287 N.C. App.—No. 5 Pages 615-695

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 15, 2023

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

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REUBEN F. YOUNG
CHRISTOPHER BROOK

[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. [7] Died 23 May 2023.

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[8] Resigned 3 April 2023. [9] Appointed 4 April 2023. [10] Retired 31 December 2022.
[11] Appointed 13 January 2023.

COURT OF APPEALS

CASES REPORTED

FILED 21 FEBRUARY 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Preservation of issues—constitutional right to jury trial—waiver—In an action for damages against a tool retailer (defendant) for injuries plaintiff sustained while visiting one of defendant's stores, plaintiff failed to preserve for appellate review his argument that the trial court erred in proceeding with a bench trial after he had requested a jury trial. When the case was called for trial, plaintiff appeared pro se, participated in the trial, and neither sought a continuance nor raised an objection to having a bench trial; therefore, plaintiff waived any resulting constitutional error. **Guerra v. Harbor Freight Tools, 634.**

Preservation of issues—exclusion of evidence—offer of proof at trial—In an action for damages against a tool retailer (defendant) for injuries plaintiff sustained while visiting one of defendant's stores, where plaintiff—appearing pro se at trial—sought to introduce evidence of email communications from defendant's claim specialist regarding plaintiff's claim against defendant, plaintiff failed to preserve for appellate review his argument that the trial court erred in excluding the email communications. Plaintiff did not make a specific offer of proof as to what the emails would have shown, and the significance of those emails was not obvious from the record. **Guerra v. Harbor Freight Tools, 634.**

Preservation of issues—motion for discovery—no ruling obtained—In an action for damages against a tool retailer (defendant) for injuries plaintiff sustained while visiting one of defendant's stores, plaintiff—acting pro se—failed to preserve for appellate review any arguments regarding his pretrial motion for discovery

where, although he brought the motion to the trial court's attention at trial, he did not obtain a ruling from the court on that motion as required under Appellate Rule 10(a)(1). **Guerra v. Harbor Freight Tools, 634.**

Preservation of issues—workers' compensation case—failure to state issue with particularity—In a workers' compensation case, defendants failed to preserve an evidentiary issue where they made only a generalized assignment of error when they appealed the Deputy Commissioner's opinion and award to the Full Commission and where there was no indication in the record that the evidentiary issue was raised before the Full Commission at all. **Gilliam v. Foothills Temp. Emp., 624.**

Record on appeal—incomplete—judicial notice of record in previous appeal—request improperly made—In defendant's second appeal from her criminal convictions, the Court of Appeals denied the parties' requests that it take judicial notice of the record in defendant's first appeal, where: the record in the second appeal was incomplete, each party had made their request for judicial notice in their appellate briefs instead of filing a motion pursuant to Appellate Rule 37, and no apparent effort was made to include the missing documents. Further, it was improper for defendant to attach the transcript of her plea in an appendix to her brief where doing so was not permitted under Appellate Rule 28(d) and where the transcript was not included in the record on appeal. **State v. Black, 653.**

Record on appeal—portion of transcript missing—adequate alternative—meaningful appellate review—In a prosecution for multiple sex offenses, defendant was not deprived of meaningful appellate review of his criminal judgment—and therefore was not entitled to a new trial—on the basis that a portion of the jury selection was missing from the transcript. His appellate attorney made sufficient efforts to reconstruct the missing portion by contacting the trial judge, attorneys, and court personnel, and produced an adequate alternative to a verbatim transcript that allowed defendant to identify potentially meritorious issues for appeal. **State v. Palacio, 667.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Statements following arrest—voluntariness—findings of fact—In a prosecution for multiple sex offenses, defendant was not entitled to the suppression of inculpatory statements he made to law enforcement after his arrest. The trial court was not required to make findings about all of the evidence at the motion hearing, and the unchallenged findings it did make were supported by substantial evidence. More specifically, the findings supported the trial court's conclusion that defendant's confession was voluntary based on defendant's verbal acknowledgment of the constitutional rights that were read to him, his statement that he was familiar with those rights from his own law enforcement work, his completion of a written waiver form, and the lack of any evidence that defendant was under the influence of alcohol or drugs during his interrogation. **State v. Palacio, 667.**

CONSTITUTIONAL LAW

Right to a public trial—*Waller* test—findings of fact—remand—In defendant's trial for attempted first-degree murder and related charges, the trial court violated defendant's Sixth Amendment right to a public trial by closing the courtroom without first conducting the four-part test in *Waller v. Georgia*, 467 U.S. 39 (1984), and

making the requisite findings of fact. Given the limited closure and the fact that the trial court failed to conduct the *Waller* test, the matter was remanded for the trial court to conduct the *Waller* test and make appropriate findings of fact. **State v. Miller, 660.**

DAMAGES AND REMEDIES

Restitution—criminal case—amount—stipulation—ability to pay—In a prosecution for attempted identity theft and possession of a stolen motor vehicle, the trial court did not abuse its discretion in ordering defendant to pay $11,000 in restitution where defendant had stipulated to this amount at her sentencing hearing and had not presented any evidence showing that she lacked the ability to pay that amount. **State v. Black, 653.**

DOMESTIC VIOLENCE

Finding of assault—issuance of DVPO mandatory—irrelevant considerations—The trial court erred by denying plaintiff's request for a domestic violence protective order (DVPO) after finding that defendant had assaulted her on two occasions. Where plaintiff and defendant had been in a dating relationship and defendant had assaulted plaintiff, issuance of a DVPO was mandatory—regardless of whether the trial court believed that plaintiff was in fear of serious bodily injury or continued harassment. **Chociej v. Richburg, 615.**

FIREARMS AND OTHER WEAPONS

Discharging a weapon within city limits—charging documents—caption of ordinance—proof of ordinance at trial—The trial court erred by denying defendant's motion to dismiss the charge of discharging a weapon within city limits where the charging documents did not include the caption of the ordinance, pursuant to N.C.G.S. § 160A-79(a), and the State failed to prove the ordinance at trial, pursuant to N.C.G.S. § 8-5. **State v. Miller, 660.**

JUDGMENTS

Criminal—clerical error—dismissed charge mistakenly included—Where defendant's criminal judgment for multiple sex offenses, which were consolidated for sentencing, mistakenly included a charge that the trial court had orally dismissed after the jury verdict, the matter was remanded for correction of a clerical error. **State v. Palacio, 667.**

Vacated—null and void—collateral estoppel—In a dispute arising from the sale of a business to plaintiffs, where the trial court dismissed plaintiffs' claims for fraud and misrepresentation against one defendant on the basis of collateral estoppel because a bankruptcy court had issued an order concluding that plaintiffs had failed to present sufficient evidence to establish a prima facie case of fraud or misrepresentation against another defendant in the same dispute, the bankruptcy court's order became null and void when it was vacated by a federal district court during the pendency of this appeal; therefore, the bankruptcy court's order lost any preclusive effect on the issues in this case and defendant was not entitled to summary judgment on the basis of collateral estoppel. **First Recovery, LLC v. Unlimited Rec-Rep, LLC, 620.**

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.

CHOCIEJ v. RICHBURG

[287 N.C. App. 615 (2023)]

KATHRYN CHOCIEJ, PLAINTIFF
v.
MARSHALL JERRY RICHBURG, DEFENDANT

No. COA22-548

Filed 21 February 2023

Domestic Violence—finding of assault—issuance of DVPO mandatory—irrelevant considerations

The trial court erred by denying plaintiff's request for a domestic violence protective order (DVPO) after finding that defendant had assaulted her on two occasions. Where plaintiff and defendant had been in a dating relationship and defendant had assaulted plaintiff, issuance of a DVPO was mandatory—regardless of whether the trial court believed that plaintiff was in fear of serious bodily injury or continued harassment.

Appeal by Plaintiff from judgment entered 5 October 2021 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 11 January 2023.

Legal Aid of North Carolina, Inc., by Corey Frost, Dietrich D. McMillan, Larissa Mañón Mervin, TeAndra H. Miller, Celia Pistolis, and James Battle Morgan, Jr., for Plaintiff-Appellant.

No brief filed on behalf of Defendant-Appellee.

CARPENTER, Judge.

Kathryn Chociej ("Plaintiff") appeals from the trial court's dismissal of her Complaint and Motion for Domestic Violence Protective Order ("Complaint") filed against Marshall Jerry Richburg ("Defendant") and the trial court's denial of her subsequent Rule 59 Motion to Amend the Judgment or for New Trial ("Rule 59 Motion"). On appeal, Plaintiff asserts the trial court erred by granting Defendant's Motion to Dismiss the Complaint despite finding Defendant assaulted Plaintiff on two occasions. After careful review, we agree with Plaintiff. Accordingly, we reverse and remand for entry of a Domestic Violence Protective Order ("DVPO").

I. Factual and Procedural Background

In 2021, Plaintiff and Defendant resided together in a dating relationship. On 31 May 2021, an altercation broke out between the couple, and Defendant assaulted Plaintiff with his fists and forehead, breaking her nose. Defendant also threw a vodka bottle and a peanut butter jar against the wall, leaving holes, and destroyed Plaintiff's television. Afterwards, Defendant apologized and promised to seek mental health treatment. On 16 June 2021, another fight broke out in the parties' bedroom. This time, Defendant assaulted Plaintiff with a belt, household objects, including a drawer and a lamp, and his forehead and fists, causing a black eye and bruises to Plaintiff's hands. When the police arrived, Defendant had already fled, but he was arrested in early July and charged with assault on a female.

After his arrest, Defendant called Plaintiff's employer to report she had wrongfully disclosed his confidential medical information to a third party. After being suspended on 16 July 2021, Plaintiff was terminated by her employer on 20 July 2021. Also on 20 July 2021—the same date as the adverse employment action—Plaintiff filed the Complaint against Defendant.

During the hearing on 5 October 2021, Plaintiff testified that Defendant assaulted her on multiple occasions, and she introduced photographs of her injuries, which the court admitted into evidence. Defendant presented no evidence. In open court, the trial court considered the duration of time between the assaults and Plaintiff seeking DVPO relief. The trial court also noted the timing between the adverse employment action and Plaintiff's initiation of the case. Ultimately, the trial court concluded Plaintiff "failed to prove grounds for [the] issuance of a [DVPO]" and dismissed her Complaint. To support its conclusion, the court made the following findings of fact:

> Although this court believes Defendant assaulted Plaintiff on two different occasions. Court does not believe that Plaintiff would have taken out [the DVPO] if she had not been in trouble at her job for releasing to Defendant's friend his medical information. Her fear of defendant appears to have developed after she was suspended from her job due to defendant's 'harassment and vindictiveness' per Plaintiff's testimony by Defendant's calling her boss to report Plaintiff's violation of releasing his private information.

Plaintiff timely filed the Rule 59 Motion. After a hearing on 6 December 2021, the trial court denied Plaintiff's Rule 59 Motion by written order filed on 19 January 2022. Plaintiff timely appealed from both orders.

II. Jurisdiction

This Court has jurisdiction over an appeal from both orders pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Issues

The issues on appeal are whether the trial court erred by: (1) dismissing Plaintiff's Complaint due to insufficient fear of serious bodily injury or continued harassment after finding Defendant had assaulted Plaintiff on two occasions; and (2) denying Plaintiff's Rule 59 Motion.

IV. Analysis

On appeal, Plaintiff first argues the trial court erred by dismissing the Complaint where uncontroverted evidence showed Defendant assaulted Plaintiff on two occasions, and by denying relief absent a showing of fear of imminent serious bodily injury or continued harassment. After careful review, we agree with both arguments.

"When the trial court sits without a jury [on a DVPO], the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Forehand v. Forehand*, 238 N.C. App. 270, 273, 767 S.E.2d 125, 127 (2014) (quoting *Hensey v. Hennessy*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009)). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Ward v. Ward*, 252 N.C. App. 253, 256, 797 S.E.2d 525, 528 (2017) (internal quotations omitted), *appeal dismissed and disc. review denied*, 369 N.C. 753, 800 S.E.2d 65 (2017).

A trial judge sitting without a jury must specifically find facts and state separately its conclusions of law. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 52(a)(1) (2021). "Evidence must support findings; findings must support conclusions; conclusions must support the judgment. . . . [E]ach link in the chain of reasoning must appear in the order itself." *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

"Domestic violence" has been defined by our Legislature as:

> the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with

> or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
>
> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in [N.C. Gen. Stat. §] 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in [N.C. Gen. Stat. §§] 14-27.21 through . . . 14-27.33.

N.C. Gen. Stat. § 50B-1(a) (2021). Each subsection of the statute—separated by the disjunctive conjunction, "or"—independently and sufficiently constitutes an act of domestic violence under North Carolina law. *See Rudder v. Rudder*, 234 N.C. App. 173, 180, 759 S.E.2d 321, 326 (2014) ("The statute thus specifies several alternative ways in which one may commit an act of domestic violence."). A showing of "fear of imminent serious bodily injury or continued harassment" is not required where a defendant intentionally causes bodily injury or attempts to cause bodily injury upon the aggrieved party. *See* N.C. Gen. Stat. § 50B-1(a).

Upon a finding that "one or more" acts of domestic violence have occurred between individuals with a sufficient past or present "personal relationship[,]" N.C. Gen. Stat. § 50B-1, "the court *shall* grant a protective order . . . ." N.C. Gen. Stat. § 50B-3(a) (emphasis added). When subsections (a) and (b) of N.C. Gen. Stat. § 50B-1 are satisfied, the issuance of a DVPO is mandatory, not discretionary. *See D.C. v. D.C.*, 279 N.C. App. 371, 373 n.2, 865 S.E.2d 889, 890 n.2 (2021) ("[I]f a trial court determines that an act qualifying as domestic violence occurred, the trial court is required to issue a DVPO.").

Here, the parties were in a cohabitating dating relationship at the time of the incidents, which constitutes a "personal relationship" within the meaning of the statute. *See* N.C. Gen. Stat. § 50B-1(b)(6) ("persons . . . who are in a dating relationship or have been in a dating relationship."). In the 5 October 2021 order dismissing the Complaint, the trial court explicitly found, based upon competent and uncontroverted evidence, that "Defendant assaulted Plaintiff on two different occasions." The finding that Defendant committed two separate assaults against Plaintiff is irreconcilable with the trial court's conclusion that Plaintiff "failed to prove grounds for issuance of a [DVPO]." *See Forehand*, 238 N.C. App. at 273, 767 S.E.2d at 127. At minimum, the trial court's finding

of two separate assaults based upon the evidence presented necessitates the conclusion that Defendant "[a]ttempt[ed] to cause bodily injury" to Plaintiff. *See* N.C. Gen. Stat. § 50B-1(a)(1). Accordingly, we reverse and remand for entry of a DVPO, inclusive of any relief set forth in N.C. Gen. Stat. § 50B-3(a) that the trial court deems appropriate under the facts of this case.

Having concluded the trial court reversibly erred by dismissing Plaintiff's request for a DVPO, we do not reach the issue of whether the trial court abused its discretion in denying Plaintiff's Rule 59 Motion, wherein Plaintiff sought the same relief under a more exacting standard.

V. Conclusion

In sum, because the trial court found that one or more acts of domestic violence occurred between two individuals with a sufficient personal relationship, the trial court lacked discretion to deny Plaintiff's request for a DVPO. *See D.C.*, 279 N.C. App. at 373, 865 S.E.2d at 890. Accordingly, we reverse the trial court's dismissal of the Complaint and remand for entry of a DVPO. On remand, the trial court should consider all potential relief set forth in N.C. Gen. Stat. § 50B-3(a) and grant any such relief the trial court deems appropriate under the facts of this case.

REVERSED AND REMANDED.

Judges MURPHY and GRIFFIN concur.

FIRST RECOVERY, LLC, AND DYLAN BROOKS, PLAINTIFFS
v.
UNLIMITED REC-REP, LLC, F/K/A UNLIMITED RECOVERY REPOSSESSION DIVISION, LLC, KEITH SANDERS, INDIVIDUALLY, AND RITCHIE, INC. D/B/A SUNBELT OF RALEIGH, DEFENDANTS

No. COA22-495

Filed 21 February 2023

Judgments—vacated—null and void—collateral estoppel

In a dispute arising from the sale of a business to plaintiffs, where the trial court dismissed plaintiffs' claims for fraud and misrepresentation against one defendant on the basis of collateral estoppel because a bankruptcy court had issued an order concluding that plaintiffs had failed to present sufficient evidence to establish a prima facie case of fraud or misrepresentation against another defendant in the same dispute, the bankruptcy court's order became null and void when it was vacated by a federal district court during the pendency of this appeal; therefore, the bankruptcy court's order lost any preclusive effect on the issues in this case and defendant was not entitled to summary judgment on the basis of collateral estoppel.

Appeal by Plaintiffs from Order entered 1 February 2022 by Judge A. Graham Shirley, II in Wake County Superior Court. Heard in the Court of Appeals 24 January 2023.

Austin Law Firm, PLLC, by John S. Austin, for Plaintiff-Appellants.

Cozen O'Connor, by Alycen Moss and Travis Ray Joyce, for Defendant-Appellee Richie Inc. d/b/a Sunbelt of Raleigh.[1]

HAMPSON, Judge.

First Recovery, LLC and Dylan Brooks (Plaintiffs) appeal from an Order granting Summary Judgment to Richie, Inc. d/b/a Sunbelt of

1. Denise L. Besselieu appeared on briefs for Defendant-Appellee. By Order entered 21 November 2022, this Court permitted Denise L. Besselieu to withdraw and Alycen Moss to be substituted as counsel. Travis Ray Joyce subsequently entered a Notice of Appearance in this Court indicating that appearance was in substitution of Alycen Moss. However, this Court was not asked to allow Alycen Moss to withdraw as counsel.

Raleigh[2] (Richie) on the basis Plaintiffs are collaterally estopped from pursuing their claims against Richie following a decision by a bankruptcy court dismissing Plaintiffs' Adversary Proceeding against co-Defendant Keith Sanders (Sanders). However, during the pendency of this appeal, the bankruptcy court's decision was vacated by a United States District Court and the Adversary Proceeding remanded for a new trial. As such, for the following reasons, we vacate the trial court's Order granting Summary Judgment in favor of Richie in this case and remand this matter to the trial court to conduct further proceedings. Relevant to this appeal, the Record before us tends to reflect the following:

Factual and Procedural Background

Plaintiffs commenced this action on 2 February 2016 by filing a Complaint against Unlimited Rec-Rep, LLC, f/k/a Unlimited Recovery Repossession Division, LLC (URR) and Sanders alleging claims of breach of contract, breach of warranty, fraud, and unfair and/or deceptive trade practices arising from the sale of URR to Plaintiffs from Sanders. On 8 August 2016, Plaintiffs filed an Amended Complaint adding Richie, the broker in the sale of the business, as a defendant. In the Amended Complaint, in addition to the claims against URR and Sanders, Plaintiffs alleged claims of fraud, negligent misrepresentation, and unfair and/or deceptive trade practices against Richie.

On 21 September 2017, URR filed a Chapter 7 bankruptcy proceeding in the United States Bankruptcy Court for the Eastern District of North Carolina. The case was subsequently placed on inactive status. On 27 March 2019, URR's bankruptcy case was resolved. On 9 August 2019, Sanders filed his own Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of North Carolina. On 13 January 2020, Plaintiffs filed an Adversary Proceeding against Sanders in the United States Bankruptcy Court for the Eastern District of North Carolina seeking to have the alleged debt owed to Plaintiffs arising from the sale of URR deemed non-dischargeable on the basis of fraud and/or misrepresentation under 11 U.S.C. § 523(a)(2).

