289 N.C. App.—No. 1 Pages 1-111

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

NOVEMBER 22, 2023

MAILING ADDRESS: The Judicial Department
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OF

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COURT OF APPEALS

CASES REPORTED

FILED 16 MAY 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

Petition for judicial review—denial of justice officer certification—sufficiency of exceptions to final agency decision—In a contested case in which a school resource officer sought judicial review of the final agency decision of the N.C. Sheriffs' Education and Training Standards Commission (Commission) denying his application for justice officer certification—a certification previously granted to petitioner when he was an officer with the state highway patrol but which the Commission had revoked for lack of good moral character—the petition for judicial review was not subject to dismissal for lack of notice where it contained, as required by N.C.G.S. § 150B-46, sufficient exceptions to the final agency decision and a request for relief (in this case, reversal of the decision and reinstatement of the justice officer certification). **Devalle v. N.C. Sheriffs' Educ. & Training Standards Comm'n, 12.**

AIDING AND ABETTING

Possession of a firearm by a felon—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss—for insufficiency of the evidence—a charge of aiding and abetting possession of a firearm by a felon, where the State

Prosecutor's closing argument—child rape trial—remarks on sexual history—unsupported and inflammatory—The trial court erred in defendant's trial for multiple counts each of rape of a child and sexual offense with a child by failing to intervene ex mero motu during the prosecutor's closing argument when the prosecutor remarked on defendant's use or lack of use of condoms during sexual intercourse and when he discussed defendant's sexual history with his girlfriend, both of which were grossly improper and inflammatory. The prosecutor's inferences that defendant was spreading sexually transmitted diseases was not supported by the evidence and served only to inflame the passions or prejudice of the jury, and the inference that defendant manipulated his girlfriend was an impermissible character attack based on improperly admitted evidence (the introduction of which constituted plain error entitling defendant to a new trial). **State v. Reber, 66.**

EVIDENCE

Disclosure of evidence by State—untimely disclosure—sanctions—exculpatory value of evidence—In defendant's trial for charges arising from allegations that he assaulted his girlfriend, the trial court did not abuse its discretion by denying defendant's motion for a mistrial premised on the State's late disclosure of discoverable material under N.C.G.S. § 15A-910 where defendant failed to identify any exculpatory value in the recorded jail phone calls. In addition, pursuant to the statute, even when a disclosure violation occurs, sanctions are not mandatory. The appellate court did not consider defendant's arguments regarding evidence that was admitted without objection. **State v. Mahatha, 52.**

Prior bad acts—child rape trial—text messages with girlfriend—highly prejudicial—new trial granted—Where the trial court committed plain error in a trial for multiple counts each of rape of a child and sexual offense with a child (based on acts alleged to have occurred when the victim was between eight and eleven years old) by allowing the State to introduce text message exchanges between defendant and a former girlfriend as Rule 404(b) evidence, defendant was entitled to a new trial. Neither exchange—one of which was in regard to a sexual encounter that occurred when defendant's girlfriend was intoxicated and which she could not later remember, and the other of which was in regard to a plan to meet at a motel and to have defendant's daughter keep the meeting a secret from defendant's family—was sufficiently similar to the events giving rise to the criminal charges at issue. Therefore, their introduction was highly prejudicial and likely impacted the jury verdict, particularly in a case where, since there was no physical evidence of the crimes or eyewitnesses, the outcome of the case was dependent upon the jury's perception of the credibility of each witness. **State v. Reber, 66.**

FIREARMS AND OTHER WEAPONS

Possession of a firearm by a felon—constructive possession—sufficiency of evidence—In a prosecution for possession of a firearm by a felon arising from a traffic stop, during which police found a rifle inside the rear passenger compartment of a vehicle while defendant sat in the front passenger seat as one of four passengers, the trial court improperly denied defendant's motion to dismiss where there was insufficient evidence that defendant constructively possessed the rifle. The State's evidence failed to show that defendant—who neither owned the vehicle nor was driving it at the time—was in exclusive possession of the vehicle when police found the rifle, and therefore the State was not entitled to an inference of constructive possession

plaintiff's forecasted evidence, she had walked through the area before defendant created the scuttle hole, and it had been covered by plywood flooring; later, after she expressed her dislike of the scuttle hole, defendant assured her that the scuttle hole would be fixed prior to closing. **Cullen v. Logan Devs., Inc., 1.**

Gross negligence—unsafe condition—newly constructed home—summary judgment—In an action arising from plaintiff's fall through the attic floor of her newly constructed home, the trial court erred by granting summary judgment in favor of defendant general contractor on plaintiff's gross negligence claim where defendant had constructed a scuttle hole in the ceiling of the master bathroom to comply with the local building code and then subsequently concealed the hole with drywall after plaintiff expressed her displeasure over the appearance of the hole. According to the forecasted evidence, defendant knew that concealing the hole violated applicable building code and posed a hazard, but he did it anyway, which a jury could find amounted to wanton conduct done with conscious or reckless disregard for the safety of others. **Cullen v. Logan Devs., Inc., 1.**

PUBLIC OFFICERS AND EMPLOYEES

Denial of justice officer certification—arbitrary and capricious—unsupported by substantial evidence—In a contested case in which a school resource officer applied for reinstatement of justice officer certification—which had previously been granted to him when he was an officer with the state highway patrol but which was revoked for lack of good moral character—the decision of the N.C. Sheriffs' Education and Training Standards Commission (Commission) to disregard the administrative law judge's recommendation for reinstatement and instead deny indefinitely petitioner's request for certification was arbitrary and capricious and not supported by substantial evidence. The Commission did not abide by its own standard in determining whether petitioner had good moral character at the time of the contested case hearing—relying instead on the incident several years prior that led to petitioner's termination from the highway patrol, which did not amount to severe misconduct—and failed to take into account evidence that petitioner's character had been rehabilitated. Therefore, the trial court did not err by reversing the Commission's decision and directing the Commission to reinstate petitioner's certification retroactively. **Devalle v. N.C. Sheriffs' Educ. & Training Standards Comm'n, 12.**

TERMINATION OF PARENTAL RIGHTS

Best interests of the child—dispositional factors—likelihood of adoption—not dispositive—The trial court did not abuse its discretion in concluding that termination of a mother's parental rights in her minor son was in the child's best interests, where clear, cogent, and convincing evidence supported the court's factual findings regarding two statutory dispositional factors: whether termination would aid in accomplishing the child's permanent plan of adoption, and the bond between the mother and her child. A likelihood of adoption (also one of the statutory factors) is not dispositive as to a best interest determination, and therefore—even if the record lacked current, relevant evidence indicating a likelihood of the child's adoption—the court's decision was not manifestly unsupported by reason. **In re D.C., 30.**

Grounds for termination—failure to make reasonable progress—sufficiency of evidence—nexus between case plan components and conditions that led

to child's removal —The trial court properly terminated a mother's parental rights in her son for failure to make reasonable progress in correcting the conditions that led to his removal from the home (N.C.G.S. § 7B-1111(a)(2)) where the court's findings of fact were supported by clear, cogent, and convincing evidence, and where there was a sufficient nexus between the case plan components that the mother failed to comply with and the conditions resulting in the child's removal. Specifically, the evidence showed that the mother willfully failed to participate in parenting classes and individual counseling sessions that her case plan required her to complete, and the main purpose of those two case plan components was to help the mother acknowledge why her son was removed from the home. **In re D.C., 30.**

Termination order—reversed and remanded—compliance with appellate court's mandate—After the Supreme Court reversed and remanded a termination of parental rights (TPR) order because the trial court had made its findings of fact under the wrong evidentiary standard, the trial court's subsequent TPR order (entered on remand) was affirmed where it sufficiently complied with the Supreme Court's mandate to "review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact." Given the mandate's plain language—along with the Court's comment that remanding the case would not necessarily be "futile," as the record was not necessarily "insufficient" to support findings that would establish any of the statutory TPR grounds—the trial court was not required on remand to conduct a new dispositional hearing or to receive additional evidence before making new findings. Further, the trial court's assertion at the remand hearing—that its prior use of the incorrect evidentiary standard was only a "clerical error"—was irrelevant where the trial court otherwise complied with the Court's mandate. **In re D.C., 30.**

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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

DEBRA CULLEN, PLAINTIFF
v.
LOGAN DEVELOPERS, INC., DEFENDANT

No. COA22-223

Filed 16 May 2023

1. Negligence—contributory negligence—unsafe condition—newly constructed home—summary judgment

In an action arising from plaintiff's fall through the attic floor of her newly constructed home, the trial court erred by granting summary judgment in favor of defendant general contractor on plaintiff's negligence claim where the forecast of evidence showed a genuine issue of material fact as to whether plaintiff was contributorily negligent by failing to look out for her safety—whether she knew or should have known that the scuttle hole that defendant had constructed and then subsequently concealed with drywall presented an unsafe condition. According to plaintiff's forecasted evidence, she had walked through the area before defendant created the scuttle hole, and it had been covered by plywood flooring; later, after she expressed her dislike of the scuttle hole, defendant assured her that the scuttle hole would be fixed prior to closing.

2. Negligence—gross negligence—unsafe condition—newly constructed home—summary judgment

In an action arising from plaintiff's fall through the attic floor of her newly constructed home, the trial court erred by granting summary judgment in favor of defendant general contractor on plaintiff's gross negligence claim where defendant had constructed a scuttle hole in the ceiling of the master bathroom to comply with the

local building code and then subsequently concealed the hole with drywall after plaintiff expressed her displeasure over the appearance of the hole. According to the forecasted evidence, defendant knew that concealing the hole violated applicable building code and posed a hazard, but he did it anyway, which a jury could find amounted to wanton conduct done with conscious or reckless disregard for the safety of others.

Appeal by Plaintiff from judgment entered 14 October 2021 by Judge Henry L. Stevens in Brunswick County Superior Court. Heard in the Court of Appeals 20 September 2022.

Ricci Law Firm, P.A., by Meredith S. Hinton and William J. Patterson, for plaintiff-appellant.

McAngus Goudelock & Courie PLLC, by Jeffery I. Stoddard, for defendant-appellee.

MURPHY, Judge.

