. § 14-277.2(a) (2021). As the missing element was essential, the trial court also erred in allowing the State to amend the charging document at trial, which changed the "nature of the offense . . . ." *Capps*, 374 N.C. at 628. For this reason, we must vacate Defendant's conviction. *See Barnett*, 223 N.C. App. at 72; *Harris*, 219 N.C. App. at 598. However, as in previous cases, we do so "without

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5. To elaborate, we note the significance of the fact the police report lists highways, roads, alleys, streets, and sidewalks as alternatives through the use of a slash. *See Slash*, Webster's New World College Dictionary 1364 (5th ed. 2014) ("[A] short diagonal line (/) used between two words to show that either is applicable . . . ."). Logically, the alternative listing of the types of locations in the list indicates that the conduct could have taken place at *any one* of them, not any particular type of location on the list. In other words, the designation "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk" applies just as accurately to a privately-owned alley as a State-controlled highway, making the designation unhelpful in distinguishing between "public place[s] owned or under the control of the State" and other places. N.C.G.S. § 14-277.2(a) (2021). This is the case even though certain *individual* items in the list on the police report, like highways, either are necessarily or are extremely likely to be "public place[s] owned or under the control of the State" such that, standing alone, they might have supplied the missing element in this case. N.C.G.S. § 14-277.2(a) (2021).

prejudice to the State's right to attempt to prosecute Defendant based upon a valid [criminal pleading]." *Id.*

CONCLUSION

¶ 17 The Misdemeanor Statement of Charges, even when taken together with the police report considered by the trial court and furnished to Defendant, lacked an essential element of N.C.G.S. § 14-277.2.

VACATED.

Judge GRIFFIN concurs.

Judge INMAN concurs in the result only.

STATE OF NORTH CAROLINA
v.
DAMIAN R. TAYLOR, DEFENDANT

No. COA22-243

Filed 29 December 2022

1. Evidence—lay opinion testimony—identification of defendant in surveillance footage

In a prosecution for discharging a weapon into an occupied property and inflicting serious injury, the trial court did not abuse its discretion in admitting lay opinion testimony by three officers identifying defendant as the shooter in the surveillance footage of the crime. Given that the officers had had previous encounters with defendant before viewing the footage, that defendant's appearance had changed between the night of the crime and defendant's trial, and that the quality of the surveillance video itself was poor, there was a rational basis for concluding that the officers were more likely than the jury to correctly identify defendant as the individual shown in the footage.

2. Firearms and Other Weapons—discharging a weapon into an occupied property inflicting serious injury—defendant as perpetrator—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss two counts of discharging a weapon into an occupied property

inflicting serious injury, where the evidence included surveillance footage showing a man approaching the victim's home until he disappeared off-screen; debris flying on-screen moments later; and the man returning to his vehicle and driving off while pointing an object at the home twice, making a flash appear on-screen each time. The surveillance footage—along with several .40 caliber rounds recovered near the home and police testimony identifying defendant as the man shown in the footage—all supported a reasonable inference that defendant fired the shots that struck the victim. Although another man could be seen on video pointing a gun at the house, the footage suggested that the gun failed to fire at all.

3. Constitutional Law—right against self-incrimination—testimony regarding defendant's silence—referenced in closing argument

In a prosecution for discharging a weapon into an occupied property inflicting serious injury, there was no plain error where the trial court allowed a police officer to testify that defendant did not cooperate with law enforcement's investigation of the crime and remained silent when police questioned him, nor was there plain error where the prosecutor referenced the testimony during closing arguments. Defendant's constitutional right against self-incrimination was not violated because the prosecutor did not ask the officer to comment on defendant's silence, did not rely on the officer's testimony to establish defendant's guilt or any element of the charged crime, and only mentioned defendant's noncooperation in order to contextualize law enforcement's decision not to immediately arrest him.

Appeal by Defendant from judgments entered 22 April 2021 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 18 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Taylor H. Crabtree, for the State.

Joseph P. Lattimore for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant Damian R. Taylor appeals from judgments entered after a jury found him guilty on two counts of discharging a weapon into an

occupied property inflicting serious injury and one count of possession of a firearm by a felon. On appeal, Defendant contends that the trial court erred in: (1) allowing several police officers to offer their lay opinion that Defendant can be identified as the shooter in surveillance video of the crime; (2) denying Defendant's motion to dismiss the charges of discharging a firearm into an occupied property inflicting serious injury; and (3) admitting testimony from police that Defendant was not cooperative in the investigation. After careful review, we hold Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The evidence of record tends to show the following:

¶ 3 In the late-night hours of 3 November 2017, Crystal Tyree was in her living room in Rocky Mount when several gunshots were fired into her home from her front yard. Ms. Tyree suffered numerous injuries from the gunfire, including a broken leg and a headwound. Several officers with the Rocky Mount Police Department promptly arrived at Ms. Tyree's home to investigate and render aid to Ms. Tyree.

¶ 4 The investigating officers located the following evidence at the crime scene: (1) six stamped .40 caliber shell casings in the front yard; (2) bullet holes in the living room wall above a couch; (3) a projectile behind Ms. Tyree's television; (4) a shattered glass coffee table on Ms. Tyree's porch; (5) bullet holes in the front door; (6) a .40 caliber stamped shell casing in the road in front of the home; and (7) a blood trail left by Ms. Tyree as she dragged herself from the living room to the kitchen.

¶ 5 Ms. Tyree gave police surveillance footage from three security cameras placed around her home. The video, in black and white, shows a Dodge Avenger stop outside Ms. Tyree's home. A driver exits the vehicle, approaches the home, and then moves closer toward the home and out of the camera frame. Debris then flies from the home. Another individual then gets out of the passenger side of the Avenger and points a gun at the home, though it does not appear to fire. No muzzle flash is shown on the video, and the person seemingly manipulates the gun's firing mechanism after attempting to fire two shots. The driver then reenters the frame and a flash can be seen after he returns to the car. The video next shows a flash from the driver's side of the vehicle as it pulls away from Ms. Tyree's home.

¶ 6 One of the responding officers who viewed the video, Sergeant Keith Miller, believed he recognized Defendant as the driver and another man, Jerry Green, as the passenger. Sgt. Miller had seen Defendant before

and was able to specifically identify him as the driver based on his thick glasses, dreadlocks, and slight size.

¶ 7 Independent of Sgt. Miller's video identification, another officer, Officer Daryl Jones, linked Defendant and Jerry Green to the crime as potential suspects. Told only to be on the lookout for a "dark-in-color sedan," Officer Jones drove to a home on Proctor Street where he had observed a dark Dodge Avenger a few days earlier. When he arrived, Officer Jones found the car parked in a driveway with two men inside. Officer Jones then drove around the block while waiting for other officers to arrive; when he next approached the home, Defendant, Jerry Green, and Terry Green—Jerry's brother—were standing beside the Dodge Avenger and a green Toyota Camry parked nearby. A detective spoke with the three men about the shooting, and all three denied any involvement. Police departed without further investigation at that time.

¶ 8 Later that evening, the identification of Defendant and Jerry Green on the video renewed police interest in the two men's potential involvement in the crime. Officers returned to Proctor Street but were unable to locate Defendant or the Greens; a short time later, however, police detained Terry Green in the green Toyota Camry during a traffic stop. Jerry Green arrived on the scene while the stop was underway and was arrested. Moments later, Defendant drove up in the dark-colored Dodge Avenger seen on the surveillance video; he was then arrested by Sgt. Miller. Police searched Defendant's car and found seven 9 mm shell casings in the vehicle.

¶ 9 Defendant was subsequently indicted on: (1) one count of assault with a deadly weapon with intent to kill inflicting serious injury; (2) two counts of discharging a weapon into occupied property inflicting serious bodily injury; and (3) one count of possession of a firearm by a felon. Prior to trial, Defendant moved to suppress any witness identification of him as the driver seen in the surveillance video. The trial court held a pre-trial *voir dire* hearing on 19 April 2021 before denying Defendant's motion. The State also dismissed the charge of assault with a deadly weapon with a deadly weapon with intent to kill inflicting serious injury.

¶ 10 The jury was impaneled the following day, and various responding officers testified for the State. The surveillance video was published to the jury, and Sgt. Miller was permitted to identify Defendant as the driver seen in the video based on his glasses, dreadlocks, and small frame. At trial, Defendant was not wearing glasses and his hair was longer than depicted in the video. Two other officers also testified that Defendant was the driver seen in the video based on their prior encounters with

him. Defendant's counsel lodged a continuing objection to these identifications. One police witness testified without objection that Defendant declined to answer questions from a detective.

¶ 11 Defendant moved to dismiss all charges at the close of the State's evidence. The trial court denied that motion. Following closing arguments by counsel, instruction by the trial court, and deliberation, the jury found Defendant guilty on all counts. Defendant received a sentence of 120 to 156 months imprisonment on one count of discharging a weapon into occupied property inflicting serious bodily injury and a consolidated, consecutive sentence of the same length for the remaining offenses. Defendant's counsel told the trial court that he intended to give oral notice of appeal immediately after entry of judgment and, following sentencing, the trial court announced that "Defendant gives notice of appeal by way of counsel . . . to the North Carolina Court of Appeals." Defendant also filed a petition for writ of *certiorari* with this Court seeking review in the event that the notice of appeal given at trial failed to comply with the technical requirements of N.C. R. App. P. 4 (2021).[1]

II. ANALYSIS

¶ 12 Defendant argues that the trial court: (1) erred in permitting three officers to offer their lay opinions identifying Defendant on the surveillance video; (2) erred in denying his motion to dismiss; and (3) plainly erred in allowing testimony regarding his silence into evidence. We hold Defendant has failed to demonstrate error under each argument.

A. Standards of Review

¶ 13 We review a trial court's decision to admit lay opinion testimony for an abuse of discretion. *State v. Williams*, 363 N.C. 689, 701, 686 S.E.2d 493, 501 (2009). A denial of a motion to dismiss, by contrast, is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Finally, for evidentiary error subject to plain error review, a defendant must show error and "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Fraley*, 202 N.C. App. 457, 465, 688 S.E.2d. 778, 785 (2010).

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1. The State did not assert a lack of jurisdiction in its brief to this Court, nor did it oppose *certiorari* review in its response to Defendant's petition. In light of these circumstances, and to the extent that Defendant's counsel's notice of appeal and the trial court's recognition thereof on the record failed to comply with the technical requirements of our appellate rules, we allow Defendant's petition for writ of *certiorari* in our discretion.

B. Lay Opinion Testimony

¶ 14 **[1]** In his first argument, Defendant asserts that the trial court abused its discretion in allowing three officers to opine to the jury that Defendant is identifiable as the driver of the Dodge Avenger seen on the surveillance footage. Defendant requests plain error review to the extent that this argument was unpreserved by adequate objection. The State disagrees with Defendant as to preservation and on the merits, noting that the following factors weighed in favor of allowing lay opinion testimony: (1) the testifying officers had encountered Defendant prior to viewing the surveillance video; (2) the Defendant's appearance had changed between the night of the crime and trial; and (3) the quality of the surveillance video itself was poor. We agree with the State and hold that, regardless of whether his counsel's objection preserved this issue below, Defendant has not shown the trial court abused its discretion in allowing this testimony.

¶ 15 Rule 701 of our Rules of Evidence permits lay opinion testimony that is "(a) rationally based on the perception of the witness and (b) helpful to . . . the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2021). In the specific context of lay identification of a defendant on videotape, such testimony is admissible if it "is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony." *State v. Belk*, 201 N.C. App. 412, 415, 689 S.E.2d 439, 441 (2009) (citation and quotation marks omitted). By natural corollary, such testimony is inadmissible when "the jury is as well qualified as the witness to draw the inference and conclusion that the person shown in the surveillance footage is the defendant." *State v. Weldon*, 258 N.C. App. 150, 155, 811 S.E.2d 683, 688 (2018) (cleaned up) (citation and quotation marks omitted).

¶ 16 This Court has identified the following factors as pertinent to the above analysis:

> (1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance [video] was taken or when the defendant was dressed in a manner similar to the individual depicted in the [video]; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial. . . .

> [C]ourts have also considered the clarity of the surveillance image and completeness with which the subject is depicted in their analysis.

Belk, 201 N.C. App. at 415-16, 689 S.E.2d at 441-42 (citations omitted). Critically, we consider the above factors pursuant to the abuse of discretion standard, and "we must uphold the admission of . . . lay opinion testimony if there was a rational basis for concluding that [the witness] was more likely than the jury to correctly identify [the] [d]efendant as the individual in the surveillance footage." *Id.* at 417, 689 S.E.2d at 442 (citation omitted).

¶ 17 Reviewing the evidence in light of the above caselaw, we hold that the trial court could rationally conclude that the officers' lay opinion testimony identifying Defendant on the surveillance video was admissible under Rule 701. First, each of the officers testified that they had previously encountered Defendant before viewing the surveillance video. Second, the first officer to so testify—Sgt. Miller—noted that on the night of the shooting, he recognized Defendant based on the length of his dreadlocks and his distinctively thick eyeglasses, and that both of those identifying characteristics had changed between the crime and trial.[2] Third, the State notes, and Defendant does not dispute, the video's relatively poor quality. As each of these factors weighs in favor of admissibility, we decline to hold that the trial court irrationally allowed the officers' identifying testimony into evidence and abused its discretion as a result. *See Weldon*, 258 N.C. App. at 156, 811 S.E.2d at 689 (holding no abuse of discretion in admission of officer's lay identification from surveillance video when the witness had previously encountered the defendant and the defendant's hairstyle changed between the recording and trial).

¶ 18 We are unconvinced by Defendant's arguments that the trial court could not have conducted a proper Rule 701 analysis because: (1) it did not expressly reference the rule in its pre-trial ruling or during trial; (2) the trial court had not viewed the video at the time of the pre-trial ruling and did not make any express findings as to its quality; and (3) Defendant was not personally responsible for his changed appearance because his glasses were seized and introduced into evidence by the State.

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2. Though the other two officers did not describe in detail what distinguishing physical features led them to identify Defendant on the video, their testimony was largely duplicative and cumulative of Sgt. Miller's admissible testimony. *See*, *e.g.*, *State v. Parker*, 140 N.C. App. 169, 182, 539 S.E.2d 656, 665 (2000) ("When one witness's testimony is properly admitted, erroneous admission of repetitive or cumulative subsequent testimony is not necessarily prejudicial.").

¶ 19 As to Defendant's first argument, we note that Defendant's counsel never expressly argued that the testimony was inadmissible under Rule 701, mentioning only Rules 901, 1001, and 1002. In any event, the pre-trial ruling was entirely preliminary because the admissibility of testimony is not finally adjudged until it is presented into evidence. *State v. McCall*, 162 N.C. App. 64, 68, 589 S.E.2d 896, 899 (2004). The trial court had a full opportunity to consider the admissibility of the officers' testimony based on counsel's objection and in due consideration of all relevant factors—including the self-evident quality of the video published to the jury alongside the officers' testimony.[3] Finally, the exact cause of Defendant's changed appearance is immaterial, as the rule is primarily concerned with whether the change in appearance diminishes an unfamiliar juror's ability to identify the person seen on video. *See Weldon*, 258 N.C. App. at 156, 811 S.E.2d at 688-89 ("[B]y the time of trial, the jury was unable to perceive the distinguishing nature of defendant's hair at the time of the shooting. . . . Accordingly, in that defendant had changed his appearance since the 2 April 2015 surveillance video, not only was [the testifying officer] qualified to identi[f]y defendant in the video, but he was *better* qualified than the jury to do so." (citation and quotation marks omitted)). *See also U.S. v. Farnsworth*, 729 F.2d 1158, 1160 (8th Cir. 1984) ("This criteria is fulfilled where the witness is familiar with the defendant's appearance around the time the surveillance photograph was taken and the defendant's appearance has changed prior to trial. . . . These [differences in appearance] made it difficult for the jury to make a positive identification from the photographs. Because the [witnesses'] frequent contacts [with the defendant] familiarized them with his appearance prior to the robbery, the district court considered their identification testimony helpful to the jury.").