On 19 March 2020, Plaintiffs and Richie entered into a Consent Order removing the matter from inactive status to allow the litigation as between them to proceed, while the matter remained inactive as to Sanders. On 16 December 2020, Richie filed a Motion for Summary

2. It appears the case caption in the case as filed below misspelled Richie as Ritchie. While we keep the caption as-is to maintain consistency, we will endeavor to use the correct spelling utilized by the parties in their briefing to this Court in the body of our opinion.

Judgment. This Motion was heard on 17 February 2021 before the Honorable G. Bryan Collins in Wake County Superior Court. On 9 April 2021, Judge Collins rendered his decision denying Richie's Motion for Summary Judgment via email to the parties. Plaintiffs did not submit a proposed Order to Judge Collins until 25 January 2022.

On 17 December 2021, following evidentiary hearings, the Bankruptcy Court issued an Order concluding Plaintiffs in that action had failed to present sufficient evidence of either justifiable or reasonable reliance to establish a prima facie case of fraud or misrepresentation under 11 U.S.C. § 523(a)(2) for non-dischargeability. The Bankruptcy Court, thus, entered judgment for Sanders and dismissed the Adversary Proceeding.

On 29 December 2021, Richie filed a second Motion for Summary Judgment, this time contending the Bankruptcy Court's ruling collaterally estopped Plaintiffs from asserting claims of fraud and misrepresentation against Richie. On 27 January 2022, Richie's second Motion for Summary Judgment was heard before the Honorable A. Graham Shirley, II in Wake County Superior Court. On 1 February 2022, Judge Shirley entered his Order granting Richie's Motion for Summary Judgment and dismissing Plaintiffs' claims against Richie. Later that day, Judge Collins entered his Order denying Richie's first Motion for Summary Judgment. Plaintiffs filed Notice of Appeal to this Court from Judge Shirley's Order on 9 February 2022.

During the pendency of this appeal, Plaintiffs appealed the Bankruptcy Court's Order in the Adversary Proceeding to the United States District Court for the Eastern District of North Carolina. On 9 January 2023, the District Court vacated the Bankruptcy Court's Order and remanded the case for a new trial.[3] *See First Recovery, LLC v. Sanders*, No. 5:21-CV-530-FL (E.D.N.C. Jan. 9, 2023).

Analysis

Judge Shirley's Order granted Richie's Motion for Summary Judgment which alleged Plaintiffs were collaterally estopped from re-litigating issues of fraud and misrepresentation by the Bankruptcy Court's Order. On appeal to this Court, Plaintiffs contend the trial court erred in granting Summary Judgment because the Bankruptcy

3. Plaintiffs have filed a Motion to Amend the Record to include the District Court's Order and Judgment as part of the Record. Richie did not file any response to this Motion. Both parties have included portions of the Adversary Proceeding filings in the Record and relied on those filings in their arguments to this Court. As such, we allow the Motion to Amend the Record.

Court's Order should not be deemed to collaterally estop their claims in this action.

"The companion doctrines of *res judicata* and collateral estoppel have been developed by the courts of our legal system during their march down the corridors of time to serve the present-day dual purpose of protecting litigants from the burden of relitigating previously decided matters and of promoting judicial economy by preventing needless litigation." *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 427, 349 S.E.2d 552, 556 (1986). In particular, collateral estoppel " 'is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally.' " *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (quoting *Comm'r v. Sunnen*, 333 U.S. 591, 599, (1948)). " ' [W]hen a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed.' " *Id.* at 355, 200 S.E.2d at 804 (quoting *Masters v. Dunstan*, 256 N.C. 520, 523-24, 124 S.E.2d 574, 576 (1962)); *see also State v. Summers*, 351 N.C. 620, 622, 528 S.E.2d 17, 20 (2000) (citing this principle specific to collateral estoppel). "[U]nder the doctrine of collateral estoppel, when an issue has been fully litigated and decided, it cannot be contested again between the same parties, even if the first adjudication is conducted in federal court and the second in state court." *McCallum v. N.C. Co-op. Extension Serv.*, 142 N.C. App. 48, 52, 542 S.E.2d 227, 231 (2001) (citing *King*, 284 N.C. at 359, 200 S.E.2d at 807)).

However, the District Court's Order and Judgment vacating the Bankruptcy Court's Order and remanding for a new trial alters the posture of this case. "A vacated order is null and void, and has no legal force or effect on the parties or the matter in question." *Brown v. Brown*, 181 N.C. App. 333, 336, 638 S.E.2d 622, 624 (2007). Federal case law agrees: "A vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case." *No E.-W. Highway Comm., Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985). Put another way, the Bankruptcy Court's Order no longer stands unreversed. *See King*, 284 N.C. at 355, 200 S.E.2d at 804.

Thus, in this case, the Bankruptcy Court's Order no longer retains any preclusive effect it may have had on the issues in this case between Plaintiffs and Richie. Therefore, collateral estoppel arising from the vacated Bankruptcy Court Order does not bar Plaintiffs' claims against Richie. Consequently, Richie is not entitled to Summary Judgment on this basis.

Conclusion

Accordingly, we vacate the trial court's 1 February 2022 Order Granting Summary Judgment and remand this matter for further proceedings.[4]

VACATED AND REMANDED.

Judges ZACHARY and GRIFFIN concur.

GLORIA GILLIAM AND REX MAURICE CONNELLY, PARENTS OF MAURICE CONNELLY, DECEASED EMPLOYEE, PLAINTIFFS
v.
FOOTHILLS TEMPORARY EMPLOYMENT, EMPLOYER, SYNERGY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA22-560

Filed 21 February 2023

1. Appeal and Error—preservation of issues—workers' compensation case—failure to state issue with particularity

In a workers' compensation case, defendants failed to preserve an evidentiary issue where they made only a generalized assignment of error when they appealed the Deputy Commissioner's opinion and award to the Full Commission and where there was no indication in the record that the evidentiary issue was raised before the Full Commission at all.

2. Workers' Compensation—calculation of average weekly wage—fifth method—date when decedent would have ended employment

In a workers' compensation case in which decedent died while working a summer job at a bakery, the Industrial Commission did not err by applying the fifth method of calculating average weekly wage (N.C.G.S. § 97-2(5)), rather than the third method, where the Commission's findings supported its conclusion that the third method would be unfair to defendants because decedent was working for the summer until his next school semester began in August,

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4. The subsequent Order denying Summary Judgment entered by Judge Collins is not before us. As such, we express no opinion as to whether that Order was properly entered or decided.

such that his earnings from May to August would have constituted his total earnings for that year. However, the Commission erred in its calculation of decedent's average weekly wage by using his start date until his date of death (in July), rather than his start date until the date he would have ended his employment had he not died (in August).

Appeal by Defendants and cross appeal by Plaintiffs from Opinion and Award entered 19 April 2022 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 January 2023.

Sellers, Ayers, Dortch & Lyons, PA, by Christian R. Ayers, John F. Ayers, III, and I. Matthew Hobbs, for Plaintiffs-Appellees.

Goldberg Segalla LLP, by Gregory S. Horner and Allegra A. Sinclair, for Defendants-Appellants.

COLLINS, Judge.

Defendants Foothills Temporary Employment and Synergy Insurance Company appeal from an Opinion and Award entered by the North Carolina Industrial Commission awarding Plaintiffs Gloria Gilliam and Rex Maurice Connelly, parents of Decedent Maurice Connelly, death benefits at a rate of $64.37 per week for 500 weeks. Defendants contend that the Commission erroneously admitted expert testimony under Rule 702 of the North Carolina Rules of Evidence, and that, absent such testimony, the Commission's findings of facts and conclusions of law are unsupported. Plaintiffs cross appeal, contending that the Commission erroneously calculated Decedent's average weekly wage under N.C. Gen. Stat. § 97-2(5). Defendants failed to preserve their argument regarding the admission of expert testimony under Rule 702. Although the Commission did not err by using the fifth method of calculating average weekly wage under N.C. Gen. Stat. § 97-2(5), the Commission erred in its calculation of Decedent's average weekly wage. We dismiss Defendant's appeal, and we vacate and remand the Opinion and Award with instructions.

I. Procedural History and Factual Background

Decedent was an employee of Foothills Temporary Employment, a temporary employment agency that places individuals with various employers. On 15 July 2018, Decedent was assigned to work at Bimbo Bakeries, a large-scale bread-making facility, in a "general utility"

position for $11.50 per hour. Bimbo Bakeries had been training Decedent in multiple areas, but on 29 July 2018 he was working on the lid line. The lid line is approximately 4 feet wide by 60 feet long and runs along a conveyor belt. Lid line workers "are generally responsible for observing that the lids are being produced efficiently, for ensuring that the type of lid being produced is consistent with the product currently being baked, and for stacking the lids to the side of the conveyor belt in racks as appropriate during changeover periods."

On 29 July 2018, Decedent's shift began "around 4:00 or 5:00 p.m." On that day, Decedent was working on the lid line with Larry Brooks, a Bimbo Bakeries employee, and "monitoring the lids." Decedent gave Brooks a 20-minute break in the break room while he continued to work on the lid line. Leon Weaver, an oven operator for Bimbo Bakeries, spoke with Decedent a few minutes prior to his collapse: "I looked at him and I asked him, I was like, 'Are you – are you okay? You good? You need water or anything?' He said he was fine and then I just walked back down to the oven." When Brooks came back from his break, he found Decedent lying face down on the lid line platform.

Burke County EMS arrived at the scene where Decedent was "unresponsive to all stimuli," his "pupils were fixed and dilated," and he was "placed on the cardiac monitor via defibrillation pads . . . [and] found to be in Vfib." Lieutenant Nicole Carswell, a paramedic with Burke County, noted that "we defibrillated quite a few times and there was no significant change in that until we were arriving at the hospital. He stayed in defib the entire time." Decedent was pronounced dead at the hospital, and an autopsy revealed that

> [t]he cause of death is probable dysrhythmia due to cardiomegaly. Major findings at autopsy were an enlarged heart with increased concentric left ventricle thickness. An enlarged heart impairs proper coordinated electrical conduction and predisposes to a fatal arrythmia. In addition to the increased muscle mass, there was an increased fibrosis seen microscopically.

Plaintiffs filed a workers' compensation claim, alleging that Decedent "collapsed and died while working in high heat inside bakery." Defendants denied Plaintiffs' workers' compensation claim on the basis that Decedent "died from natural causes as ruled by OSHA and Medical Examiner." After a hearing, Deputy Commissioner Tiffany M. Smith entered an Opinion and Award, concluding that Decedent's death was compensable and ordering Defendants to pay death benefits calculated pursuant to the third statutory method of calculating average weekly

wage under N.C. Gen. Stat. § 97-2(5). Defendants appealed the Opinion and Award, and the Full Commission affirmed the compensability of Decedent's death but recalculated the average weekly wage pursuant to the fifth statutory method. Defendants appealed the Commission's Opinion and Award, and Plaintiffs cross-appealed.

II. Discussion

A. Expert Witness Testimony

[1] Defendants contend that the Commission erred under Rule of Evidence 702 by admitting Dr. Owens' testimony and thus the Commission's findings of fact and conclusions of law concerning compensability are unsupported. Plaintiffs contend this issue is not preserved for our review.

Pursuant to North Carolina Industrial Commission Rule 701, an application for review of a Deputy Commissioner's opinion and award must be made within 15 days from the date notice of the opinion and award was given. Workers' Comp. R. N.C. Indus. Comm'n 701(a), 2021 Ann. R. N.C. 635-36.[1] The Commission must acknowledge the request for review by letter and within 30 days, must prepare and provide the parties involved with the official transcript and exhibits, if any, along with a Form 44 Application for Review. *Id.* Rule 701(c).

> The appellant shall submit a Form 44 Application for Review stating with particularity all assignments of error and grounds for review, including, where applicable, the pages in the transcript or the record on which the alleged errors shall be recorded. Grounds for review and assignments of error not set forth in the Form 44 Application for Review are deemed abandoned, and argument thereon shall not be heard before the Full Commission.

Id. Rule 701(d).

"[T]he portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission." *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 744, 619 S.E.2d 907, 910 (2005). The penalty for non-compliance with the particularity requirement on appeal to the Full Commission is waiver of the grounds. *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 249, 652 S.E.2d 713,

1. The Rules of the North Carolina Industrial Commission are codified as 11 N.C. Admin. Code 23A.0701 (2021).

715 (2007) (citations omitted). Grounds waived on appeal to the Full Commission are not preserved for this Court's review. *See Bentley v. Jonathan Piner Constr.*, 254 N.C. App. 362, 368, 802 S.E.2d 161, 165 (2017).

Defendants argue that the following assignment of error[2] in its Form 44 was sufficient to preserve its argument that the Commission erred under Rule 702 by admitting Dr. Owens' testimony: "Defendants allege error in Findings of Fact 1-2, 7-9, 21, 23-27, 34-49 as these findings are either unsupported by competent evidence, conflict with the evidence of record and/or are against the weight of the evidence taken as a whole."

However, that assignment of error is only a generalized assignment of error regarding the Commission's findings of facts that fails to state with particularity as grounds for review the admissibility of Dr. Owens' testimony under Rule of Evidence 702. *See Reed v. Carolina Holdings*, 251 N.C. App. 782, 787-88, 796 S.E.2d 102, 106 (2017) (holding that Defendants failed to preserve an issue where there was "no indication in the record that [the] issue was raised at all before the Commission prior to the Opinion and Award" and that "Defendants pleaded only a generalized assignment of error . . . ."). Furthermore, the record on appeal before this Court does not contain Defendants' brief or other document filed with the Full Commission stating with particularity as grounds for review the admissibility of Dr. Owens' testimony under Rule 702. *Cf. Cooper v. BHT Enters.*, 195 N.C. App. 363, 369, 672 S.E.2d 748, 753-54 (2009) ("Since both this Court and the plain language of the Industrial Commission's rules have recognized the Commission's discretion to waive the filing requirement of an appellant's Form 44 where the appealing party has stated its grounds for appeal with particularity in a brief or other document filed with the Full Commission, we overrule these assignments of error."). *See also Reed*, 251 N.C. App. at 789-90, 796 S.E.2d at 107-08 ("Although Defendants contend in response to the Motion to Dismiss that they stated their challenge to the Commission's authority to award attorney's fees in their brief to the Commission on appeal from the Deputy Commissioner's decision, they did not include the referenced brief in the record."). Finally, the Commission did not

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2. Although our Rules of Appellate Procedure no longer limit the scope of appellate review to those issues presented by assignments of error set out in the record on appeal, North Carolina Industrial Commission Rule 701(d) requires a party appealing a Deputy Commissioner's opinion and award to the Full Commission "to submit a Form 44 Application for Review stating with particularity all assignments of error and grounds for review . . . ." Workers' Comp. R. N.C. Indus. Comm'n 701(d).

explicitly address in its Opinion and Award the admission of Dr. Owens' testimony under Rule 702; thus, it is not apparent that the Commission considered that ground for review. *See Adcox v. Clarkson Bros. Constr. Co.*, 241 N.C. App. 178, 186, 773 S.E.2d 511, 517 (2015). Accordingly, there is no indication in the record that the admission of Dr. Owens' testimony under Rule 702 was raised before the Commission prior to the filing of the Opinion and Award from which this appeal arises. Accordingly, that ground was abandoned before the Commission and Defendants have failed to preserve it for our review.

B. Average Weekly Wage

[2] Plaintiffs contend that the Commission erred by concluding that the fifth method of calculating average weekly wage under N.C. Gen. Stat. § 97-2(5) should be applied instead of the third method. Plaintiffs further contend that even if the fifth method is used, the Commission erroneously calculated Decedent's average weekly wage by using the earnings he accrued from 17 May 2018 to his death on 29 July 2018 rather than the earnings he would have accrued from 17 May 2018 to when he would have ceased working for Defendant-Employer in August 2018.

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted). "The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, even though there is evidence that would support findings to the contrary." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (brackets, quotation marks, and citation omitted). The Commission's conclusions of law are reviewed de novo. *Pickett v. Advance Auto Parts*, 245 N.C. App. 246, 249, 782 S.E.2d 66, 69 (2016).

1. Application of the Fifth Method

Plaintiffs contend that the Commission's decision to apply the fifth method of calculating average weekly wage was erroneous.

Whether the Commission selected the correct method of calculating average weekly wage under N.C. Gen. Stat. § 97-2(5) is a question of law that we review de novo. *Nay v. Cornerstone Staffing Sols.*, 380 N.C. 66, 85, 867 S.E.2d 646, 659 (2022). Whether a particular method of calculating average weekly wage produces "fair and just" results is a question of fact subject to the "any competent evidence" standard. *Id.*

The calculation of average weekly wage is governed by N.C. Gen. Stat. § 97-2(5). "Subsection 97-2(5) sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed and establishes an order of preference for the calculation method to be used . . . ." *Id.* at 77, 867 S.E.2d at 654. (citation and quotation marks omitted).

The third method of calculating average weekly wage states: "Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained." N.C. Gen. Stat. § 97-2(5) (2021). Results fair and just, within the meaning of N.C. Gen. Stat. § 97-2(5), "consist of such average weekly wages as will most nearly approximate the amount which the injured employee would be earning were it not for the injury, in the employment in which he was working at the time of his injury." *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 796 (1956) (emphasis and quotation marks omitted).

The fifth method of calculating average weekly wage states: "But where for exceptional reasons the foregoing [methods of calculating average weekly wages] would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." N.C. Gen. Stat. § 97-2(5). The fifth method may not be used unless there has been a finding that unjust results would occur by using one of the first four methods. *McAninch v. Buncombe Cnty. Sch.*, 347 N.C. 126, 130, 489 S.E.2d 375, 378 (1997).

Here, the Commission found, in relevant part, as follows:

> 6. Although Decedent's employment with Defendant-Employer was at-will and had no specified end date, the preponderance of the evidence demonstrates that Decedent would have ended his employment with Defendant-Employer and returned to school in August 2018. The medical record from the 11 July 2018 "Well Male Check" reflects that Decedent was "currently in grad school for sports communication at Mississippi college." Furthermore, an 18 July 2018 Facebook post authored by Decedent expressed his plan to return to school: "I'm so glad school starts in August so I don't have much longer in the bakery lol." Decedent's sister testified that Decedent

was "in school" at the time of his death. Moreover, ceasing his employment to return to school in August 2018 would have followed the pattern of Decedent's work history in recent years. The Work Experience portion of Decedent's 14 May 2018 employment application with Defendant-Employer reflects that he worked for two different employers during the previous two summers before departing each August. The document reflects that Decedent worked from 8 June 2017 until 7 August 2017 and from 31 May 2016 until 1 August 2016, and on this form he indicated that he discontinued his work in those positions due to "school."

7. According to the Form 22 *Statement of Days Worked and Earnings of Injured Employee* stipulated into evidence, Decedent worked for Defendant-Employer for 64 days over a 73-day period starting 17 May 2018 and ending with his death on 29 July 2018. Defendant-Employer's payroll records reflect that Plaintiff earned $5,021.13 during this period.

. . . .

33. Based upon the preponderance of the evidence in view of the entire record, exceptional reasons, including the limited duration of Decedent's work for Defendant-Employer and the fact that Decedent would have terminated the employment within a few weeks but for his death, the first four methods of calculating average weekly wage under N.C. Gen. Stat. § 97-2(5) are inappropriate. Given the nature of Decedent's employment with Defendant-Employer, the Full Commission finds that dividing Decedent's total earnings by 52 yields an average weekly wage which most nearly approximates what Decedent would be earning were it not for the injury.