The trial court improperly granted Defendant's motion for summary judgment and dismissed Plaintiff's negligence claim where the forecast of evidence showed a genuine issue of material fact as to whether Plaintiff knew or should have known that the scuttle hole Defendant constructed in her attic walk space had not been closed but was concealed with drywall and thus presented an unsafe condition. As the forecast of evidence must be viewed in the light most favorable to Plaintiff, the trial court erred in concluding Plaintiff was contributorily negligent as a matter of law. The forecast of evidence likewise showed a genuine issue as to whether Defendant's conduct in visually concealing the scuttle hole with drywall amounted to gross negligence. We vacate the trial court's order.

BACKGROUND

Defendant general contractor Logan Developers, Inc. contracted to build a new home for Plaintiff Debra Cullen and her husband in Southport. The home was a model home that Defendant designed. During a final walkthrough of the home nearing the end of construction, Plaintiff and her husband noticed that Defendant had cut a new scuttle hole to access the attic through the area of the existing attic walk space and the master bathroom ceiling. Plaintiff and her husband complained to Defendant that the scuttle hole was an eyesore and they wanted it

gone. Defendant's agent told Plaintiff the local building code required the scuttle hole be there; however, "[t]o meet the Cullens halfway," according to Defendant, it agreed to cover the scuttle hole with drywall and concealed its appearance from the master bathroom ceiling.

During their first week in the home, on 1 May 2019, Plaintiff walked into the attic and began taking pictures of areas where she wanted to add plywood flooring to the existing walk space but where there was only insulation. Plaintiff stepped onto the area of the walk space that Defendant cut for the scuttle hole and fell through the ceiling of the master bathroom. Plaintiff suffered serious injuries, including a broken ankle and thumb.

Plaintiff acknowledged at deposition that, if she had looked down at the scuttle hole, she likely "would have seen insulation and [she] would not have stepped in it." However, according to Plaintiff, Defendant never spoke with her about what covering the scuttle hole would entail or "the details of what work they were going to do[.]" Instead, Plaintiff stated that Defendant's agent's "exact words were 'by closing, you'll never know [the scuttle hole] was there.' " Plaintiff testified that, in light of Defendant's statements, she did not think to look down at the area because she "thought that [w]hole thing was plywood like it was in the beginning . . . ."[1]

On 15 October 2020, Plaintiff filed suit in Brunswick County, asserting one count each of negligence and gross negligence. Plaintiff alleged Defendant was negligent and grossly negligent in, *inter alia*, (1) failing to comply with applicable building codes, (2) failing to construct the home in a fit and habitable condition and failing to properly inspect and repair the scuttle hole, and (3) failing to adequately warn Plaintiff of the unsafe condition. Plaintiff sought recovery for her injuries, including medical expenses and lost income and Social Security benefits, as well as punitive damages for Defendant's gross negligence.

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1. Defendant answered the following to an interrogatory regarding its placement of the scuttle hole:

> On [28 December] 2018, the rough-in inspection noted that the distance from the attic entry to the mechanical air handler unit was greater than 20 feet. According to the [building] code, if the air handler is more than 20 feet from the access point, the entire walk path to the unit must have six feet of head clearance. Some of the framing in the Cullen's house lowered the head clearance below six feet. This required a scuttle hole or another access to the mechanic air handler unit. . . . The only location that would allow for access within 20 feet along with the clearance requirement was the master bathroom [area of the attic].

Defendant answered, alleging Plaintiff was aware of the scuttle hole and that "the framed opening from the attic side was left open, not concealed in any way, and clearly visible to someone in the attic." Defendant asserted affirmative defenses, including contributory negligence, assumption of risk, and completion and acceptance.[2]

On or about 1 July 2021,[3] Defendant filed a motion for summary judgment seeking Plaintiff's claims be dismissed and judgment be entered in its favor on all counts. By order entered 14 October 2021, the trial court concluded the forecasted evidence, even in the light most favorable to her, showed Plaintiff was contributorily negligent as a matter of law, thus barring her negligence claim, and that Plaintiff had alleged "insufficient facts . . . to support a conclusion of gross negligence on behalf of Defendant." The trial court granted Defendant's motion for summary judgment and dismissed Plaintiff's claims. Plaintiff timely appealed.

ANALYSIS

We review a trial court's order granting summary judgment *de novo*. *Proffitt v. Gosnell*, 257 N.C. App. 148, 151 (2017). "Under a *de novo* review, the reviewing court considers the matter anew and freely substitutes its own judgment for that of the lower court." *Id.* (marks omitted).

Summary judgment is appropriate under Rule 56 of the North Carolina Rules of Civil Procedure where

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment bears the burden of showing that no triable issue of fact exists, and may satisfy its burden by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that an affirmative defense would bar the non-moving party's claim.

Id. at 151 (marks omitted); N.C.G.S. § 1A-1, Rule 56(c) (2021).

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2. Defendant also alleged affirmative defenses of failure to mitigate and lack of proximate cause.

3. Defendant's motion for summary judgment is not file stamped, but there was no dispute regarding the filing of the motion at the hearing.

"[S]ummary judgment is proper in a negligence case where the forecast of evidence fails to show negligence on [the] defendant's part, or establishes [the] plaintiff's contributory negligence as a matter of law." *Stansfield v. Mahowsky*, 46 N.C. App. 829, 830, *disc. review denied*, 301 N.C. 96 (1980); *see also McCauley v. Thomas*, 242 N.C. App. 82, 90 (2015) ("The issue of gross negligence should be submitted to the jury if there is substantial evidence of the defendant's wanton and/or [willful] conduct."). Summary adjudication of such claims, however, "is normally inappropriate due to the fact that the test of the reasonably prudent person is one which the jury must apply in deciding the questions at issue." *Barber v. Presbyterian Hosp.*, 147 N.C. App. 86, 88 (2001). Moreover, the issue of whether a plaintiff was contributorily negligent "is ordinarily a question for the jury; such an issue is rarely appropriate for summary judgment, and only where the evidence establishes a plaintiff's negligence so clearly that no other reasonable conclusion may be reached." *Proffitt*, 257 N.C. App. at 152.

A. Contributory Negligence

[1] For the purposes of this appeal, Defendant concedes that its actions may have been negligent, but maintains that, "[r]egardless of whether it was negligent to place the scuttle hole, cover the scuttle hole with drywall, fail to cover the attic side of the scuttle hole with plywood, or whether any of these actions were a code violation, the evidence is unequivocal that [Plaintiff] was negligent in stepping backwards in an attic while unreasonably choosing to not watch where she was stepping." The trial court, in its order, concluded that Plaintiff's "own negligence clearly contributed to her" injuries in that the forecasted evidence "affirmatively show[ed]" she failed "to keep a proper lookout for her own safety while stepping backwards and off the plywood walking path in the attic and into an area that she knew was unsafe."

We disagree and conclude the forecast of evidence shows a genuine issue of fact exists as to whether Plaintiff knew or should have known there was an unsafe condition in the area where she was walking in the attic. The trial court therefore erred in concluding Plaintiff was contributorily negligent as a matter of law for failing to look down and behind her before she stepped in that area.

The doctrine of contributory negligence provides that "a plaintiff cannot recover for injuries resulting from a defendant's negligence if the plaintiff's own negligence contributed to [her] injury." *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 483 (2020). Contributory negligence is "conduct which fails to conform to an objective standard of behavior—the care an ordinarily prudent person would

exercise under the same or similar circumstances to avoid injury." *Proffitt*, 257 N.C. App. at 152 (emphasis omitted).

A successful defense requires "a want of due care on the part of the plaintiff[.]" *Id.* (marks omitted). Oftentimes, "[t]he basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, [the] plaintiff failed to keep a proper lookout for her own safety. The question is . . . whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor." *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468 (1981), *overruled on other grounds*, *Nelson v. Freeland*, 349 N.C. 615 (1998); *see also Proffitt*, 257 N.C. App. at 164 ("[I]t is well settled that a person is contributorily negligent if he or she knows of a dangerous condition and voluntarily goes into a place of danger."). Our Supreme Court has further explained that "one is not required to anticipate the negligence of others; in the absence of anything which gives or should give notice to the contrary, one is entitled to assume and to act on the assumption that others will exercise ordinary care for their own or others' safety." *Norwood*, 303 N.C. at 469. Plaintiff's behavior must be "compared to that of a reasonable person under similar circumstances." *Draughon*, 374 N.C. at 484.

In this case, Defendant affirmed its agent

> told [Plaintiff and her husband] that wherever there was subflooring in the attic they could place storage bins but that they were prohibited by code from adding any additional subflooring to the attic. *[Plaintiff and her husband] knew from these conversations they could not step off the subflooring in the attic.* . . . [Defendant told Plaintiff the scuttle hole] was required by code so [Defendant] could not cover it with plywood. To meet [Plaintiff and her husband] halfway, [Defendant's agent] told them he could put drywall over the scuttle hole.

(Emphasis added). But Plaintiff's forecasted evidence, if believed, shows the only time Plaintiff walked in the attic prior to the accident was before Defendant installed the scuttle hole, and the area where Defendant cut the scuttle hole was within the area of what was once a walk space when Plaintiff was previously in the attic. *See Norwood*, 303 N.C. at 469 (emphasis added) ("Applying this principle to the facts of the case *sub judice*, [the] plaintiff was contributorily negligent only if in the exercise of ordinary care she should have seen *and appreciated the danger of* the protruding platform."). Plaintiff explained in her answers to interrogatories that her husband had previously

> walked in and saw the hole in the [master bathroom] ceiling. He asked [Defendant] what it was. [Defendant] told him not to worry, that they would fix the hole as soon as the inspection was completed. It was our understanding that this was fixed prior to us closing on the house.

Plaintiff stated she believed this meant Defendant would "replace[] the plywood that [Defendant] had . . . removed to" cut the scuttle hole. Plaintiff further averred that "[t]he *hole* was something that [Defendant] told us would be fixed prior to us closing on the house." (Emphasis added).