C. Motion to Dismiss

¶ 20 **[2]** Defendant next argues that the trial court erred in denying his motion to dismiss the charges against him, asserting that there was insufficient evidence that he fired the bullets that struck the victim. We disagree.

¶ 21 A motion to dismiss is properly granted only when the State fails to present substantial evidence of each essential element of the charged

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3. The clarity of the video is not dispositive where the testifying officer knew the defendant from prior encounters and the defendant's appearance changed between the video and trial. *See Weldon*, 258 N.C. App. at 156, 811 S.E.2d at 689 (holding such testimony was admissible based on the latter two factors without discussion of the surveillance video's quality).

offense. *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020). We must view the evidence in the light most favorable to the State, giving it the benefit of "every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* Circumstantial evidence is considered equally probative as direct evidence. *State v. Jenkins*, 167 N.C. App. 696, 699, 606 S.E.2d 430, 432 (2005). Here, the State was required to introduce sufficient evidence showing "(1) the willful or wanton discharging (2) of a firearm (3) into any building (4) while it is occupied," *State v. Jones*, 104 N.C. App. 251, 258, 409 S.E.2d 322, 326 (1991), and that Defendant's commission of those acts caused bodily injury to another, N.C. Gen. Stat. § 14-34.1(c) (2021).

¶ 22 Defendant argues that the State's evidence fails to establish that he fired the shots that struck Ms. Tyree. But the testimonial, video, and physical evidence in this case, as well as the reasonable inferences drawn therefrom, show otherwise. Specifically, the video shows a man identified as Defendant get so close to the home that he leaves the camera's field of view, and debris flies on screen moments later. Defendant reenters the frame and returns to his car, after which he points an object at the home and a flash is seen on screen. Then, as Defendant drives away, he points the object at the house again and another flash is observable from the driver's side of the vehicle. The officers' testimony, coupled with the video and several .40 caliber rounds, all fired from the same gun and recovered by police close to the house and in the street, support a reasonable inference that Defendant fired several shots into Ms. Tyree's home. And while it is true that another man can be seen on video pointing a gun at the house, the absence of any casings from another gun at the crime scene, the lack of any muzzle flash on screen, and the man's apparent attempts to manipulate the gun's firing mechanism all support a reasonable inference that he attempted but failed to successfully fire an inoperable firearm at the home. Viewed in the light most favorable to the State, this evidence sufficiently establishes all essential elements of the crime charged, namely that Defendant fired several bullets into Ms. Tyree's home and injured her as a result.

D. Defendant's Silence and Plain Error

¶ 23 **[3]** In his final argument, Defendant argues that the trial court plainly erred in permitting admission of the following testimony from a police officer:

> [THE STATE]: Okay. And, ultimately, you left 1332 Proctor Street?

> [THE WITNESS]: Yes. They weren't cooperative on the scene, and we didn't have charges at the time, so based on what we had, we left the scene.
>
> [THE STATE]: And when you say, "They weren't cooperative," what do you mean?
>
> [THE WITNESS]: They weren't answering a lot of Detective Woods's questions. They weren't particularly happy that we were there speaking to them.

Later, the prosecutor stated in closing argument:

> Now, from there, the officers admitted, "We didn't make an arrest. They didn't want to cooperate, so we had to clear the scene."
>
> Now, ladies and gentlemen, that's what we want officers to do. At that point in time, all they had was a vague vehicle description, and they had no reason to effectuate an arrest. So what did they do? They cleared the scene, and gathered more information.
>
> . . . .
>
> And there is also the fact that it was Sergeant Miller who stopped the Defendant on that night, after they drove around the city trying to find these individuals that they first saw at 1332 Proctor Street. Once law enforcement said, "Hey, can we talk to you about a shooting?" once they said "We don't have anything for you," and got—you heard law enforcement went back to that residence several times that night trying to locate them and trying to locate that vehicle.

Defendant claims the admission of this testimony and the prosecutor's mentions of it in closing argument violated his constitutional right against self-incrimination under the Fifth Amendment to the United States Constitution and Article 1, Section 23 of the North Carolina Constitution.

¶ 24 Defendant has not shown plain error in the above testimony and closing argument. On plain error review, we must consider whether the State "emphasize[d], capitalize[d] on, or directly elicit[ed]" the inadmissible statements. *State v. Moore*, 366 N.C. 100, 106, 726 S.E.2d 168, 173 (2012). The prosecutor did none of those things here. The prosecutor did not ask the witness to comment on Defendant's silence and appears

instead to have sought to contextualize law enforcement's decision to leave Defendant and Terry Green alone in the immediate aftermath of the shooting. The prosecutor's closing argument briefly mentioned Defendant's lack of cooperation only to describe law enforcement's actions in investigating the crime. Finally, the prosecutor did not rely on the challenged testimony to establish Defendant's guilt or any element of the crime charged. We therefore hold that the trial court did not plainly err under *Moore* and the applicable law.

III. CONCLUSION

¶ 25 For the foregoing reasons, we hold Defendant received a fair trial, free from error.

PETITION FOR WRIT OF CERTIORARI ALLOWED; NO ERROR.

Judges GRIFFIN and JACKSON concur.

STATE OF NORTH CAROLINA
v.
JAMEY LAMONT WILKINS

No. COA22-339

Filed 29 December 2022

1. Appeal and Error—preservation of issues—criminal defendant's right to competency hearing—statutory—constitutional—waiver

In a prosecution for multiple drug-related charges, where the trial court entered a pretrial order requiring the State to submit defendant for a competency evaluation but where the evaluation never took place, defendant failed to preserve for appellate review his argument that the court erred in proceeding to trial without the evaluation or a competency hearing. Defendant waived his statutory right to a competency hearing (under N.C.G.S. § 15A-1002) by failing to assert it at trial, and he conceded on appeal that his nonwaivable constitutional right to a competency hearing was not at issue. Further, defendant's main argument on appeal—that the statutory right should be treated as nonwaivable in cases where a trial court orders an evaluation or otherwise inquires into a defendant's competency—was rejected.

2. Appeal and Error—preservation of issues—constitutional argument—waiver—plain error review

In a prosecution for multiple drug-related charges, where several police officers testified that defendant remained silent during a search of his vehicle, defendant waived appellate review—including plain error review—of his argument that the testimony's admission violated his Fifth Amendment rights, given that defendant did not raise this constitutional objection at trial. Even if plain error review had been available on appeal, defendant failed to show that, but for the testimony, the jury probably would have reached a different verdict.

Judge INMAN dissenting.

Appeal by defendant from judgment entered 29 July 2021 by Judge Edwin G. Wilson, Jr., in Caswell County Superior Court. Heard in the Court of Appeals 1 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Keith Clayton, for the State.

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

DIETZ, Judge.

¶ 1 When the competency of a criminal defendant is questioned, there are two sources of rights that can apply: statutory protections and constitutional ones. Our Supreme Court—repeatedly over many decades—has held that the statutory protections can be waived if not timely asserted by the defendant's counsel. The constitutional protections, by contrast, cannot be waived by failure to assert them.

¶ 2 In this appeal, Defendant Jamey Lamont Wilkins concedes that he is not raising a constitutional competency issue, and that he did not preserve his statutory competency issue in the trial court. So he asks this Court to reshape decades of settled law from our Supreme Court distinguishing statutory issues (waivable) and constitutional ones (nonwaivable) by creating a new subcategory of statutory competency cases that are treated the same way that our Supreme Court treats the constitutional ones.

¶ 3 That is not an appropriate task for this Court. We are an error-correcting court, not a law-making one. If, as Wilkins argues, the long

line of cases concerning waiver of statutory competency should be subject to a new, court-created exception, that change must come from our Supreme Court.

Facts and Procedural History

¶ 4 In 2018, Defendant Jamey Lamont Wilkins was riding in the front passenger seat of an SUV when police pulled the vehicle over on suspicion of having thrown contraband into a nearby prison yard. Wilkins remained silent while officers searched the SUV. The search revealed two footballs on the floorboard behind Wilkins's seat that had been cut open, filled with drugs and other contraband, and duct-taped closed. Police also found a large sum of cash within the center console. Law enforcement arrested both Wilkins and the driver of the SUV.

¶ 5 The State charged Wilkins with multiple drug possession offenses, several counts of attempting to provide contraband to an inmate, and attaining habitual felon status. Two days later, Wilkins's counsel filed a motion requesting a competency hearing. At the competency hearing, Wilkins's counsel informed the trial court that, in addition to counsel's own concerns regarding his client's competency, jail staff reported that Wilkins was "exhibiting some odd behaviors" and had recommended an evaluation. The trial court entered an order finding that Wilkins's "capacity to proceed is in question." The order required the State to transport Wilkins to a mental health facility for a forensic evaluation.

¶ 6 That never happened. Wilkins was not transported to the mental health facility and he never received any competency evaluation. Instead, Wilkins was jailed for a brief period and then released on bail.

¶ 7 Several years later, in 2021, Wilkins's case went to trial. By this point, Wilkins had hired new counsel. His new counsel never asserted that the trial court's order requiring a competency evaluation had not been followed, and never asserted that Wilkins required a competency evaluation or hearing.

¶ 8 During the trial, the State elicited testimony from three witnesses concerning Wilkins's silence during the stop and search. Wilkins did not object to this testimony.

¶ 9 The jury acquitted Wilkins of attempting to provide contraband to an inmate but convicted him of the drug possession charges. Wilkins then pleaded guilty to attaining habitual felon status. The trial court consolidated the convictions into one judgment and sentenced Wilkins to a term of 51 to 74 months in prison. Wilkins timely appealed.

Analysis

I. Failure to conduct competency hearing

¶ 10 **[1]** Wilkins first argues that the trial court erred because it ordered a competency evaluation but then proceeded to trial several years later without one. Although Wilkins never objected to the lack of a competency evaluation and hearing, he contends that "once a trial court finds a defendant's capacity to proceed is in question, the right to a competency determination cannot be waived."

¶ 11 Wilkins's argument is not an accurate statement of the law as it exists today. There are two potential sources of a criminal defendant's right to a competency hearing: constitutional and statutory. The constitutional right, which stems from the Due Process Clause, provides that when "a trial court possesses information regarding a defendant that creates sufficient doubt of his competence to stand trial to require further inquiry on the question," the trial court *must* conduct a competency hearing. *State v. Sides*, 376 N.C. 449, 458, 852 S.E.2d 170, 176 (2020). This constitutional right cannot be waived by the defendant because the "trial court has a *constitutional duty* to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court" that meets the due process criteria. *Id.*; *see also State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007). Importantly, Wilkins did not assert an argument under this due process standard in his appellate briefing and conceded at oral argument that he is not raising this due process claim.

¶ 12 Criminal defendants also can have a statutory right to a competency hearing that arises from Section 15A-1002 of our General Statutes. That provision states that when the competency of a defendant is questioned, the trial court "shall hold a hearing" to determine capacity to proceed:

> (a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, *or the court*. . . .
>
> (b) (1) When the capacity of the defendant to proceed is questioned, *the court shall hold a hearing* to determine the defendant's capacity to proceed. If an examination is ordered . . . the hearing *shall be held* after the examination. . . .

N.C. Gen. Stat. § 15A-1002(a)–(b)(1) (emphasis added).

¶ 13 Ordinarily, this sort of compulsory statutory language might be considered a "statutory mandate" and fall within a long line of cases holding

that compliance with the statute cannot be waived by failure to timely assert it to the trial court. *See In re E.D.*, 372 N.C. 111, 121–22, 827 S.E.2d 450, 457 (2019) (collecting cases).

¶ 14 But beginning nearly half a century ago, our Supreme Court held that Section 15A-1002 was subject to ordinary preservation requirements and, thus, defendants must timely raise noncompliance with the statute or the issue is waived on appeal. *State v. Young*, 291 N.C. 562, 566, 231 S.E.2d 577, 580 (1977). Since *Young*, our Supreme Court repeatedly has held that "the statutory right to a competency hearing is waived by the failure to assert that right at trial" and if a defendant proceeds to trial without raising Section 15A-1002 with the trial court, the defendant's "statutory right to a competency hearing was therefore waived by the failure to assert that right at trial." *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221; *see also State v. King*, 353 N.C. 457, 466, 466 S.E.2d 575, 584–85 (2001).

¶ 15 Wilkins argues that we should find his statutory competency argument preserved for appellate review by further subdividing the Supreme Court's precedent in *Young*, *King*, *Badgett*, and *Sides*. Wilkins contends that the *Young*, *King*, and *Badgett* cases should be interpreted to apply only when the trial court did not order an evaluation or otherwise inquire into the defendant's competency. But, if the trial court makes that inquiry—for example, by ordering an evaluation as occurred in this case—then *Young*, *King*, and *Badgett* no longer apply and the defendant's counsel need not raise the issue at trial in order to preserve it.

¶ 16 The flaw in this argument is that the Supreme Court in *Young*, *King*, *Badgett*, and the rest of this line of cases never made the sort of distinction that Wilkins asserts here. Instead, these cases focus solely on one factor: that the defendant proceeded to trial and entry of judgment without asserting the right to the hearing. There is no basis in any of these cases to draw factual distinctions that would permit *some* statutory competency issues to be waivable but not others. In these cases, the Supreme Court's holding was straightforward and categorical: the constitutional issue is not waivable; the statutory one is. *See*, *e.g.*, *King*, 353 N.C. at 466, 466 S.E.2d at 584–85; *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221; *Sides*, 376 N.C. at 458, 852 S.E.2d at 176. If this case presents a need for a new subcategory of statutory cases that are not waivable, like the corresponding constitutional ones, that change must come from our Supreme Court.

¶ 17 Having set out the applicable law, we hold that Wilkins's statutory competency argument is not preserved for appellate review. In 2018, shortly after Wilkins's arrest, his counsel questioned his competency

and the trial court ordered that Wilkins be transported to a mental health facility for evaluation. That evaluation never took place and instead Wilkins was released on bail. Three years later, in 2021, Wilkins's case was called for trial and Wilkins appeared with new counsel. He proceeded to trial without raising any competency issues or requesting that the court conduct the evaluation and review it previously had ordered.

¶ 18 Under *Young*, *King*, *Badgett* and their progeny, the failure to assert the statutory right to a competency hearing at trial, before entry of the judgment, waived the *statutory* issue on appellate review. And, because Wilkins did not assert a *constitutional* competency argument on appeal and conceded at oral argument that the constitutional standard is not at issue in this appeal, that nonwaivable issue is not applicable in this appeal. Accordingly, under controlling precedent from our Supreme Court, Wilkins's competency argument is not preserved for appellate review.