Decedent's medical records, Facebook post, employment application, and Form 22 are competent evidence to support the Commission's findings of fact, including "that Decedent would have ended his employment with Defendant-Employer and returned to school in August 2018" and that "Decedent would have terminated the employment within a few weeks but for his death . . . ." Because Decedent began working for Defendant-Employer on 17 May 2018 and would have ceased working for Defendant-Employer in August 2018, within a few weeks of his death, Decedent's earnings from May to August would have constituted

his total earnings in 2018. If Decedent's total earnings are divided by the number of weeks and parts thereof that he would have worked, this would yield an average weekly wage reflecting that Decedent would have worked for the entire year rather than just three months.

Accordingly, the Commission's findings of fact support its conclusion of law that applying "a third method [of] calculation would be unfair to Defendants in this case in that it would overestimate the wages Decedent would have earned but for the compensable accident. The third method is therefore inappropriate in this case as it would not produce results 'fair and just to both parties.' " *See Joyner v. A. J. Carey Oil Co.*, 266 N.C. 519, 521-22, 146 S.E.2d 447, 448-49 (1966) (holding that dividing plaintiff's earnings by the number of weeks in his brief period of employment during peak season would not be fair and just where plaintiff's employment was "inherently part-time and intermittent" and did not "provide work in each of the 52 weeks of the year; some weeks the job is non-existent").

Furthermore, the Commission's findings of fact support its conclusion that the fifth method should be used:[3]

> Given the highly unusual situation presented by the facts of this case, "exceptional reasons" exist and "such other method of computing average weekly wages" "as will most nearly approximate the amount" Decedent "would be earning were it not for the injury" must be used. N.C. Gen. Stat. § 97-2(5). The fifth method of calculation under N.C. Gen. Stat. § 97-2(5) is therefore appropriate. *See Pope v. Johns Manville*, 207 N.C. App. 157, 700 S.E.2d 22 (2010).

2. Calculating Average Weekly Wage under the Fifth Method

Plaintiffs further contend that, even if the fifth method is used, the Commission erroneously calculated Decedent's average weekly wage by using his date of death to calculate his total earnings when there was no competent evidence that Decedent would have ceased working for Defendant-Employer on that date.

Findings of fact 6, 7, and 33, as recited above, including that "Decedent would have ended his employment with Defendant-Employer and returned to school in August 2018[,]" that "Decedent would have

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3. The Commission's conclusion of law 4 also details why the first, second, and fourth methods of calculating Decedent's average weekly wage should not be used. Plaintiffs do not argue that this portion of the Commission's conclusion was erroneous.

terminated the employment within a few weeks but for his death," and that "dividing Decedent's total earnings by 52 yields an average weekly wage which most nearly approximates what Decedent would be earning were it not for [his death]" are supported by competent evidence. However, these findings do not support the Commission's conclusion of law calculating Decedent's average weekly wage as follows:

> 5. . . . In the case at bar, the evidence shows that Decedent earned $5,021.13 during his summer employment with Defendant-Employer. This figure divided by 52 yields an average weekly wage of $96.56. This average weekly wage most nearly approximates the amount Decedent would be earning were it not for the injury. This average weekly wage yields a corresponding weekly workers' compensation rate of $64.37. N.C. Gen. Stat. §§ 97-2(5); 97-38 (2021).

Because there is no evidence that Decedent would have ceased working for Defendant-Employer on 29 July 2018 but for his death, using the $5,021.13 Decedent earned from 17 May 2018 to 29 July 2018 as his "total earnings" to calculate his average weekly wage underestimates the wages Decedent would have earned but for the compensable accident. Instead, using the amount Decedent would have earned from 17 May 2018 to the date he would have ceased working for Defendant-Employer in August 2018 as his "total earnings," and dividing that figure by 52, yields an average weekly wage that most nearly approximates the amount Decedent would be earning were it not for his death.

Accordingly, the Commission erroneously calculated Decedent's average weekly wage under the fifth method by using the "total earnings" he accrued from 17 May 2018 to 29 July 2018 rather than the "total earnings" he would have accrued had he worked from 17 May 2018 to August 2018, within a few weeks of his death.

III. Conclusion

Defendants did not properly preserve their argument that Dr. Owens' testimony was inadmissible, and we therefore dismiss Defendants' appeal. The Commission did not err by concluding that the third method of calculating Decedent's average weekly wage under N.C. Gen. Stat. § 97-2(5) would not produce results "fair and just to both parties" in that it would overestimate the wages Decedent would have earned but for the compensable accident. As such, the Commission did not err by concluding that the fifth method of calculation under N.C. Gen. Stat. § 97-2(5) is appropriate.

However, the Commission erred under the fifth method in calculating Decedent's average weekly wage by using his "total earnings" from 17 May 2018 to 29 July 2018 instead of the "total earnings" he would have accrued had he worked until August 2018. Accordingly, we vacate the Commission's Opinion and Award and remand with the following instructions: find, based on competent evidence, the date Decedent would have ended his employment with Defendant-Employer, had he not died; determine Decedent's "total earnings" based on his start date of 17 May 2018 and the date Decedent would have ended his employment with Defendant-Employer; calculate Decedent's average weekly wage by dividing Decedent's "total earnings" by 52; enter a new opinion and award consistent with these findings and conclusions.

DISMISSED IN PART; VACATED AND REMANDED WITH INSTRUCTIONS IN PART.

Chief Judge STROUD and Judge ZACHARY concur.

JESSE GUERRA, PLAINTIFF
v.
HARBOR FREIGHT TOOLS, DEFENDANT

No. COA22-351

Filed 21 February 2023

1. Appeal and Error—preservation of issues—constitutional right to jury trial—waiver

In an action for damages against a tool retailer (defendant) for injuries plaintiff sustained while visiting one of defendant's stores, plaintiff failed to preserve for appellate review his argument that the trial court erred in proceeding with a bench trial after he had requested a jury trial. When the case was called for trial, plaintiff appeared pro se, participated in the trial, and neither sought a continuance nor raised an objection to having a bench trial; therefore, plaintiff waived any resulting constitutional error.

2. Appeal and Error—preservation of issues—exclusion of evidence—offer of proof at trial

In an action for damages against a tool retailer (defendant) for injuries plaintiff sustained while visiting one of defendant's stores, where plaintiff—appearing pro se at trial—sought to introduce

evidence of email communications from defendant's claim specialist regarding plaintiff's claim against defendant, plaintiff failed to preserve for appellate review his argument that the trial court erred in excluding the email communications. Plaintiff did not make a specific offer of proof as to what the emails would have shown, and the significance of those emails was not obvious from the record.

3. Appeal and Error—preservation of issues—motion for discovery—no ruling obtained

In an action for damages against a tool retailer (defendant) for injuries plaintiff sustained while visiting one of defendant's stores, plaintiff—acting pro se—failed to preserve for appellate review any arguments regarding his pretrial motion for discovery where, although he brought the motion to the trial court's attention at trial, he did not obtain a ruling from the court on that motion as required under Appellate Rule 10(a)(1).

Appeal by Plaintiff from judgment entered 23 November 2021 by Judge Larry Archie in Guilford County District Court. Heard in the Court of Appeals 2 November 2022.

Jesse Guerra, Plaintiff-Appellant pro se.

Lincoln Derr PLLC, by R. Jeremy Sugg, for the Defendant-Appellee.

WOOD, Judge.

Jesse Guerra ("Plaintiff") appeals from the 23 November 2021 judgment of the district court dismissing his appeal and reinstating the judgment of the magistrate. Because Plaintiff has failed to properly preserve the issues raised in his brief for appellate review in violation of our North Carolina Rules of Appellate Procedure, we dismiss the appeal.

I. Factual and Procedural Background

On 28 September 2019, Plaintiff visited one of Harbor Freight Tools' ("Defendant") establishments with the intent of buying a crowbar for various household repairs. When Plaintiff reached for the crowbar located on a shelf system, the overhead metal span of the shelving system fell on top of Plaintiff. Plaintiff suffered injuries to his face and left hand. On 22 September 2021, Plaintiff filed a complaint for money owed against Defendant in small claims court. Plaintiff's complaint alleged that he was owed $10,000 as a result of "[d]amage to the Plaintiff's [p]roperty or caused injury to the Plaintiff."

Pursuant to a judgment entered on 14 October 2021, a magistrate determined that Plaintiff had "failed to prove the case by the greater weight of the evidence" and ordered that the "action be dismissed with prejudice." On 20 October 2021, Plaintiff filed a notice of appeal to district court and requested trial before a jury. On 5 November 2021, the trial court coordinator filed a calendar request for a bench trial of Plaintiff's appeal and issued a notice of hearing for 23 November 2021. Defendant filed an answer on 19 November 2021 denying all allegations in Plaintiff's complaint and asserted contributory negligence as an affirmative defense. On the day of trial, Plaintiff, acting *pro se*, served Defendant with a "Motion for Discovery" via hand delivery. Plaintiff's motion listed nine categories of items, the "release" of which Plaintiff requested including Defendant's insurance agreements, photos taken by Defendant's employees of Plaintiff's injuries, and any video recordings from Defendant's store's cameras capturing the incident in question. When the case was called for trial, Plaintiff appeared *pro se*. He did not ask for a continuance, nor raise an objection to proceeding with a bench trial instead of his previously requested jury trial.

During Plaintiff's case-in-chief, he referenced his motion for discovery. However, Plaintiff did not request a ruling on the motion, and the trial court did not render one. Plaintiff further stated to the trial court that he wanted "to get discovery" of a surveillance video of the incident in question.

In response, the trial court informed Plaintiff that if the discovery he sought had not already been produced, it was not going to be produced during trial. Plaintiff also attempted to introduce email "communication[s] from [Defendant's] claim specialist, addressing that there was a claim and then that [Defendant] denied it." Defense counsel objected to these email communications based on hearsay and as a statement made to compromise a claim pursuant to Rule 408 of the North Carolina Rules of Evidence. The trial court sustained Defendant's objection. In response to the trial court's ruling, Plaintiff explained to the court, "this was the denial of the claim, so I'm -- I was hoping that this would not fall under some sort of [exception]." The trial court then looked at the physical copies of the communications from Plaintiff to determine whether the documents were in fact admissible, but did not change or modify its ruling on Defendant's objection.

At the close of the evidence, the trial court determined Plaintiff had not proven his case by the greater weight of the evidence. Thus, the trial court dismissed Plaintiff's appeal and reinstated the judgment of the

magistrate. Plaintiff filed a written notice of appeal on 20 December 2021 but did not specify in his notice the court to which he was appealing.

II. Appellate Jurisdiction

Defendant filed a motion to dismiss Plaintiff's appeal due to several violations of the North Carolina Rules of Appellate Procedure. Defendant argues Plaintiff: (1) failed to designate in his written notice of appeal the court to which appeal was taken, a violation of Rule 3(d); (2) violated Rule 7 (b)(3) and (4) by failing to complete or serve an Appellate Division Transcript Documentation form upon Defendant; (3) violated Rule 9(a)(1), by failing to include in the Record on Appeal a copy of any Appellate Division Transcript Documentation form; and, (4) failed to identify an applicable standard of review for any of his arguments, thereby violating Rule 28(b)(6).

Even if we were able to get beyond the jurisdictional defect under Rule 3(d) and the other appellate rules violations in Plaintiff's appeal, we are, nonetheless, unable to reach the merits of Plaintiff's arguments as he failed to properly preserve for appellate review any of the issues raised in his brief. Thus, we dismiss the appeal. *See Lake Colony Constr., Inc. v. Boyd*, 212 N.C. App. 300, 312, 711 S.E.2d 742, 750 (2011); *Lake Toxaway Cmty. Ass'n v. RYF Enters., LLC*, 226 N.C. App. 483, 493, 742 S.E.2d 555, 562 (2013).

III. Analysis

"[R]ules of procedure are necessary in order to enable the courts properly to discharge their duty of resolving disputes." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 193, 657 S.E.2d 361, 362 (2008) (citation and internal quotation marks omitted). "It necessarily follows that failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice." *Id.* Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states, "in order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). The preservation of an issue for appellate review also requires "the complaining party to obtain a ruling upon the party's request, objection, or motion." *Id.*

"The requirement expressed in Rule 10[(a)] that litigants raise an issue in the trial court before presenting it on appeal goes 'to the heart

of the common law tradition and [our] adversary system.' " *Don't Do It Empire, LLC v. Tenntex*, 246 N.C. App. 46, 54, 782 S.E.2d 903, 908 (2016) (citation omitted). Rule 10(a)(1) "is not simply a technical rule of procedure but shelters the trial judge from an undue if not impossible burden." *Id.* (cleaned up). Thus, due to the "practical considerations promoted by the waiver rule, a party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood Dev. & Mgmt. Co., LLC*, 362 N.C. at 195-96, 657 S.E.2d at 364 (citations omitted).

A. Plaintiff's demand for a jury trial.

[1] First, Plaintiff contends the trial court "erred in proceeding with a bench trial" as his appeal to the district court included a written demand for a jury trial. We disagree.

While "[t]he right to a jury trial is a substantial right of great significance[,]" this right may be waived by a party. *Mathias v. Brumsey*, 27 N.C. App. 558, 560, 219 S.E.2d 646, 647 (1975). Although Plaintiff's appeal explicitly requested a jury trial, the record reveals that Plaintiff appeared at the trial, participated in the bench trial, and did not raise this objection before the trial court.

We agree with Defendant that "[w]hen the appellant fails to raise an argument at the trial court level, the appellant 'may not . . . await the outcome of the [trial court's] decision, and, if it is unfavorable, then attack it on the ground of asserted procedural defects not called to the [trial court's] attention.' " *Global Textile All., Inc. v. TDI Worldwide, LLC*, 375 N.C. 72, 79, 847 S.E.2d 30, 35 (2020) (citation omitted). As it is "well settled that an error, even one of constitutional magnitude, that [a party] does not bring to the trial court's attention is waived and will not be considered on appeal[,]" we dismiss Plaintiff's argument because it has not been properly preserved for review. *State v. James*, 226 N.C. App. 120, 127, 738 S.E.2d 420, 426 (2013) (citation omitted).

B. Trial court's ruling on evidence as settlement communications.

[2] Next, Plaintiff argues that the trial court "erred in its application of privileged settlement communication and in its sustaining defense counsel's objection to [Plaintiff's] introduction of email communication." In response, Defendant contends that Plaintiff also has not preserved this particular issue for appeal as "he made no offer of proof as to what the . . . [c]ommunication would have shown, or otherwise shown that a different result would have been reached" if the communication was admitted. We agree with Defendant.

"[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007) (citation omitted). If a party fails to provide an adequate offer of proof, the appellate court "can only speculate" as to what the excluded evidence would have shown. *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861-62 (2010) (citation omitted).

Here, the settlement communication does not appear in the record before us, and Plaintiff does not attempt to explain the significance of the excluded evidence by any document within the record. According to the transcript, the communication in question was from Defendant's claims specialist, who allegedly addressed that "there was a claim and then that they denied it." Because Plaintiff made no offer of proof as to what the communication would have shown, we can only speculate as to the significance of the evidence. Therefore, we must conclude Plaintiff has failed to preserve this issue for appellate review. This argument is dismissed.

C. Plaintiff's request for discovery.

[3] Finally, Plaintiff challenges the trial court's "ruling on discovery material from [Defendant]" and argues that he "motioned the court to step in and the court permitted other parties to be decision makers." In turn, Defendant argues "there was no ruling on [Plaintiff's] [m]otion for [d]iscovery," such that "there is nothing for this Court to review."

Although Plaintiff filed a motion for discovery before the court hearing and brought this motion to the trial court's attention during the trial, the transcript shows there was neither a hearing on this motion nor a ruling on it. Rule 10 of the North Carolina Rules of Appellate Procedure requires an appellant to obtain a ruling upon a motion for an issue to be preserved for appeal. N.C. R. App. P. 10(a)(1). Because Plaintiff "did not request a ruling on this issue at the hearing, this issue was not properly preserved for appellate review." *Smith v. Axelbank*, 222 N.C. App. 555, 561, 730 S.E.2d 840, 844 (2012). Thus, Plaintiff's argument is dismissed.

IV. Conclusion

Although we recognize the difficult challenges a *pro se* litigant and appellant encounters when navigating the rules and procedures of our legal system, our Rules of Appellate Procedure equally "apply to everyone—whether acting *pro se* or being represented by all of the five largest

firms in the state." *Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999). Because of Plaintiff's failure to properly preserve and present any of his arguments for appellate review, we dismiss his appeal.

DISMISSED.

Judges TYSON and MURPHY concur.

HEATHER O'NEAL AND FLETCHER O'NEAL, PLAINTIFFS
v.
ARLEEN BURLEY, AND DEVIL SHOAL OYSTER & CLAM CO., LLP, DEFENDANTS

No. COA22-624

Filed 21 February 2023

1. Partnerships—judicial dissolution—partnership classification—limited versus general

In the judicial dissolution of a shellfish business, the trial court erred in classifying the company as a limited partnership rather than as a general partnership governed by the Uniform Partnership Act. Although the parties formed the company under a "Limited Partnership Agreement," the agreement was evidence of the parties' intent to form a general partnership where it identified the parties as general partners but did not name any limited partners, and where there was no evidence that a certificate of limited partnership was filed with the Secretary of State on the company's behalf.

2. Partnerships—judicial dissolution—date of dissolution—unsupported by findings of fact

In a legal dispute between two partners of a shellfish business (a general partnership), the trial court's order judicially dissolving the business was reversed and remanded where the court erroneously identified the date of dissolution. The court's conclusion of law—that, as of 1 January 2018, it was not reasonably practicable for the partners to carry on the partnership's business—was inconsistent with its findings of fact stating that the partners had acted on the partnership's behalf when applying for disaster relief and receiving proceeds from the partnership's insurance policy for losses that the partnership had incurred after January 2018 (specifically, a hurricane had destroyed the partnership's shellfish crops in 2019).

3. Partnerships—judicial dissolution—partnership property—classification of insurance proceeds—allocation between partners

In a legal dispute between two partners of a shellfish business (a general partnership) where, after a hurricane destroyed much of the partnership's shellfish crops, disaster relief funds were paid to the partnership from an insurance policy covering its losses, the trial court's order judicially dissolving the business was reversed and remanded where the court improperly allocated seventy-five percent of the insurance proceeds to one partner and twenty-five percent to the other. The disaster relief funds met the statutory definition of "partnership property," and the express terms of the partnership agreement showed that the partners intended to share partnership profits equally.

4. Partnerships—judicial dissolution—valuation, classification, and allocation of assets—partners' contributions

In a legal dispute between two partners of a shellfish business (a general partnership), the trial court's order judicially dissolving the business was reversed and remanded where the court erred in distributing the partnership's property before first determining its assets and liabilities and their respective values. In particular, the trial court made findings of fact about two shellfish bottom leases—one that the partnership had acquired and another that one of the partners had contributed to the partnership—but failed to assign a value to each lease for the purpose of repaying each partner's respective contributions and then failed to allocate the value of the partnership's remaining assets in accordance with the express terms of the partnership agreement, which stated that the partners were to share equally in all partnership profits.

Appeal by defendant from judgment entered 29 April 2022 by Judge Wayland J. Sermons, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 11 January 2023.

Sharp, Graham, Baker & Varnell, LLP, by Casey C. Varnell, for Plaintiffs-Appellees.

Rodman, Holscher, Peck, Edwards & Hill, P.A., by Chad H. Stoop, for Defendant-Appellant Arleen Burley.

CARPENTER, Judge.

Arleen Burley ("Defendant") appeals from the "Amended Judgment" entered by the trial court. In her prior appeal in this matter, Defendant challenged the trial court's original judgment, which judicially dissolved and wound up Devil Shoal Oyster & Clam Co., LLP ("Devil Shoal")[1]; the appeal was dismissed as interlocutory. *O'Neal v. Burley*, 2022-NCCOA-238 (unpublished) ("*O'Neal I*").