We must view the evidence in the light most favorable to Plaintiff, and these statements create a genuine issue of material fact as to whether Plaintiff knew the area remained unsafe such that she was negligent in failing to look out for her safety while walking. *See Dobson v. Harris*, 352 N.C. 77, 83 (2000) (citations omitted) ("The movant's papers are carefully scrutinized; those of the adverse party are indulgently regarded. All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party."); *Maness v. Fowler-Jones Constr. Co.*, 10 N.C. App. 592, 598 ("While . . . there may have been other, safer procedures which [the] plaintiff could have followed . . . , this would not as a matter of law require a holding that [she] was negligent in doing what [she] did."), *cert. denied*, 278 N.C. 522 (1971). The merits of Defendant's affirmative defense and any evidence that Plaintiff knew the danger existed present a question of fact for the jury to decide. *See*, *e.g.*, *id.*; *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 395 (2007) (marks omitted) ("[S]ummary judgment is rarely appropriate in cases of negligence or contributory negligence."); *see also Proffitt*, 257 N.C. App. at 152 ("Contradictions or discrepancies in the evidence even when arising from the plaintiff's evidence must be resolved by the jury rather than the trial judge.").

We note further the cases Defendant cites in support of its argument pertaining to Plaintiff's knowledge in this case all involve plaintiffs employed and working in a specialized or dangerous line of work, or involve falls in public areas where the plaintiff had no reasonable expectation the area would be free of dangers. *See Swinson v. Lejeune Motor Co.*, 147 N.C. App. 610, 618-19 (2001) (McCullough, J., dissenting) (affirming finding of contributory negligence where the plaintiff fell in a car dealership parking lot), *reversed for reasoning stated in dissenting opinion*, 356 N.C. 286 (2002); *Holland v. Malpass*, 266 N.C. 750, 752 (1966) ("The plaintiff's evidence . . . shows that the plaintiff, an experienced garage worker, failed to look before he stepped where he should have anticipated some obstruction was likely."); *Lee v. Carolina*

Upholstery Co., 227 N.C. 88, 89 (1946) ("[The P]laintiff was an experienced truckman and was doing the work in his own way."); *Dunnevant v. Southern Ry. Co.*, 167 N.C. 232, 233 (1914) (sustaining motion to nonsuit where the plaintiff fell at a train station late at night after walking off into the dark without his lantern).

Our Supreme Court held in *Holland* that "[w]hat constitutes reasonable care depends upon the nature of the business and the normal use in such business establishments of like areas." *Holland*, 266 N.C. at 752. Plaintiff's state of mind is relevant in determining whether she conducted herself in a reasonably prudent manner; in this case, Plaintiff's state of mind was that of someone walking into her brand-new home she contracted with Defendant to build, subject to the safety standards set forth in the applicable building codes, as well as any contractual assurances and warranties. She was also aware of the area of attic previously covered by plywood flooring, prior to the creation of the scuttle hole, and aware of Defendant's assurance the scuttle hole had been fixed prior to closing on the home. *See Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 377 (marks omitted) ("The standard is always the rule of the prudent man or the care which a prudent man ought to use under like circumstances. What reasonable care is, of course, varies in different cases and in the presence of different conditions."), *aff'd*, 307 N.C. 267 (1982); *see also Crescent Univ. City Venture, LLC v. Trussway Mfg., Inc.*, 376 N.C. 54, 61-62 (2020) (noting that, even in cases involving only economic loss by "subsequent home purchaser[s]," the plaintiff may "recover against the builder of a home in negligence" on grounds of public policy specific to "the plight of residential homebuyers[,]" specifically that "[t]he ordinary purchaser of a home is not qualified to determine when or where a defect exists"). Plaintiff's forecast of evidence, taken as true, prevented a conclusion by the trial court that Plaintiff was contributorily negligent as a matter of law by failing to look out for her safety. The trial court therefore erred in concluding Plaintiff was contributorily negligent and dismissing Count I of Plaintiff's complaint.

B. Plaintiff's Claim of Gross Negligence

[2] Plaintiff next challenges the trial court's conclusion that Plaintiff alleged insufficient facts to support a finding of gross negligence.

Gross negligence "consists of wanton conduct done with conscious or reckless disregard for the rights and safety of others. An act is wanton when it is . . . done needlessly, manifesting a reckless indifference to the rights of others." *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 490 (citations and marks omitted), *disc. review denied*, 766 S.E.2d 646 (2014).

Our Supreme Court

> has described the difference between ordinary and gross negligence as follows:
>
> [T]he difference between the two is not in degree or magnitude of inadvertence or carelessness, but rather is intentional wrongdoing or deliberate misconduct affecting the safety of others. An act or conduct rises to the level of gross negligence when the act is done purposely and with knowledge that such act is a breach of duty to others, i.e., a conscious disregard of the safety of others.

Ray v. N.C. Dep't of Transp., 366 N.C. 1, 13 (2012) (quoting *Yancey v. Lea*, 354 N.C. 48, 53 (2001)).

> In determining or defining gross negligence, this Court has often used the terms willful and wanton conduct and gross negligence interchangeably to describe conduct that falls somewhere between ordinary negligence and intentional conduct. We have defined gross negligence as wanton conduct done with conscious or reckless disregard for the rights and safety of others. An act is wanton when it is done of wicked purpose, *or when done needlessly*, manifesting a reckless indifference to the rights of others. Our Court has defined willful negligence in the following language:
>
> An act is done wilfully when it is done *purposely and deliberately in violation of law* or when it is done knowingly and of set purpose, *or when the mere will has free play, without yielding to reason*. The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law.

Green v. Kearney, 217 N.C. App. 65, 70 (2011) (emphases added) (quoting *Yancey*, 354 N.C. at 52-53). "Wanton and willful negligence rests on the assumption that [the defendant] knew the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results." *Wagoner v. R.R.*, 238 N.C. 162, 168 (1953).

Plaintiff alleged the following "intentional wrongdoing or deliberate misconduct[,]" *Green*, 217 N.C. App. at 75, in support of her claim of gross negligence:

4. Prior to Plaintiff taking possession of the Premises, Defendant left a hole in the ceiling of the master bathroom in order for it to be inspected.

5. Defendant assured Plaintiff that the hole would be fixed after the inspection and before her taking possession of the Premises.

6. On or about [25 April 2019], Plaintiff began occupying the Premises.

7. The hole in the ceiling of the master bathroom appeared to have been properly repaired and was no longer visible to Plaintiff.

. . . .

10. Plaintiff had no knowledge or notice of any unresolved dangerous condition of the attic floor/master bathroom ceiling that would cause it to collapse.

. . . .

25. The conduct of Defendant constituted gross negligence and/or willful and wanton disregard for the rights and safety of Plaintiff.

26. By reason of the conduct of Defendant, Plaintiff is entitled to punitive damages.

Defendant's operations director stated the following at Defendant's Rule 30 deposition:

Q. Do you think [covering the scuttle hole with drywall] was a right decision for [Defendant] to make?

A. No. Absolutely not. I told [our employee working on the site]—I said, that—whether we think it's necessary or not it is—was required by code. It was installed and inspected and it should have stayed.

Q. And so doing away with that would make the house not up to code?

A. Correct. If an inspector re-inspected that he would have—he would have found that in violation.

Q. Would that be a problem for [Defendant]?

A. Yes.

Q. Did [Defendant's employee] ever ask if he could do that?

A. He did not.

The forecasted evidence in this case thus contains allegations and averments which, if taken as true, show Defendant knew concealing the appearance of the scuttle hole from the side of the master bathroom ceiling violated applicable building code, and otherwise knew concealing the hole posed a hazard, but did it anyway. *See Sawyer v. Food Lion, Inc.*, 144 N.C. App. 398, 403 (2001) ("Conduct is wanton when it is carried out with a . . . reckless indifference."). While we acknowledge gross negligence "is a high threshold for liability," *Green*, 217 N.C. App. at 74 (marks omitted), viewing the materials in the light most favorable to Plaintiff, as we must, we hold the trial court erred in concluding Defendant was not grossly negligent as a matter of law. The forecasted evidence states a claim for gross negligence and raises a genuine issue of material fact whether Defendant's conduct surrounding the scuttle hole amounted to "wanton conduct done with conscious or reckless disregard for the . . . safety of others" such that it cannot be said Defendant was not grossly negligent as a matter of law.[4] *See Bullins v. Schmidt*, 322 N.C. 580, 583 (1988); *Beck*, 57 N.C. App. at 385 ("Plaintiff's evidence which tended to show numerous violations of the National Electrical Safety Code and of defendant's own standards was sufficient to merit the submission of the issue of punitive damages to the jury."); *cf. Bashford v. N.C. Licensing Bd. for General Contractors*, 107 N.C. App. 462, 466 (1992) (noting more than a violation of the building code is needed to establish gross negligence under both N.C.G.S. § 87-11(a) and the common law). Accordingly, the trial court erred in dismissing Count II of Plaintiff's complaint.

Lastly, Defendant's argument that Plaintiff has abandoned the available remedy of punitive damages by failing to discuss them in her Appellant Brief is misplaced. The trial court dismissed Plaintiff's complaint, determining she was not entitled to relief as a matter of law. The issue of to what relief she would be entitled is thus not before us. Plaintiff specifically alleged willful and wanton conduct in Count II of her complaint for gross negligence in support of punitive damages. If,

4. Since the forecasted evidence does not establish Plaintiff was contributorily negligent as a matter of law, Defendant's argument concerning Plaintiff's gross-contributory negligence likewise fails. *See McCauley*, 242 N.C. App. at 89 (citation omitted) ("[A] plaintiff's contributory negligence does not bar recovery from a defendant who is grossly negligent. Only gross contributory negligence by a plaintiff precludes recovery by the plaintiff from a defendant who was grossly negligent.").

from the evidence, the jury determines there was willful and wanton conduct on the part of Defendant amounting to gross negligence and Plaintiff was not contributorily negligent, Plaintiff may pursue punitive damages. *See Beck*, 57 N.C. App. at 383 (marks omitted) ("Our Court has stated that under the common law of this State punitive damages may be awarded when the wrong is done willfully . . . or in a manner which evinces a reckless and wanton disregard of [the] plaintiff's rights.").

CONCLUSION

For the foregoing reasons, we vacate the trial court's order granting Defendant's motion for summary judgment and remand for further proceedings.

VACATED AND REMANDED.

Chief Judge STROUD and Judge ZACHARY concur.

MAURICE DEVALLE, PETITIONER
v.
NORTH CAROLINA SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION, RESPONDENT

No. COA22-256

Filed 16 May 2023

1. Administrative Law—petition for judicial review—denial of justice officer certification—sufficiency of exceptions to final agency decision

In a contested case in which a school resource officer sought judicial review of the final agency decision of the N.C. Sheriffs' Education and Training Standards Commission (Commission) denying his application for justice officer certification—a certification previously granted to petitioner when he was an officer with the state highway patrol but which the Commission had revoked for lack of good moral character—the petition for judicial review was not subject to dismissal for lack of notice where it contained, as required by N.C.G.S. § 150B-46, sufficient exceptions to the final agency decision and a request for relief (in this case, reversal of the decision and reinstatement of the justice officer certification).