¶ 19 Our dissenting colleague finds it "ironic" that, as an error-correcting court, we are unwilling to correct the error that the dissent sees in this case. But what occurred here is commonplace. There are countless examples of cases where an error occurred in the trial court but it was not a *reversible* error—that is, the type of error this Court can correct. This often happens because the error is not prejudicial, but it also happens for the reason presented in this case—because the error was not preserved for appellate review.

¶ 20 Indeed, this case highlights precisely why we have preservation requirements. If Wilkins's counsel believed the competency evaluation was necessary (although due process did not require one), there was ample opportunity to raise the issue and have the trial court act on it. By saving this argument for appeal, Wilkins was able to await the jury's verdict and then, after the verdict was unsatisfactory, seek a second bite at the apple by arguing for a new trial. All the while, the issue producing that new trial easily could have been brought to the trial court's attention and corrected in the first go round. *See State v. Black*, 260 N.C. App. 706, 817 S.E.2d 506, 2018 WL 3734703, at *2 (2018) (unpublished). The dissent may not care about encouraging this sort of gamesmanship, but the Supreme Court does. *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019).

II. Evidence concerning Wilkins's silence

¶ 21 **[2]** Wilkins next argues that the trial court committed plain error by admitting testimony from several law enforcement officers concerning Wilkins's silence during the traffic stop and search of the vehicle.

¶ 22 Wilkins concedes that he did not object to this testimony at trial and requests that this Court review for plain error. The plain error test consists of three factors. First, the defendant must show that "a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Second, the defendant must show that the error had a probable impact on the outcome—that is, "that, absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Finally, because plain error "is to be applied cautiously and only in the exceptional case," the defendant must show that the error is the type that seriously affects "the fairness, integrity or public reputation of judicial proceedings." *Id.* at 518, 723 S.E.2d at 334.

¶ 23 As an initial matter, it is not clear that this issue is reviewable on appeal, even for plain error. Our Supreme Court has long held that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error." *State v. Buchanan*, 253 N.C. App. 783, 789, 801 S.E.2d 366, 370 (2017). Although Rule 10 of the Rules of Appellate Procedure does not preclude plain error review of constitutional issues, the Supreme Court has not overturned this precedent. Wilkins concedes that this testimony would be admissible but for his Fifth Amendment argument—in other words, he acknowledges that this argument is solely a constitutional one. Thus, is it an issue that is fully waived if not timely asserted in the trial court.

¶ 24 In any event, even if subject to plain error review, Wilkins has not shown that, but for the references to his silence, the jury probably would have reached a different result. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Nor has he shown that these purported errors were so fundamental, given the weight of the State's evidence at trial, that they call into question the integrity of our justice system. *Id.* We therefore find no error, and certainly no plain error, in the trial court's judgment.

Conclusion

¶ 25 For the reasons explained above, we find no error in the trial court's judgment.

NO ERROR.

Judge DILLON concurs.

Judge INMAN dissents with separate opinion.

INMAN, Judge, dissenting.

¶ 26 I fully agree with the majority that "[w]e are an error-correcting court, not a law-making one." And there does not appear to be any serious disagreement over whether error occurred here: the State ignored a lawful order compelling it to submit Defendant for a competency evaluation, and the trial court ignored a statutory mandate directing it to conduct a competency hearing. Where the majority and I differ, ironically enough, is whether we may perform our error-correcting function in this case to set right the mistakes made below, just as this Court has done in other cases with analogous facts. Because in my view we may provide such redress in this case without running afoul of Supreme Court precedent, I respectfully dissent from the majority's determination that Defendant is not entitled to relief here.

I. ANALYSIS

¶ 27 The statute at issue, N.C. Gen. Stat. § 15A-1002(a)-(b)(1) (2021), contains a statutory mandate compelling the trial court to conduct a hearing on defendant's competency once judicially questioned. *See State v. Myrick*, 277 N.C. App. 112, 2021-NCCOA-146, ¶ 13 ("By failing to make a determination of Defendant's capacity (which had been questioned) and failing to make findings of fact to support that determination, the trial court acted contrary to [Section 15A-1002's] statutory mandate."). As a general rule, such violations are automatically preserved for appellate review without objection. *See In re E.D.*, 372 N.C. 111, 121-22, 827 S.E.2d 450, 457 (2019) (collecting cases). And in at least two cases, this Court has remedied such a violation notwithstanding a defendant's failure to object at trial. *Myrick*, ¶ 13; *State v. Tarrance*, 275 N.C. App. 981, 2020 WL 7973946 (2020) (unpublished).[1]

¶ 28 The majority rightly notes that, in another line of decisions beginning with *State v. Young*, 291 N.C. 562, 231 S.E.2d 577 (1977), our Supreme Court has created a specific exception to this general rule of preservation in the context of statutory competency hearings. But, based on a close reading of those cases and the distinguishing facts of this case, I disagree with the majority that *Young* and its progeny require us to hold that Defendant—unlike the defendants in *Myrick* and *Tarrance*—cannot obtain relief from the trial court's error below.

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1. *Tarrance* lacks precedential value as an unpublished decision, but I find it instructive given it is the only decision from a North Carolina appellate court addressing this issue on procedural facts identical to this case.

1. Young *and Waiver of the Statutory Mandate*

¶ 29 In *Young*, a trial court found the defendant's competency to be in question, involuntarily committed the defendant, and ordered a psychiatric evaluation. 291 N.C. at 566, 231 S.E.2d at 580. Following the evaluation, a psychiatrist opined that the defendant was competent to stand trial. *Id.* at 566-67, 231 S.E.2d at 580. However, the trial court never convened a hearing to judicially determine the defendant's competency, and the case proceeded to judgment. *Id.* at 568, 231 S.E.2d at 581. The Supreme Court declined to entertain the defendant's argument on appeal that the failure to hold a competency hearing constituted error based on the facts including that the defendant's psychiatric evaluation showed him to be competent:

> In the case before us we find no indication that the failure to hold a hearing under [Section 15A-1002] was considered or passed upon by the trial judge. Neither defendant nor defense counsel, although present at trial, *questioned the correctness of the diagnostic finding that defendant was competent to stand trial, understood the charges and was able to cooperate with his attorney*; and neither objected to the failure to hold the hearing. When arraigned, defendant entered a plea of not guilty. The defense of insanity was not raised. *On these facts* we hold that defendant's statutory right, under [Section 15A-1002], to a hearing *subsequent to his commitment*, was waived by his failure to assert that right. His conduct was inconsistent with a purpose to insist upon a hearing to determine his capacity to proceed.

Id. at 567-68, 231 S.E.2d at 580-81 (emphasis added).

¶ 30 Our appellate courts have since applied *Young* to hold a defendant waives his statutory rights to a competency hearing under two general fact patterns: (1) when, as in *Young*, *the ordered psychiatric examination reveals the defendant to be competent*, and the case proceeds to conviction and sentencing without objection or any indication from the defendant that he may lack competency; or (2) when there is no indication of record suggesting incompetency and the question of defendant's competency is never raised in the trial court. *See State v. Dollar*, 292 N.C. 344, 350-51, 233 S.E.2d 521, 525 (1977) (holding a defendant's statutory right to a competency hearing was waived under *Young* and "under the circumstances of this case" because "[t]he report of the psychiatric

examination is admissible in evidence at such [a] hearing" and "[t]he record in the present case shows that the report of the examining psychiatrist was to the effect that the defendant did have the requisite mental capacity to plead to the indictment and to stand trial"); *State v. King*, 353 N.C. 457, 466, 546 S.E.2d 575, 584-85 (2001) (holding a defendant waived application of Section 15A-1002 because "neither defendant nor defense counsel questioned defendant's capacity to proceed"); *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (same).

¶ 31 In sum, the above decisions held the statutory right to a competency hearing had been waived when all the circumstances showed the defendants to be competent, either through uncontradicted evidence in the form of a psychiatric evaluation or through a failure to raise the question at all. The majority has not identified, and I cannot find, any case holding that a defendant waives his right to a mandated competency hearing under facts similar to this case, *i.e.*, when: (1) the issue of a defendant's competency is raised; (2) a trial court judicially determines the defendant's competency to be in question and orders the State submit him to an evaluation; (3) the State ignores the order and no evaluation is conducted; and (4) the case proceeds to judgment without any further action to determine the defendant's competency.

2. Cases Remedying Statutory Violation Absent a Defendant's Motion for Competency Hearing

¶ 32 Defendant has directed us to two decisions by this Court holding that the trial court erred when a defendant's competency was judicially questioned but never determined notwithstanding the defendant's failure to request such a ruling before judgment. In *Myrick*, the defendant filed a motion requesting a competency evaluation, which the trial court granted. *Myrick*, ¶ 2. The defendant was evaluated, and the examining physician opined that he was "incapable to proceed due to untreated psychosis." *Id.* ¶ 3. The defendant was then involuntarily committed at the request of the State, and the trial court found the defendant not guilty by reason of insanity without ever entering an order determining whether the defendant was competent to stand trial. *Id.* ¶ 4. We vacated the trial court's order, holding that "[b]y failing to make a determination of [the d]efendant's capacity (which had been questioned) and failing to make findings of fact to support that determination, the trial court acted contrary to [Section 15A-1002's] statutory mandate." *Id.* ¶ 13.

¶ 33 We reached a similar result in *Tarrance*, which is procedurally identical to the present case. There, the defendant requested and was ordered to undergo a competency evaluation. 2020 WL 7973946 at *1. The

evaluation was never conducted, and the trial court never held a hearing to determine whether the defendant was competent. *Id.* Nonetheless, the trial court proceeded with trial and the defendant was convicted and sentenced. *Id*. On appeal, we held that the matter required a remand for a retroactive competency determination because "[t]he plain language of [Section 15A-1002's] statutory provisions compels the conclusion that once [a trial judge] found that [the d]efendant's capacity to proceed was 'in question,' a competency hearing was statutorily required." *Id.* at *2.

¶ 34 *Tarrance* is an unpublished decision and therefore not binding. But in my view it is persuasive.

3. Reconciling Young, Myrick, *and* Tarrance

¶ 35 At first blush, *Myrick* and *Tarrance* appear inconsistent with *Young* and its progeny; neither of the defendants in those cases raised the lack of a final competency hearing at trial, and yet this Court remedied the statutory violation that *Young* had held, more than thirty years earlier, was waived. But a critical factual distinction resolves this conflict: the *Young* cases all involved defendants who never had their competency questioned at all or who underwent examinations showing them to be competent, while *Myrick* and *Tarrance* involved defendants whose competency remained an open question prior to and at the time of trial.

¶ 36 I draw this distinction largely from the text of *Young* and *Dollar*. In *Young*, our Supreme Court concluded the defendant waived a challenge to the denial of a competency hearing because "[n]either defendant nor defense counsel, although present at trial, questioned the correctness of the diagnostic finding that defendant was competent to stand trial, understood the charges and was able to cooperate with his attorney[.]" 291 N.C. at 568, 231 S.E.2d at 580-81. The Supreme Court in *Dollar* relied on this same fact to conclude that the defendant was not entitled to relief:

> The record in the present case shows that the report of the examining psychiatrist was to the effect that the defendant did have the requisite mental capacity to plead to the indictment and to stand trial. Nothing in the record indicates that before going to trial the defendant requested a hearing or otherwise indicated any adherence to his contention of lack of mental capacity. He offered no evidence on the question.

292 N.C. at 350-51, 233 S.E.2d at 525. Later decisions have followed *Young* and *Dollar* only under similar circumstances, *i.e.*, when a subsequent evaluation and all other evidence showed the defendant to be

competent,[2] or when the defendant's competency was never questioned in the first place. *See*, *e.g.*, *State v. Hoover*, 174 N.C. App. 596, 601, 621 S.E.2d 303, 306 (2005) (holding a defendant waived his statutory right to a competency hearing after the trial court summarily adopted, without objection, the conclusion of competency reached by a forensic examiner); *State v. Ashe*, 230 N.C. App. 38, 40, 748 S.E.2d 610, 613 (2013) ("Here, no one requested a hearing on his capacity to stand trial. Thus, defendant waived his statutory right to such a hearing.").

¶ 37 These substantial factual distinctions lead me to respectfully disagree with the majority's assertion that *Young* and decisions following it "focus solely on one factor: that the defendant proceeded to trial and entry of judgment without asserting the right to the hearing." If the failure to assert the statutory right to a competency hearing were truly the sole factor necessary to establish waiver when competency has been judicially questioned, our Supreme Court would not have specifically noted the expert evaluations in *Young* and *Dollar* in explaining their holdings. *See Young*, 291 N.C. at 568, 231 S.E.2d at 580-81 (expressly including the fact that counsel did not "question[] the correctness of the diagnostic finding that defendant was competent to stand trial" as one of the "facts" on which its holding of waiver was based); *Dollar*, 292 N.C. at 350-51, 233 S.E.2d at 525 (citing *Young* and holding waiver of the right to a statutory competency hearing was shown "under the circumstances of this case," including an expert opinion that the defendant was competent). That this particular fact did not appear in the statutory waiver analyses conducted in the other cases cited by the majority such as *King* and *Badgett* is unsurprising, because the records in those cases contain no indication—such as a motion and subsequent order judicially questioning competency—that the defendants' competency were in question. *King*, 353 N.C. at 466, 546 S.E.2d at 584-85 (2001) ("[N]either defendant nor defense counsel questioned defendant's capacity to proceed"); *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221 ("Nothing in the instant record indicates that the prosecutors, defense counsel, defendant, or the court raised the question of defendant's capacity to proceed at any point during the proceedings, nor was there any motion made detailing the specific conduct supporting such an allegation.").

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2. The significance of this fact in holding waiver occurred neatly correlates with our caselaw holding that a trial court need not enter a formal written competency order when all the evidence demonstrates the defendant is competent. *See*, *e.g.*, *State v. Gates*, 65 N.C. App. 277, 283, 309 S.E.2d 498, 502 (1983) ("Although the better practice is for the trial court to make findings and conclusions when ruling on a motion under [Section] 15A-1002(b), it is not error for the trial court to fail to do so where the evidence would have compelled the ruling made.").

¶ 38 I am, of course, mindful of and agree with the majority's statement that "we are an error-correcting court, not a law-making one." But my disagreement with the majority's holding is not based on any policy preference and would vindicate the straightforward statutory command of our General Assembly—unquestionably a law-making body—that the trial court must conduct a hearing once a defendant's competency is judicially questioned. I am cautious to give our Supreme Court's decisions broader application than intended by their text, particularly when doing so raises a potential conflict with decisions of this Court. After all, the Supreme Court's decision in *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), reversed a decision of this Court because it construed a seemingly bright-line rule found in Supreme Court precedent too broadly and, in doing so, effectively overruled a prior decision of this Court that addressed the same legal issue under different facts. 324 N.C. at 378, 384, 379 S.E.2d at 33, 36-37.

¶ 39 I also depart from the majority because our Supreme Court has most recently erred on the side of vindicating a defendant's right to a competency determination—albeit on constitutional rather than statutory grounds—when the evidence as to competency is inconclusive. In *State v. Sides*, 376 N.C. 449, 852 S.E.2d 170 (2020), a defendant was unable to attend her trial due to a suicide attempt and involuntary commitment. 376 N.C. at 451, 852 S.E.2d at 170. The trial court, without conducting a competency hearing, ruled that the defendant's absence was voluntary and proceeded with trial without her present. *Id.* at 455, 852 S.E.2d at 175. The defendant was convicted and argued on appeal that her statutory and constitutional rights to a competency determination were violated. *Id.* at 455-56, 852 S.E.2d at 175. This Court held that both rights, in addition to the defendant's right to be present at her trial, were waived. *Id.* The defendant then appealed that decision to our Supreme Court.