In the instant appeal, Defendant raises the same challenges to the trial court's Amended Judgment: that the trial court erred in concluding Devil Shoal is a limited partnership, and in classifying, allocating, and distributing the partnership's assets—including insurance proceeds—and liabilities. After careful review, we agree with Defendant that Devil Shoal is a general partnership and that the trial court erred in its wind up of Devil Shoal. Accordingly, we reverse and remand the Amended Judgment for the trial court to: determine Devil Shoal's date of dissolution; classify and value Devil Shoal's assets and liabilities; satisfy any liabilities, including the partners' contributions; and allocate to the partners any remaining property of Devil Shoal.

I. Factual & Procedural Background

In *O'Neal I*, we summarized the pertinent factual history of the case:

> This case arises from a dispute between two general partners of a partnership over the classification and distribution of partnership assets. On 1 October 2015, Plaintiff Heather O'Neal and Defendant (collectively, the "Partners") executed the "Limited Partnership Agreement" (the "Agreement"), memorializing the terms and conditions of the partnership. The conditions of the partnership included: (1) Defendant would provide the partnership use of a shellfish bottom lease ("Lease 9802") and related water column amendment, granted by the North Carolina Division of Marine Fisheries to Defendant in her individual name; (2) Plaintiff Heather O'Neal would provide the partnership a boat and crew to set up, maintain, and harvest shellfish on Lease 9802; (3) the Partners would share equally the costs of gear and seed; and (4) the Partners would share equally the net profit of the business. The Agreement also provided that the partnership term would "continue until mutually agreed dissolution or transfer."

1. Devil Shoal is not a party to this appeal.

> On 9 January of 2018, Devil Shoal obtained its own 4.84-acre shellfish bottom lease ("Lease 9787") and a corresponding amendment to add the superjacent water column. The Partners agreed through an addendum to the Agreement that Devil Shoal would "fully own and operate" Lease 9787 and its respective water column.
>
> In July of 2018, the Partners had discussions concerning Plaintiff Heather O'Neal buying out Defendant's share of Devil Shoal. After unsuccessful negotiations, Plaintiff Heather O'Neal informed Defendant by email on 1 August 2018 that she would be seeking a separate lease but would continue to utilize Lease 9787 with her own gear and seed until Plaintiff Heather O'Neal obtained a new lease. On 2 August 2018, Defendant responded to Plaintiff Heather O'Neal's email, advising "[a]ny seed or gear purchased by you needs to be placed on your own lease" and "[s]eed and equipment placed on the partnership leases becomes the property of Devil Shoal Oyster & Clam Co."

O'Neal, 2022-NCCOA-238, ¶¶ 2–4.

Between 2015 and 2017, the Partners obtained three loans for Devil Shoal: (1) a Small Business Administration ("SBA") loan for $8,900.00 to purchase a refrigerated truck; (2) "Golden Leaf Loan 1" for $15,000.00, which was used to purchase gear; and (3) "Golden Leaf Loan 2" for $15,000.00, which was used to establish Lease 9787 and purchase its equipment.

> On 17 December 2019, Plaintiff Heather O'Neal and her spouse, Fletcher O'Neal (collectively, the "Plaintiffs"), commenced the instant action by filing a verified complaint and issuing a summons for Defendant. In their complaint, Plaintiffs sought a judicial decree dissolving the Devil Shoal partnership and a declaratory judgment against Defendant, holding she committed a violation of N.C. Gen. Stat. § 75-1.1 for unfair and deceptive trade practices by "willfully and intentionally misappropriat[ing] insurance proceeds that were paid to the Partnership . . . ." As an alternative cause of action to the Chapter 75 violation, Plaintiffs alleged a cause of action for constructive fraud related to the allocation of insurance proceeds. On 21 January 2020, Defendant filed an answer pro se. On 20 February 2020, Defendant filed, through counsel, an amended answer.

> On 6 April 2021, a bench trial was held before the Honorable Wayland J. Sermons, Jr., judge presiding. Testimony from the parties revealed the following: Plaintiff Fletcher O'Neal performed services for Devil Shoal as the farm manager, in which he purchased seed, performed marketing tasks, sold product, and obtained the necessary permits. He was not paid by Devil Shoal for his services.
>
> No new crops had been planted on behalf of Devil Shoal since 2017. Plaintiffs planted and harvested oyster crops on Lease 9787 in 2018 and 2019, using seed and gear they purchased individually. Defendant began planting clams again at Lease 9802 in June of 2019, which were separate from the partnership. In 2019, Hurricane Dorian destroyed "about half of [the oyster] crop" planted by Plaintiffs and some of the clam crop planted by Defendant. During this period, Devil Shoal's crops on Lease 9802 and Lease 9787 were protected under the Noninsured Crop Disaster Assistance Program ("NAP"). Plaintiffs and Defendant applied for NAP financial assistance under the partnership name because Devil Shoal was the named lessee of the Lease 9787 and "the [insurance] policy was under the partnership [name]." Based on a calculation worksheet prepared by the Farm Service Agency of the United States Department of Agriculture ("USDA"), Devil Shoal was entitled to a NAP payment of $63,328.00, minus a $ 3,157.00 insurance premium. In December of 2019, NAP proceeds totaling $59,596.00 were deposited into the Devil Shoal bank account. Using these funds, Defendant paid off two remaining partnership loans and took $34,059.95 as her share.
>
> In addition to NAP, Defendant and Plaintiffs applied for assistance under the Wildfires and Hurricanes Indemnity Program ("WHIP") for the damaged 2018 and 2019 crops, listing Devil Shoal as the producer. The gross WHIP payments were calculated to be $541.00 for clam crops in 2018, and $22,538.00 for oyster crops in 2019.

O'Neal, 2022-NCCOA-238, ¶¶ 5–8. Using the NAP funds, Defendant paid off the $8,009.12 SBA loan balance and the $7,982.07 Golden Leaf Loan 1 balance. Using a corporation she formed, Defendant assumed the remaining $8,900.12 Golden Leaf Loan 2 balance.

On 6 May 2021, the trial court entered its original judgment, in which it, *inter alia*, judicially dissolved Devil Shoal and wound up its affairs. The trial court ordered the NAP funds be allocated "75% to Plaintiff [Heather] O'Neal and 25% to Defendant Burley." The trial court dismissed Plaintiffs' unfair and deceptive trade practice claim but did not decide their constructive fraud claim. Defendant appealed to this Court, and the matter was heard on 5 April 2022. This Court dismissed the appeal as interlocutory due to the unresolved constructive fraud claim. *O'Neal*, 2022-NCCOA-238, ¶ 15.

On 29 April 2022, the trial court entered the Amended Judgment, in which it, *inter alia*: distributed Lease 9802 to Defendant and Lease 9787 to Plaintiff Heather O'Neal; distributed 75% of NAP funds to Plaintiff Heather O'Neal and 25% of NAP funds to Defendant; distributed the partnership's refrigerated truck to Plaintiff Heather O'Neal; awarded a monetary judgment to Plaintiff Heather O'Neal for $11,572.69; and dismissed Plaintiffs' constructive fraud claim against Defendants. On 20 May 2021, Defendant gave timely written notice of appeal to this Court.

II. Jurisdiction

This Court has jurisdiction to address Defendant's appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Issues

The issues before this Court are whether the trial court erred by: (1) concluding that Devil Shoal is a limited partnership; and (2) classifying, allocating, and distributing Devil Shoal's assets and liabilities in winding up the affairs of the business.

IV. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (citation omitted), *disc. rev. denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). Findings of fact not challenged on appeal "are deemed to be supported by competent evidence and are binding on appeal[.]" *In re K.D.L.*, 207 N.C. App. 453, 456, 700 S.E.2d 766, 769 (2010), *disc. rev. denied*, 365 N.C. 90, 706 S.E.2d 478 (2011). We review the trial court's conclusions of law *de novo*. *Dept. of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, 370 N.C. 101, 106, 804 S.E.2d 486, 492 (2017).

V. Analysis

A. Nature of Partnership

[1] In her first argument, Defendant contends "the trial court erred in concluding that Devil Shoal is a limited partnership." Defendant and Plaintiff Heather O'Neal agree the trial court's determination that Devil Shoal is a limited partnership does not impact the dissolution and winding up of Devil Shoal. After examination of the record, we conclude Devil Shoal is a general partnership, and the North Carolina Uniform Partnership Act (the "Uniform Partnership Act") governs its dissolution and wind up.

Under North Carolina law, a limited partnership is defined as "a partnership formed by two or more persons under the laws of [North Carolina] and having one or more general partners and one or more limited partners[.]" N.C. Gen. Stat. § 59-102(8) (2021). "In order to form a limited partnership, a certificate of limited partnership must be executed and filed in the office of the Secretary of State . . . ." N.C. Gen. Stat. § 59-201(a) (2021). Generally, the "failure to file a certificate of limited partnership is a failure of 'substantial compliance' such that any assertion of limited partnership is negated." *Blow v. Shaughnessy*, 68 N.C. App. 1, 19, 313 S.E.2d 868, 878 (1984), *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 127 (1984). "[W]here a limited partnership is found not to exist, it is the intent of the parties and not the operation of law . . . that determines whether or not a general partnership results." *Id.* at 21, 313 S.E.2d at 879; *see also* N.C. Gen. Stat. § 59-36(a) (2021) (defining a general partnership as "an association of two or more persons to carry on as co-owners a business for profit").

Here, the Agreement was formed by two persons, Defendant and Plaintiff Heather O'Neal, who are identified in the Agreement as general partners. The Agreement did not name any limited partners. *See* N.C. Gen. Stat. § 59-102(8). Additionally, there is no evidence that a certificate of limited partnership was filed with the Secretary of State on behalf of Devil Shoal. *See* N.C. Gen. Stat. § 59-201(a). The Agreement is evidence of the Partners' intent to form a general partnership and share equally in the partnership's profits. *See Blow*, 68 N.C. App. at 21, 313 S.E.2d at 879; *see also* N.C. Gen. Stat. § 59-36(a). Therefore, we conclude Devil Shoal is a general partnership governed by the Uniform Partnership Act. *See* N.C. Gen. Stat. §§ 59-31 *et seq*.

B. Classification, Allocation, and Distribution of Devil Shoal's Assets and Liabilities

In her second argument, Defendant asserts the trial court erred in classifying, allocating, and distributing the assets and liabilities of the partnership, including the proceeds received from the NAP and WHIP disaster financial assistance programs as well as Lease 9787. Specifically, Defendant contends the trial court erred in ordering the NAP and WHIP payouts to be split 75% to Plaintiff Heather O'Neal and 25% to Defendant and in distributing Lease 9787 to Plaintiff Heather O'Neal without first assigning a value to the lease.

1. Date of Dissolution

[2] We first consider the date of dissolution for Devil Shoal. Defendant argues the trial court erred in concluding "that the partnership should be treated as dissolved as of 1 January 2018" because this conclusion of law "is not supported by the facts of this case or the applicable law." We agree.

Initially, we note the Uniform Partnership Act provides gap-filling default rules to "govern[ ] the relations among partners and between partners and the partnership" where an agreement between the partners cannot or does not resolve the issue. 59A Am. Jur. 2d *Partnership* § 93 (2023); *see also* N.C. Gen. Stat. § 59-34(e) (2021) (explaining the Uniform Partnership Act should "not be construed so as to impair the obligations of any contract").

"The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on [of the business] as distinguished from the winding up of the business." N.C. Gen. Stat. § 59-59 (2021). Dissolution is caused:

> (1) Without violation of the agreement between the partners,
>
> a. By the termination of the definite term or particular undertaking specified in the agreement,
>
> b. By the express will of any partner when no definite term or particular undertaking is specified,
>
> c. By the express will of all partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specific term or particular undertaking,

> d. By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;
>
> (2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;
>
> (3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;
>
> (4) By the death of any partner, unless the partnership agreement provides otherwise;
>
> (5) By the bankruptcy of any partner or the partnership;
>
> (6) By decree of court under [N.C. Gen. Stat. §] 59-62.

N.C. Gen. Stat. § 59-61 (2021).

"[D]issolution terminates all authority of any partner to act for the partnership." N.C. Gen. Stat. § 59-63 (2021). On the date of dissolution, the right to an account of a partnership interest accrues, unless there exists an agreement to the contrary. N.C. Gen. Stat. § 59-73 (2021). Nonetheless, the partnership itself is not terminated "until the winding up of partnership affairs is completed." N.C. Gen. Stat. § 59-60 (2021). "Winding up generally involves the settling of accounts among partners and between the partnership and its creditors." *Simmons v. Quick-Stop Food Mart, Inc.*, 307 N.C. 33, 40, 296 S.E.2d 275, 280 (1982).

Here, Defendant maintains "the Partnership was dissolved by the express will of . . . Defendant after the filing of the Complaint but before Defendant was served with the Complaint." As support for this contention, Defendant relies on a "Notice of Dissolution" she prepared pursuant to N.C. Gen. Stat. § 59-59 and sent via certified mail to Plaintiffs' attorney. Because the Agreement expressly required *mutual agreement* for the Partners to dissolve Devil Shoal, we reject Defendant's assertion that her notice was sufficient to dissolve the partnership.

In its Amended Judgment, the trial court did not expressly find Devil Shoal's date of dissolution but nevertheless concluded "that a Decree of Dissolution of the limited partnership should issue as a result of the actions of each partner, making it not reasonably practicable to carry on the business in conformity with the [Agreement], as of January 1, 2018." The trial court then ordered Devil Shoal was "[there]by [j]udicially

dissolved." Yet, the trial court also found and concluded as a matter of law that the Partners applied for, were entitled to, and ultimately received NAP and WHIP payments, including in 2019. The conclusion of law that it was not reasonably practicable for the Partners to carry on the business of Devil Shoal as of 1 January 2018, is wholly inconsistent with the findings that the Partners acted on behalf of Devil Shoal to apply for and receive proceeds from Devil Shoal's insurance policy for losses incurred by the partnership *after* January 2018. Therefore, we conclude that conclusion of law 6 is not supported by the trial court's findings of fact. *See Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176. Accordingly, we reverse and remand the Amended Judgment to the trial court for its determination of Devil Shoal's date of dissolution, not inconsistent with the other findings of fact.

2. Classifying and Valuing Devil Shoal's Assets & Liabilities

[3] In the context of non-jury trials, our Court has stated: "Where findings of fact are challenged on appeal, each contested finding of fact must be separately [challenged], and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding." *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000). Notwithstanding this rule,

> an appeal constitutes an exception to the judgment and presents the question whether the facts found support the judgment. [I]t follows that an exception to a conclusion of law upon which the judgment is predicated presents the question whether the facts found support the conclusion of law.

Halsey v. Choate, 27 N.C. App. 49, 51, 217 S.E.2d 740, 742 (1975), *disc. rev. denied*, 288 N.C. 730, 220 S.E.2d 350 (1975).

In this case, Defendant has not challenged any specific finding of fact; thus, all findings of fact—that the trial court has correctly designated as findings of fact—"are deemed to be supported by competent evidence and are binding on appeal[.]" *In re K.D.L.*, 207 N.C. App. at 456, 700 S.E.2d at 769.

We note finding of fact 25, where the trial court apportioned insurance proceeds to the Partners based on the respective leases they were using, is a conclusion of law, and we review it as such. *See In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018) ("If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion *de novo*."). Finding

of fact 25 states: "[T]he Court finds . . . 75% to Plaintiff O'Neal and 25% to Defendant Burley is a proper division of all net NAP and WHIP payments already received for the 2019 year, given the relative size and scope of each lease contributed to the Partnership by each partner." Conclusion of law 5 reiterates this conclusion.

Partnership property means "[a]ll property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership[.]" N.C. Gen. Stat. § 59-38(a) (2021). "Unless [a] contrary intention appears, property acquired with partnership funds is partnership property." N.C. Gen. Stat. § 59-38(b). Property belonging to one partner, "which is agreed to be used for partnership purposes, may be deemed partnership property." *Jones v. Shoji*, 110 N.C. App. 48, 53–54, 428 S.E.2d 865, 868 (1993), *aff'd*, 334 N.C. 163, 432 S.E.2d 361 (1994).

The assets of a partnership include partnership property and "[t]he contributions of the partners necessary for the payment of all the liabilities" owed by the partnership under N.C. Gen. Stat. § 59-70(2) (2021). N.C. Gen. Stat. § 59-70(1) (2021). On the other hand, "[t]he liabilities of the partnership rank in order of payment" and are to be satisfied in the following order:

> a. Those owing to creditors other than partners.
>
> b. Those owing to partners other than for capital and profits.
>
> c. Those owing to partners in respect of capital.
>
> d. Those owing to partners in respect of profits.

N.C. Gen. Stat. § 59-70(2). "Until the liabilities [and assets] of the partnership have been determined[,] *there can be no distribution to the partners*." *Brewer v. Elks*, 260 N.C. 470, 474, 133 S.E.2d 159, 163 (1963) (citations omitted and emphasis added); *see* N.C. Gen. Stat. 59-70.

In the instant case, the record and transcript reveal the NAP and WHIP funds were paid out to named insured Devil Shoal from an insurance policy, which covered losses incurred by Devil Shoal for shellfish crops cultivated in its leased premises. Hence, the NAP and WHIP funds were property "subsequently acquired" through Devil Shoal's insurance proceeds and are thus "partnership property." *See* N.C. Gen. Stat. § 59-38(a); *see also Jones v. Shoji*, 336 N.C. 581, 585, 444 S.E.2d 203, 205–06 (1994) (concluding the settlement proceeds from a joint venture's vehicular liability insurance policy constituted joint venture property).

The conclusion of law contained in finding of fact 25 relating to a 75/25 allocation of insurance proceeds between the Partners is not supported by the findings or the evidence of record. On the contrary, the express terms of the Agreement show the parties intended to share partnership profits equally. Finally, there is no finding to support the conclusion regarding the sizes and scopes, and thus values, of the leases. Therefore, finding of fact 25, a conclusion of law labeled as a finding of fact, and its counterpart conclusion of law 5, are not supported by the findings. *See Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176.

On remand, the trial court—after determining Devil Shoal's date of dissolution—should classify and assign values to Devil Shoal's assets and liabilities and satisfy any liabilities owed to creditors other than the Partners. *See* N.C. Gen. Stat. § 59-70. Next, the trial court should satisfy all liabilities owed to the Partners other than for capital and profits, including reimbursement to Defendant for assuming Golden Leaf Loan 2. *See id.*

3. Repayment of Partners' Contributions & Allocation of Remaining Capital

[4] Finally, Defendant challenges the trial court's classification and allocation of Lease 9787 and its distribution of the remaining partnership property. Under decretal 2, the trial court found "that each partner shall receive the lease they contributed to the partnership." Accordingly, the trial court concluded "Plaintiff O'Neal shall receive and be the sole holder of Lease No. 9787" and "Defendant Burley shall receive and be the sole holder of Lease No. 9807 [sic]." Defendant contends "the trial court failed to assign a value to Lease 9787 and allocate one-half that value to Defendant since Plaintiff was awarded the lease." As discussed above, the trial court erred in distributing Devil Shoal's property before first determining its assets and liabilities and their respective values. *See Brewer*, 260 N.C. at 474, 133 S.E.2d at 163.

Under N.C. Gen. Stat. § 59-48(1), "*[e]ach partner shall be repaid his contributions*, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits." N.C. Gen. Stat. § 59-48(1) (2021) (emphasis added).

Here, the trial court found in finding of fact 4 that Defendant contributed Lease 9802 to the partnership, and Plaintiff Heather O'Neal contributed "labor, boats, and harvesting." In finding of fact 5, the trial

court found the partnership acquired a second lease, Lease 9787, in 2018. Lastly, it ordered "each partner [to] receive the lease they contributed to the partnership."