2. Public Officers and Employees—denial of justice officer certification—arbitrary and capricious—unsupported by substantial evidence

In a contested case in which a school resource officer applied for reinstatement of justice officer certification—which had previously been granted to him when he was an officer with the state highway patrol but which was revoked for lack of good moral character—the decision of the N.C. Sheriffs' Education and Training Standards Commission (Commission) to disregard the administrative law judge's recommendation for reinstatement and instead deny indefinitely petitioner's request for certification was arbitrary and capricious and not supported by substantial evidence. The Commission did not abide by its own standard in determining whether petitioner had good moral character at the time of the contested case hearing—relying instead on the incident several years prior that led to petitioner's termination from the highway patrol, which did not amount to severe misconduct—and failed to take into account evidence that petitioner's character had been rehabilitated. Therefore, the trial court did not err by reversing the Commission's decision and directing the Commission to reinstate petitioner's certification retroactively.

Appeal by Respondent from order entered 22 November 2021 by Judge James Gregory Bell in Columbus County Superior Court. Heard in the Court of Appeals 2 November 2022.

The McGuinness Law Firm, by J. Michael McGuinness, for petitioner-appellee.

North Carolina Fraternal Order of Police, Amicus Curiae Brief, by Norris A. Adams, II, for petitioner-appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ameshia Cooper Chester, for respondent-appellant.

MURPHY, Judge.

Where the North Carolina Sheriffs' Education and Training Standards Commission revoked Petitioner's justice officer certification for lack of good moral character based on his conduct in 2016, the Commission could not deny Petitioner's certification indefinitely where the only recent evidence to support the denial was his demeanor on

cross examination during the contested-case hearing and Petitioner presented sufficient evidence that he rehabilitated his character. We affirm the trial court's order on judicial review reversing the Commission's final agency decision and ordering that it issue Petitioner his justice officer certification retroactive to the date of application.

BACKGROUND

Petitioner Maurice Devalle served with the North Carolina State Highway Patrol for nineteen years. Respondent North Carolina Sheriffs' Education and Training Standards Commission ("the Commission") had certified Mr. Devalle as a justice officer during that time, since November 1998. Prior to April 2017, Mr. Devalle received only one disciplinary action by the Highway Patrol in the form of a written warning.

The Highway Patrol received a tip in November 2016 that Mr. Devalle was at his residence in Wake County while he was supposed to be on duty in Wayne County. The Highway Patrol conducted an internal investigation following the tip. The Highway Patrol learned Mr. Devalle had falsely reported he resided within the mandated-20-mile radius of his duty station in Wayne County, when he in fact lived 44 miles away, in Wake County. On 11 November 2016, Highway Patrol personnel traveled to Mr. Devalle's Wake County home while he was scheduled to be on duty and found him there dressed in plain clothing. Mr. Devalle admitted that, on occasion, he would drive home for lunch and then stay home "for extended periods of time while he was on-duty . . . ." Mr. Devalle acknowledged he knew this conduct violated Highway Patrol Policy.

On 24 April 2017, the Highway Patrol terminated Mr. Devalle's employment and, four days later, notified the Commission of Mr. Devalle's termination and the above conduct. The Commission revoked Mr. Devalle's justice officer certification as a result of the report effective 24 April 2017.[1]

In August 2017, Mr. Devalle began working as a school resource officer for East Columbus County High School and applied that same month once again for justice officer certification with the Commission through the Columbus County Sheriffs' Office. On 29 January 2019,[2] the Commission notified Mr. Devalle that it had reviewed his application for certification and denied his certification indefinitely. The notification

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1. Mr. Devalle's termination from the Highway Patrol and initial loss of certification in April 2017 are not at issue in this appeal.

2. Mr. Devalle remained employed at East Columbus County High during this period.

indicated to Mr. Devalle his denial was due to him "[n]o longer possessing the good moral character required of all justice officers."[3]

On 20 March 2019, Mr. Devalle filed a request for a contested case hearing in the Office of Administrative Hearings. On 3 December 2019, Mr. Devalle's case came on for hearing before administrative law judge Melissa Owens Lassiter. The Commission only presented evidence of the 2016 conduct that led to Mr. Devalle's termination. Mr. Devalle presented two witnesses at the hearing, the Sheriff of Columbus County and school principal of East Columbus County High School, his superiors, where Mr. Devalle was employed as a school resource officer. Both individuals testified in depth to the effect that Mr. Devalle currently had good moral character. The administrative law judge found:

> 68. . . . . [The Commission] failed to present any evidence concerning any activities involving [Mr. Devalle] that took place more recently than 2016. While four witnesses from the [Highway] Patrol testified regarding [Mr. Devalle's] dismissal from the Patrol, none of those witnesses possessed any first-hand knowledge of how [Mr. Devalle] has conducted himself in terms of truthfulness or conformance with policies while [presently] employed as a deputy sheriff in Columbus County. None of those witnesses opined that [Mr. Devalle] lacked good moral character, either generally, or to serve as a deputy sheriff in this State.

(Transcript citations omitted). By proposal for decision filed 3 June 2020, the administrative law judge recommended a conclusion that the evidence at the hearing "rebutted the finding by [the Commission] that Petitioner lacks the good moral character required of a justice officer." The administrative law judge recommended this was a result of the testimony by Mr. Devalle's superiors establishing that Mr. Devalle "has rehabilitated his character since 2017."

By final agency decision signed 6 October 2020,[4] the Commission rejected the administrative law judge's proposal and concluded instead that the evidence before the administrative law judge showed Mr. Devalle "currently does not possess the good moral character required

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3. The Commission also denied Mr. Devalle's certification for the Class B misdemeanor of "Willfully Failing to Discharge Duties," but suspended the denial. This ground is not at issue on appeal.

4. Alan Cloninger, Chairman, North Carolina Sheriffs' Education and Training Standards Commission.

to continue certification as a deputy sheriff." The Commission accepted and found the testimony of Mr. Devalle's present character to be credible and believable. The Commission found, however, that Mr. Devalle lacked candor and truthfulness while testifying on cross examination at the contested case hearing, and therefore concluded he lacked the good moral character required for justice officer certification. The Commission denied Mr. Devalle's certification indefinitely as a result.[5]

On 3 December 2020, Mr. Devalle filed a petition for judicial review of the Commission's final agency decision in Columbus County Superior Court. The Commission filed a motion to dismiss and brief in opposition.

On 22 November 2021, the trial court concluded the record established that Mr. Devalle "*presently* has good moral character to serve as a Deputy Sheriff," and reversed the Commission's final agency decision. The trial court ordered the Commission to grant Mr. Devalle's application for certification effective and retroactive to August 2017. The Commission appeals.

ANALYSIS

The Commission advances several arguments on appeal challenging the trial court's reversal of its final agency decision. The Commission first argues the trial court erroneously concluded Mr. Devalle's petition for judicial review provided sufficient notice to the Commission of Mr. Devalle's exceptions to its final agency decision. The Commission also argues no grounds support the trial court's reversal of its final agency decision under the provisions of N.C.G.S. § 150B-51(b). We disagree, and affirm the trial court's order.

"Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies . . . , is entitled to judicial review of the decision . . . ." N.C.G.S. § 150B-43 (2021). On petition for judicial review from a final administrative agency decision, the trial court sits as an appellate court reviewing the administrative agency. *See Rector v. N.C. Sheriff's Educ. & Training Standards Com.*, 103 N.C. App. 527, 532 (1991) (citing *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410 (1977)).

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5. The Commission denied the certification indefinitely based upon Mr. Devalle's "lack of good moral character." The Commission denied Mr. Devalle's certification for a suspended sanction of five years for the commission of the Class B offense of willful failure to discharge duties.

The North Carolina Administrative Procedure Act defines the scope of a Superior Court's review over a final agency decision. *See* N.C.G.S. § 150B-51 (2021). Subsection (b) provides:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C.G.S. § 150B-51(b) (2021).

Errors asserted under subdivisions (1) through (4) of subsection (b) are reviewed *de novo*. N.C.G.S. § 150B-51(c) (2021). "Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency's." *N.C. Dep't of Env't and Nat. Res. v. Carroll*, 358 N.C. 649, 660 (2004) (quotation marks omitted). In contrast, errors asserted under subdivisions (5) and (6) are reviewed "using the whole record standard of review." N.C.G.S. § 150B-51(c) (2021).

Under the whole record standard of review, the trial court reviews the whole record to ensure "the administrative agency's decision is supported by substantial evidence." *Rector*, 103 N.C. App. at 532. The question before the trial court was whether there was "substantial evidence to support a finding" essential to the agency's determination. *In re Rogers*, 297 N.C. 48, 65-66 (1979). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and 'is more than a scintilla or a permissible inference.' " *Rector*, 103 N.C. App. at 532 (marks omitted).

"When this Court reviews an appeal from the [S]uperior [C]ourt reversing the decision of an administrative agency, our standard of review is twofold and is limited to determining: (1) whether the [S]uperior

[C]ourt applied the appropriate standard of review and, if so, (2) whether the [S]uperior [C]ourt properly applied this standard." *McCrann v. N.C. HHS*, 209 N.C. App. 241, 246, *disc. review denied*, 365 N.C. 198 (2011); *see also Powell v. N.C. Crim. Justice Educ. Training Stds. Comm'n.*, 165 N.C. App. 848, 851 (2004) (citation and marks omitted) ("The appellate court examines the trial court's order regarding an agency decision for error of law.").

A. Adequacy of Petition for Judicial Review

[1] We first address the Commission's argument that Mr. Devalle's petition for judicial review lacked sufficient notice to the Commission of the specific exceptions Mr. Devalle took to its final agency decision. We conclude the trial court properly denied the Commission's motion to dismiss Mr. Devalle's petition for judicial review on this ground.