¶ 40 Though the Supreme Court declined to address whether the defendant had waived her statutory right to a competency hearing under Section 15A-1002, *id.* at 457-58, 852 S.E.2d at 177, it did conclude that we erred in holding she had waived her constitutional right to be present at trial without a competency determination, as doing so " 'put the cart before the horse[,]' " *id.* at 456-57, 852 S.E.2d at 176. This was because "a defendant cannot be deemed to have voluntarily waived her constitutional right to be present at her own trial unless she was mentally competent to make such a decision in the first place. *Logically, competency is a necessary predicate to voluntariness*." *Id.* at 459, 852 S.E.2d at 177 (emphasis added). The Supreme Court held the defendant was entitled to a new trial because the trial court erred in failing to conduct a

sua sponte competency hearing prior to concluding the defendant had waived her right to be present for trial, as there was substantial evidence of incompetency sufficient to trigger that constitutionally required procedure. *Id.* at 466, 852 S.E.2d at 182. *Sides* therefore suggests that, in cases like this one, a defendant cannot be said to have waived a right to a competency determination when the question of the defendant's competency is raised by the record. *Cf. Medina v. California*, 505 U.S. 437, 450, 120 L. Ed. 2d 353, 366 (1992) ("[I]t is impossible to say whether a defendant whose competence is in doubt has made a knowing and intelligent waiver of his right to a competency hearing."); *Pate v. Robinson*, 383 U.S. 375, 384, 15 L. Ed. 2d 815, 821 (1966) ("The State insists that Robinson deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois law. But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.").

¶ 41 In sum, this case is factually distinct from those in which the Supreme Court and this Court have held the defendant waived the statutory right to a competency hearing; in each of those cases, the competency of the defendant was never judicially questioned at all or the unequivocal evidence showed the defendant to be competent. The importance of this distinction is reinforced by *Sides*, which recognized that competency is a necessary predicate to voluntary waiver. I disagree with the majority that *Young*, *Dollar*, and related decisions compel a waiver in cases like the one before us, where a defendant's competency is judicially questioned but an ordered evaluation disclosing his competency is never completed due to the fault of the State. Instead, following the more analogous decisions of *Myrick* and *Tarrance*, I would hold that the trial court's failure to conduct the statutorily mandated competency determination hearing may be raised and remedied on appeal notwithstanding Defendant's failure to renew the issue at trial.

4. Defendant Is Entitled to a New Trial

¶ 42 A defendant who was erroneously denied a competency hearing may receive one of two remedies on appeal, depending on the circumstances: a retroactive competency hearing or a new trial. *Sides*, 376 N.C. at 466, 852 S.E.2d at 182. "Where a retrospective hearing would require the trial court to assess the defendant's competency 'as of more than a year ago,' the Supreme Court has suggested that such a hearing is not an appropriate remedy." *Id.* In this case, Defendant's competency was brought into question over three years ago, his trial concluded more than one year ago, and the State makes no argument in favor of a retroactive

competency hearing. Consistent with *Sides* and absent any countervailing rationale from the State, I would hold that a retroactive competency evaluation is not feasible, vacate Defendant's convictions, and remand for a new trial.

II. CONCLUSION

¶ 43 Defendant's competency in this case was judicially questioned by a trial judge. The State—not Defendant—was required by the trial court's order to submit Defendant to a competency evaluation, and the trial court—not Defendant—bore the express statutory duty to conduct a hearing following that evaluation. The State did not comply with the trial court's order, and the trial court never held the statutorily required hearing because no evaluation had occurred. Under these facts, meaningfully distinct from those in *Young*, *Dollar*, and other decisions finding a waiver of the statutory right to a competency hearing, I would hold that Defendant may seek and receive redress for the trial court's failure to comply with the statutory mandate found in Section 15A-1002. And, given the particular circumstances presented here, Defendant is entitled to a new trial rather than a retroactive competency hearing. Because I do not believe that such a result runs counter to the duties of this Court or conflicts with binding precedent, I respectfully dissent from the majority's holding that Defendant waived his right to correction of the error below.

TAYLOR v. BANK OF AM., N.A.

[287 N.C. App. 358, 2022-NCCOA-912]

CHESTER TAYLOR III, RONDA AND BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE AND ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, PLAINTIFFS-APPELLANTS

v.

BANK OF AMERICA, N.A., DEFENDANT-APPELLEE

No. COA20-160-3

Filed 29 December 2022

Statutes of Limitation and Repose—fraudulent denial of mortgage modification—date of discovery—dismissal for failure to state a claim—sufficiency of allegations

In an action brought against a bank by homeowners who alleged that their applications for mortgage modification were denied as part of a fraudulent scheme, resulting in foreclosure, the trial court improperly dismissed plaintiffs' claims pursuant to Civil Procedure Rule 12(b)(6) as being time-barred by the applicable statute of limitations. Plaintiffs' complaint, which included allegations that plaintiffs were unaware of defendant's alleged fraudulent scheme for many years and that they each suffered a resulting harm, sufficiently stated a claim for relief from fraud to survive defendant's motion to dismiss. Any question regarding when plaintiffs discovered or should have discovered the alleged fraud was one of fact to be resolved at a later stage in the proceedings.

Judge DILLON dissenting.

On remand from the Supreme Court of North Carolina, 2022-NCSC-117, vacating and remanding the decision of the Court of Appeals, 279 N.C. App. 684, 863 S.E.2d 326 (2021). Appeal by plaintiffs from order entered 3 October 2019 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Originally heard in the Court of Appeals 21 October 2021.

Robinson Elliott & Smith, by William C. Robinson, Dorothy M. Gooding, and Robert F. Orr, and Aylstock, Witkin, Kreis & Overholtz, PLLC, by Samantha Katen, Justin Witkin, Chelsie Warner, Caitlyn Miller, and Daniel Thornburgh, for plaintiffs-appellants.

McGuireWoods, LLP, by Bradley R. Kutrow, and Goodwin Procter LLP, by Keith Levenberg, and James W. McGarry, for defendant-appellee.

CARPENTER, Judge.

¶ 1 This case returned to us on remand from our Supreme Court to address whether the allegations made in Plaintiffs' complaint, if treated as true, are "sufficient to state a claim upon which relief can be granted under some legal theory." *Taylor v. Bank of Am., N.A.*, 2022-NCSC-117, ¶ 9 (citing *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)). After conducting a thorough *de novo* review of the record, we hold the trial court erred when granting Defendant's 12(b)(6) motion.

I. Facts & Procedural Background

¶ 2 We adopt the facts and procedural history of this case as described in this Court's previous opinion, while adding additional key facts considered in our *de novo* review. *See Taylor v. Bank of Am., N.A.*, 279 N.C. App. 684, 2021-NCCOA-556.

¶ 3 On 1 May 2018, eleven Plaintiffs initiated the underlying action against Defendant. On 13 March 2019, an amended complaint was filed after two of the initial Plaintiffs withdrew from the action, leaving nine Plaintiffs remaining. The remaining nine Plaintiffs are domiciled in North Carolina, Wisconsin, Michigan, Arizona, California, and Nevada.

¶ 4 Each Plaintiff sought a modification of their mortgage through Defendant's Home Affordable Modification Program ("HAMP"). Each Plaintiff communicated with loan representatives employed by Defendant regarding their respective HAMP qualification and application.

¶ 5 According to sworn declarations made by its employees, Defendant employed a common strategy of delaying HAMP applications by "claiming that documents were incomplete or missing when they were not, or simply claiming the file was 'under review' when it was not." Defendant's employees were instructed to "inform homeowners that modification documents were not received on time, not received at all, or that documents were missing, even when, in fact, all documents were received in full and on time." Defendant's employees "witnessed employees and managers change and falsify information in the systems of record." One employee of Defendant stated that he was instructed to participate in a "blitz," during which his team "would decline thousands of modification files . . . for no reason other than the documents were more than 60 days old."

¶ 6 Each Plaintiff had their mortgage foreclosed after applying for and being denied a HAMP modification. Plaintiffs allege they are victims of a fraudulent scheme exacted by Defendant.

II. Standard of Review

¶ 7 The sole issue we consider is whether the trial court erred by granting Defendant's motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. "Our review of the grant of a motion to dismiss under Rule 12(b)(6) . . . is de novo." *Bridges*, 366 N.C. at 541, 742 S.E.2d at 796; *See Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 75, 752 S.E.2d 661, 663 (2013) (stating that the court should liberally construe the legal theory under which the requested relief was made.). "We consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.' " *Id.* at 541, 742 S.E.2d at 796 (quoting *Coley v. State*, 360 N.C. 593, 631 S.E.2d 121, 123 (2006)).

III. Analysis

¶ 8 At the heart of the underlying matter is whether Plaintiffs' claims are barred by the statute of limitations. In North Carolina a cause of action for a fraud claim must be brought within three years and "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9) (2021). Discovery means either the actual discovery, or when the fraud should have been discovered in the exercise of "reasonable diligence under the circumstances." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (citing *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 154, 143 S.E.2d 312, 317 (1965)). Generally, the appropriate date of discovery of "alleged fraud or negligence—or whether [the plaintiff] should have discovered it earlier through reasonable diligence—is a question of fact for a jury, not an appellate court." *Piles v. Allstate Insurance Co.*, 187 N.C. App. 399, 405, 653 S.E.2d 181, 186 (2007); *see Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 670 (2001) (reasoning that when "evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury.").

¶ 9 Here, we hold the trial court erred in granting Defendant's 12(b)(6) motion. Upon review of Plaintiffs' complaint, taking the allegations therein as true, we determine that there are sufficient facts alleged to suggest Plaintiffs remained unaware of Defendant's alleged fraudulent scheme for many years and that they each suffered a resulting harm. Further, the determination of *when* Plaintiffs became aware of the fraud will be dispositive of whether the applicable statute of limitations had expired prior to Plaintiffs bringing their claims. For that reason, we hold that Plaintiffs' complaint sufficiently alleged enough information to withstand a motion to dismiss for failure to state a claim. *See* N.C. R. Civ. P. 12(b)(6).

¶ 10 The dissent states the statute of limitations ceased to be tolled at the time Plaintiffs' homes were foreclosed. This issue may be appropriate to address on a subsequent motion for summary judgment. The determination of *when* Plaintiffs became aware of the alleged fraud may also be appropriate to consider at a later procedural stage—but has no bearing at this juncture—as Plaintiffs have sufficiently pleaded a cause of action, treating all pled allegations as true, to survive dismissal pursuant to N.C. R. Civ. P. 12(b)(6). *See Bridges*, 366 N.C. at 541, 742 S.E.2d at 796. As such, we hold the trial court erred in granting Defendant's 12(b)(6) motion.

IV. Conclusion

¶ 11 We conclude the trial court erred by granting Defendant's 12(b)(6) motion to dismiss. Thus, we reverse the trial court's dismissal of Plaintiffs' complaint and remand for further proceedings.

REMANDED.

Judge JACKSON concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

¶ 12 I dissent for the reasoning stated in my dissent in *Taylor v. Bank of America*, 279 N.C. App. 684, 863 S.E.2d 326 (2021) (Dillon, J., dissenting). As I stated in that dissent, I conclude that the statute of limitations ceased to be tolled, if at all, by the time each plaintiff became aware of his/her injury, that is, when his/her home was foreclosed upon. And since the complaint alleges when the foreclosures took place and that they took place more than three years before the complaint was filed, I conclude that dismissal pursuant to Rule 12(b)(6) was appropriate.

ANTHONY TERRY, PLAINTIFF
v.
PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INCORPORATED, AND
WILLIAM V. LUCAS, DEFENDANT

No. COA22-160

Filed 29 December 2022

1. Premises Liability—common law negligence—landlord's failure to inspect rental property—natural gas explosion—reasonable care

In an action for common law negligence brought against defendant landlord after plaintiff tenant was severely injured by a natural gas explosion that occurred in the rental house, summary judgment was improperly granted in favor of defendant where plaintiff sufficiently forecast evidence that raised a genuine issue of material fact regarding whether defendant's failure to inspect any part of the property during the more than eleven years that plaintiff and his family lived in the house, including the natural gas heating system, or to provide maintenance of that system, constituted reasonable care.

2. Landlord and Tenant—Residential Rental Agreements Act claim—breach of duty of care—failure to inspect gas furnace

The trial court erred by granting summary judgment in favor of defendant landlord on plaintiff tenant's claim under the Residential Rental Agreements Act (RRAA), which plaintiff asserted after being severely injured by a natural gas explosion that occurred in the rental house. Plaintiff's evidence raised a genuine issue of material fact regarding whether defendant breached the statutory duty of care to maintain the premises in a fit and habitable condition by failing to adequately maintain the natural gas furnace and piping in the house.

3. Premises Liability—negligence per se—housing code violation—natural gas explosion—landlord's failure to inspect rental property

In an action brought by plaintiff tenant against defendant landlord after being seriously injured in a gas explosion that occurred in the rental house, the trial court erred by granting summary judgment in favor of defendant on plaintiff's claim of negligence per se. Plaintiff forecast sufficient evidence that defendant violated the city housing code—a public safety statute designed to protect inhabitants of dwellings—by failing to properly inspect and maintain the

natural gas heating system and plumbing and that, as a result of this violation, water leaks led to the severe rusting and corrosion of a gas pipe over a period of many years.

4. Landlord and Tenant—implied warranty of habitability—failure to inspect gas furnace—fit and habitable condition

In an action brought by plaintiff tenant against defendant landlord after being severely injured in a gas explosion that occurred in the rental house, the trial court erred by granting summary judgment in favor of defendant on plaintiff's breach of implied warranty of habitability claim. Plaintiff forecast sufficient evidence that the defective gas pipe that caused the explosion was observable upon reasonable inspection and raised a genuine issue of material fact regarding whether defendant's failure to inspect or maintain any part of the premises in the more than eleven years that plaintiff and his family lived in the house met defendant's obligations under the city housing code and the Residential Rental Agreements Act to maintain the premises in a fit and habitable condition.

Judge CARPENTER dissenting.

Appeal by Plaintiff from order entered 21 September 2021 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 10 August 2022.

Poyner Spruill LLP, by Steven B. Epstein, and Hendren Redwine & Malone, PLLC, by J. Michael Malone, for the Plaintiff-Appellant.

Haywood, Denny & Miller LLP, by Robert E. Levin, for the Defendant-Appellee.

JACKSON, Judge.

¶ 1 Anthony Terry ("Plaintiff") appeals from the trial court's order granting summary judgment in favor of William V. Lucas ("Defendant"). For the reasons detailed below, we reverse the order of the trial court.

I. Background

¶ 2 On 15 September 2006, Plaintiff's wife, Stephanie Terry, entered into a written lease with Defendant for the rental of a three-bedroom, one-bathroom residential property located at 1007 Colfax Street, in Durham, North Carolina. Mrs. Terry, Plaintiff, and their two sons moved

into the home on or around that date. The home contained a crawl space where the water heater and furnace were located. The furnace was located under the home's single bathroom.