Because there is no provision in the Agreement to the contrary, the distribution rules set out in N.C. Gen. Stat. § 59-70 are applicable to the wind up of Devil Shoal. The trial court should find each Partner's interest in Devil Shoal is 50% because the Agreement expressly stated the Partners were to share equally in all profits. The trial court should then repay the Partners for their respective contributions. *See* N.C. Gen. Stat. § 59-48(1). Finally, the trial court should allocate Devil Shoal's remaining assets pursuant to N.C. Gen. Stat. § 59-70. See N.C. Gen. Stat. § 59-70 (establishing the rules for distribution to satisfy a partnership's liabilities, including monies owed to partners for capital and profits).

Accordingly, we instruct the trial court on remand to make appropriate findings regarding the value of the Partners' contributions, the repayment of the Partners' contributions, and the distribution of remaining Devil Shoal property. *See Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176; *see also* N.C. Gen. Stat. § 59-48(1); N.C. Gen. Stat. § 59-70. Additionally, the trial court should enter judgment, which is supported by the findings of fact and conclusions of law. *See id.* at 699, 567 S.E.2d at 176.

VI. Conclusion

We conclude Devil Shoal is a general partnership within the meaning of the Uniform Partnership Act. We also conclude the trial court erred in its classification, valuation, and distribution of partnership assets and liabilities in connection with its wind up of Devil Shoal. Accordingly, we reverse and remand the matter to the trial court for its dissolution and wind up of Devil Shoal, pursuant to the Uniform Partnership Act and not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges MURPHY and GRIFFIN concur.

STATE v. BLACK

[287 N.C. App. 653 (2023)]

STATE OF NORTH CAROLINA
v.
ELEANOR BLACK

No. COA22-426

Filed 21 February 2023

1. Appeal and Error—record on appeal—incomplete—judicial notice of record in previous appeal—request improperly made

In defendant's second appeal from her criminal convictions, the Court of Appeals denied the parties' requests that it take judicial notice of the record in defendant's first appeal, where: the record in the second appeal was incomplete, each party had made their request for judicial notice in their appellate briefs instead of filing a motion pursuant to Appellate Rule 37, and no apparent effort was made to include the missing documents. Further, it was improper for defendant to attach the transcript of her plea in an appendix to her brief where doing so was not permitted under Appellate Rule 28(d) and where the transcript was not included in the record on appeal.

2. Damages and Remedies—restitution—criminal case—amount—stipulation—ability to pay

In a prosecution for attempted identity theft and possession of a stolen motor vehicle, the trial court did not abuse its discretion in ordering defendant to pay $11,000 in restitution where defendant had stipulated to this amount at her sentencing hearing and had not presented any evidence showing that she lacked the ability to pay that amount.

Appeal by Defendant from Judgment entered 8 September 2021 by Judge Marvin P. Pope, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 11 January 2023.

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

Jarvis John Edgerton, IV for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

[1] Eleanor Black (Defendant) appeals from Judgment entered 8 September 2021 upon her convictions for Possession of a Stolen Motor Vehicle and Attempted Identity Theft. The Record before us, however, fails to include any record of Defendant's initial sentencing hearing or transcript of Defendant's plea. The Record also fails to include any record of Defendant's first appeal to this Court. Instead, both parties request in their briefs that this Court take judicial notice of the record in Defendant's first appeal, *State v. Black*, 276 N.C. App. 15, 854 S.E.2d 448 (2021). We decline to do so.

Motions to an appellate court may not be made in a brief but must be made in accordance with N.C. R. App. P. 37. *Horton v. New S. Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858, *cert. denied*, 343 N.C. 511, 472 S.E.2d 8 (1996) (citing *Morris v. Morris*, 92 N.C. App. 359, 361, 374 S.E.2d 441, 442 (1988)). "Even if a motion were properly made, we will not take judicial notice of a document outside the record when no effort has been made to include it." *Id.* at 268, 468 S.E.2d at 858. Further, in her brief to our Court, Defendant included the transcript of her plea as an appendix. While our Rules of Appellate Procedure permit an appendix, "it [is] improper for [a party] to attach a document not in the record and not permitted under N.C. R. App. P. 28(d) in an appendix to its brief." *Id.* (citing N.C. R. App. P. 9(a); 28(b)).

The Record before us, including our opinion in Defendant's prior appeal to this Court, tends to reflect the following:

On 17 May 2019, Defendant pled guilty to Attempted Identity Theft and Possession of a Stolen Motor Vehicle. Her plea agreement provided the two Class H felony charges "will be consolidated into [one] judgment for supervised probation[.]" The Restitution Worksheet dated 17 May 2019 provided the amount of restitution owed was $11,000. There is no evidence Defendant challenged this amount in the Record before us. Indeed, Defendant's briefing to this Court reflects Defendant stipulated to this amount of restitution during the original hearing.

In Defendant's first appeal to this Court, she argued: (I) the trial court erred in calculating her prior record level by improperly counting out-of-state misdemeanor convictions without considering whether each conviction was substantially similar to any North Carolina Class A1 or Class 1 misdemeanor; and (II) the trial court erred in entering a civil judgment for attorney's fees because the trial court did not allow Defendant to be heard on the issue. *Black*, 276 N.C. App. at 17, 845 S.E.2d at 451. This Court held that the trial court erred in concluding

Defendant's out-of-state offenses were substantially similar to certain North Carolina crimes for sentencing purposes absent comparison of the elements of each statute, and it also erred by imposing attorney's fees without providing Defendant the opportunity to be heard. *Id.* at 21, 845 S.E.2d at 453. As such, the case was remanded for resentencing and the civil judgment of attorney's fees was vacated. *Id.*

The matter came back before the trial court on remand on 9 September 2021. At the hearing, the following colloquy occurred:

> [DEFENSE COUNSEL]: Could we request, Your Honor, that if she financially complies with her probation, she can be transferred to unsupervised probation?
>
> THE COURT: What does the State have to say? Are you talking about paying the attorney fees?
>
> [DEFENSE COUNSEL]: Well, the restitution. I would just ask that given – here would be my argument, Your Honor. She's – Your Honor just gave her a nine-month sentence, which she's already served almost half of. You put her on probation for 36 months. She's already kind of done half of her sentence, which nobody is expecting her to do any more of. We're just trying to set the situation where if she's successful on probation, she can be transferred to unsupervised probation before the 36 months is up.
>
> THE COURT: That's fine with me as long as the probation officer is agreeable to it. She complies with all other conditions of probation.
>
> [DEFENSE COUNSEL]: Thank you.
>
> THE COURT: I found page 2 out of place . . . Here's the restitution sheet. Okay. $11,000 restitution. Yes, she's got to repay that to [Victim].
>
> THE DEFENDANT: Can I say something?
>
> [DEFENSE COUNSEL]: Hold on a second.

The hearing concluded following this exchange. Defendant was subsequently sentenced to a suspended sentence of 9 to 20 months, with a 36-month period of supervised probation. Defendant was also ordered to pay $11,000 in restitution, consistent with the stipulated amount in the 17 May 2019 Restitution Worksheet. Defendant timely filed written Notice of Appeal on 8 September 2021.

Issue

[2] The dispositive issue on appeal is whether the trial court erred in ordering Defendant to pay restitution in the amount of $11,000.

Analysis

Defendant contends the trial court erred in failing "to hear from Defendant[1] or consider her ability to pay before assessing her $11,000 in restitution." We disagree.

> In determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of fact or conclusions of law on these matters. The amount of restitution must be limited to that supported by the record[.]

N.C. Gen. Stat. § 15A-1340.36(a) (2021). "Whether the trial court properly considered a defendant's ability to pay when awarding restitution is reviewed by this Court for abuse of discretion." *State v. Hillard*, 258 N.C. App. 94, 98, 811 S.E.2d 702, 705 (2018) (citation omitted). The defendant bears the burden of demonstrating an inability to pay restitution. *See State v. Riley*, 167 N.C. App. 346, 349, 605 S.E.2d 212, 215 (2004) ("Because [defendant] failed to present evidence showing that she would not be able to make the required restitution payments, we find no error.").

The Record before us contains no indication the trial court erred or abused its discretion in ordering Defendant to pay $11,000 in restitution. There is nothing in the Record to suggest Defendant presented any evidence of inability to make the required restitution payments. Moreover, Defendant concedes she previously stipulated to the $11,000 restitution amount set out in the May 2019 Restitution Worksheet. Thus, on the

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1. Defendant argues the trial court erred in failing to "hear from defendant", contending N.C. Gen. Stat. § 15A-1340.36(a) requires a trial court to "invite [a] [d]efendant to be heard on her financial ability to pay restitution." As expressly stated in the statute, the trial court is required to "take into consideration" numerous factors when determining the amount of restitution to be made. N.C. Gen. Stat. § 15A-1340.36(a) (2021). However, the statute is silent as to how the court is to obtain knowledge about a defendant's resources, and we decline to adopt Defendant's position.

Record before us, Defendant has not met her burden of demonstrating any inability to comply with the restitution order. Therefore, the trial court did not err in ordering Defendant to pay her stipulated $11,000 in restitution. Consequently, we affirm the trial court's 8 September 2021 Judgment.

Conclusion

Accordingly, for the foregoing reasons, the trial court did not err or abuse its discretion in ordering Defendant to pay her stipulated $11,000 in restitution, and we affirm the trial court's Judgment.

AFFIRMED.

Judges DILLON and TYSON concur.

STATE OF NORTH CAROLINA
v.
LEWIS RODNEY LYTLE, JR., DEFENDANT

No. COA22-675

Filed 21 February 2023

Probation and Parole—revocation—after probation expired—finding of good cause required

A judgment revoking a criminal defendant's probation was vacated where the trial court had failed to enter a factual finding—as required under N.C.G.S. § 15A-1344(f)—that good cause existed to revoke defendant's probation 700 days after it had expired. Because the record did not provide any persuasive evidence that the court had made reasonable attempts to hold defendant's probation revocation hearing before the probationary term had expired, the judgment was vacated without remand.

Appeal by defendant from judgment entered 6 January 2022 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 10 January 2023.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Cheryl L. Kaminski, for the State-appellee.

GORE, Judge.

On 6 August 2018, defendant Lewis Rodney Lytle, Jr., pled guilty to possession of a firearm by a felon and possession of a stolen firearm. The two charges were combined into one judgment with defendant receiving a sentence of 17 to 30 months in prison. This sentence was suspended for 18 months of supervised probation. Defendant's probation expired on 6 February 2020.

Defendant presents three issues on appeal: (i) whether the trial court failed to make a finding of good cause to revoke his probation in violation of N.C. Gen. Stat. § 15A-1344(f); (ii) whether his waiver of counsel was knowing and voluntary under N.C. Gen. Stat. § 15A-1242; and (iii) whether the trial court erred in failing to address all filed violations of probation individually in its judgment. Upon review, we vacate without remand.

Defendant filed written notice of appeal from a final judgment revoking probation entered against him in Buncombe County Superior Court. This Court has jurisdiction to hear this appeal pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1347.

Defendant contends, and the State concedes, that the trial court failed to find good cause to revoke probation after the expiration of the probation period as required by N.C. Gen. Stat. § 15A-1344(f)(3). We agree. This issue is preserved for appellate review without objection entered upon the ruling because § 15A-1344(f)(3) is a statutory mandate that requires the trial judge to make a specific finding before revoking probation after expiration of the probationary period. *State v. Morgan*, 372 N.C. 609, 617, 831 S.E.2d 254, 259 (2019); *see also State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) ("[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial.").

"Alleged statutory errors are questions of law, and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721, (internal citation omitted), *rev. denied*, 365 N.C. 193, 707 S.E.2d 246 (2011).

The statute provides:

> The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

N.C. Gen. Stat. § 15A-1344(f)(1)-(3) (2022).

Under subsection (f)(3), the trial court is "required . . . to make an *additional* finding of 'good cause shown and stated' to justify the revocation of probation even though the defendant's probationary term has expired." *Morgan*, 372 N.C. at 617, 831 S.E.2d at 259 (emphasis added). "In the absence of statutorily mandated factual findings, the trial court's jurisdiction to revoke probation after expiration of the probationary period is not preserved." *State v. Bryant*, 361 N.C. 100, 103, 637 S.E.2d 532, 534 (2006). Our review of the transcript and record does not show that the trial court made any findings, oral or written, that good cause existed to revoke defendant's probation after expiration of his probationary term.

"Ordinarily, when the trial court fails to make a material finding of fact, the case must be remanded so that proper findings can be made." *State v. Sasek*, 271 N.C. App. 568, 575, 844 S.E.2d 328, 334, (citation omitted), *rev. denied*, 376 N.C. 543, 851 S.E.2d 49 (2020). However, when the trial court fails to make a finding of good cause under § 15A-1344(f)(3), this Court "may only remand where the record contain[s] sufficient evidence to permit the necessary finding of 'reasonable efforts' by the State to have conducted the probation revocation hearing earlier." *Id.* (alteration in original) (quotation marks and citation omitted).

Defendant argues, and the State concedes, that the appropriate remedy under these facts is to vacate without remand.

Here, defendant's probation expired 700 days prior to the revocation hearing. The record on appeal provides no persuasive evidence that the

trial court made reasonable attempts to hold the probation revocation hearing prior to the expiration of defendant's probation. We, therefore, "vacate the trial court's judgments revoking [d]efendant's probation without remand." *Id.* at 576, 844 S.E.2d at 335 (citing *Bryant*, 361 N.C. at 101, 637 S.E.2d at 534). In light of our resolution of this matter above, it is unnecessary to reach defendant's remaining arguments.

VACATED.

Judges ARROWOOD and WOOD concur.

STATE OF NORTH CAROLINA
v.
DEREK JVON MILLER

No. COA22-561

Filed 21 February 2023

1. Constitutional Law—right to a public trial—*Waller* test—findings of fact—remand

In defendant's trial for attempted first-degree murder and related charges, the trial court violated defendant's Sixth Amendment right to a public trial by closing the courtroom without first conducting the four-part test in *Waller v. Georgia*, 467 U.S. 39 (1984), and making the requisite findings of fact. Given the limited closure and the fact that the trial court failed to conduct the *Waller* test, the matter was remanded for the trial court to conduct the *Waller* test and make appropriate findings of fact.

2. Firearms and Other Weapons—discharging a weapon within city limits—charging documents—caption of ordinance—proof of ordinance at trial

The trial court erred by denying defendant's motion to dismiss the charge of discharging a weapon within city limits where the charging documents did not include the caption of the ordinance, pursuant to N.C.G.S. § 160A-79(a), and the State failed to prove the ordinance at trial, pursuant to N.C.G.S. § 8-5.

Appeal by Defendant from judgment entered 10 December 2021 by Judge Jonathan Wade Perry in Union County Superior Court. Heard in the Court of Appeals 25 January 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna B. Wojcik, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for Defendant-Appellant.

COLLINS, Judge.

Defendant Derek Jvon Miller appeals from judgment entered upon a jury verdict of guilty of attempted first degree murder, going armed to the terror of the people, possession of a handgun by a minor, and discharge of a firearm within city limits in violation of a city ordinance. Defendant contends that the trial court erred by failing to make sufficient findings of fact to justify closing the courtroom and by denying Defendant's motion to dismiss the charge of discharging a weapon within city limits. We hold that the trial court erred by closing the courtroom without making the requisite findings of fact and by denying Defendant's motion to dismiss the charge of discharging a weapon within city limits, in violation of Monroe's ordinance.

I. Factual Background and Procedural History

The evidence at trial tended to show the following: On 19 August 2018, Neqayvius McLendon, his brother Nyhiem Kendall, and his friend Oaklen Starnes were walking to a neighborhood basketball court when a car with four occupants drove up beside them. All of the occupants were armed, and Defendant was seated in the front passenger seat. The car drove down the block a little bit, and McLendon, Kendall, and Starnes began walking away. As the car began to drive away, Defendant leaned out of the passenger window and began shooting. One of the bullets hit McLendon in the back, striking his liver before exiting through the center of his chest.

Defendant was indicted for attempted first degree murder, going armed to the terror of the people, attempted robbery with a dangerous weapon, possession of a handgun by a minor, and discharge of a firearm within city limits in violation of a city ordinance. Defendant moved to dismiss all charges at the close of the State's evidence, and the trial court granted the motion as to the attempted robbery charge. The jury found Defendant guilty of the remaining charges. The trial court consolidated Defendant's convictions and sentenced him within the presumptive range to 144 to 185 months' imprisonment. Defendant timely appealed.

II. Discussion

A. Motion to Close the Courtroom

[1] Defendant contends that his constitutional right to a public trial was violated because the trial court closed the courtroom without engaging in the four-part test set forth in *Waller v. Georgia*, 467 U.S. 39 (1984).

"We review alleged violations of constitutional rights *de novo*." *State v. Gettys*, 243 N.C. App. 590, 593, 777 S.E.2d 351, 354 (2015) (citation omitted).

The Sixth Amendment of the United States Constitution and Article I, Section 18, of the North Carolina Constitution guarantee a criminal defendant the right to a public trial. "The violation of the constitutional right to a public trial is a structural error, not subject to harmless error analysis." *State v. Rollins*, 221 N.C. App. 572, 576, 729 S.E.2d 73, 77 (2012) (citations and quotation marks omitted). "Although there is a strong presumption in favor of openness, the right to an open trial is not absolute . . . ." *State v. Comeaux*, 224 N.C. App. 595, 599, 741 S.E.2d 346, 349 (2012) (citation and quotation marks omitted). "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Id.* (quoting *Waller*, 467 U.S. at 45).

Accordingly, within the bounds of these constitutional principles, a trial court "may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present." N.C. Gen. Stat. § 15A-1034(a) (2021). Additionally, the trial court may order that all persons in the courtroom "be searched for weapons or devices that could be used to disrupt or impede the proceedings[,]" but such order "must be entered on the record." *Id.* § 15A-1034(b) (2021).

Before closing the courtroom, "the trial court must determine if the party seeking closure has advanced an overriding interest that is likely to be prejudiced, order closure no broader than necessary to protect that interest, consider reasonable alternatives to closing the procedure, and make findings adequate to support the closure." *State v. Jenkins*, 115 N.C. App. 520, 525, 445 S.E.2d 622, 625 (1994) (citing *Waller*, 467 U.S. at 48). "[W]hile the trial court need not make exhaustive findings of fact, it must make findings sufficient for this Court to review the propriety of the trial court's decision to close the proceedings." *Rollins*, 221 N.C. App. at 579, 729 S.E.2d at 79 (citation omitted).

Here, the State made a pre-trial motion to close the courtroom during McLendon and Kendall's testimony, stating the following rationale for closure:

> Number one, determine whether the party seeking closure has advanced an overriding interest that is likely to be prejudiced. We would state that we have in that the interests of our witnesses being safe outside of the courtroom as well as being -- us being able to go forward with this case without there being any type of intimidation of them while they are possibly on the stand is the prejudice that we are trying to overcome or want to overcome.
>
> An order of closure -- second, order of closure no broader than necessary to protect that interest. We're not asking that the entire courtroom be closed for the entire trial. Just be closed when those two young men take the stand.
>
> Also consider -- and then consider reasonable alternative[s] to closing the proceeding and make findings which support the closure. I don't know of any other reasonable alternative. We can, of course, take phones and things like that. I think in my motion we ask that that be done as well of Mr. Miller, the Court hold the phone until or at least after those two young men testify, if he has his phone with him, to make sure there's no recordings or anything like that . . . .