Section 150B-46 of the North Carolina Administrative Procedure Act governs the contents of a petition for judicial review over an administrative agency's final decision. N.C.G.S. § 150B-46 (2021). It requires only that "[t]he petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks." N.C.G.S. § 150B-46 (2021). " 'Explicit' is defined in this context as 'characterized by full clear expression: being without vagueness or ambiguity: leaving nothing implied.' " *Gray v. Orange County Health Dept.*, 119 N.C. App. 62, 70 (quoting *Vann v. N.C. State Bar*, 79 N.C. App. 173, 173-74 (1986)), *disc. review denied*, 341 N.C. 649 (1995).

Mr. Devalle's petition for judicial review in this case took exception to the Commission's finding "that [Mr. Devalle] lacked the good moral character required of every justice officer under 12 NCAC 10B .0303(a)(8)." Mr. Devalle complained that the Commission found the only evidence regarding Mr. Devalle's current moral character to be "credible, honest, and believable," but that the Commission nonetheless concluded Mr. Devalle lacked the requisite moral character. Moreover, Mr. Devalle cited our Supreme Court's decision in *In re Dillingham*, 188 N.C. 162 (1924), and asserted that the sanction of revocation for an indefinite period may continue only "so long as the stated deficiency exists." Mr. Devalle thus excepted "to particular findings of fact, conclusions of law, or procedures." *Kingsgrab v. State Bd. of Barber Examiners*, 236 N.C. App. 564, 570 (2014), *disc. review denied*, 368 N.C. 244 (2015). He then prayed that the trial court "[r]everse the portion of the Final Agency Decision that determined that he continues to lack good moral character," and that the court "[r]einstate [his] justice officer certification[.]" We conclude this filing adequately stated the exceptions Mr. Devalle took to the Commission's final agency decision—i.e., an erroneous

finding of Mr. Devalle's present lack of good moral character—and that Mr. Devalle was seeking a reversal thereof. *See James v. Wayne County Board of Education*, 15 N.C. App. 531, 533 (1972) (citing *In re Appeal of Harris*, 273 N.C. 20 (1968) ("Our Supreme Court has held that the primary purpose of the statute is to confer the right of review and that the statute should be liberally construed to preserve and effectuate that right."). Moreover, although the Commission was not required to file a response to the petition for judicial review, *see* N.C.G.S. § 150B-46 (emphasis added) ("Other parties to the proceeding *may* file a response to the petition within 30 days of service."), the Commission did file a brief in opposition, which was extensive and which addressed the various exceptions raised in Mr. Devalle's petition for review and argued their inadequacy. We agree with the trial court that the Commission was "in no way blindsided by a lack of notice or detail," and conclude Mr. Devalle's petition for review was "sufficiently explicit to have allowed effective judicial review." *Gray*, 119 N.C. App. at 71 (brackets omitted).

B. N.C.G.S. § 150B-51

[2] We next address the Commission's argument the trial court erred in reversing its final agency decision pursuant to N.C.G.S. § 150B-51(b) on the grounds it was unsupported by substantial evidence in view of the entire record and that the Commission erred as a matter of law. The trial court held that, "[u]nder a correct interpretation of the good moral character rule, [Mr. Devalle] presently has good moral character sufficient for certification as a Deputy Sheriff." The trial court rendered additional findings of fact to the effect that "[t]he credible and persuasive testimonies by Sheriff Greene and Principal Johnson demonstrated that [Mr. Devalle] has restored his character so that he now possesses the good moral character required to continue to be certified as a deputy sheriff."

The Commission addresses each of subdivisions N.C.G.S. § 150B-51(b)(3)-(6) and argues that, because the administrative law judge had found Mr. Devalle lacked "candor and sincerity" on cross examination during the contested case hearing, the trial court erred in reversing its final agency decision in that it was not entered upon unlawful procedure (N.C.G.S. § 150B-51(b)(3)) or based upon an error of law (N.C.G.S. § 150B-51(b)(4)), and that it was otherwise supported by substantial evidence (N.C.G.S. § 150B-51(b)(5)) and not arbitrary, capricious, or an abuse of discretion (N.C.G.S. § 150B-51(b)(6)). Mr. Devalle maintains the trial court's order should be affirmed because the Commission failed to present sufficient evidence that his 2016 conduct amounted to "a severe case" of bad moral character warranting indefinite denial, "particularly in light of the evidence of rehabilitation, and that his *present* character is good."

Mr. Devalle maintains the Commission erroneously distorted the administrative law judge's "credibility determinations and [failed] to give deference to her role as the fact-finder and [that] this conduct amounts to arbitrary and capricious decision making on the part of" the Commission.

We agree with the trial court and conclude the Commission did not abide by its own good moral character standard when it denied Mr. Devalle's justice officer certification indefinitely. The Commission's decision was arbitrary and capricious, and its denial was unsupported by substantial evidence. We affirm the trial court's order reversing the Commission's final agency decision.

Chapter 17E of the North Carolina General Statutes, as well as our Administrative Code, grant the Commission the authority to certify, revoke, suspend, or deny justice officer certifications in North Carolina based on certain qualifications, which the Commission is permitted to establish. *See* N.C.G.S. §§ 17E-1, -4 (2021); *see also* Strong's North Carolina Index 4th § 30 (2021) (citing N.C.G.S. §§ 17E-1, -4 (2021) ("The commission was created to deal with the training and educational needs of sheriffs and deputy sheriffs and has the power, among other things, to establish minimum educational and training standards and to certify persons who have met those standards."). Article 12, Chapter 10B of our Administrative Code provides, in relevant part:

> (b) The [Sheriffs' Education and Training Standards] Commission shall revoke, deny, or suspend the certification of a justice officer when the commission finds that the applicant for certification or the certified officer:
>
> . . . .
>
> (2) fails to meet or maintain any of the employment or certification standards required by 12 NCAC 10B .0300[.]

12 NCAC 10B .0204(b)(2) (2021).

Subdivision .0301 provides that "[e]very Justice Officer employed or certified in North Carolina shall":

> be of good moral character as defined in: In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed 423 U.S. 976 (1975); State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940); In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989); In re Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906); In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924); State

> v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); and later court decisions that cite these cases as authority[.]

12 NCAC 10B .0301(a)(9) (2021). Accordingly, our State's caselaw defines the concept of good moral character. *See* 12 NCAC 10B .0301(a)(9).

The requirement that an applicant maintain good moral character means

> something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong.

In re Rogers, 297 N.C. at 58 (quoting *In re Applicants for License*,191 N.C. 235 (1926)). "Character thus encompasses both a person's past behavior and the opinion of members of his community arising from it." *Id*. Further, "whether a person is of good moral character is seldom subject to proof by reference to one or two incidents." *Id*. "[W]hen one seeks to establish restoration of a character which has been deservedly forfeited, the question becomes essentially one 'of time and growth.' " *In re Willis*, 288 N.C. 1, 13, *appeal dismissed*, 423 U.S. 976 (1975) (quoting *In re Dillingham*, 188 N.C. 162 (1924)).

While vague, the "good moral character" standard is not "an unconstitutional standard." *Id*. at 11. "The right to establish such qualifications rests in the police power—a power by virtue of which a State is authorized to enact laws to preserve the public safety, maintain the public peace and order, and preserve and promote the public health and public morals." *In re Applicants for License*, 143 N.C. 1, 5 (1906). Nonetheless, "[s]uch a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial . . . ." *Konigsberg v. State*, 353 U.S. 252, 263 (1957).

In 2011, the Commission, in a different case, issued a final agency decision in which it summarized its operating framework for determinations of lack of good moral character and the appropriate corresponding sanctions. *See Royall v. N.C. Sheriffs' Educ. And Training Standards Comm'n*, Final Agency Decision, 09 DOJ 5859 (5 January 2011). The conduct at issue in *Royall* involved the petitioner releasing to the public

sensitive information he obtained about ongoing investigations through his service with the Yadkin County Sheriffs' Office on certain social media websites. The administrative law judge who heard the evidence in the contested case hearing recommended a finding of a lack of good moral character by the petitioner and, as a result, recommended his certification be revoked for four months.

Despite the administrative law judge's recommendations, the Commission concluded there was no factual or legal basis to support a finding the petitioner presently lacked the requisite good moral character to warrant his revocation. The Commission explained:

> 6. While having good moral character is an ideal objective for everyone to enjoy, the lack of consistent and clear meaning of that term within the [Commission's] rule, and the lack of clear enforcement standards or criteria for application of the rule, renders enforcement actions problematic and difficult.
>
> 7. Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension or revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character *should be reserved for clear and severe cases of misconduct*.
>
> 8. Generally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. . . . . The incident alleged in this case is insufficient to rise to the required level of proof to establish that Petitioner Royall lacks good moral character. Under *In Re Rogers*, a single instance of conduct amounting to poor judgment, especially where there is no malice or bad faith, would not ordinarily rise to the high level required to reflect a lack of good moral character.
>
> . . . .
>
> 11. The totality of the facts and circumstances surrounding Petitioner Royall's conduct, in light of his exemplary history of good moral character and professionalism in law enforcement, does not warrant any finding that Petitioner Royall lacks good moral character. The substantial evidence of Petitioner's good moral character is clear and compelling. Sheriff Jack Henderson's description of Petitioner Royall is very telling: "He's the kind of guy, if

> he's cutting a watermelon, he'll give you the best piece." Therefore, the evidence demonstrates that there is no proper basis for revocation or suspension of Petitioner's law enforcement certification.
>
> . . . .
>
> 13. The totality of the facts and circumstances surrounding Petitioner Royall's conduct, in light of his otherwise exemplary history of good moral character and professionalism in law enforcement, do not warrant or justify revoking or suspending Petitioner's law enforcement certification. There has been no violation of [the Commission's] good moral character rule.

Royall v. N.C. Sheriffs' Educ. And Training Standards Comm'n, Final Agency Decision, 09 DOJ 5859 (5 January 2011) (emphasis supplied) (citations omitted). It appears the Commission viewed the petitioner's social media activity and postings in *Royall* to constitute "a single instance of conduct."

Here, as the trial court noted, instead of investigating Mr. Devalle's current moral character, the Commission relied solely on Mr. Devalle's conduct in 2016 which led to his termination of employment from the Highway Patrol.