¶ 3 In January 2017, Plaintiff and his family were on their way back from taking their oldest son to college when Mrs. Terry received a phone call from her brother, Charles Jones, to inform her that Mr. Jones saw a Public Service Company of North Carolina ("PSNC")[1] truck and fire truck at Plaintiff's home. Mr. Jones also told Mrs. Terry that Plaintiff's neighbor reported smelling natural gas near Plaintiff's home. When Plaintiff and Mrs. Terry returned from their trip there was no one at their home and they received no follow-up information from PSNC, Defendant, or the fire department.

¶ 4 In March 2017, Plaintiff smelled natural gas while in the front yard of his home. In the same month, a neighbor informed Plaintiff that she smelled natural gas around Plaintiff's home. In mid-March 2017, the fire department and PSNC technicians came to Plaintiff's house after a report from someone in the neighborhood about the smell of gas. PSNC technicians used what Plaintiff identified as "leak detectors" around the manhole covers near Plaintiff's house in addition to around the meter at Plaintiff's home. A PSNC technician informed Plaintiff at that time that they did not identify any leaks around the fitting of the meter.

¶ 5 On 13 April 2017, Plaintiff and Mrs. Terry were at home when Plaintiff walked into the bathroom at approximately 6:00 p.m. Immediately as Plaintiff turned on the light, there was an explosion. This explosion caused Plaintiff to catch on fire, resulting in burns over much of his body. Plaintiff was in a coma at the burn center at the University of North Carolina at Chapel Hill Hospital from April 2017 until mid-August 2017. On 21 September 2017, Plaintiff was discharged from the hospital. Following his release, Plaintiff returned to the hospital on a bi-weekly, then monthly basis until he was fully released from care at the end of 2018. Plaintiff continues to suffer constant pain in his legs and feet, nerve damage in his left hand, and is bed-bound for most of his daily life.

¶ 6 After the explosion, the floor of Plaintiff's bathroom was removed for replacement, revealing a severely rusted and corroded pipe leading from the gas meter to the home's furnace. Defendant had not conducted an inspection of the home's furnace, the pipes leading from the gas meter, or any other part of the property since the time that Plaintiff and his family moved into the home in 2005. Defendant did conduct a move-out

1. PSNC has been dismissed from this suit and is no longer a party.

inspection after the prior residents left and before Plaintiff and his family moved in; however, that inspection did not involve Defendant going in the crawl space to examine the furnace or the pipes leading from the gas meter.

¶ 7 On 18 September 2018, Plaintiff initiated this action in Durham County Superior Court asserting claims of negligence against PSNC. On 2 April 2019, Plaintiff filed his First Amended Complaint, with the consent of PSNC, adding Defendant and asserting claims of negligence, violation of the North Carolina Residential Rental Agreements Act ("RRAA"), and breach of warranty of habitability. On 13 July 2020, Plaintiff filed his Second Amended Complaint, alleging violation of North Carolina's RRAA, breach of warranty of habitability, negligence, and negligence *per se* against Defendant. Plaintiff filed a notice of voluntary dismissal of PSNC on 31 August 2021.

¶ 8 On 14 July 2021, Defendant filed a motion for summary judgment. Defendant's motion came on for hearing on 20 September 2021, before the Honorable Orlando F. Hudson, Jr., in Durham County Superior Court. By order dated 21 September 2021, the trial court granted Defendant's motion for summary judgment.

¶ 9 Plaintiff timely filed and served written notice of appeal on 7 October 2021.

II. Analysis

¶ 10 Plaintiff makes four arguments on appeal: (1) genuine issues of material fact preclude summary judgment in Defendant's favor on Plaintiff's common law negligence claim; (2) genuine issues of material fact preclude summary judgment in Defendant's favor on Plaintiff's claim for violation of the RRAA; (3) genuine issues of material fact preclude summary judgment in Defendant's favor on Plaintiff's negligence *per se* claim; and (4) genuine issues of material fact preclude summary judgment in Defendant's favor on Plaintiff's breach of the implied warranty of habitability claim.

¶ 11 We hold that Plaintiff has made a sufficient forecast of admissible evidence on these claims, and that summary judgment in Defendant's favor was therefore improper.

A. Standard of Review

¶ 12 "In a ruling for summary judgment, the court does not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666,

668 (1980). The movant bears the burden of showing "that there is no triable issue of fact and that he is entitled to judgment as a matter of law." *Id.* "All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008). "[S]ummary judgment is rarely appropriate in negligence cases." *Nick v. Baker*, 125 N.C. App. 568, 571, 481 S.E.2d 412, 414 (1997). A trial court's grant of summary judgment is reviewed de novo on appeal. *Hensley v. Nat'l Freight Transp., Inc.*, 193 N.C. App. 561, 563, 668 S.E.2d 349, 351 (2008). Under *de novo* review, this Court considers the matter anew without deference to the trial court's rulings. *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007).

B. Common Law Negligence

¶ 13 **[1]** Plaintiff first argues that there are triable issues of fact as to his common law negligence claims because there was evidence that Defendant had constructive notice of the alleged hazardous condition and was negligent in failing to warn of or repair the condition. We agree.

¶ 14 Under the ordinary rules of negligence, a landlord may be held liable for personal injury to his tenants if he "knew, *or in the exercise of ordinary care should have known*" that the defect or unsafe condition exists but fails to correct it. *Brooks v. Francis*, 57 N.C. App. 556, 560, 291 S.E.2d 889, 891 (1982) (emphasis added). Whether a party exercised ordinary care is typically a question for the jury. *See Green v. Wellons, Inc.*, 52 N.C. App. 529, 534, 279 S.E.2d 37, 41 (1981) (finding that summary judgment was inappropriate where the "defendant's own evidentiary material contains testimony from which a jury could find that the unsafe condition had existed for such time that [the] defendant should have known of it.").

¶ 15 Here, evidence was introduced that Defendant had not performed any inspection of Plaintiff's property during the entirety of Plaintiff's lease—a period of more than 11 years. Defendant also testified at his deposition that, at the time the tenants prior to Plaintiff moved out of the property, he conducted a "move out inspection," but that this inspection did not involve an examination of the furnace or pipes located in the crawl space under the bathroom. Further, in the summer of 2016, Defendant saw debris in Plaintiff's backyard and became upset at how the property was being maintained. However, despite his concerns, Defendant did not conduct inspections of any other portions of the property to make sure they were being appropriately maintained.

¶ 16 Defendant argues that Plaintiff is seeking for us to impose a duty to inspect on landlords, and further that Plaintiff has provided no evidence

showing that Defendant breached any duty of care owed by Defendant because Plaintiff never informed Defendant of a potential gas leak. We disagree.

¶ 17 Our holding here is not that there is a blanket duty to "inspect the living quarters or crawlspace of a tenant." Rather, we are merely reaffirming the existing and repeatedly recognized common law duty that landlords must "use reasonable care in the inspection and maintenance of leased property." *Bradley v. Wachovia Bank & Trust Co., N.A.*, 90 N.C. App. 581, 585, 369 S.E.2d 86, 88 (1988). In this matter, there remains a question of fact for the jury as to whether Defendant's choice to not inspect any part of Plaintiff's property, including the natural gas heating system, or provide any regular maintenance of the natural gas heating system and related pipes was "reasonable care."

C. Violation of the RRAA

¶ 18 **[2]** Plaintiff also argues that the trial court's grant of summary judgment on his claim for violation of the RRAA was error because there is evidence that Defendant violated the statutory duty of care contained in the RRAA, specifically that Defendant failed to maintain the gas furnace and associated piping in a manner that was safe for tenant occupancy. We agree.

¶ 19 The RRAA creates a statutory duty to "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." N.C. Gen. Stat. § 42-42(a)(2) (2021); *Martin v. Kilauea Props., LLC*, 214 N.C. App. 185, 188, 715 S.E.2d 210, 212 (2011). A breach of this duty is a breach of the implied warranty of habitability, discussed *infra*. In addition, "a violation of the duty to maintain the premises in a fit and habitable condition is evidence of negligence." *Brooks*, 57 N.C. App. at 559, 291 S.E.2d at 891 (cleaned up).

¶ 20 Just as the evidence presented by Defendant and Plaintiff creates a question of fact about whether Defendant's actions constituted "reasonable care," that same evidence presents a jury issue about whether Defendant did "whatever necessary" to maintain the premises in a fit and habitable condition.

D. Negligence *Per Se*

¶ 21 **[3]** Plaintiff next asserts that the trial court improperly granted summary judgment in Defendant's favor on Plaintiff's negligence *per se* claim. Plaintiff contends that the Housing Code of the City of Durham ("the Housing Code") is a statute enacted to protect the public and promote the general welfare of the public and that a triable issue of material fact existed about whether Defendant violated the Housing Code. We agree.

¶ 22 As a threshold matter, we reject Defendant's argument that the Housing Code was not properly submitted to the trial court and that we may not consider them on appeal. The Housing Code complies with the requirements of N.C. Gen. Stat. §§ 160A-79(b)(1) and 160A-77 and are therefore properly before us.

¶ 23 The violation of a public safety statue or ordinance is negligence *per se* unless the statute states otherwise. *Hart v. Ivey*, 332 N.C. 299, 303, 420 S.E.2d 174, 177 (1992). However, not all statutes or ordinances with general safety implications are subject to this rule. *Mosteller v. Duke Energy Corp.*, 207 N.C. App. 1, 11, 698 S.E.2d 424, 432 (2010). For a safety regulation to be adopted as a standard of care, the purpose of the regulation must be at least in part:

> (a) To protect a class of persons which includes the one whose interest is invaded,
>
> (b) To protect the particular interest which is invaded,
>
> (c) To protect that interest against the kind of harm which resulted, and
>
> (d) To protect that interest against the particular hazard from which the harm resulted.

Id. (cleaned up). If the violation of a safety statute or regulation is punishable as a criminal offense, this weighs in favor of the violation constituting negligence *per se* in a civil trial. *Id.* at 12, 698 S.E.2d at 432.

¶ 24 In *Jackson v. Housing Authority of High Point*, our Court held that a local ordinance regulating the maintenance of heater flues had an "obvious purpose" of protecting the lives and limbs of residents of affected buildings and was therefore a public safety ordinance. 73 N.C. App. 363, 369, 326 S.E.2d 295, 299 (1985). As the legislature had not provided otherwise, a violation of that ordinance constituted negligence *per se*. *Id.*

¶ 25 The Housing Code is a public safety statute, a violation of which would establish negligence *per se*. According to the legislative findings of the Housing Code, the Durham City Council found that:

> [T]here exists in the city, housing which is unfit for human habitation due to dilapidation, defects increasing the hazards of fire, accidents or other calamities, lack of ventilation, light or sanitary facilities and other conditions rendering such housing unsafe or unsanitary or dangerous or detrimental to the health

> or safety or otherwise inimical to the welfare of the residents of the city and that a public necessity exists to exercise the police powers of the city pursuant to G.S. 160D-441 et seq., to cause the repair and rehabilitation, closing or demolishing of such housing in the manner herein provided.

Durham, N.C., Ord. No. 14271, § 2, 6-4-2012. The sections that Plaintiff alleges were violated by Defendant are 10-234(e)(2), 10-234(g)(7), 10-234(h)(1), and 10-234(j)(1). Section 10-234(e)(2) provides:

> (e) Heating.
>
> (2) Central heating units.
>
> a. Every central heating unit shall:
>
> 1. Have every duct, pipe or tube free of leaks and functioning properly to provide an adequate amount of heat or hot water to the intended place of delivery;
>
> 2. Be provided with proper seals between sections of hot air furnaces to prevent the escape of noxious fumes and gases into heat ducts;
>
> 3. Be properly connected to an electric circuit of adequate capacity in an approved manner if electrical power is required; and
>
> 4. Be provided with all required automatic or safety devices and be installed and operated in the manner required by the laws, ordinances and regulation of the city.
>
> b. All liquid fuel used to operate any central heating unit shall be stored in accordance with the city's fire prevention and building codes;
>
> c. All gas and oil heating equipment installed on the premises shall be listed by a testing laboratory and shall be installed, including proper ventilation, in accordance with the applicable provisions of the North Carolina State Building Code.

Section 10-234(g)(7) provides:

> (g) Structural standards.
>
> (7) Floors.

a. Broken, overloaded, excessively decayed or sagging structural floor members are prohibited.

b. Structural floor members shall be supported on foundation walls and piers that are not deteriorated and perform the function for which they were intended.

c. Floor joists shall be supported on structural bearing members and shall not be made structurally unsound by deterioration.

d. Flooring shall be reasonably smooth, not rotten or worn through, and without holes or excessive cracks which permit outside air to penetrate rooms.

e. Flooring shall not be loose.

f. Split, splintered, or badly worn floor boards shall be repaired or replaced.

g. Floors in contact with soil shall be paved either with concrete not less than three inches thick or with masonry not less than four inches thick, which shall be sealed tightly to the foundation walls.

h. All laundry and kitchen floors shall be constructed and maintained so as to be impervious to water.

Section 10-234(h)(1) provides:

(h) Property maintenance.

(1) Structures.

a. Floors, walls, ceilings and fixtures shall be maintained in a clean and sanitary condition.

b. Every dwelling shall be maintained so as to prevent persistent excessive dampness or moisture on interior or exterior surfaces. Building materials discolored or deteriorated by mold or mildew or conditions that may contribute to mold, shall be cleaned, dried, and repaired.

Section 10-234(j)(1) provides:

(j) Plumbing Standards.

(1) General.

a. Every dwelling unit shall be connected to a city water supply and/or sanitary sewer system unless the dwelling unit is connected to a county approved water supply and/or sanitary sewer system.

b. All plumbing, water closets and other plumbing fixtures in every dwelling or dwelling unit shall be installed and maintained in good working condition and repair and in accordance with the requirements of this article and the applicable portions of the North Carolina State Building Code.

c. All plumbing shall be so maintained and used as to prevent contamination of the water supply through cross connections or back siphoning.

d. All fixtures, piping and other plumbing system components shall be in proper working condition with no leaks.

e. No fixtures shall be cracked, broken or badly chipped.

f. All water piping shall be protected from freezing by proper installation in enclosed or concealed areas or by such other means as approved by a city plumbing inspector.

g. At least one three-inch minimum size main plumbing vent shall be properly installed for each building.

h. Soil and water lines shall be properly supported with no broken or leaking lines.

i. Access to all bathrooms shall be through a weather tight and heated area.

j. Every dwelling unit shall contain within a room which affords privacy, a bathtub or shower in good working condition which shall be properly connected to both hot and cold water lines and to the public sanitary sewer or to an approved sewage disposal system. The floor of such room shall be made impervious to water to prevent structural deterioration and any development of unsanitary conditions.

> k. Clean nonabsorbent water-resistant material on bathroom wall surfaces shall extend at least 48 inches above a bathtub and 72 inches above the floor of a shower stall. Such materials on walls shall form a watertight joint with the bathtub or shower.

¶ 26 While the version of the Housing Code in effect at the time of Plaintiff's initiation of this suit provided that a violation of the Housing Code constituted a misdemeanor and was punishable by a maximum fine of $500.00 and 30 days in jail, Durham, N.C., Ord. No. 14271, § 2, 6-4-2012, this section has since been amended to remove criminal liability for a violation of the Housing Code, Durham, N.C., Ord. No. 15982, § 17, 8-1-2022.