Defendant objected, asserting that closing the courtroom would violate his Sixth Amendment right to a public trial. The trial court held the ruling open at that time to review exhibits from a prior hearing to increase Defendant's bond for potential witness intimidation. A bench conference was held at the end of the day, and the trial court stated the following synopsis on the record:

> [M]y resolution at this point, unless circumstances change, is for direct relatives of Mr. Miller to stay in the courtroom during those two witnesses. Anybody not directly related to him will be outside the courtroom. And deputies, after my admonition for no cell phone use, will keep an eye on anybody in the courtroom and their use of cell phones. And that will be true for any State witnesses as well, Mr. Collins, or speculators. So anybody who's not a direct relative of Mr. Miller or Mr. Purser, they will be asked to step outside during those two witnesses' examinations.

The trial court's written order entered on 30 November 2021 states:

> STATE'S MOTION TO CLOSE COURTROOM TO PUBLIC FOR THE TESTIMONY OF NEQUAVIUS (sic) MCLENDON AND NYHIEM KENDALL, OBJECTION BY DEFENDANT ~ GRANTED, RELATIVES OF THE DEFENDANT AND LEAD INVESTIGATOR KYLE PURSER MAY STAY IN THE COURTROOM. ALL CELLPHONES EXCEPT FOR COURT PERSONNEL ARE NOT ALLOWED IN THE COURTROOM OR MAY BE PUT ON FRONT COUNTER.

Because the trial court closed the courtroom to the public, it was required to utilize the four-part *Waller* test to determine whether closure was appropriate and to "make findings sufficient for this Court to review the propriety of the trial court's decision to close the proceedings." *Rollins*, 221 N.C. App. at 579, 729 S.E.2d at 79 (citation omitted). The trial court's written order does not include any findings of fact, and the only oral finding of fact the trial court made was that "the [c]ourt is concerned because of the documents I've reviewed with there being some social media posts and things like that . . . ." The trial court did not utilize the four-part W*aller* test before closing the courtroom, and its finding of fact is inadequate to support closure. *Cf. Comeaux*, 224 N.C. App. at 603, 741 S.E.2d at 351 ("We believe these findings of fact show that the State advanced an overriding interest that was likely to be prejudiced; that the closure of the courtroom was no broader than necessary to protect the overriding interest; that the trial court considered reasonable alternatives to closing the courtroom; and that the trial court made findings adequate to support the closure.").

"Given the limited closure in the present case and the fact that the trial court did not utilize the *Waller* four-part test, . . . the proper remedy is to remand this case for a hearing on the propriety of the closure" during McLendon and Kendall's testimony. *Rollins*, 221 N.C. App. at 580, 729 S.E.2d at 79. On remand, the trial court must engage in the four-part *Waller* test and make the appropriate findings of fact in an order regarding the necessity of the closure. *Id.* If the trial court determines that the closure was not justified, then Defendant is entitled to a new trial. *Id.* If the trial court determines that the closure was justified, then Defendant may seek review of the trial court's order by means of an appeal from the judgment that the trial court will enter on remand following the resentencing hearing as set out in the next section of this opinion. *Id.*

B. Discharging a Firearm within City Limits

[2] Defendant next contends that the charge of discharging a weapon within Monroe city limits should have been dismissed because neither the arrest warrant nor the indictment contained the caption of the ordinance and the State failed to prove the ordinance at trial. We agree.

"We review a trial court's denial of a motion to dismiss *de novo*." *State v. Thomas*, 268 N.C. App. 121, 131, 834 S.E.2d 654, 662 (2019) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Hicks*, 243 N.C. App. 628, 639, 777 S.E.2d 341, 348 (2015) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Ingram*, 283 N.C. App. 85, 88, 872 S.E.2d 148, 150 (2022) (citation and quotation marks omitted). "In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (citation omitted).

N.C. Gen. Stat. § 160A-79(a) provides that "[i]n all civil and criminal cases a city ordinance that has been codified in a code of ordinances adopted and issued in compliance with G.S. 160A-77 must be pleaded by both section number and caption." N.C. Gen. Stat. § 160A-79(a) (2018). Furthermore, N.C. Gen. Stat. § 8-5 states that "[i]n a trial in which the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, proven as provided in G.S. 160A-79, shall be prima facie evidence of the existence of such ordinance." N.C. Gen. Stat. § 8-5 (2021). It is well-established that a court "cannot take judicial notice of the provisions of municipal ordinances." *Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 775, 796 S.E.2d 120, 123 (2017) (citation and quotation marks omitted).

Section 130.02(a) of the Monroe Code of Ordinances is captioned "Firearms and other weapons" and states, "Subject to divisions (B), (C), and (D) of this section, no person may fire, discharge or shoot within the city any rifle, shotgun, handgun or other firearm, bow and arrow, or similar contrivance." Monroe, N.C., Code of Ordinances § 130.02(a) (2018).

Here, the arrest warrant for discharging a firearm within city limits stated that there was probable cause to believe that Defendant "unlawfully and willfully did FIRE, DISCHARGE, OR SHOOT WITHIN THE CITY A HANDGUN.MONROE CITY ORDINANCE 130.02[.]" Furthermore, the indictment charged that Defendant "unlawfully and willfully did fire, discharge or shoot within the city a handgun, a Monroe City Ordinance 130.02." The indictment and arrest warrant did not contain the caption of the city ordinance, as required by N.C. Gen. Stat. § 160A-79(a). The State likewise did not prove the ordinance at trial. *See In re Jacobs*, 33 N.C. App. 195, 197, 234 S.E.2d 639, 641 (1977) ("The ordinance was clearly not proven at trial and the record does not contain a caption. Respondent's motion to quash the petition based on violating 'City Code 15-2' should have been allowed.").

Accordingly, the trial court erred by denying Defendant's motion to dismiss the charge of discharging a weapon within city limits in violation of Monroe's ordinance.

III. Conclusion

Because the trial court failed to utilize the *Waller* four-part test and make adequate findings of fact in an order to support closing the courtroom to the public, we remand for a hearing on the propriety of the closure. If the trial court determines that the closure was not justified, then Defendant is entitled to a new trial. If the trial court determines that the closure was justified, then Defendant may seek review of the trial court's order by means of an appeal from the judgment that the trial court will enter on remand following resentencing.

Furthermore, the trial court erred by denying Defendant's motion to dismiss the charge of discharging a weapon within Monroe city limits because the charging documents did not include the caption of the ordinance and the State failed to prove the ordinance at trial. Accordingly, we vacate Defendant's conviction of this charge and remand for resentencing.

REMANDED IN PART; VACATED AND REMANDED IN PART.

Judges ARROWOOD and WOOD concur.

STATE OF NORTH CAROLINA
v.
JAIRO PALACIO PALACIO

No. COA22-231

Filed 21 February 2023

1. Appeal and Error—record on appeal—portion of transcript missing—adequate alternative—meaningful appellate review

In a prosecution for multiple sex offenses, defendant was not deprived of meaningful appellate review of his criminal judgment—and therefore was not entitled to a new trial—on the basis that a portion of the jury selection was missing from the transcript. His appellate attorney made sufficient efforts to reconstruct the missing portion by contacting the trial judge, attorneys, and court personnel, and produced an adequate alternative to a verbatim transcript that allowed defendant to identify potentially meritorious issues for appeal.

2. Sexual Offenses—incest—elements—definition of "niece"—blood relation

In a prosecution for multiple sex offenses, defendant's motion to dismiss the charge of incest should have been granted where his relationship with the victim was one of affinity, not consanguinity, because she was the daughter of his wife's sister and, therefore, the victim did not meet the definition of "niece" for purposes of the criminal offense of incest (N.C.G.S. § 14-178(a)).

3. Confessions and Incriminating Statements—statements following arrest—voluntariness—findings of fact

In a prosecution for multiple sex offenses, defendant was not entitled to the suppression of inculpatory statements he made to law enforcement after his arrest. The trial court was not required to make findings about all of the evidence at the motion hearing, and the unchallenged findings it did make were supported by substantial evidence. More specifically, the findings supported the trial court's conclusion that defendant's confession was voluntary based on defendant's verbal acknowledgment of the constitutional rights that were read to him, his statement that he was familiar with those rights from his own law enforcement work, his completion of a written waiver form, and the lack of any evidence that defendant was under the influence of alcohol or drugs during his interrogation.

4. Judgments—criminal—clerical error—dismissed charge mistakenly included

Where defendant's criminal judgment for multiple sex offenses, which were consolidated for sentencing, mistakenly included a charge that the trial court had orally dismissed after the jury verdict, the matter was remanded for correction of a clerical error.

Appeal by Defendant from judgment entered 1 April 2021 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 19 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for Defendant-Appellant.

COLLINS, Judge.

Defendant Jairo Palacio[1] appeals from judgment entered upon a jury verdict of guilty of statutory rape of a child 15 years or younger, sexual activity by a substitute parent, incest, and two counts of indecent liberties with a child. Defendant contends that (1) he is entitled to a new trial because the transcript for one day of the proceedings is missing; (2) the trial court erred by denying his motion to dismiss the incest charge; (3) the trial court erred by denying his motion to suppress; and (4) the case must be remanded to the trial court to correct a clerical error in the trial court's judgment. We conclude that Defendant is not entitled to a new trial and that the trial court did not err by denying his motion to suppress. However, we vacate Defendant's incest conviction and remand for resentencing, and remand for correction of a clerical error on the written judgment.

I. Procedural History and Factual Background

Mary,[2] a Columbian citizen, moved to Jacksonville, North Carolina, in April 2018 with her mother, father, and sister. Mary and her family lived with Defendant and his wife. Defendant's wife is Mary's mother's

1. The trial court allowed the State's motion to amend the indictment to read Jairo Palacio, but the judgment, appellate entries, and amended appellate entries identify Defendant as Jairo Palacio Palacio.

2. Mary is a pseudonym used to protect the identity of the child victim.

sister, making Defendant's wife Mary's aunt by blood and Defendant Mary's uncle by marriage. Because Mary's parents did not initially plan to stay permanently in the United States, Defendant began the process of legally adopting Mary.

One Tuesday in the summer of 2018, when Mary was 15 years old and Defendant was 42 years old, Mary, her mother, her sister, and Defendant were by the pool in the backyard. Mary went inside the house to get drinks; Defendant followed her into the kitchen and kissed her on the lips. The next day, Mary and her family were again at the pool; Mary went inside the house to use the bathroom. Defendant, who was already inside, pushed her through the doorway. Defendant touched her on the vagina over her swimsuit, made her touch him on his penis over his swimsuit, and pulled her hand inside his swimsuit. Defendant stopped after Mary began to cry and said, "No" loudly.

On 16 July 2018, Mary and her younger sister were home alone with Defendant. Mary was doing laundry in the garage when Defendant came in and grabbed her buttocks. When Mary turned around, Defendant grabbed her arms and tried to kiss her. Defendant pushed her to the ground and continued to try to kiss her. Defendant took off his pants and underwear and then took off Mary's pants and underwear. Defendant grabbed a condom and engaged in vaginal intercourse with Mary. After Defendant finished, Mary grabbed her little sister, went into her bedroom, and locked the door until Defendant left the house. Defendant left that same day to visit his family in Colombia. Mary did not immediately tell her family about these encounters out of fear that it would destroy her family's future. About two weeks after Defendant had left for Columbia, Mary told her father what happened, and he called the police.

As part of the subsequent investigation, the Child Advocacy Center conducted a forensic interview with Mary through an interpreter during which Mary detailed the encounters with Defendant. During the medical evaluation, Mary told the nurse practitioner that she was worried that she might be pregnant by Defendant. The nurse practitioner conducted a genital exam of Mary and determined that, although there was no evidence of injury to Mary's hymen, Mary's symptoms and characteristics were consistent with the profiles of children who had been sexually abused.

Defendant was indicted for statutory rape of a child who was 15 years or younger, sexual activity by a substitute parent, three counts of indecent liberties with a child, incest, and obstruction of justice.

Prior to trial, Defendant moved to suppress his inculpatory statements made at the Onslow County Sheriff's Office following his arrest. After an evidentiary hearing, the trial court orally denied the motion and subsequently entered a written denial order.

The case came on for trial on 1 March 2021. After all the evidence was presented, and prior to submitting the case to the jury, the trial court dismissed one count of indecent liberties with a child and the single count of obstruction of justice. The jury found Defendant guilty of the remaining charges. Prior to sentencing, the trial court dismissed the charge of sexual activity by a substitute parent. The trial court consolidated the remaining convictions into a single Class B1 felony. The trial court sentenced Defendant within the presumptive range to 192 to 291 months' imprisonment, ordered that Defendant register as a sex offender for a period of 30 years upon his release, and entered a permanent no contact order prohibiting Defendant from contacting Mary. Defendant timely appealed.

II. Discussion

A. Missing Transcript

[1] Defendant first contends that he is entitled to a new trial because the transcript for 2 March 2021 is missing, depriving him of meaningful appellate review.

"[W]hen an indigent defendant ha[s] entered notice of appeal, he is entitled to receive a copy of the trial transcript at State expense." *State v. Hobbs*, 190 N.C. App. 183, 185, 660 S.E.2d 168, 170 (2008) (citing N.C. Gen. Stat. § 7A-452(e)). However, "due process does not require a verbatim transcript of the entire proceedings[.]" *Id.* (quotation marks, citation, and brackets omitted). Generally, a defendant is entitled to "a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution." *Id.* (quoting *Hardy v. United States*, 375 U.S. 277, 282 (1964)).

Here, Defendant's case was tried from 1 to 5 March 2021 and the transcript consists of four volumes. Volume I transcribes the COVID-19 safety protocols and initial jury impanelment proceedings that took place on 1 March 2021. At the end of volume I, the transcript states, "The jury impanelment proceedings recessed at 4:21 p.m. on Monday, March 1, 2021, continued through Tuesday, March 2, 2021, and resumed 9:00 a.m. Wednesday, March 3, 2021." Volume II starts by noting, "The following proceedings with the defendant present and outside the presence of

the jurors at 9:02 a.m." The transcript indicates that the trial court then stated, "The defendant is present with counsel. The State is here represented by counsel. The jury has been selected, not impaneled."

Although the proceedings on 2 March 2021 are not transcribed, it is evident from volumes I and II of the transcript that the trial court conducted jury selection on that day. As the jury was not impaneled and no evidence was presented on 2 March, Defendant was not entitled to a verbatim transcript of those proceedings. *See Hobbs*, 190 N.C. App. at 185, 660 S.E.2d at 170. Accordingly, that there is no verbatim transcript of the jury selection on 2 March 2021 does not deprive Defendant of meaningful appellate review.

Even assuming arguendo that the missing portion of transcript could possibly contain information necessary for a meaningful appeal, Defendant has failed to demonstrate he is prejudiced by its absence.

"[T]he unavailability of a verbatim transcript does not *automatically* constitute reversible error in every case." *In re Shackleford*, 248 N.C. App. 357, 361, 789 S.E.2d 15, 18 (2016). "To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006) (citation omitted). "General allegations of prejudice are insufficient to show reversible error." *Id.* (citations omitted).

We conduct a three-step inquiry to determine whether the right to a meaningful appeal has been lost due to the unavailability of a verbatim transcript. S*tate v. Yates*, 262 N.C. App. 139, 142, 821 S.E.2d 650, 653 (2018).

> First, we must determine whether defendant has "made sufficient efforts to reconstruct the [proceedings] in the absence of a transcript." Second, we must determine whether those "reconstruction efforts produced an adequate alternative to a verbatim transcript—that is, one that would fulfill the same functions as a transcript . . . ." Third, "we must determine whether the lack of an adequate alternative to a verbatim transcript of the [proceedings] served to deny [defendant] meaningful appellate review such that a new [trial] is required."

Id. (quoting *Shackleford*, 248 N.C. App. at 361-64, 789 S.E.2d at 18-20).

Here, Defendant's appellate counsel made sufficient efforts to reconstruct the record from 2 March 2021 by contacting the trial judge, Defendant's trial attorney, the district attorney who prosecuted the case,

the court reporting manager and court reporter who transcribed the proceedings on 1 March 2021 and 3 March 2021, and the deputy clerk of superior court.

Based on his efforts, Defendant determined that on 1 March 2021, the trial court reviewed the COVID-19 safety protocols and began the process of jury impanelment. At the end of the day, Defendant offered several objections to the COVID-19 protocols, and the trial court suggested that Defendant make a list of his objections to consider after impanelment.

Regarding the 2 March 2021 proceedings, Defendant's trial attorney stated:

> In an attempt to reconstruct March 2 and upon review of the materials, I do not recall anything particularly unusual or remarkable about the jury selection. There were no outbursts, no overt comments about race, religion, sexuality or politics by any juror or the State, or any juror acting in a way that I felt was otherwise concerning or objectionable . . . .
>
> The materials indicate that the judge denied approximately five (5) of my motions to strike jurors for cause, (3 on March 1, 2 on March 2). Three of the show cause motions were because the respective jurors were either the direct victim of a sexual offense or knew someone close to them who was. One motion was due to the juror's prior professional relationship with Onslow County Sheriff deputies. The fifth was a juror who worked for a property management company I had been adverse to in prior, unrelated civil litigation. As a result of the denials, we elected to use peremptory challenges on all five jurors. The notes from March 2 indicate we used the 6th peremptory challenge that day.

Volume II of the transcript, which covers the proceedings on 3 March 2021, begins with the trial court noting that the jury had been selected but not yet impaneled. The transcript continues:

> THE COURT: So I believe we left this time open to hear from [Defendant] with regards to some motions that he has raised earlier, and I gave him permission to expand on those motions this morning outside the presence of the jury before the case actually -- the evidence is actually received.

Defendant then detailed specific objections to the COVID-19 protocols, including the physical layout of the courtroom, the size of the jury pool, the possible bias of jurors "for having to be here during COVID," and the length of time the proceedings would take with the newly-implemented protocols. After Defendant's objections were addressed, the trial court impaneled the jury. Defendant's efforts produced an adequate alternative to a verbatim transcript in that Defendant can "identify all potential meritorious issues, particularly as they relate to the procedures and manner in which his trial was conducted." *Yates*, 262 N.C. App. at 142, 821 S.E.2d at 653.

Accordingly, because Defendant made sufficient reconstruction efforts that produced an adequate alternative to a verbatim transcript, he was not deprived of meaningful appellate review. *Shackleford*, 248 N.C. App. at 362, 789 S.E.2d at 19. Defendant's argument that he is entitled to a new trial is thus without merit.

B. Incest

[2] Defendant next contends that the trial court erred by denying his motion to dismiss the incest charge. Defendant specifically contends that the term "niece" in N.C. Gen. Stat. § 14-178 does not include a niece-in-law for the purposes of incest as criminalized by that statute. We agree.

"This Court reviews a trial court's denial of a motion to dismiss *de novo*[.]" *State v. Moore*, 240 N.C. App. 465, 470, 770 S.E.2d 131, 136 (2015) (citation omitted). Moreover, "[i]ssues of statutory construction are questions of law which we review *de novo* on appeal[.]" *State v. Hayes*, 248 N.C. App. 414, 415, 788 S.E.2d 651, 652 (2016). Under de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

Upon a defendant's motion to dismiss, the trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Worley*, 198 N.C. App 329, 333, 679 S.E.2d 857, 861 (2009) (quotation marks and citations omitted). "[T]he trial court must consider the record evidence in the light most favorable to the State . . . ." *Id.* (citation omitted).

"The primary endeavor of courts in construing a statute is to give effect to legislative intent." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d

274, 276-77 (2005) (citations omitted). "Generally, the intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act[,] and what the act seeks to accomplish." *State v. Huckelba*, 240 N.C. App. 544, 559, 771 S.E.2d 809, 821 (2015) (quotation marks, brackets, and citation omitted), *rev'd per curiam on other grounds*, 368 N.C. 569, 780 S.E.2d 750 (2015). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277 (citation omitted). "When, however, a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Id.* (quotation marks and citation omitted). Moreover, "criminal statutes are to be strictly construed against the State." *State v. Raines*, 319 N.C. 258, 263, 354 S.E.2d 486, 489 (1987) (quotation marks and citation omitted).