The Commission characterized the testimony concerning Mr. Devalle's present moral character as follows:

> 21. Despite knowing that [Mr. Devalle] had been working as a deputy sheriff for two and a half years, [the Commission's Probable Cause Committee] did not interview the Columbus County Sheriff or the school principal for whom [Mr. Devalle] served as a school resource officer since August 2017. [The Commission's Probable Cause Committee] had no knowledge of what Mr. Devalle did while working as a school resource officer or how he discharged his duties as a school resource officer.
>
> . . . .
>
> 54. At hearing, [Mr. Devalle] attempted to justify his working from home while on duty by stating that a "very, very small percentage' " of his job duties involved being on patrol. However, [Mr. Devalle] completed weekly reports of daily activity claiming approximately 40% of his time was spent on patrol in Wayne County.

55. The transcripts of [Mr. Devalle's] statements to the Patrol's Internal Affairs on [15 November] 2016, [18 November] 2016, and [27 March] 2017 corroborate [Mr. Devalle's] above cited admissions. They also provide substantial statements of [Mr. Devalle] made closer in time to the events in question, shedding light on facts that [Mr. Devalle] allegedly no longer recalls.

. . . .

69. Steadman Jody Greene is the Sheriff of Columbus County, Whiteville, North Carolina. [Mr. Devalle] works for Sheriff Greene as a deputy in the capacity of the school resource officer. ln this capacity, [Mr. Devalle] is armed with both lethal and non-lethal weapons. [Mr. Devalle] serves at the pleasure of the Sheriff. At the time of hearing, Sheriff Greene had just been released from the hospital and voluntarily came to testify that [Mr. Devalle] does a fine job for him and how important [Mr. Devalle] is to his agency.

70. When Sheriff Greene hired [Mr. Devalle], he was aware that [Mr. Devalle] had been dismissed from the [Highway] Patrol. [Mr. Devalle] had told him. Sheriff Greene is satisfied that [Mr. Devalle] has good moral character. Given the importance of the school resource officer, Greene must place someone in that position upon which he has a special trust and confidence. Sheriff Green has that special trust and confidence in [Mr. Devalle]. He hired [Mr. Devalle] based upon the principal, school board members, parents and students all recommending him and not based upon the past. Sheriff Greene is satisfied that [Mr. Devalle] had performed his duties "above and beyond." If [Mr. Devalle] was unable to serve as a deputy, it would negatively impact Greene's force.

71. Based on [Mr. Devalle's] service as a deputy sheriff, Sheriff Greene has no hesitation as to [his] truthfulness or ability to tell the truth.

72. Jeremiah Johnson is the principal at East Columbus High School in Lake Waccamaw, North Carolina. Johnson knows [Mr. Devalle] in two capacities: as the school resource officer at East Columbus High School and as an assistant football coach and track coach at that school.

[Mr. Devalle] has served, and continues to serve, in those capacities since 2017. Johnson has had the opportunity to watch [Mr. Devalle] perform those duties "every day" that school is in session. Johnson described [Mr. Devalle], in performing his duties as a school resource officer, as "dedicated to the school, dedicated to the students, dedicated to the staff. He comes to school - comes to work every day, is there to serve and protect. He's part of my administrative team. He's almost my right-hand man."

73. When asked whether he had had an opportunity to form an opinion as to [Mr. Devalle's] character, Johnson said, "He is an awesome person. He is an awesome man. And I'm not just saying that for me, I'm saying that for my kids at my school." When asked whether [Mr. Devalle] had ever committed any act that would cause Johnson to doubt [his] capacity to be truthful, Johnson answered, "No."

74. Mr. Johnson has no doubt, based on what he's observed from [Mr. Devalle], that [Mr. Devalle] does not lack the character necessary to serve as a school resource officer at Johnson's high school. Johnson would not have permitted [Mr. Devalle] to serve as an assistant football coach and track coach, in addition to serving as a school resource officer, if he had any doubts about [Mr. Devalle's] character.

75. Mr. Johnson opined that if [Mr. Devalle] was no longer able to serve East Columbus as a school resource officer, the lack of [Mr. Devalle's] presence would make the school less safe.

76. Johnson also spoke of the strong professional bond that exists between himself as principal and [Mr. Devalle] as the school resource officer. Johnson thinks that [Mr. Devalle] is the best school resource officer he has ever worked with and as a school administrator, Johnson has trained many SROs. He opined that interaction with the students would suffer tremendously if [Mr. Devalle] was not at East Columbus High. "These kids, they look up to him." Johnson explained how [Mr. Devalle] has helped other students such as buying shoes for kids, bought lunch for kids, and given them food. . . .

. . . .

> 79. Neither [the Commission's Probable Cause Committee] nor [the Commission] presented any evidence at hearing regarding [Mr. Devalle's] performance of his duties as a Columbus County deputy sheriff. [The Commission] failed to present any evidence concerning any activities involving [Mr. Devalle] that took place more recently than 2016. While four witnesses from the Patrol testified regarding [Mr. Devalle's] dismissal from the Patrol, none of those witnesses possessed any first-hand knowledge of how [Mr. Devalle] has conducted himself in terms of truthfulness or conformance with policies while employed as a deputy sheriff in Columbus County. None of those witnesses opined that [Mr. Devalle] lacked good moral character, either generally, or to serve as a deputy sheriff in this State.
>
> . . . .
>
> 81. During his case in chief, [Mr. Devalle] presented significant evidence demonstrating that [Mr. Devalle] has rehabilitated and rebuilt his career since 2016 and 2017 while working as a school resource officer at East Columbus High School. Such evidence showed that [Mr. Devalle] has exhibited highly favorable traits, including but not limited to helping, teaching, and serving as positive role models for students at East Columbus High School not only as a school resource officer, but as a coach in two sports. Sheriff Greene and Principal Johnson opined that [Mr. Devalle's] absence from their respective entities would have a negative impact on their workplaces. The scope and magnitude of [Mr. Devalle's] character traits, as witnessed by Sheriff Greene and Principal Johnson, qualify as extenuating circumstances which the [Commission] should consider in determining whether [Mr. Devalle] possesses the good moral character required of a justice officer.

The Commission further concluded:

> 24. Sheriff Greene and Principal Johnson testified that [Mr. Devalle] has rehabilitated and rebuilt his character, since being fired by the [Highway] Patrol, and as a deputy sheriff, and as school resource officer and coach at East Columbus High School. Greene and Johnson testified that for two and a half years, [Mr. Devalle's] service as a deputy sheriff has been nothing but exemplary both of

> that service and of [Mr. Devalle's] character while engaging in that service. Such testimony was credible, honest, and believable.

Despite the above credible evidence of Mr. Devalle's present moral character, the Commission found that, while testifying on cross examination before the administrative law judge, Mr. Devalle

> exhibited a lack of candor and sincerity during cross-examination by [the Commission's] counsel. During [the Commission's] questions, [Mr. Devalle] was evasive and feigned a lack of memory or confusion in response to [the Commission's] questions about [Mr. Devalle's] conduct with the [Highway] Patrol in 2016. [Mr. Devalle] remained evasive and elusive even after having his recollection refreshed with his prior statements. In contrast, [Mr. Devalle] readily recollected circumstances from this period, when questioned by his own counsel, without having to review any materials.

The Commission therefore concluded that "the most recent demonstration of [Mr. Devalle's] character was the hearing itself[,]" and denied Mr. Devalle's certification for a lack of moral character.

We agree with the trial court these findings and conclusions do not conform with the standard the agency applied in *Royall*. By failing to apply the same standard to similarly situated individuals, the record in this case is one "which indicates arbitrary, discriminatory or capricious application of the good moral character standard" by the Commission. *In re Willis*, 288 N.C. at 19.

The administrative law judge who heard the evidence in this case found and concluded the following regarding Mr. Devalle's conduct at the contested case hearing:

> 69. At hearing, [Mr. Devalle's] testimony exhibited a lack of candor and sincerity during cross-examination by [the Commission's] counsel. During [the Commission's] questions, [Mr. Devalle] was evasive and feigned a lack of memory or confusion in response to [the Commission's] questions about [Mr. Devalle's] conduct with the [Highway] Patrol in 2016. [Mr. Devalle] remained evasive and elusive even after having his recollection refreshed with his prior statements. In contrast, [Mr. Devalle] readily recollected circumstances from this period, when questioned by his own counsel, without having to review any materials.

> 70. During his case in chief, [Mr. Devalle] presented significant evidence demonstrating that [he] has rehabilitated and rebuilt his career since 2016 and 2017 while working as a school resource officer at East Columbus High School. Such evidence showed that [Mr. Devalle] has exhibited highly favorable traits, including but not limited to helping, teaching, and serving as positive role models for students at East Columbus High School not only as a school resource officer, but as a coach in two sports. Sheriff Greene and Principal Johnson opined that [Mr. Devalle's] absence from their respective entities would have a negative impact on their workplaces. The scope and magnitude of [Mr. Devalle's] character traits, as witnessed by Sheriff Greene and Principal Johnson, qualify as extenuating circumstances which the [Commission] should consider in determining whether [Mr. Devalle] possesses the good moral character required of a justice officer.

The administrative law judge concluded that "*[e]ven given [Mr. Devalle's] cross-examination testimony at hearing*, the totality of the evidence rebutted the finding by the Probable Cause Committee that [Mr. Devalle] lacks the good moral character required of a justice officer and showed that [Mr. Devalle] has rehabilitated his character since 2017[,]" and that the "credible and persuasive testimonies by Sheriff Greene and Principal Johnson demonstrated that [he] has restored his character so that he now possesses the good moral character required to continue certification as a deputy sheriff." (Emphasis added).

As the Commission made clear in its statement of the applicable law in *Royall*, it would only be cases of severe conduct that may serve as the basis for a finding of lack of good moral character and, where evidence of rehabilitation is presented, the question becomes one of time and growth. Neither the Commission nor the administrative law judge made a finding in this case that Mr. Devalle's conduct with the Highway Patrol in 2016 was severe, and the Commission made a finding concerning rehabilitation. The Commission found Sheriff Greene and Principal Johnson's testimony was "credible, honest, and believable" and that Mr. Devalle had "rehabilitated and rebuilt his character."