¶ 27 The purpose of the Housing Code is explicitly to protect the occupants of affected buildings. The "welfare of the residents of the city" is paramount in the legislative findings. *See* Durham, N.C., Ord. No. 14271, § 2, 6-4-2012. Further, the relevant sections for this action regulate heating units, general structural standards, flooring standards, and plumbing—each of which is clearly designed to prevent structural breakdowns that could result in hazardous conditions for inhabitants. The plain language reveals that the Housing Code is designed to protect inhabitants, such as Plaintiff, of these dwellings, and prevent against injuries that may be caused by failure to maintain the required minimum standards.

¶ 28 Defendant does not appear to dispute that the Housing Code is a public safety statute or ordinance, but instead contests the existence of any evidence of a violation or notice of a violation. Defendant relies on our Court's decision in *Olympic Prods. Co. v. Roof Sys.*, 88 N.C. App. 315, 363 S.E.2d 367 (1988), in support of his contention that he may not be found negligent *per se* for a violation of the Housing Code in the absence of Plaintiff notifying him of a defect.

¶ 29 In *Olympic Products*, the code at issue was the North Carolina Building Code, not a city housing code. *Id.* at 326, 363 S.E.2d at 374. Our Supreme Court has enumerated specific conditions that must be satisfied for a building owner to be found negligent *per se* for a violation of the state Building Code: "(1) the owner knew or should have known of the Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage." *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 415, 395 S.E.2d 112, 114 (1990). Neither this Court nor our Supreme Court has extended these requirements to negligence *per se* in the context of a municipal housing code, and we decline to do so here.

¶ 30 There was a sufficient forecast of admissible evidence that Defendant violated the Housing Code such that summary judgment was improper. There was substantial testimony from both Plaintiff's and Defendant's witness depositions about the severely deteriorated nature of the pipe from which the natural gas leaked. Sam Pendergrass, identified by Plaintiff as a metallurgist expert retained to examine the pipe, testified at his deposition that "[a]s of April 13, 2017, the pipe was severely rusted and corroded and had several holes through which natural gas could have escaped." When asked his opinion on the source of the corrosion on the pipe, Mr. Pendergrass responded that it was from moisture leaking on the pipe. Mr. Pendergrass also opined that it would take approximately seven years for the pipe to have corroded to the level that it was at when he examined it.

¶ 31 Daryl Greenberg, identified by Plaintiff as an expert with a background in real estate brokering, property management, and property management consulting, testified at his deposition that "[i]t would appear that the plumbing standards were not being maintained because they hadn't been inspected, and they had not been functioning properly as the leaks that were occurring under the house apparently were the causation of the rusted gas line."

¶ 32 Defendant questions the credibility of Plaintiff's experts and argues that their testimony should be disregarded. Defendant supports this contention by alleging that Mr. Greenberg's testimony was disregarded in an unrelated matter and that both he and Mr. Pendergrass attempt to create a duty not provided for by law. We are not persuaded.

¶ 33 "Expert testimony is admissible as long as the witness can be helpful to the jury because of his superior knowledge." *Federal Paper Bd. Co. v. Kamyr, Inc.*, 101 N.C. App. 329, 334, 399 S.E.2d 411, 415 (1991). Further, "[q]uestions of expert credibility may not be resolved by summary judgment." *Id.*; *See also City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 657, 268 S.E.2d 190, 195 (1980) (expert credibility questions should be tested by the trier of fact). In this case, the record shows that Mr. Greenberg and Mr. Pendergrass are sufficiently knowledgeable to express an opinion that may be helpful to the jury, particularly in light of the forgiving summary judgment standard.

¶ 34 Defendant testified at his deposition that he viewed the pipe after the explosion and that its condition was "pretty bad." Defendant also conceded that, while he had not read and was not aware of the Housing Code, he agreed that a landlord should maintain their rental property in compliance with the Code. Defendant agreed that heating and plumbing

units degrade over time and need to be maintained and repaired, but also testified that he had not performed an inspection of Plaintiff's property in the 11 years that they had been leasing it.

¶ 35 This forecast of evidence, viewed in the light most favorable to Plaintiff, supports a finding of negligence *per se*. Summary judgment in favor of Defendant was therefore inappropriate on Plaintiff's negligence *per se* claim.

E. Breach of Implied Warranty of Habitability

¶ 36 **[4]** Plaintiff's final argument is that the trial court improperly granted summary judgment in Defendant's favor on Plaintiff's breach of implied warranty of habitability claim because there is evidence supporting Plaintiff's contention that the defective gas pipe was observable upon reasonable inspection by Defendant, and that it violated the Durham Housing Code. Again, we agree.

¶ 37 The RRAA imposes certain duties on landlords and requires them to provide "fit premises." N.C. Gen. Stat. § 42-42(a)(1)-(4) (2021). Specifically, the RRAA mandates that:

> (a) The Landlord shall:
>
> (1) Comply with the current applicable building and housing codes[] . . . to the extent required by the operation of such codes[.]
>
> (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
>
> (3) Keep all common areas of the premises in safe condition.
>
> (4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be provided by the landlord provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations.

Id.

"The RRAA provides an affirmative cause of action to a tenant for recovery of rent due to a landlord's breach of the implied warranty of

habitability." *Stikeleather Realty & Invs. Co. v. Broadway*, 242 N.C. App. 507, 516, 775 S.E.2d 373, 378 (2015).

¶ 38 Defendant contends that summary judgment was appropriate as Plaintiff did not forecast any evidence as to when the property became unfit. Further, Defendant asserts that there is no evidence that Defendant knew or had reason to know of any defect on the property and can therefore not be liable for breach of the implied warranty of habitability. We disagree.

¶ 39 While Defendant is correct that N.C. Gen. Stat. § 42-42(a)(4) requires written notification of defects in electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities supplied or required to be supplied by the landlord, we have held that such written notification is not required "if the repairs are necessary to put the premises in fit and habitable condition." *Surratt v. Newton*, 99 N.C. App. 396, 405, 393 S.E.2d 554, 559 (1990). The question of whether the conditions requiring repairs render the premises in an unfit and uninhabitable condition is a question of fact for the jury, and therefore is inappropriate for disposition through summary judgment. *See id.* (where the jury found that "the conditions requiring repairs rendered the premises in unfit and uninhabitable condition," no written notice was required of those conditions).

¶ 40 Further, Plaintiff presented sufficient evidence to show that Defendant failed to comply with N.C. Gen. Stat. §§ 42-42(a)(1) and (2), neither of which contain a written notice requirement. As discussed *supra*, there was deposition testimony offered by Plaintiff's experts and by Defendant himself that the residence was not in compliance with the Housing Code, a violation of N.C. Gen. Stat. § 42-42(a)(1).

¶ 41 Defendant also testified that he had undertaken no inspection of the premises in the over 11 years that Plaintiff and his family lived there. N.C. Gen. Stat. § 42-42(a)(2) places an affirmative obligation on landlords to "do whatever is necessary to put and keep the premises in a fit and habitable condition." Defendant is correct that the RRAA contains no mandate that inspections be conducted on any set interval. However, it remains a question for the jury whether failing to conduct any inspection of a residential property for over a decade is doing "whatever is necessary" to maintain the premises in compliance with the RRAA.

¶ 42 Our dissenting colleague theorizes that our decision will potentially allow law enforcement to "enter the homes of tenants to observe inspections by a landlord which may reveal contraband." While we respect our colleague's concern, we do not share it in this matter. This opinion does not modify, or even touch on, the existing framework for searches of

and seizures within rental properties. The Supreme Court of the United States has held that law enforcement may not search a tenant's home based only on the consent of the landlord. *Chapman v. United States*, 365 U.S. 610, 616-17 (1961) ("[S]earch and seizure without a warrant would reduce the Fourth Amendment to a nullity and leave tenants' homes secure only in the discretion of landlords."). We have affirmed this principle, holding that:

> A law enforcement officer may conduct a valid search without a warrant if consent to the search is given "by a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of premises." G.S. 15A-222(3). A tenant in possession of the premises is such a person.

State v. Reagan, 35 N.C. App. 140, 142, 240 S.E.2d 805, 807 (1978).

¶ 43 We have similarly held, in the context of a hotel room rental, that even where hotel management has a duty to exercise reasonable care in keeping the premises safe, a duty which may include an obligation to inspect a room for damages that may harm other guests, the exercise of that duty does not "excuse law enforcement from complying with the requirements of the Fourth Amendment." *State v. McBennett*, 191 N.C. App. 734, 742, 664 S.E.2d 51, 57 (2008). In *McBennett*, we held that law enforcements' warrantless entry into an occupied hotel room was unlawful, even where the officers were accompanying hotel management in the exercise of their duties. *Id.* "[T]his implied permission to enter was limited to agents of the hotel in the performance of their duties and was an exception to [the] defendant's general expectations of privacy which applied to others, including law enforcement, who were not performing duties on behalf of the hotel." *Id.* at 739, 664 S.E.2d at 55-56. In so holding we noted that the rights of hotel tenants are analogous to the rights of the tenants of a house. *Id.* at 742, 664 S.E.2d at 57.

¶ 44 In this case, the lease between Plaintiff and Defendant already allows Defendant "to enter and inspect said premises at any and all reasonable times." As we have stated above, our decision does not create a blanket duty for landlords to inspect their rental premises; rather, we hold that it is a question for the jury as to whether Defendant's failure, over the course of 11 years, to exercise the right to inspect that he gave to himself in his lease with Plaintiff was reasonable and in compliance with the already existing statutory and common law framework for maintenance of rental properties.

III. Conclusion

¶ 45 For the aforementioned reasons, we reverse the trial court's grant of summary judgment in Defendant's favor and remand the case for further proceedings.

REVERSED AND REMANDED.

Judge MURPHY concurs.

Judge CARPENTER dissents by separate opinion.

CARPENTER, Judge, dissenting.

¶ 46 The majority holds "Plaintiff has made a sufficient forecast of admissible evidence" on his claims of common law negligence, violation of the Residential Rental Agreements Act (the "RRAA"), negligence *per se*, and breach of implied warranty of habitability. Accordingly, the majority reversed and remanded the case to the trial court.

¶ 47 Because Plaintiff failed to forecast evidence showing that Defendant owed a duty to Plaintiff and that Defendant was on notice of dangerous conditions in the home, I disagree and respectfully dissent. For the reasons discussed below, I would hold the trial court did not err in granting Defendant's motion for summary judgment and would thus affirm the trial court's order granting summary judgment in favor of Defendant.

I. Standard of Review

¶ 48 This Court reviews the grant of summary judgment to determine

> whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Summary judgment is appropriate when viewed in the light most favorable to the non-movant, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

S.B. Simmons Landscaping & Excavating, Inc. v. Boggs, 192 N.C. App. 155, 164, 665 S.E.2d 147, 152 (2008) (citations omitted); *see also* N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 56(c) (2021). The movant bears "the burden of

showing that there is no triable issue of fact and that he is entitled to judgment as a matter of law." *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980) (citation omitted). "All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008) (citation omitted).

¶ 49 Although "summary judgment is seldom appropriate in a negligence case, summary judgment may be granted in a negligence action where there are no genuine issues of material fact[,] and the plaintiff fails to show one of the elements of negligence." *Lavelle v. Schultz*, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995) (citations omitted), *disc. rev. denied*, 342 N.C. 656, 467 S.E.2d 715 (1996); *see Croker v. Yadkin, Inc.*, 130 N.C. App. 64, 67, 502 S.E.2d 404, 406 (explaining summary judgment is appropriate when "it is shown the defendant had no duty of care to the plaintiff . . . ."), *disc. rev. denied*, 349 N.C. 355, 525 S.E.2d 449 (1998).

¶ 50 A trial court's grant of summary judgment is reviewed *de novo* on appeal. *Hensley v. Nat'l Freight Transp., Inc.*, 193 N.C. App. 561, 563, 668 S.E.2d 349, 351 (2008) (citation omitted). Under *de novo* review, this Court considers the matter "anew" without "deference to the trial court's rulings[.]" *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (citations omitted).

II. Analysis

A. Common Law Negligence

¶ 51 First, the majority concludes there are genuine issues of material fact as to Plaintiff's common law negligence claim "because there was evidence that Defendant had constructive notice of the alleged hazardous condition and was negligent in failing to warn of or repair the condition." In support of this conclusion, the majority cites Defendant's knowledge of debris in Plaintiff's backyard. The majority also concludes that Defendant's failure to perform an inspection of Plaintiff's property during the lease period creates a question for the jury as to whether Defendant exercised reasonable care; however, no duty to inspect the interior of the private living space of a tenant exists in our common law negligence jurisprudence absent the landlord's knowledge of a dangerous condition. I further disagree that overgrown grass and debris in the backyard served to put Defendant on notice as to the dangerous conditions of the corroded natural gas pipe or plumbing above the furnace. There is no reasonable nexus between the innocuous conditions occurring in the backyard and the apparently dangerous and hidden conditions occurring in the crawlspace of the home. Defendant had no duty

to inspect the property without being put on notice, or otherwise having reason to know, of a hazardous condition.

¶ 52 To establish a *prima facie* action for negligence at common law, a plaintiff must show: "(1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of the injury." *Collingwood v. Gen. Elec. Real Est. Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted). If no legal duty exists between a plaintiff and a defendant, there can be no liability. *Inman v. City of Whiteville*, 236 N.C. App. 301, 303, 763 S.E.2d 332, 333–34 (2014). Traditionally, North Carolina has considered a tenant to be an invitee of the landlord, and "the liability of a landlord for physical harm to its tenant depends on if it knows of the danger." *Prince v. Wright*, 141 N.C. App. 262, 271, 541 S.E.2d 191, 198 (2000) (citation omitted). Therefore, "[a] landlord owes a duty to an invitee to use reasonable care to keep the premises safe and *to warn of hidden dangers*, but he is not an insurer of the invitee's safety." *Id.* at 271, 541 S.E.2d at 198 (citation omitted and emphasis in original). Landlords owe a duty to make repairs and fix hazardous conditions "about which they kn[o]w or ha[ve] reason to know" exist. *Id.* at 271, 541 S.E.2d at 198; *see also Robinson v. Thomas*, 244 N.C. 732, 736–37, 94 S.E.2d 911, 915 (1956) (holding the landlord was not liable to the tenant for the tenant's injuries where the tenant complained of a crack in the floor but did not notify the landlord that the crack was dangerous); *Bradley v. Wachovia Bank & Trust Co., N.A.*, 90 N.C. App. 581, 585, 369 S.E.2d 86, 88 (1988) (holding landlord did not have a duty to tear down the walls of a rented house for purposes of inspection without notice of a hazardous condition). "If the landlord is without knowledge at the time of the letting of any dangerous defect in the premises, he is not responsible for any injuries which result from such defect." *Robinson*, 244 N.C. at 736, 94 S.E.2d at 914 (citation omitted).

¶ 53 Here, there is no evidence that Defendant was aware, or had reason to know, of a plumbing leak above the furnace or that the water leak caused the natural gas pipe to corrode. The liability of the landlord depends on whether the landlord knows of the danger, and in this case, Defendant did not know or have reason to know of the danger. *See Bradley*, 90 N.C. App. at 585, 369 S.E.2d at 88. Defendant did not have reason to know of the corroded pipe because he never received any complaint from Plaintiff about the gas heating system, nor did he know of any fire department or Public Service Company of North Carolina,

Inc. ("PSNC") investigation into natural gas smells around the rental home. *See Robinson*, 244 N.C. at 736, 94 S.E.2d at 914.