The offense of incest is governed by section 14-178(a) of our General Statutes, which provides:

> A person commits the offense of incest if the person engages in carnal intercourse with the person's (i) grandparent or grandchild, (ii) parent or child or stepchild or legally adopted child, (iii) brother or sister of the half or whole blood, or (iv) uncle, aunt, nephew, or niece.

N.C. Gen. Stat. § 14-178(a) (2018).

In its primary sense, "niece" is defined as "[t]he daughter of a person's brother or sister[,]" *Niece*, *Black's Law Dictionary* (11th ed. 2019), and is understood to be a relationship of consanguinity. *See Consanguinity*, *Black's Law Dictionary* (11th ed. 2019) (defining "consanguinity" as "[t]he relationship of persons of the same blood or origin"). In a secondary sense, "niece" is only "*sometimes* understood to include the daughter of a person's brother-in-law or sister-in-law[,]" *Niece*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added), and is only sometimes understood to be a relationship of affinity. *See Affinity*, *Black's Law Dictionary* (11th ed. 2019) (defining "affinity" as "[a]ny familial relation resulting from a marriage"). The plain language of the term "niece" in its primary sense indicates the legislature's intent to criminalize carnal intercourse with "[t]he daughter of a person's brother or sister[,]" a relationship of consanguinity. However, the scope of the term "niece" could be subject to debate, depending on which dictionary definition is used, and thus could be considered ambiguous. *See State v. Sherrod*, 191 N.C. App. 776, 778, 663 S.E.2d 470, 472 (2008) (The language of a statute is ambiguous when it is "fairly susceptible of two or more meanings.");

State Auto. Mut. Ins. Co. v. Hoyle, 106 N.C. App. 199, 201, 415 S.E.2d 764, 765 (1992) ("A word is ambiguous when it is reasonably capable of more than one meaning.").

Even so, the text of the relevant statutory provision further supports the legislature's intent that a "niece" must be a consanguineous relationship to constitute the crime of incest. *See State v. Conley*, 374 N.C. 209, 215, 839 S.E.2d 805, 809 (2020) ("[A] statute must be considered as a whole[.]" (quotation marks omitted)). The relationships detailed in section 14-178 are all those of consanguinity, except the relationships of child by marriage or legal adoption. In the application of criminal law, it would be an unwarranted extension and presumption to assume that, by specifying the relationship of child by marriage or legal adoption, the legislature intended to include other nonconsanguineous relationships. *See State v. McCants*, 275 N.C. App. 801, 824, 854 S.E.2d 415, 432 (2020) ("Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list.").

Furthermore, the legislative history, the spirit of the incest statute, and what the statute seeks to accomplish all confirm the legislative intent that a "niece" must be a consanguineous relationship for the purpose of criminalizing incest.

In January 1878, the North Carolina Supreme Court issued *State v. Keesler*, 78 N.C. 469 (1878), dismissing an indictment against the defendant for incest for his having had improper intercourse with his daughter. The Court explained, "This offence was not indictable at common law, and as we have no statute in this State declaring it to be a criminal offence, this indictment cannot be maintained." *Id.* at 469. Noting that "[i]n most of the States of the Union incest is made an indictable offence by statute[,]" the Court opined that "[p]erhaps its rare occurrence in this State has caused the revolting crime to pass unnoticed by the Legislature." *Id.* at 469-70.

Immediately following *Keesler*, the General Assembly criminalized incest in 1879 by sections 1060 and 1061 of the North Carolina Code. Section 1060 provided:

> In all cases of carnal intercourse between grand parent and grand child, parent and child, and brother and sister, of the half or whole blood, the parties shall be guilty of felony, and punished for every such offence by imprisonment in the county jail or penitentiary for a term not exceeding five years, in the discretion of the court.

1 N.C. Code of 1883, § 1060. Section 1061 provided:

> In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and punished by fine or imprisonment, in the discretion of the court.

Id. § 1061.

In *State v. Laurence*, 95 N.C. 659 (1886), our Supreme Court held that section 1060 applies to both legitimate and illegitimate children. The Court stated that "[i]t is obvious that the legitimacy of birth in one of the offending parties is not, and ought not to be, an essential ingredient in the crime" because the statute prohibits intercourse between those who are "related in those degrees by consanguinity[.]" *Id.* at 660.

In 1905, the General Assembly recodified sections 1060 and 1061 as sections 3351 and 3352, respectively. *See* 1 N.C. Revisal of 1905, §§ 3351, 3352.[3] Section 3351 continued to criminalize as felony incest "carnal intercourse between grandparent and grandchild, parent and child, and brother and sister, of the half or whole blood," punishable by imprisonment for a term not exceeding five years, but changed the location of imprisonment from the "county jail or penitentiary" to the "state's prison[.]" *Id.* § 3351. Section 3352 continued to criminalize as misdemeanor incest "carnal intercourse between uncle and niece, and nephew and aunt," punishable by fine or imprisonment. *Id.* § 3352.

In *State v. Harris*, 149 N.C. 513, 62 S.E. 1090 (1908), our Supreme Court upheld the defendant's conviction for incest where the sole question before the Court was whether the daughter of the defendant's half-sister came within the language of section 3352. The Court explained:

> For obvious reasons, nothing is said [in section 3352] of the half or whole blood. The relation of uncle and niece must of necessity be of the half blood, as in all other relations of consanguinity, other than those defined in [section 3351]. As here, the daughter of defendant's sister is of course related to him only by the half blood. The fact that

3. Section 3351 provided that "In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister, of the half or whole blood, the parties shall be guilty of a felony, and punished for every such offense by imprisonment in the state's prison for a term not exceeding five years, in the discretion of the court." 1 N.C. Revisal of 1905, § 3351. Section 3352 provided that: "In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and punished by fine or imprisonment, in the discretion of the court." *Id.* § 3352.

> the mother of the girl is only half sister of defendant cannot affect the case . . . .

Id. at 514, 62 S.E. at 1090-91. Accordingly, the Court concluded the "defendant and his niece, the daughter of the half sister, are clearly within the statute." *Id.* at 514, 62 S.E. at 1091.

In 1919, the General Assembly recodified sections 3351 and 3352 as sections 4337 and 4338, respectively, of the Consolidated Statutes.[4] course between grandparent and grandchild, parent and child, and brother and sister, of the half or whole blood," punishable by a term of imprisonment in the state's prison, but increased the allowable term of imprisonment from "not exceeding five years" to "not exceeding fifteen years[.]" 1 N.C. Consol. Stat. of 1919, § 4337. Section 4338 continued to criminalize as misdemeanor incest "carnal intercourse between uncle and niece, and nephew and aunt," punishable by fine or imprisonment. *Id.* § 4338. In 1943, sections 4337 and 4338 were recodified as sections 14-178 and 14-179, respectively, of the North Carolina General Statutes. The recodified sections were identical to their predecessors.

In *State v. Rogers*, 260 N.C. 406, 133 S.E.2d 1 (1963), our Supreme Court reversed the defendant's conviction for incest where the defendant had sexual relations with his adopted daughter. At that time, section 14-178 read:

> In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister of the half or whole blood, the parties shall be guilty of a felony, and shall be punished for every such offense by imprisonment in the State's prison for a term not exceeding fifteen years, in the discretion of the court.

Id. at 407-08, 133 S.E.2d at 2 (quoting N.C. Gen. Stat. § 14-178). The Court explained, "The crime of incest is purely statutory, and our statute is based on consanguinity and, therefore, excludes affinity. Our statute . . . would not include the relationship between a stepfather and his stepdaughter, since their relationship would not be one of consanguinity."

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4. Section 4337 provided that: "In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister of the half or whole blood, the parties shall be guilty of a felony, and shall be punished for every such offense by imprisonment in the state's prison for a term not exceeding fifteen years, in the discretion of the court." 1 N.C. Consol. Stat. of 1919, § 4337. Section 4338 provided that "In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, in the discretion of the court." *Id.* § 4338.

Id. at 409, 133 S.E.2d at 3 (citation omitted). Noting that "[t]he word 'daughter' means, and is generally understood to mean, 'an immediate female descendant,' and not an adopted daughter, a stepdaughter, or a daughter-in-law[,]" the Court concluded that while "[t]he defendant's conduct . . . in having sexual relations with his adopted daughter[] is indeed detestable, [i]t rests, however, within the power of the Legislature to make such conduct incestuous." *Id.* (quotation marks and citation omitted).

Immediately following *Rogers*, the General Assembly amended section 14-178 in 1965 to include the affinity relationship of "stepchild" and the legal relationship of "legally adopted child," as follows:

> The parties shall be guilty of a felony in all cases of carnal intercourse between (i) grandparent and grandchild, (ii) parent and child or stepchild or legally adopted child, or (iii) brother and sister of the half or whole blood. Punishment for every such offense shall be imprisonment in the State prison for a term of not more than fifteen years, in the discretion of the court.

N.C. Gen. Stat. § 14-178 (1969).[5] Section 14-179 remained unchanged. *See* N.C. Gen. Stat. § 14-179 (1969).

In 2002, the General Assembly enacted "An Act to Close the Legal Loophole that Exists Under the State's Incest Laws by Equalizing Punishments for Crimes Committed Against Children Without Regard to Familial Status[.]" *See* 2002 N.C. Sess. Laws 280 (capitalization altered). The Act consolidated portions of sections 14-178 and 14-179, repealed section 14-179, and enacted a new section 14-178, labeled "Incest," which reads as follows:

> (a) Offense. – A person commits the offense of incest if the person engages in carnal intercourse with the person's (i) grandparent or grandchild, (ii) parent or child or stepchild or legally adopted child, (iii) brother or sister of the half or whole blood, or (iv) uncle, aunt, nephew, or niece.
>
> (b) Punishment and Sentencing. –
>
> > (1) A person is guilty of a Class B1 felony if either of the following occurs:

5. Section 14-178 was amended by 1965 N.C. Sess. Laws 190, but the amended statute did not appear in the North Carolina General Statutes until the 1969 volume.

> a. The person commits incest against a child under the age of 13 and the person is at least 12 years old and is at least four years older than the child when the incest occurred.
>
> b. The person commits incest against a child who is 13, 14, or 15 years old and the person is at least six years older than the child when the incest occurred.
>
> (2) A person is guilty of a Class C felony if the person commits incest against a child who is 13, 14, or 15 and the person is more than four but less than six years older than the child when the incest occurred.
>
> (3) In all other cases of incest, the parties are guilty of a Class F felony.
>
> (c) No Liability for Children Under 16. — No child under the age of 16 is liable under this section if the other person is at least four years older when the incest occurred.

2002 N.C. Sess. Laws 281.

The relationships specified remained unchanged, but the Act increased the punishment and sentencing for individuals convicted of incest to equalize punishments for crimes committed against children, without regard to whether the perpetrators are related to their victims. *Id*. Notably, the Act increased the punishment for incest based on carnal intercourse with an aunt, uncle, nephew, or niece from a misdemeanor to a felony. *Id*. The Act also created different punishment classes based on certain age requirements. *Id*. Finally, the Act excused any child under the age of 16 from liability for incest if the other person was at least four years older when the incest occurred. *Id*. The version of N.C. Gen. Stat. § 14-178 adopted in 2002 remains in effect today.

By tracing the legislative history and judicial treatment of incest from 1878 to the present, the following is apparent: Our legislature has actively criminalized incest since 1879, presumably in response to our Supreme Court dismissing an incest indictment because North Carolina had no incest statute. *See Keesler*, 78 N.C. at 469. The first incest statutes criminalized carnal intercourse between an uncle and a niece, and the punishment was later increased from a misdemeanor to a felony. Our courts have repeatedly stated that our incest statutes are based on consanguinity, not affinity, except where the legislature has specified otherwise. *See Laurence*, 95 N.C. at 660 (holding that the incest

statute prohibits intercourse between individuals who are "related in those degrees by consanguinity"); *Harris*, 149 N.C. at 514, 62 S.E. at 1091 ("The relation of uncle and niece must of necessity be of the half blood, as in all other relations of consanguinity, other than those defined in [section 3351]."); *Rogers*, 260 N.C. at 409, 133 S.E.2d at 3 ("The crime of incest is purely statutory, and our statute is based on consanguinity and, therefore, excludes affinity. Our statute . . . would not include the relationship between a stepfather and his stepdaughter, since their relationship would not be one of consanguinity."). The legislature acted swiftly in 1965, presumably in response to *Rogers*, to amend the statute to include the affinity relationship of "stepchild" and the legal relationship of "legally adopted child."

The legislature has the authority, and has had the opportunity, to expand the definition of incest to include familial relationships by affinity or other means, as it did in 1965 with stepchildren and legally adopted children. However, even in 2002 when it consolidated sections 14-178 and 14-179 and significantly overhauled the punishment and sentencing for incest, the legislature did not expand the definition of incest to include familial relationships by affinity or other means. Had the legislative intent been to include what, in this case, would commonly be called a relationship of niece-in-law and uncle-in-law, it would have done so.

Furthermore, judicially expanding the definition of incest to include familial relationships by affinity or other means "could lead to absurd results." *Beck*, 359 N.C. at 615, 614 S.E.2d at 277. Incest is defined as "sexual intercourse between persons so closely related that marriage is illegal[.]" *The Merriam-Webster Dictionary* 251 (2019). *See also Incest*, *Black's Law Dictionary* (11th ed. 2019) (defining "incest" as "[s]exual relations between family members or close relatives, including children related by adoption"). In North Carolina, "marriages between any two persons nearer of kin than first cousins, or between double first cousins" are void. N.C. Gen. Stat. § 51-3 (2018). In ascertaining whether persons are nearer of kin than first cousins, "the half-blood shall be counted as the whole-blood . . . ." N.C. Gen. Stat. § 51-4 (2018). Expanding the scope of section 14-178 to include a niece-in-law would mean that, while an individual could marry their niece-in-law where certain age restrictions do not prohibit otherwise, that individual would be guilty of incest if the marriage were consummated.

We thus conclude that the term "niece" in N.C. Gen. Stat. § 14-178 does not encompass a niece by affinity for the purposes of incest as criminalized by that statute. Our construction is consistent with a majority of other jurisdictions with similar statutes that have addressed

whether sexual intercourse between an uncle and niece, related only by affinity, is incestuous within the meaning of their statutes. *See State v. Tucker*, 93 N.E. 3, 4 (Ind. 1910) ("[T]o constitute the crime of incest by uncle and niece under the provisions of the act under consideration they must be such kindred by the ties of consanguinity."); *State v. Moore*, 262 A.2d 166, 169 (Conn. 1969) ("Had the legislative intent been to include what, in this case, would commonly be called a relationship of niece-in-law and uncle-in-law, it would have been a simple matter to say so.[6]"); *State v. Anderson*, 484 N.E.2d 640, 641 (Ind. Ct. App. 1985) ("Although the statute[7] does not contain a requirement for consanguinity in the case of incest between an uncle and a niece, this precise question was addressed by our Supreme Court in *State v. Tucker* . . . . Thus, the trial court's judgment dismissing the charges is affirmed."); *Hull v. State*, 686 So. 2d 676, 677 n.2 (Fla. Dist. Ct. App. 1996) ("The relationship of uncle-in-law and niece-in-law is clearly not alone sufficient to . . . implicate the incest statute, section 826.04, Florida Statutes (1995)[.8]"); *State v. Dodd*, 871 S.W.2d 496, 497 (Tenn. Crim. App. 1993) (reversing the conviction of a defendant who had sexual relations with the daughter of his wife's half-sister where the applicable incest statute "include[d] all relationships of consanguinity and only a *limited number* of those by affinity[.]" (emphasis added)).

In this case, because Mary is not Defendant's niece by consanguinity, Mary is not Defendant's niece as contemplated by N.C. Gen. Stat. § 14-178 and the trial court erred by denying Defendant's motion to dismiss the incest charge. We therefore vacate Defendant's incest conviction and remand for resentencing.

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6. "Every man and woman who marry or carnally know each other, being within any of the degrees of kindred specified in section 46-1, shall be imprisoned in the State Prison not more than ten years." Conn. Gen. Stat. § 53-223 (1969). "No man shall marry his mother, grandmother, daughter, granddaughter, sister, aunt, niece, stepmother or stepdaughter, and no woman shall marry her father, grandfather, son, grandson, brother, uncle, nephew, stepfather or stepson . . . ." Conn. Gen. Stat. § 46-1 (1969).

7. "A person eighteen (18) years of age or older who engages in sexual intercourse or deviate sexual conduct with another person, when he knows that the other person is his parent, stepparent, child, stepchild, grandparent, grandchild, sibling, aunt, uncle, niece, or nephew, commits incest, a Class D felony." IND. CODE § 35-46-1-3 (1977).

8. "Whoever knowingly marries or has sexual intercourse with a person to whom he is related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece, commits incest[.]" Fla. Stat. § 826.04 (1995).

C. Defendant's Statements at the Sheriff's Office

[3] Defendant contends that the trial court erred by denying his motion to suppress his inculpatory statements made at the Onslow County Sheriff's Office following his arrest. Defendant specifically contends that the trial court's findings of fact are incomplete and that the evidence does not support the conclusion that his statements were made voluntarily.

"The standard of review for a motion to suppress evidence is whether the trial court's findings of fact are supported by competent evidence and whether the findings support the court's conclusions of law." *State v. Boyd*, 207 N.C. App. 632, 636, 701 S.E.2d 255, 258 (2010) (quotation marks and citation omitted). "Unchallenged findings of fact are deemed supported by competent evidence and are binding on appeal." *State v. Davis*, 237 N.C. App. 22, 27-28, 763 S.E.2d 585, 589 (2014) (citation omitted). "The trial court's conclusions of law, however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

The trial court made the following relevant findings of fact in its written order denying Defendant's motion to suppress:

> 6. Accompanied by local law enforcement, the detectives arrested the defendant once he arrived back at Raleigh-Durham Airport on August 7, 2018 at approximately 11:00 a.m. after a flight from Colombia.
>
> 7. The defendant was transported to Onslow County by the detectives in an Onslow County Sheriff's Department motor vehicle. The defendant, at the time of the arrest, was 42 and was an active duty marine stationed in the provost marshal office aboard Camp Lejeune, N.C.
>
> 8. The defendant was handcuffed in front of his body and sat in the front passenger seat while Detective Pete Johnston drove, and Detective Charles Parrish was seated in the rear seat behind the defendant. They arrived at the Onslow County Sheriff's Office at shortly after 1:30 p.m. An audio recording of the conversation in the car during the trip was captured through a Go-Pro device in the car, and portions were played for the jury.
>
> 9. Shortly after they left RDU on the trip back to Onslow County, the defendant initiated questioning about his case. The detectives stopped him, and Johnston told him that

"as long as you are in custody, you know as well as we do, that we cannot really talk." He was told that if he wanted to talk, they would have to go over the rights form. The defendant asked what they thought he ought to do, and Johnston told him it was "what he thought." He advised the officers that he wanted to ask them "what is coming" and "what he is facing." In response the officers told him that whether he talked about the case was "totally up to him." He was told that after they went over the form, he could then make a decision as to what he wanted to do. After his rights were read to him, the defendant appeared to decide that he would not sign the waiver and talk then but wait until he got back. Discussion about the case ceased at that point.

10. They basically advised him that it was his choice as to whether he wanted to talk about the case. In the car Detective Parrish at 11:28 a.m. read him his Miranda rights . . . . The language of the waiver was also read to the defendant by Detective Parrish, but he chose not to execute the waiver at that time.