In view of the Commission's findings that Mr. Devalle has rehabilitated his moral character since the 2016 conduct and the lack of a finding or substantial evidence that Mr. Devalle's conduct on cross examination was severe, pursuant to the Commission's own standard expounded upon in *Royall*, we agree with the trial court the Commission erred and

applied an arbitrary and capricious decision to Mr. Devalle. The evidence and findings fail to show severe misconduct amounting to a lack of good moral character as a matter of law. *See In re Rogers*, 297 N.C. at 58 ("Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents."); *Rector*, 103 N.C. App. at 532 (quotation marks omitted) ("Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith, or 'whimsical' in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment.").[6] We agree there is a lack of substantial record evidence to support the Commission's conclusion Mr. Devalle presently lacks the good moral character required of justice officers in North Carolina warranting indefinite denial of his certification, *see Rector*, 103 N.C. App. at 532 (quotation marks omitted) ("[T]he whole record rule requires the court, in determining the substantiality of evidence supporting the Board's decisions, to take into account whatever in the record fairly detracts from the weight of the Board's evidence."), and affirm the trial court's order reversing the Commission's decision and ordering it issue Mr. Devalle his justice officer certification retroactive to August 2017.

CONCLUSION

Mr. Devalle's petition for judicial review provided adequate notice to the Commission, and the Commission applied a heightened good moral character standard to Mr. Devalle than that which it has previously enumerated when it denied his justice officer certification indefinitely such that its decision was arbitrary and capricious. The Commission's denial was further unsupported by substantial evidence. We affirm the trial court's order reversing the Commission's final agency decision. The Commission's imposition of the sanction of a five-year denial and suspension thereof for five years for willfully failing to discharge duties was not appealed and is thus binding on the Commission.

AFFIRMED.

Judges TYSON and WOOD concur.

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6. In *Royall*, the Commission held "[t]he substantial evidence of [the petitioner's] good moral character [was] clear and compelling" in light of Sheriff Jack Henderson's "very telling" description of the petitioner that "He's the kind of guy, if he's cutting a watermelon, he'll give you the best piece." *Jeffrey Gray Royall v. N.C. Sheriffs' Educ. and Training Standards Comm'n*, Final Agency Decision, 09 DOJ 5859 (2011).

IN RE D.C.

[289 N.C. App. 30 (2023)]

IN THE MATTER OF D.C. AND J.C.

No. COA22-751

Filed 16 May 2023

1. Termination of Parental Rights—termination order—reversed and remanded—compliance with appellate court's mandate

After the Supreme Court reversed and remanded a termination of parental rights (TPR) order because the trial court had made its findings of fact under the wrong evidentiary standard, the trial court's subsequent TPR order (entered on remand) was affirmed where it sufficiently complied with the Supreme Court's mandate to "review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact." Given the mandate's plain language—along with the Court's comment that remanding the case would not necessarily be "futile," as the record was not necessarily "insufficient" to support findings that would establish any of the statutory TPR grounds—the trial court was not required on remand to conduct a new dispositional hearing or to receive additional evidence before making new findings. Further, the trial court's assertion at the remand hearing—that its prior use of the incorrect evidentiary standard was only a "clerical error"—was irrelevant where the trial court otherwise complied with the Court's mandate.

2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of evidence—nexus between case plan components and conditions that led to child's removal

The trial court properly terminated a mother's parental rights in her son for failure to make reasonable progress in correcting the conditions that led to his removal from the home (N.C.G.S. § 7B-1111(a)(2)) where the court's findings of fact were supported by clear, cogent, and convincing evidence, and where there was a sufficient nexus between the case plan components that the mother failed to comply with and the conditions resulting in the child's removal. Specifically, the evidence showed that the mother willfully failed to participate in parenting classes and individual counseling sessions that her case plan required her to complete, and the main purpose of those two case plan components was to help the mother acknowledge why her son was removed from the home.

3. Termination of Parental Rights—best interests of the child—dispositional factors—likelihood of adoption—not dispositive

The trial court did not abuse its discretion in concluding that termination of a mother's parental rights in her minor son was in the child's best interests, where clear, cogent, and convincing evidence supported the court's factual findings regarding two statutory dispositional factors: whether termination would aid in accomplishing the child's permanent plan of adoption, and the bond between the mother and her child. A likelihood of adoption (also one of the statutory factors) is not dispositive as to a best interest determination, and therefore—even if the record lacked current, relevant evidence indicating a likelihood of the child's adoption—the court's decision was not manifestly unsupported by reason.

Appeal by respondent-father and respondent-mother from an order entered 22 June 2022 by Judge Kristina Earwood in Swain County District Court. Heard in the Court of Appeals 26 April 2023.

Edward Eldred for respondent-appellant father.

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

Justin B. Greene for petitioner-appellee Swain County Department of Social Services.

Womble Bond Dickinson LLP, by Theresa M. Sprain, for appellee guardian ad litem.

FLOOD, Judge.

Respondent-Mother and Respondent-Father (collectively, "Respondent-Appellants") appeal from an order terminating their parental rights of their two minor children. We conclude the trial court obeyed the mandate of our Supreme Court on remand and affirm the trial court's order terminating parental rights.

I. Facts and Procedural Background

In early 2016, Respondent-Appellants were caring for their three biological children, Diana, Julia, and Dylan, and three unrelated children,

Ryan, Charlotte, and Ava.[1] *In re D.C.*, 262 N.C. App. 372, 2018 WL 5796710, at *1 (N.C. App. and Nov. 6, 2018). On 4 April 2016, Ryan was admitted to the emergency room with "life-threatening, non-accidental injuries." *Id.* The attending doctor noted Ryan to be "dirty, covered with scabs and bruises, and severely malnourished[,]" and concluded that Ryan was "minutes to an hour away from death at the time he arrived[.]" *Id.* On 5 April 2016, the Swain County Department of Social Services ("DSS") filed petitions alleging Ryan was abused, and the five other children were neglected by Respondent-Appellants. All six children were taken into custody by DSS that same month. *Id.* at *3. Respondent-Appellants were subsequently indicted for, *inter alia*, felony child abuse against Ryan, and they were both arrested in June 2016. Respondent-Appellants were released on bond soon after.

On 20 July 2017, the trial court entered an order adjudicating Respondent-Appellants' biological children (the "children") neglected. Six months later, in January 2018, the trial court entered a disposition order that eliminated reunification with Respondent-Appellants as part of the children's permanent plans. Respondent-Appellants appealed both the adjudication and disposition orders. *Id.* at *3.

On 6 November 2018, this Court entered an opinion where we: (1) affirmed the adjudication order; (2) vacated the disposition order because the trial court erred by not making the "necessary *specific* finding . . . that a court of competent jurisdiction has determined that aggravating circumstances exist based on the enumerated list to cease reunification efforts"; and (3) remanded for further proceedings. *Id.* at *8–9. On 16 July 2019, the trial court entered a disposition order pursuant to this Court's remand, and again ordered elimination of reunification efforts from the children's permanent plan. On 18 July 2019, the trial court entered a permanency planning order, and in January 2020, the trial court entered a permanency planning review order whereby the children's permanent plan was set to adoption.

On 10 June 2020, DSS filed a petition to terminate Respondent-Appellants' parental rights in Dylan and Julia,[2] and the trial court heard the petition on 7 December 2020 and 2 February 2021. On 29 March 2021, the trial court entered a termination of parental rights order, with its findings of fact made by a preponderance of the evidence. Respondent-Appellants appealed the trial court's order to our Supreme

1. Pseudonyms have been used to protect the identities of the minor children.

2. Pre-hearing, DSS dismissed the petition as to Diana because she "was expected to reach the age of majority prior to the final resolution of this matter."

Court, arguing the trial court used the wrong standard of proof. *In re J.C.*, 380 N.C. 738, 2022-NCSC-37, ¶ 1.

On 28 September 2021, DSS filed a motion to remand to the trial court for a "correction" of the court's statement regarding the standard of proof used to make its findings of fact, and our Supreme Court denied the motion. *Id.* ¶ 5 n. 6. On 18 March 2022, our Supreme Court reversed and remanded the trial court's order "for its consideration of the record before it in order to determine whether DSS demonstrated by clear, cogent, and convincing evidence that one or more statutory grounds exist to permit termination of parental rights." *Id.* ¶ 16. Our Supreme Court also provided:

> Without commenting on the amount, strength, or persuasiveness of the evidence contained in the record, we merely conclude that we cannot say that remand of this case for the trial court's consideration of the evidence in the record utilizing the proper "clear, cogent, convincing" standard of proof would be "futile," so as to compel us to conclude that the record of this case is insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination.

Id. ¶ 16 (emphasis in original) (internal citation omitted).

The hearing on remand was held on 20 April 2022. Following statements by counsel, the trial court provided:

> It was fully the [c]ourt's intention to find by clear, cogent and [convincing evidence] standard. And I'm going to do that. I have reviewed the file. I have reviewed the evidence. I've also reviewed the Supreme Court's judgment and opinion.
>
> And so that was the [c]ourt's intent. It was a clerical error, so if you will correct that and submit the appropriate order.

On 22 June 2022, the trial court again entered a written order terminating Respondent-Appellants' parental rights and concluded there were two sufficient grounds for termination:

> [(1)] that [Respondent-Appellants] have willfully and not due solely to poverty, left the juvenile(s) in a placement[] outside of the home for a period of greater than twelve months, and [(2)] that [Respondent-Appellants] have neglected the minor child(ren) within the meaning of N.C. [Gen. Stat. §] 7B-101 and N.C. [Gen. Stat. §] 7B-1111,

> and said neglect has continued through the date of the filing of the petition(s) for termination of parental rights and that there is a likelihood of continuing neglect of the minor child(ren).

The trial court also noted in its order that it made its findings of fact—which were largely the same as those in the 29 March order—"using the clear, cogent and convincing evidence standard, following the remand of this matter from the Honorable Supreme Court of North Carolina." The trial court's adjudicatory findings of fact include, *inter alia*:

> 21. That [Respondent-Appellants'] case plan(s) include the following provisions, to wit:
>
> i) Complete a mental health and substance abuse assessment and follow the recommendations of the assessment
>
> ii) Complete parenting classes
>
> iii) Obtain stable housing and employment
>
> iv) Address the juveniles' educational needs
>
> v) Participate in random drug screens
>
> vi) Participate in individual counseling
>
> 22. That [Respondent-Appellants] completed mental health and substance abuse assessments in April of 2016. There were no recommendations associated with the assessments at that time.
>
> 23. That [DSS] requested that [Respondent-Appellants] complete an in-person parenting class of at least [twelve] hours. [Respondent-Appellants] together completed an online parenting class totaling four hours, which [DSS] (and the [c]ourt) have found to be unsatisfactory. [Respondent-Appellants] have never enrolled in or completed an in-person parenting class.
>
> 24. That [Respondent-Appellants] were notified on numerous occasions that their completion of an online parenting class was not satisfactory toward the completion of their case plan and the [c]ourt's Order on Disposition (Finding #44) reflects that the parents had prior notice of this as early in this case as November of 2017.
>
> 25. That [DSS] felt that the parenting classes would be necessary in this case based upon the history of abuse and

neglect that occurred in [Respondent-Appellants'] home and as set forth in the [c]ourt's Order of Adjudication.