¶ 54 It is noteworthy that Plaintiff did not plead that he informed or otherwise put Defendant on notice of the alleged defects and hazardous conditions. In fact, Plaintiff plead bare conclusory allegations in his complaint, not based upon information and belief, indicating Defendant "knew or should have known" that the water pipe was leaking on to the gas pipe. He further alleges the "defective conditions" were "known or *knowable*" by Defendant; however, this is not the standard used in North Carolina for establishing a duty on the part of a landlord. *See Prince*, 141 N.C. App. at 271, 541 S.E.2d at 198. Plaintiff provides no factual basis as to why Defendant would have known of the leak, nor did Plaintiff establish that Defendant was under a duty—recognized in this State—to inspect the property. Additionally, in Plaintiff's response to Defendant's requests for admissions, Plaintiff contradicts the allegations in his complaint that Defendant "knew or should have known" of the dangerous conditions and admits Defendant's knowledge of the facts and circumstances leading up to the explosion were "unknown" to Plaintiff.

¶ 55 Finally, an inspection of the bathroom may have revealed the gas pipe's condition because in the light most favorable to the nonmovant, it was visible through a hole in the floor, but Defendant had no reason and no duty to conduct an inspection without knowledge of any possibly hazardous condition. *See Prince*, 141 N.C. App. at 271, 541 S.E.2d at 198. The record reveals Defendant regularly asked Plaintiff how things were at the rental home, and Plaintiff always told Defendant things were "fine."

¶ 56 Because there is no evidence Defendant had actual or constructive notice of the dangerous conditions, I conclude Defendant did not owe a duty to Plaintiff to warn of or correct the conditions. *See Prince*, 141 N.C. App. at 271, 541 S.E.2d at 198; *see also Robinson*, 244 N.C. at 736, 94 S.E.2d at 915. Accordingly, I would hold the trial court did not err in granting Defendant summary judgment on the common law negligence claim because Defendant did not owe Plaintiff a duty to repair or warn of dangers without actual or constructive knowledge that the defect existed. *See S.B. Simmons Landscaping & Excavating, Inc.*, 192 N.C. App. at 164, 665 S.E.2d at 152.

¶ 57 The majority is inventing a duty to inspect the interior living space of a tenant's residential premises and placing that duty upon the landlord. This is an endeavor better suited for the Legislature. By creating this duty to inspect, there are many questions that will necessarily require an answer, including, but not limited to:

(1) How often **must** the landlord inspect the interior living space of a tenant?;

(2) How often **may** a landlord inspect the interior living space of a tenant?;

(3) What is the scope of the inspection that **must** be conducted?;

(4) What **may** be included in the inspection pursuant to the duty created by the majority?;

(5) Who may conduct these inspections? Can the landlord delegate the duty to a property manager or other third party?;

(6) Can a party authorized to inspect be joined by a law enforcement officer?;

(7) Can the duty to inspect be delegated to law enforcement? (If so, the warrant requirement to enter one's home in the residential tenant setting is practically moot);

(8) Does the duty to inspect apply to government-owned public housing?;

(9) Does the duty to inspect apply to dorms and apartments owned by colleges and universities? If so, can campus police conduct the inspections?;

(10) Can furniture be moved and closets, doors, and cabinets be opened during the inspection?

¶ 58 The duty to inspect created by this majority opinion falls outside the protections of our Constitution against unreasonable searches as the "inspections" are judicially permitted and required, apparently without limitation.

B. Violation of the RRAA

¶ 59 Next, the majority concludes the trial court's grant of summary judgment on Plaintiff's claim for violation of the RRAA was in error because "Defendant failed to maintain the gas furnace and associated piping in a manner that was safe for tenant occupancy." I disagree with this conclusion because Plaintiff failed to show he complied with the statute by providing Defendant with written notice of the needed repairs.

¶ 60 The RRAA creates a statutory duty of care between landlords and their tenants and requires landlords to "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." *Prince*, 141 N.C. App. at 270, 541 S.E.2d at 198 (quoting N.C. Gen. Stat. § 42-42(a)(2)). Under the RRAA, a landlord is required to "[m]aintain in good and safe working order and promptly repair . . . heating [units and other facilities] *provided that notification of needed repairs is made to the landlord in writing by the tenant*[.]" N.C. Gen. Stat. § 42-42(4) (2021) (emphasis added). The RRAA allows a tenant to recover rent based on "a landlord's breach of the implied warranty of habitability." *Stikeleather Realty & Invs. Co. v. Broadway*, 241 N.C. App. 152, 161, 772 S.E.2d 107, 114 (2015). "However, the statute requires that a landlord must have knowledge, actual or imputed, or be notified of a hazard's existence before being held liable in tort." *DiOrio v. Penny*, 331 N.C. 726, 729, 417 S.E.2d 457, 459 (1992) (citing N.C. Gen. Stat. § 42-42(a)(4)); *see also Stikeleather Realty & Inv. Co.*, 241 N.C. App. at 163, 772 S.E.2d at 115 (holding landlord was not liable for defective carbon monoxide detectors because landlord did not know, or have reason to know, they were not in working order).

¶ 61 Here, Plaintiff failed to forecast evidence showing Defendant received written notification from Plaintiff regarding the conditions of the gas furnace and related piping. *See* N.C. Gen. Stat. § 42-42(a)(4). To the contrary, the record reveals Defendant regularly asked Plaintiff how things were at the rental home, and Plaintiff always told Defendant things were "fine." Therefore, I conclude Defendant did not violate the RRAA. *See* N.C. Gen. Stat. § 42-42(4). Accordingly, I would hold the trial court did not err in granting Defendant summary judgment on Plaintiff's RRAA claim. *See S.B. Simmons Landscaping & Excavating, Inc.*, 192 N.C. App. at 164, 665 S.E.2d at 152.

C. Negligence *Per Se*

¶ 62 Third, the majority concludes summary judgment in Defendant's favor was inappropriate because "a triable issue of material fact existed about whether Defendant violated the Housing Code." The majority declined to extend the requirements for establishing violation of a state building code to that of a municipal housing code. I conclude these conditions are equally applicable to building and housing codes.

¶ 63 To make out a *prima facie* claim for negligence *per se*, a plaintiff must establish:

> (1) a duty created by a statute or ordinance; (2) that the statute or ordinance was enacted to protect a

> class of persons which includes the plaintiff; (3) a breach of the statutory duty; (4) that the injury sustained was suffered by an interest which the statute protected; (5) that the injury was of the nature contemplated in the statute; and (6) that the violation of the statute proximately caused the injury.

Asher v. Huneycutt, 2022-NCCOA-517, ¶ 22 (citation omitted). "The general rule in North Carolina is that the violation of a [public safety statute] constitutes negligence *per se*." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 326, 626 S.E.2d 263, 266 (2006) (citation omitted). A public safety statute imposes a duty on a defendant for the protection of others. *Id.* at 326, 626 S.E.2d at 266. Violations of a housing or building code constitute negligence *per se* because both ordinances promote the safety of the public. *See Lassiter v. Cecil*, 145 N.C. App. 679, 684, 551 S.E.2d 220, 223 (2001).

¶ 64 Our Supreme Court has enumerated specific conditions, or elements, that must be satisfied for a building owner to be found negligent *per se* for a violation of the North Carolina Building Code: "(1) the owner knew or should have known of the Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage." *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 415, 395 S.E.2d 112, 114 (citing *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 329, 363 S.E.2d 367, 375, *disc. rev. denied*, 321 N.C. 744, 366 S.E.2d 862 (1988)).

¶ 65 I disagree with the majority's refusal to conclude the specific conditions, or elements, that must be satisfied for an owner to be found negligent *per se* under the state building code do not equally apply to a municipal housing code violation. *See Olympic Products Co.*, 88 N.C. App. at 329, 363 S.E.2d at 375; *Lamm*, 327 N.C. at 415, 395 S.E.2d at 114. North Carolina law requires a landlord to "[c]omply with the current applicable building and housing codes . . . ." N.C. Gen. Stat. § 42-42(a)(1) (2021). The Legislature did not create separate duties for compliance with building and housing codes, and I can discern no logical reason why this Court should create separate duties where the Legislature has addressed the issue and chose not to do so. Therefore, the requirements for establishing negligence *per se*, set out by this Court in *Olympic Products* and cited by our Supreme Court in *Lamm*, should apply to building and housing codes alike.

¶ 66 In this case, Defendant cannot be found liable for negligence *per se* because the notice condition is not satisfied. *See Olympic Products Co.*,

88 N.C. App. at 329, 363 S.E.2d at 375; *Lamm*, 327 N.C. at 415, 395 S.E.2d at 114. Accordingly, I would hold the trial court did not err in granting Defendant summary judgment on the negligence *per se* claim. *See S.B. Simmons Landscaping & Excavating, Inc.*, 192 N.C. App. at 164, 665 S.E.2d at 152.

D. Breach of Implied Warranty of Habitability

¶ 67 Finally, the majority concludes the trial court erred in granting summary judgment in favor of Defendant with respect to Plaintiff's breach of implied warranty of habitability claim "because there is evidence supporting Plaintiff's contention that the defective gas pipe was observable upon reasonable inspection by Defendant, and that it violated the Durham Housing Code." As discussed above, Defendant did not owe a duty to inspect the gas pipe without notice of its defective condition.

¶ 68 "Tenants may bring an action for breach of the implied warranty of habitability, seeking rent abatement, based on their landlord's noncompliance with [N.C. Gen. Stat. §] 42-42(a)." *Surrat v. Newton*, 99 N.C. App. 396, 404, 393 S.E.2d 554, 558–59 (1990) (citation omitted). Our Court has stated that N.C. Gen. Stat. § 42-42(a)(4) "require[s] written notification of needed repairs involving electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord"; however, written notice is not required for "needed repairs if the repairs are necessary to put the premises in a fit and habitable condition or if the conditions constitute an emergency." *Id.* at 405, 393 S.E.2d at 559 (tenant established a *prima facie* case of breach of implied warrant of habitability and provided verbal notice to landlord of needed repairs). This does not obviate the requirement that a tenant must give notice to the landlord of the repair that is needed to put the premises in a fit and habitable condition. *See DiOrio*, 331 N.C. at 729, 417 S.E.2d at 459; *see also* N.C. Gen. Stat. § 42-42(a)(4).

¶ 69 The majority correctly states the RRAA imposes certain duties on landlords to provide "fit premises." The majority then concludes there was sufficient evidence "Defendant knew or had reason to know of any defect on the property" and thus violated N.C. Gen. Stat. § 42-42(a). Here, the record contains ample evidence that Plaintiff did not provide Defendant with notice of the issues with, or concerns about, hazardous conditions. Defendant did not have notice an inspection was warranted. *See Prince*, 141 N.C. App. at 271, 541 S.E.2d at 198. Therefore, Defendant cannot be liable for repairs of which he had no knowledge were needed. *See id.* at 271, 541 S.E.2d at 198. Accordingly, I would hold the trial court did not err in granting Defendant summary judgment on the breach of

implied warranty of habitability claim. *See S.B. Simmons Landscaping & Excavating, Inc.*, 192 N.C. App. at 164, 665 S.E.2d at 152.

¶ 70 It appears the majority is judicially creating a duty of a landlord to inspect that is not established by statue or common law. Under the approach to this case taken by the majority, law enforcement could potentially partner with landlords "for safety and/or accountability purposes" to enter the homes of tenants to observe the inspections by a landlord which may reveal contraband. That "public service" provided by law enforcement may well result in many lawful seizures and arrests that would otherwise be unlawful or not permitted absent probable cause to enter the home. This newly created duty poses the risk of severely undermining the constitutional protections of residential tenants, to the exclusion of those fortunate enough to own their homes, to be free from searches of their homes without probable cause and the issuance of a search warrant.

III. Conclusion

¶ 71 For the foregoing reasons, I disagree with the majority's conclusion that genuine issues of fact existed as to Plaintiff's four claims, and I respectfully dissent. I would hold the trial court did not err in granting Defendant's motion for summary judgment. Accordingly, I would affirm the Order.

WRIGHT CONSTRUCTION SERVICES, INC., ET AL., PLAINTIFFS
v.
LIBERTY MUTUAL INSURANCE COMPANY, ET AL., DEFENDANTS

No. COA21-583

Filed 29 December 2022

Discovery—North Carolina Uniform Interstate Depositions and Discovery Act—discovery objections of nonparty—attorney-client privilege—subject matter jurisdiction

While ordinarily North Carolina courts have subject matter jurisdiction over the discovery objections of a nonparty to an underlying foreign action when a subpoena is issued in North Carolina pursuant to the North Carolina Uniform Interstate Depositions and Discovery Act, here, a nonparty's (defendant's counsel) discovery objections based on the attorney-client privilege were subject to the subject matter jurisdiction of the out-of-state court where the underlying action was pending, not the trial court in North Carolina. Because the attorney-client privilege belongs to the client (defendant here), discovery objections based on the client's privilege are "disputes between the parties to the action" and therefore fall under the jurisdiction of the court where the underlying foreign suit is pending, pursuant to N.C.G.S. § 1F-6.

Appeal by Defendants from order entered 30 July 2021 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 March 2022.

Bell, Davis & Pitt, P.A., by Joshua B. Durham, Jason B. James, and Alan M. Ruley, for plaintiff-appellee.

Sigmon Law, PLLC, by Mark R. Sigmon, and Shumaker, Loop & Kendrick, LLP, by Steven A. Meckler and Daniel R. Hansen, for defendants-appellants.

MURPHY, Judge.

¶ 1 Ordinarily, where a subpoena is issued in North Carolina in connection with a case tried in a different state pursuant to the North Carolina Uniform Interstate Depositions and Discovery Act ("NCUIDDA"), N.C.G.S. § 1F-1, *et seq.*, North Carolina courts have subject matter jurisdiction over the discovery objections of a nonparty to the underlying

foreign action. However, since the attorney-client privilege always belongs to the client, discovery objections based on the attorney-client privilege must fall under the jurisdiction of the court where the underlying foreign suit is pending. Here, where Defendant's counsel objected to discovery after being issued a subpoena pursuant to the NCUIDDA in connection with an ongoing Missouri suit, the Missouri court, not the trial court in North Carolina, had subject matter jurisdiction over the objection, notwithstanding the fact that Defendant's counsel objected only in its own name.

BACKGROUND

¶ 2 This appeal arises out of a discovery request by Plaintiff Wright Construction Services, Inc., associated with an interstate subpoena pursuant to the NCUIDDA. The foreign action for which Plaintiff sought a subpoena in North Carolina was a Missouri insurance dispute concerning whether Defendant Liberty Mutual, which had issued performance and payment bonds to Plaintiff for a failed construction project, had a right to indemnify Plaintiff for legal fees incurred resolving its claims.

¶ 3 During the Missouri action, Plaintiff sought discovery from Defendant, including "all [Defendant's] correspondence and communications with Shumaker, Loop, & Kendrick[,] LLP [("SLK"),]" the law firm representing Defendant in all matters relevant to this case. In response, Defendant produced a ten-page privilege log asserting the attorney-client privilege and work product doctrine. Plaintiff moved to compel, arguing, *inter alia*, that (1) "[r]outine[] investigative documents," of which many of the requested documents allegedly are, "cannot be protected under the work product doctrine" because SLK was operating in the capacity of a claims adjuster; (2) the documents at issue were "created well before litigation was reasonably foreseeable"; (3) Plaintiff alleged that it acted in good faith in part based on its reliance on counsel, which waives the attorney-client privilege; and (4) "[c]ommon sense requires that, in order to defend against the indemnity claim, [Plaintiff] should obtain discovery into whether [Defendant] acted reasonably in incurring the charges in the first place." After an in camera review of five of the items, the Missouri trial court denied the motion, ruling in an order entered 25 February 2021 that all of the documents were protected under both the work product doctrine and the attorney-client privilege.