11. In the car after each right was read to him, the defendant orally answered "Yes, Sir." After being handed the printed Interrogation-Advisement of Rights form on a clipboard, the defendant initialed each right in the space provided after each right. He advised that from his work in the Provost Marshal's office, he jokingly stated that he had read those rights "a few times himself" in his law enforcement work. He chose not to sign under the waiver of rights paragraph at that time, and returned the clipboard containing the rights form back to Detective Parrish.

. . . .

14. Once the defendant got seated next to the table, he was provided the same rights waiver form, which he had previously been read from in the car and on which he had initialed next to each right during the trip from the airport.

15. Once he joined the defendant and Deputy Parrish already seated in the room, Detective Johnston told him that now they had to be a "little more candid than they were in the car." The defendant was told not to say anything but just to listen, and they will go over "some stuff."

The defendant was told "Nothing you say here is going to change the things that happened. You are fully charged with the offense."

16. This was said to the defendant by Detective Johnston because the warrant for arrest for statutory rape had already been issued, and because of that, nothing that was going to be discussed during the interrogation was going to change the status of the case.

. . . .

18. The defendant was advised that they work in the Special Victims Unit, and they know there are always "two sides to every story, and they are never going to arrest anyone without giving them an opportunity to tell them what's going on." In order to give the defendant that opportunity, they had to "finish signing and going over that [rights] form" which the defendant had in front of him. "That is up to you. Before we address that and ask you what you want to do with that, keep in mind, again, that nothing you say in here is going to hurt you or change the situation as it stands. It will give us some insight. Right now we have a little girl that "we kind to (sic) have more questions than we have answers for. Now we are hoping that you can shed some light on what is going on with her." Parrish advised him that part of their job was the consideration of the welfare of the victims.

19. . . . After which, the defendant signed the waiver form at 2:02 p.m . . . .

. . . .

24. After the defendant continued to deny any misconduct, Detective Johnston eventually told the defendant that based on other sources that the defendant did not know about, "stuff" was not adding up and he could not explain it. He intimated that defendant was not telling the truth.

25. About thirty minutes into the interrogation the defendant stated that "I fucked up. I screwed up." He stated that he and the victim got close and kissed. On the day he left for Colombia while the victim's parents were at work, he had gotten the victim to put coconut butter on his back after he had been sunbathing. They talked about

> the victim's boyfriend in Spain and went into the garage and had intercourse. He told law enforcement that he did not force her.
>
> 26. When it appeared to Detective Johnston that the defendant was close to making an inculpatory statement, he reached over and touched the defendant on his knee with an open palm. Johnston explained that this was a technique to show empathy and humanity to the defendant . . . .
>
> 27. The defendant never requested counsel, never asked that the questioning stop and never invoked his right to remain silent.

1. Findings of Fact

Defendant does not challenge any findings of fact; they are thus binding on appeal. *See State v. Hoque*, 269 N.C. App. 347, 361, 837 S.E.2d 464, 475 (2020). Defendant instead argues that the trial court's findings of fact are incomplete because the trial court failed to "make [a] finding of fact as to how many times and when Johnston touched [Defendant]." However, the findings of fact need not summarize *all* the evidence presented at voir dire. *State v. Dunlap*, 298 N.C. 725, 730, 259 S.E.2d 893, 896 (1979). Indeed, if there is no conflicting testimony about the facts alleged, it is permissible for the trial court to admit evidence a defendant seeks to suppress without making specific findings of fact at all, although it is better practice to make them. *Id.* In light of this rule, it is enough that the findings are supported by substantial and uncontradicted evidence, as they are here, and Defendant's argument is overruled.

2. Voluntariness

"The determination of whether a defendant's statements are voluntary and admissible is a question of law and is fully reviewable on appeal." *State v. Maniego*, 163 N.C. App. 676, 682, 594 S.E.2d 242, 245-46 (2004) (quotation marks and citation omitted). We look at the totality of the circumstances to determine whether the confession was voluntary. *State v. Cortes-Serrano*, 195 N.C. App. 644, 655, 673 S.E.2d 756, 763 (2009).

> The requisite factors in the totality of the circumstances inquiry include: 1) whether the defendant was in custody at the time of the interrogation; 2) whether the defendant's *Miranda* rights were honored; 3) whether the interrogating officer made misrepresentations or deceived the

> defendant; 4) the interrogation's length; 5) whether the officer made promises to the defendant to induce the confession; 6) whether the defendant was held incommunicado; 7) the presence of physical threats or violence; 8) the defendant's familiarity with the criminal justice system; and 9) the mental condition of the defendant.

State v. Martin, 228 N.C. App. 687, 690, 746 S.E.2d 307, 310 (2013) (citation omitted). "The presence or absence of one or more of these factors is not determinative." *State v. Greene*, 332 N.C. 565, 579, 422 S.E.2d 730, 738 (1992) (citation omitted).

Here, Defendant was advised of his *Miranda* rights, and, after each right was read to him, he orally answered "Yes, Sir." After Defendant was handed the Interrogation-Advisement of Rights form, he initialed in the space provided after each right. At the time of his arrest, Defendant was an active duty marine stationed in the provost marshal office in Camp Lejeune and "he jokingly stated that he had read those rights 'a few times himself' in his law enforcement work." Upon arrival at the Onslow County Sheriff's Office, Defendant was placed into an interrogation room where he waited for approximately fifteen minutes for the officers to return. Thereafter, he was permitted to use the restroom before returning to the interrogation room. Defendant was again advised of his *Miranda* rights, and he signed the rights waiver form. The interrogation proceeded for approximately thirty minutes before Defendant made inculpatory statements. Defendant did not appear to be under the influence of any alcohol or drugs, did not display any ill effects from his trip from Colombia, and conversed in fluent English.

The findings of fact support the trial court's conclusion that "[f]rom the totality of the circumstances, the defendant was aware of his constitutional rights at the time of his interrogation[,]" and that "the defendant was fully and completely advised of his *Miranda* warnings, and his waiver of his *Miranda* rights was executed freely, knowingly, voluntarily and intelligently." The findings of fact also support the trial court's conclusion of law that "the defendant's inculpatory statements were made voluntarily and understandingly." Thus, Defendant's argument lacks merit.

D. Clerical Error

[4] Defendant contends, and the State essentially concedes, that the case must be remanded to the trial court to correct a clerical error in the trial court's judgment. We agree.

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (quotation marks and citation omitted).

Here, the jury convicted Defendant of sexual activity by a substitute parent. Prior to sentencing, however, the trial court orally dismissed Defendant's conviction of sexual activity by substitute parent:

> [DEFENDANT]: I would make further motions to dismiss all charges. The arguments previously set forth for the record, if the Court could just take judicial notice of the content of those. They were voluminous. That would be the bases for any further motions.
>
> THE COURT: Okay.
>
> [DEFENDANT]: I'm happy to expound upon anything you want, Judge, but –
>
> THE COURT: Okay.
>
> [DEFENDANT]: – they've been argued several times.
>
> THE COURT: The Court is going to allow the motion to dismiss as to the sexual activity by substitute parent.
>
> [DEFENDANT]: Thank you, Judge.

Thereafter, the trial court consolidated the remaining convictions for sentencing. However, the judgment and subsequent modified judgment indicate that Defendant was convicted of sexual activity by a substitute parent. Accordingly, we remand for correction of the clerical error.

III. Conclusion

Defendant's incest conviction is vacated and remanded for resentencing and for correction of a clerical error on the written judgment.

NO ERROR IN PART; VACATED IN PART AND REMANDED FOR RESENTENCING AND FOR CORRECTION OF JUDGMENT.

Judges DILLON and WOOD concur.

YVES v. TOLENTINO

[287 N.C. App. 688 (2023)]

MUGABO YVES, PLAINTIFF
v.
NOE MARTINEZ TOLENTINO A/K/A TOLENTINO NOE MARTINEZ, DEFENDANT

No. COA22-730

Filed 21 February 2023

Process and Service—sufficiency of service of process—attempted delivery—incorrect address—dismissal proper

The trial court properly dismissed plaintiff's negligence complaint for insufficient service pursuant to Civil Procedure Rule 4 where defendant presented two affidavits demonstrating that he had not been personally served with the summons and complaint because, even though the private shipping service used by plaintiff provided a proof of delivery receipt at the address listed by plaintiff, defendant was not living at that address when service was attempted. Further, dismissal of the complaint with prejudice was appropriate where plaintiff did not seek judgment by default and the relevant statute of limitations had expired.

Appeal by defendant from judgment entered 13 January 2022 by Judge George Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 February 2023.

The Layton Law Firm, PLLC, by Christopher D. Layton, for the plaintiff-appellant.

Law Office of Zach R. Snyder, PLLC, by Zach Snyder, for the defendant-appellee.

TYSON, Judge.

Mugabo Yves ("Plaintiff") sought damages for injuries which occurred as a result of Noe Martinez-Tolentino's ("Defendant") purported negligence. Defendant moved to dismiss Plaintiff's Summons and Complaint for improper service. The trial court allowed the motion and dismissed Plaintiff's complaint with prejudice. Plaintiff appeals. We affirm.

I. Background

Defendant drove his car through an intersection and ran into Plaintiff on 5 March 2018. Plaintiff was riding a bicycle and alleged he

had sustained serious injuries. Plaintiff and Defendant unsuccessfully attempted to settle the matter outside of court. Plaintiff filed his complaint a few days before the statute of limitations expired, seeking compensatory damages for Defendant's purported negligence on 2 March 2021.

Plaintiff used the United Parcel Service ("UPS") to attempt to serve Defendant on 13 April 2021. UPS had temporarily adjusted its delivery guidelines for packages requiring a signature to a no-contact policy because of restrictions from the COVID-19 pandemic. According to the UPS website, UPS drivers were still required "to make contact with the consignee," and the consignee was required to "acknowledge that UPS is making a delivery and, if applicable, show government issued photo ID."

The UPS "Proof of Delivery" receipt provides the package was delivered on 19 April 2021 and received by "MARTINAZ." The driver signed "COVID-19" in the space designated for a consignee's signature to indicate compliance with the COVID-19 no-contact signature protocols. Plaintiff's lawyer signed an Affidavit of Service on 22 April 2021, which provided that a certified a copy of the Affidavit of Service was mailed to the same address using the United States Postal Service ("USPS").

Defendant moved to dismiss pursuant to Rule 4 and Rules 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the North Carolina Rules of Civil Procedure on 20 July 2021. Defendant's motion to dismiss included two affidavits: (1) one by Defendant stating he had moved and had not been personally served with a copy of the Summons or Complaint; and, (2) one from the person currently living at Defendant's former address, who stated he resided at the address on the day the Summons and Complaint were sent. Defendant also attached paystubs and a change of address from his bank demonstrating he was being paid at a different address at the time he was served. Plaintiff filed a response to Defendant's motion to dismiss on 27 August 2021.

Defendant's motion was heard on 14 December 2021. The trial court found the Summons "did not contain the Defendant's correct address" and "the Defendant ha[d] not been personally served with this lawsuit, pursuant to Rule 4 of the North Carolina Rules of Civil Procedure." The trial court granted Defendant's motion to dismiss with prejudice on 13 January 2022, as any subsequent issuance of any Alias and Pluries would be time-barred as occurring after the statute of limitations had expired. Plaintiff filed timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Proof of Service

Plaintiff argues the trial court erred in dismissing his complaint because Defendant was properly served according to Rule 4(j)(1)(d) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 4 (2021). He asserts the trial court failed to find and apply a presumption of valid service, because Defendant's purported signature was contained on the UPS "Proof of Delivery" receipt.

Plaintiff also asserts Rule 4(j2)(2) prevents Defendant from pleading the statute of limitation as a defense, because the action was commenced before the period of limitation expired. *Id.*

A. Standard of Review

"We review *de novo* questions of law implicated by . . . a motion to dismiss for insufficiency of service of process." *New Hanover Cty. Child Support Enf't ex rel. Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012).

B. Analysis

"The purpose of a summons is to give notice to a person to appear at a certain place and time to answer a complaint against him." *Stinchcomb v. Presbyterian Med. Care Corp.*, 211 N.C. App. 556, 562, 710 S.E.2d 320, 325 (2011) (citation and quotation marks omitted).

"In order for a summons to serve as proper notification, it must be issued and served in the manner [as is] prescribed by statute." *Id.* (citation and quotation marks omitted); *Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998) ("[I]t is well established that a court may only obtain personal jurisdiction over a defendant by the issuance of summons and service of process by one of the statutorily specified methods.") (citation omitted).

A plaintiff's failure to comply with the statutory requirements for service and process will not cure procedural defects, including a defendant's actual notice of a lawsuit. *Ryals v. Hall-Lane Moving & Storage Co.*, 122 N.C. App. 242, 247, 468 S.E.2d 600, 604 (1996) ("It is well-settled that process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid, even though a defendant had actual notice of the lawsuit.") (citations omitted).

Long ago, this Court stated, "a person relying on the service of a notice by mail must show strict compliance with the requirements of the statute." *In re Appeal of Harris*, 273 N.C. 20, 24, 159 S.E.2d 539, 543 (1968) (citation and internal quotation marks omitted); *Fulton v. Mickle*, 134 N.C. App. 620, 623, 518 S.E.2d 518, 521 (1999).

Our statutes provide several options for the acceptable manner of service of process. One option for serving a "natural person" is to: "deposit [ ] with a designated delivery service . . . a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt." N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(d). A delivery receipt "includes an electronic or facsimile receipt." *Id.*

1. Presumption of Valid Service

If the record demonstrates compliance with the statutory requirements for service of process, such compliance raises a rebuttable presumption the service was valid. *Patton v. Vogel*, 267 N.C. App. 254, 258, 833 S.E.2d 198, 202 (2019) (quoting *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 491, 586 S.E.2d 791, 796 (2003) (citations omitted)); *see also Taylor v. Brinkman*, 108 N.C. App. 767, 771, 425 S.E.2d 429, 432 (1993) ("The filing of an affidavit consistent with N.C. [Gen. Stat.] § 1–75.10(4) raises a rebuttable presumption of valid service consistent with N.C. [Gen. Stat.] § 1A–1, Rule 4(j)(1)(c)") (citation omitted).

In *Patton*, the plaintiff first mailed a copy of the complaint and summons *via* FedEx to an address listed on the accident report. *Id.* at 255, 833 S.E.2d at 200. The attempted service was returned to plaintiff and indicated the delivery address was vacant. *Id.* When plaintiff mailed another copy to an address discovered by a private investigator, plaintiff received a signed receipt of delivery from someone named "R. Price." *Id.* The defendant in *Patton* filed an affidavit with her motion to dismiss for improper service, averring: (1) she lived at the address listed on the accident report "on and after the day of the accident[;]" (2) had "neither lived nor worked" at the address supposedly discovered by the private investigator; (3) "had not authorized 'R. Price' or anyone else to accept legal papers for her[;]" and, (4) "had never been served with a copy of the summons, complaint, or amended complaint." *Id.* at 255-56, 833 S.E.2d at 200-01.

On appeal, the plaintiff in *Patton* argued the defendant's "single affidavit averring she did not reside" at the address discovered by the private investigator did not "overcome the presumption" she lived there. *Id.* at 258, 833 S.E.2d at 202. This Court held defendant had overcome

the presumption because the plaintiff had "produced no evidence other than the 'R. Price' receipt from FedEx to support the presumption of effective service." *Id.*

The facts before us are very similar to those in *Patton*. Defendant produced two sworn affidavits: (1) one averring he did not live at the address at the time the complaint and summons were delivered and attached paystubs indicating his current address; and, (2) another from the current occupant averring Defendant did not live at the address listed on the UPS delivery receipt on the date the summons and complaint were delivered. Those two affidavits, taken together, provided sufficient evidence for the trial court to find and conclude Defendant was not timely served according to the statute. *Id.* Plaintiff's argument is overruled.

2. Statute of Limitation Defense Pursuant to N.C. R. Civ. Pro. 4(j2)(2)

Plaintiff's argument asserting Rule 4(j2)(2) prevents Defendant from pleading the statute of limitation as a defense is similarly without merit. The application of Rule 4(j2)(2) is explained in *Taylor*:

> If the plaintiff, in seeking judgment by default, presents an affidavit giving rise to the presumption of valid service and this presumption is later rebutted, "the statute of limitation may not be pleaded as a defense if the action was initially commenced within the period of limitation and service of process is completed within 60 days from the date the service is declared invalid."
>
> Because Taylor was not seeking the imposition of a *judgment by default*, *the sixty-day saving provision of Rule 4(j2)(2) was not applicable.*

Taylor, 108 N.C. App. at 771, 425 S.E.2d at 432 (emphasis supplied) (citations omitted).

Here, Plaintiff was not seeking judgment by default, as Defendant had timely moved to dismiss the complaint for improper service. Rule 4(j2)(2) is not applicable, and the expiration of the statute of limitation bars Plaintiff from bringing the claim again. *Id.*; *see also United States v. Locke*, 471 U.S. 84, 101, 85 L.Ed.2d 64, 80 (1985) ("[S]tatutes of limitations [ ] necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a [statute of limitations] is to have any content, the deadline must be enforced."). Plaintiff's argument is overruled.

IV. Conclusion

The trial court properly concluded Plaintiff had failed to timely perfect service upon Defendant. The two affidavits Defendant submitted with his motion to dismiss sufficiently rebutted any presumption the service was valid. N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(d); *Patton*, 267 N.C. App. at 258, 833 S.E.2d at 202.

The trial court also properly dismissed Plaintiff's claim with prejudice, because Plaintiff was not seeking a default judgment and Rule 4(j2)(2) of the North Carolina Rules of Civil Procedure does not apply. N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2); *Taylor*, 108 N.C. App. at 771, 425 S.E.2d at 432. The statute of limitation bars Plaintiff from renewing his claims. *Id.*; *Locke*, 471 U.S. at 101, 85 L.Ed.2d at 80. The order of the trial court is affirmed. *It is so ordered.*

AFFIRMED.

Judges ZACHARY and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 FEBRUARY 2023)

DUNCAN v. TRANSEAU No. 22-375	Guilford (19CVD7868)	Reversed and Remanded.
ELLER v. AUTEN No. 22-577	Rowan (20CVS1518)	Affirmed
GRIFFING v. GRAY, LAYTON, KERSH, SOLOMON, FURR & SMITH, P.A. No. 22-576	Gaston (21CVS4249)	Vacated and Remanded.
IN RE A.A.C.D. No. 22-202	Mecklenburg (19JT143)	Affirmed.
IN RE C.M.S. No. 22-512	Iredell (16JT227)	Affirmed
IN RE E.P. No. 22-352	New Hanover (16JT358) (16JT359) (20JT96)	Affirmed
IN RE FORECLOSURE OF LIEN BY EXEC. OFF. PARK OF DURHAM ASS'N, INC. v. ROCK No. 20-405-2	Durham (18SP1035)	Vacated and Remanded
IN RE L.G.M.W. No. 22-419	Mitchell (20JT1)	Affirmed.
IN RE M.G.B. No. 22-389	Alamance (20JA155) (20JA156) (20JA46)	Affirmed
STATE v. CASS No. 22-187	Yadkin (18CRS50638) (18CRS50640) (18CRS50894-95) (18CRS50916) (18CRS50918-21) (18CRS50923)	No Error
STATE v. DAVIS No. 22-645	Cumberland (20CRS55737)	No Error

STATE v. JONES No. 22-716	Guilford (21CRS74073) (21CRS80277)	Affirmed.
STATE v. ORE No. 21-693-2	Davidson (20CRS50976) (21CRS681)	Dismissed
STATE v. PHAIR No. 22-445	Lee (20CRS63)	Affirmed
STATE v. SPEAKS No. 22-499	Surry (18CRS52806) (19CRS461)	No Error
STATE v. TEAL No. 22-336	Scotland (18CRS52094) (18CRS52115) (19CRS181) (19CRS69)	Affirmed In Part; Remanded For Resentencing.

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