¶ 4 However, on 1 November 2019, long before the Missouri court's ruling on Plaintiff's motion to compel, the Missouri court entered a *Commission to Serve Subpoena for Testimony and the Production of Documents* pertaining to SLK, pursuant to which Plaintiff served a

subpoena directly on SLK in Mecklenburg County Superior Court in compliance with N.C.G.S. § 1F-3. *See* N.C.G.S. § 1F-3(a)-(b) (2021) ("To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this State. A request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this State. . . . When a party submits a foreign subpoena to a clerk of court in this State, the clerk, in accordance with that court's procedure, shall promptly open an appropriate court file, assign a file number, collect the applicable filing fee pursuant to [N.C.G.S. §] 7A-305(a)(2), and issue a subpoena for service upon the person to which the foreign subpoena is directed."). In doing so, Plaintiff sought "all documents" in SLK's possession pertaining to the construction bonds and the resulting litigation. SLK objected, and Plaintiff moved to compel, with Plaintiff making substantially the same arguments as it made before the Missouri court. However, unlike the Missouri court, which denied the motion entirely, the North Carolina trial court granted the motion in part and denied it in part, producing an itemized list of documents by privileged status. The resulting order, entered 12 April 2021, provided that, "[t]o the extent [it] may conflict with the Missouri [o]rder . . . the Missouri [o]rder shall control."

¶ 5 The following day, on 22 April 2021, Defendant filed a *Motion to Amend or Clarify Order* under Rule 52(b) arguing that, with respect to the conflict provision in the trial court's April order, all documents the trial court ruled were unprotected conflicted with the Missouri order because the underlying theories Plaintiff used to contest the privileged status of the documents in its North Carolina motion to compel were substantially the same as those rejected by the Missouri trial court in its Missouri motion to compel. On 11 May 2021, while that motion was pending, Defendant appealed; and, in a separate order entered 30 July 2021, the trial court clarified that this conflict provision referred only to direct conflicts between specific documents.

¶ 6 Defendant timely appealed from the 30 July 2021 order.

ANALYSIS

¶ 7 On appeal, Defendant argues that (1) based on N.C.G.S. § 1F-1 *et seq.*, the trial court lacked subject matter jurisdiction over SLK's discovery objection; (2) the trial court erred by failing to make adequate findings of fact and conclusions of law with respect to whether the documents at issue were privileged; and (3) the trial court erred in holding that some of the documents were not protected by the work product

doctrine or the attorney-client privilege. For the reasons discussed below, we hold the trial court lacked jurisdiction over SLK's discovery objection, rendering the other issues moot.

¶ 8 Defendant argues the trial court lacked subject matter jurisdiction to hear SLK's discovery objection because, under the terms of the NCUIDDA, only the Missouri court may exercise subject matter jurisdiction over discovery objections. Under N.C.G.S. § 1F-6,

> [a]n application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under [N.C.G.S. §] 1F-3 must comply with the rules or statutes of this State and be submitted to the court in the county in which discovery is to be conducted. Where a dispute exists between the parties to the action, the party opposing the discovery shall apply for appropriate relief to the court in which the action is pending and not to the court in the state in which the discovery is sought.

N.C.G.S. § 1F-6 (2021). Defendant admits that "the North Carolina [trial] court has jurisdiction to rule on objections from the non-party target of [a] subpoena[,]" but contends that, in this case, because "[b]oth SLK and [Defendant] have objected to the subpoena on privilege and work-product grounds[,]" the "trial court lacked jurisdiction to rule on the objection, and the only court that can resolve Liberty's objections is the Missouri court." In the alternative, Defendant argues that the official comments to N.C.G.S. § 1F-6 indicate its terms should apply in cases such as these where, in asserting a privilege, a party's protection is contingent on the privileged status of a non-party's document. Plaintiff, meanwhile, argues that only SLK, not Defendant, objected to the production of documents in North Carolina, rendering N.C.G.S. § 1F-6 inapplicable.

¶ 9 At the threshold, we clarify that, as a factual matter on the Record, SLK's objection to document production appears to have been on its own behalf and not, in any part, on Defendant's. The only objection to the subpoena—tellingly entitled *Objection of Shumaker, Loop & Kendrick, LLP to Subpoena and Deposition Notice*—neither states nor implies that the objection is being made on behalf of Defendant in a representative capacity. (Emphasis added.) Similarly, the response to Plaintiff's North Carolina motion to compel—entitled *Shumaker Loop & Kendrick's Brief in Opposition to Plaintiff's Motion to Compel*—also makes no mention of speaking for Defendant in a representative

capacity. (Emphasis added.) On the other hand, both documents explicitly identify the affected interests as those of SLK itself. Accordingly, we must evaluate, in light of the fact that SLK objected to discovery only on its own behalf, where jurisdiction over SLK's objection exists under the NCUIDDA.

¶ 10 "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992). Here, N.C.G.S. § 1F-6's language indicates that recourse to the court where the original action is pending is required "[w]here a dispute exists between *the parties to the action*[.]" N.C.G.S. § 1F-6 (2021) (emphasis added). Furthermore, it is well-established in our canons of statutory interpretation that, "[u]nder the doctrine of *expressio unius est exclusion alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." *Cooper v. Berger*, 371 N.C. 799, 810 (2018). Thus, we can infer that, by specifying that a discovery dispute between *parties* to the underlying foreign case must be resolved in the court where the original action is pending, the General Assembly intended that disputes involving a *nonparty* to the underlying case be resolved domestically.

¶ 11 The official comments to N.C.G.S. § 1F-6 support this view. Very explicitly, the example laid out in Comment 1 specifies where jurisdiction exists with respect to both parties and nonparties to the underlying foreign case:

> Example 1: A dispute is pending in Tennessee. Plaintiff, by issuance of a North Carolina subpoena in accordance with [N.C.G.S. §] 1F-3, notices the deposition of defendant's ex-wife, who resides in North Carolina. During the deposition held in North Carolina, plaintiff asks a question about information to which the joint spousal privilege applies. The attorneys for the ex-wife and defendant object on grounds of the spousal privilege. If plaintiff believes the privilege has been invoked inappropriately by the ex-wife, plaintiff must resort to the North Carolina court issuing the North Carolina subpoena, which would apply its laws on privilege and its conflicts of laws principles. However, to overcome defendant's objection on grounds of the spousal privilege or to have that information admitted at trial, plaintiff must resort to the trial court in Tennessee, which would apply its own laws, including its conflicts of laws principles.

N.C.G.S. § 1F-6, N.C. cmt. 1 (2021). Comments, while not binding authority, are highly persuasive. *See Crowder Const. Co. v. Kiser*, 134 N.C. App. 190, 206 (1999) ("Consistent with the practice of our Supreme Court, we have given the Commentary 'substantial weight[.]' "); *Porter v. Beaverdam Run Condo. Ass'n*, 259 N.C. App. 326, 332 (2018) ("In interpreting this statutory provision, we are guided by the Official Comment to the statute[] . . . ."). Especially in cases where, as here, the North Carolina Comments corroborate a plain reading of the statute, we see no reason to deviate from the General Assembly's guidance. Accordingly, we hold that a nonparty, when objecting on its own behalf to a subpoena issued in North Carolina pertaining to an underlying foreign case, is ordinarily subject to the jurisdiction of the trial court in North Carolina.

¶ 12 However, having established the general rule under N.C.G.S. § 1F-6, our inquiry is still incomplete as to the facts in this case. In the hypothetical posed by North Carolina Comment 1, the subpoena issued to the non-party—the ex-wife—seeks documents allegedly protected by the spousal privilege. N.C.G.S. § 1F-6, N.C. cmt. 1 (2021). The ex-wife then objects on her own behalf, which results in North Carolina having jurisdiction over the objection. *Id.* Critically, not only does the ex-wife in this scenario *in fact* object to discovery on her own behalf, but she also raises the spousal privilege—a privilege conceptually belonging, at least in part, to her. *See State v. Godbey*, 250 N.C. App. 424, 430 (2016) (marks omitted) (emphasis added) ("The marital communications privilege is premised upon the belief that the marital union is sacred and that its intimacy and confidences deserve legal protection. Whatever is known by reason of that intimacy should be regarded as knowledge confidentially acquired, and *neither spouse should be allowed to divulge it to the danger or disgrace of the other*.") (quoting *State v. Rollins*, 363 N.C. 232, 236 (2009), and *Hicks v. Hicks*, 271 N.C. 204, 205 (1967)).

¶ 13 Not so here. Although, like the ex-wife in North Carolina Comment 1, SLK objected strictly in its own name, *see supra* ¶ 9, the privilege it invoked does not conceptually belong to it or exist for its benefit. Rather, "[t]he law of privileged communications between attorney and client is that the privilege is that of the client. *He alone is the one for whose protection the rule is enforced*." *In re Miller*, 357 N.C. 316, 339 (2003) (emphasis in original). In other words, SLK's objection, though in its own name, was *not* for its own benefit; instead, SLK's objection to the production of documents pertaining to Defendant's representation must necessarily have been for Defendant's benefit, as the privilege belongs to Defendant alone. *See Crosmun v. Trustees of Fayetteville Tech. Cmty. Coll.*, 266 N.C. App. 424, 440 (2019) ("[The attorney-client privilege] is

the client's alone[;] . . . '*[i]t is not the privilege of the court or any third party.*' ") (quoting *id.* at 338) (emphasis in original).

¶ 14 This, we believe, renders the case at bar distinguishable from the scenario posited in North Carolina Comment 1. While North Carolina courts will ordinarily have jurisdiction over the discovery objections of a nonparty to the underlying foreign action when a subpoena is issued pursuant to N.C.G.S. § 1F-1, *et seq.*, *see supra* ¶¶ 10-11, this general rule does not apply to an attorney objecting on the basis that documents pertaining to her client's representation are privileged. Instead, because the attorney-client privilege always belongs to the client and the client alone, discovery objections based on the client's privilege—even where purportedly invoked only in the name of the attorney—are necessarily "dispute[s] [] between the parties to the action" and must therefore fall under the jurisdiction of the court where the underlying foreign suit is pending. N.C.G.S. § 1F-6 (2021). Accordingly, pursuant to N.C.G.S. § 1F-6, the Missouri court, not the trial court in North Carolina, had subject matter jurisdiction over SLK's objection, notwithstanding the fact that SLK objected only in its own name.

¶ 15 Having determined the trial court lacked subject matter jurisdiction, the parties' remaining arguments are moot. Furthermore, as "the court must [] have subject matter jurisdiction[] . . . in order to decide a case[,]" we must vacate the order of the trial court and dismiss the case. *In re T.R.P.*, 360 N.C. 588, 590 (2006). SLK must obtain a ruling on its objection by seeking a valid order on the privileged status of the documents at issue from the Missouri court.

CONCLUSION

¶ 16 Under the NCUIDDA, the trial court lacked subject matter jurisdiction over SLK's objection and therefore lacked the authority to enter the challenged order. Accordingly, we vacate the order and dismiss the case.

VACATED AND DISMISSED.

Judges INMAN and GRIFFIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 29 DECEMBER 2022)

BATES v. STAPLES, INC. 2022-NCCOA-915 No. 22-431	Mecklenburg (21CVS823)	Affirmed
BOYLES v. ORRELL 2022-NCCOA-916 No. 22-309	Forsyth (16CVD4920) (18CVD2726)	Vacated
BRADSHAW v. MAIDEN 2022-NCCOA-917 No. 21-380	Mecklenburg (14CVS14445)	Affirmed
C.G.C. v. PETTEWAY 2022-NCCOA-918 No. 22-56	Wake (20CVS13466)	Other
EST. OF CHANCE v. FAIRFIELD INN & SUITES BY MARRIOTT 2022-NCCOA-919 No. 22-449	Cumberland (19CVS4910)	Affirmed
GANTT v. CITY OF HICKORY 2022-NCCOA-920 No. 21-767	Catawba (20CVS1183)	Affirmed
GEHRKE v. GATES AT QUAIL HOLLOW HOMEOWNERS' ASS'N, LTD. 2022-NCCOA-921 No. 22-460	Mecklenburg (21CVS4280)	Affirmed
GYGER v. CLEMENT 2022-NCCOA-922 No. 22-81	Guilford (16CVD5358)	Affirmed
IN RE C.H. 2022-NCCOA-923 No. 22-476	Durham (21SPC2564)	Affirmed
JAYAWARDENA v. DAKA 2022-NCCOA-924 No. 22-384	Cumberland (19CVS3319)	Affirmed
KOENIG v. KOENIG 2022-NCCOA-925 No. 22-282	Pitt (20CVD969)	Affirmed

LECHOWICZ v. GOODRICH CORP. 2022-NCCOA-926 No. 22-319	Mecklenburg (20CVS14021)	Affirmed
NEW VISION TR. v. ELIZA, LLC 2022-NCCOA-927 No. 22-559	Wake (21CVD5634)	Affirmed
PRICE v. PRICE 2022-NCCOA-928 No. 21-273	Currituck (17CVD102)	Vacated and Remanded
SCOTT v. CITY OF CHARLOTTE 2022-NCCOA-929 No. 21-547	Mecklenburg (18CVS16700)	Reversed in Part, Dismissed in Part, and Remanded
SMITH v. WISNIEWSKI 2022-NCCOA-930 No. 22-457	Wake (19CVD15443)	Affirmed in Part; Reversed in Part; and Remanded.
STATE v. BROWN 2022-NCCOA-931 No. 22-492	Rockingham (20CRS51143) (20CRS539)	Dismissed
STATE v. CHRISTMAN 2022-NCCOA-932 No. 22-330	Brunswick (16CRS55123-27) (16CRS55131)	No Error
STATE v. DAWKINS 2022-NCCOA-933 No. 22-138	Mecklenburg (17CRS239077) (17CRS239079) (17CRS239465-70)	No Error
STATE v. ECKENROD 2022-NCCOA-934 No. 22-7	McDowell (18CRS50438) (18CRS50441) (18CRS50477) (18CRS50478)	No Error
STATE v. HALL 2022-NCCOA-935 No. 21-496	Yancey (20CRS245) (20CRS50006)	No error in part; no plain error in part.
STATE v. JONES 2022-NCCOA-936 No. 22-518	Columbus (19CRS478)	Reversed and remanded for a new trial.
STATE v. SANDERS 2022-NCCOA-937 No. 22-274	Johnston (21CRS264) (21CRS292) (21CRS50312)	Vacated and Remanded

STATE v. WHITING 2022-NCCOA-938 No. 22-36	New Hanover (17CRS60179) (18CRS694) (18CRS695)	Affirmed
THOMPSON v. J.H. HONEYCUTT & SONS, INC. 2022-NCCOA-939 No. 22-581	N.C. Industrial Commission (18-028971)	Affirmed
EST. OF WYER v. ALAMANCE REG'L MED. CTR. 2022-NCCOA-940 No. 22-320	Alamance (20CVS2215)	Affirmed in part; vacated and remanded in part.