26. That [Respondent-Appellants] were enrolled in individual counseling in April of 2016 through November of 2016. [DSS] received an update in November 2016 that stated that [Respondent-Appellants] were engaging and participating in individual therapy.

27. That [DSS] received no further updates regarding [Respondent-Father's] engagement with therapy past November of 2016.

28. That [Respondent-Appellants] completed a child and family evaluation in April of 2016. The recommendations of that evaluation were that [Respondent-Appellants] should complete parenting classes, engage in individual therapy, and complete a capacity to parent evaluation. One of the stated goals of [Respondent-Appellants'] engagement in therapy was to complete individual therapy to acknowledge why the juveniles[] came into custody of [DSS].

. . . .

33. That neither of [Respondent-Appellants] have had any visitation with the juveniles since June of 2016. Visitation occurred for approximately two months at the initial stages of this case. [Respondent-Appellants] were thereafter arrested for felony and misdemeanor child abuse, and [Respondent-Appellants'] bond restrictions prevented them from having any contact with the juveniles. The juvenile court subsequently ordered that [Respondent-Appellants] should have no contact with the juveniles unless recommended by the juveniles' counselor.

. . . .

36. That [the foster care social worker] has had numerous meetings and conversations with [Respondent-Appellants] and has encouraged them to complete their case plans and to re-enroll in therapy.

37. That [Respondent-Mother] has told the social worker that she does not trust or need counseling and has chosen not to participate [in] counseling. [Respondent-Appellants] have never signed any sort of release to allow [DSS] access to their counseling records, and [Respondent-Appellants']

counselor(s) never provided any specific details about [Respondent-Appellants'] counseling sessions to [DSS].

. . . .

48. That [Dylan] and [Julia] have more needs (physical, mental and psychological) than other children of their age. The history of this case indicates that [Respondent-Appellants] lack the skills necessary to address the juveniles['] particular needs and further that [Respondent-Appellants] have not availed themselves of services such as parenting classes or therapy which would better equip them to address the juveniles' needs.

. . . .

69. That [Dylan] does not often speak about [Respondent-Appellants] in counseling. On the occasions when he has brought them up, he has stated that he does not feel safe with them, and they did not keep him safe.

. . . .

71. That [Dylan] continues to be afraid of his parents and has expressed those feelings to his counselor.

72. That [Dylan] will often try to change subjects or avoid the topic of [Respondent-Appellants].

73. That Ms. Farr[, Dylan's counselor,] has discussed future contact and visitation with [Dylan]. [Dylan] has repeatedly stated that he does not want to have contact with his parents. . . .

74. That [Dylan's counselor] believes that [Dylan] having contact with [Respondent-Appellants] would lead [Dylan] to being hospitalized again. She expressed concern that seeing [Respondent-Appellants] would lead to an increase in his fear and anxiety that could lead to a psychiatric break.

75. That [Dylan's counselor's] professional opinion is . . . that contact with [Respondent-Appellants] would cause significant harm to [Dylan]. [Dylan's counselor's] opinion is based on her past observations and therapy of [Dylan] and his past responses.

Additionally, the 22 June order's dispositional findings section provides, in relevant part:

> 9. That [Dylan] does not have a bond with [Respondent-Appellants], however he does have some positive memories of [Respondent-Father].
>
> . . . .
>
> 11. That [Dylan's counselor has opined] . . . that having the parental rights of [Dylan's] parents terminated would bring [Dylan] a sense of relief. He has said in the past that he was afraid that his biological parents would take him away from [his foster family].
>
> . . . .
>
> 15. That [Dylan's counselor] opined . . . that it would not be appropriate or in the best interests of [Dylan] to have ongoing contact with his parents.
>
> . . . .
>
> 41. That the continued parental rights of [Respondent-Appellants] are a barrier to the adoption(s) of the juveniles and a barrier to the accomplishment of the permanent plan for the juvenile(s).
>
> . . . .
>
> 52. That the [c]ourt makes the above findings following a review of the [R]ecord, the evidence presented and the argument(s) of counsel. The court would find that following an application of the clear, cogent, and convincing evidence standard, the evidence could show that it is in the best interest[s] of the juveniles, [Dylan] and [Julia,] . . . that the parental rights of [Respondent-Appellants] be terminated.
>
> . . . .
>
> 101. That [Respondent-Appellants] have willfully, and not due solely to poverty, left the minor children in placement outside off the home for more than twelve (12) months.

Respondent-Father and Respondent-Mother each timely filed notice of appeal.

II. Jurisdiction

Respondent-Appellants' appeals are properly before this court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2), 7B-1001(a)(7), and 7B-1002(4). *See* N.C. Gen. Stat. §§ 7A-27(b)(2), 7B-1001(a)(7), 7B-1002(4) (2021).

III. Analysis

Respondent-Appellants each argue the trial court did not obey the Supreme Court's Mandate. Respondent-Mother further argues the trial court's findings and conclusions regarding grounds for terminating her parental rights in Dylan do not meet a clear, cogent, and convincing standard, and the trial court abused its discretion when it made findings contrary to the evidence and relied on those findings in making its decision.

A. Supreme Court's Mandate

[1] Respondent-Father and Respondent-Mother each argue the trial court did not strictly follow the Supreme Court's Mandate by failing to reconsider whether DSS met its evidentiary burden under the clear, cogent, and convincing standard. Respondent-Father specifically contends the trial court disobeyed the Supreme Court's Mandate by failing to "reconsider" the evidence, and by failing to make a new best interests determination. Respondent-Mother specifically contends the Supreme Court's Mandate required the trial court to do more than correct a clerical error in its 29 March order, and the trial court's attempt to correct a clerical error was insufficient to comply with the Mandate. We address both Respondent-Father's and Respondent-Mother's contentions.

This Court's interpretation of an appellate court's mandate on remand to the trial court is an issue of law reviewable *de novo*. *See State v. Hardy*, 250 N.C. App. 225, 232, 792 S.E.2d 564, 568 (2016); *see also State v. Watkins*, 246 N.C. App. 725, 730, 783 S.E.2d 279, 282 (2016). An appellate court's mandate "is binding upon the trial court and must be strictly followed without variation or departure." *McKinney v. McKinney*, 228 N.C. App. 300, 302, 745 S.E.2d 356, 358 (2013). "[I]t is well-established that in discerning a mandate's intent, the plain language of the mandate controls." *In re Parkdale Mills*, 240 N.C. App. 130, 135, 770 S.E.2d 152, 156 (2015). Trial court judgments that are "inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court . . . [are] unauthorized and void." *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989).

In *Parkdale*, this Court heard an appeal from a lower tribunal's decision on remand, where we had instructed the lower tribunal "to conduct further hearings *as necessary*." *Parkdale*, 240 N.C. App. at 135, 770 S.E.2d at 156 (emphasis in original). We held, "[w]here a directive of this Court instructs a lower tribunal that the lower tribunal shall conduct hearings *as necessary*, the plain language of such a directive indicates

that the lower tribunal may, but is not required to, conduct additional hearings." *Id.* at 131, 770 S.E.2d at 154 (emphasis in original) (internal quotation marks omitted).

Here, our Supreme Court's Mandate provided that the trial court was to "review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact[,]" and that "remand of this case to the trial court for such an exercise is appropriate, unless the record of this case is insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination." *In re J.C.*, ¶ 15 (emphasis in original) (internal quotation marks omitted). Upon remand, the trial court provided in its written order that it made its findings of fact "[f]ollowing a review of the record, the evidence presented and the argument(s) of counsel[,]" and "using the clear, cogent and convincing evidence standard, following the remand of this matter from the Honorable Supreme Court of North Carolina."

Respondent-Father contends that "[b]y instructing the trial court to make a *new adjudicatory ruling*, the Supreme Court necessarily instructed the trial court to conduct a new disposition hearing." As set forth in *Parkdale*, however, the mandate of an appellate court is to be interpreted by its plain language, and even where the mandate requires a trial court to "conduct further hearings *as necessary*," the trial court "may, but is not required to, conduct additional hearings." *Parkdale*, 240 N.C. App. at 131, 770 S.E.2d at 154 (emphasis in original). The plain language of our Supreme Court's Mandate, here, contains no such stipulation as to the trial court conducting a further disposition hearing. Rather, the Mandate directed the trial court to "review and reconsider the *record before it* by applying the clear, cogent, and convincing standard to make findings of fact." *In re J.C.*, ¶ 15 (emphasis added). Further, our Supreme Court concluded that it "cannot say that remand of this case for the trial court's consideration of the evidence in the record utilizing the proper 'clear, cogent, convincing' standard of proof would be 'futile,' " and that the record is not necessarily "insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination." *Id.* ¶ 16 (emphasis in original). Accordingly, it was not incumbent upon the trial court to hear additional evidence or conduct further hearings, and the court properly reviewed and reconsidered "the record before it." *See id.* ¶ 15; *see Parkdale*, 340 N.C. App. at 131, 770 S.E.2d at 154.

We note that the trial court stated during the 20 April hearing that "[i]t was fully the [c]ourt's intention to find [facts] by [the] clear, cogent and [convincing evidence] standard[,]" and its use of the incorrect standard "was a clerical error." Respondent-Mother contends "[t]his was not

consistent with the Supreme Court's [M]andate, which called for the trial court to 'reconsider' the evidence." The Record demonstrates, however, that the court obeyed the plain language of the Supreme Court's Mandate by reviewing and reconsidering the record before it under the clear, cogent, and convincing evidence standard. *See In re J.C.*, ¶ 15. Whether the court's use of the incorrect standard in the 29 March order was a "clerical error" has no bearing on our analysis, and the trial court did not err.

B. Clear, Cogent, and Convincing Evidence

[2] Respondent-Mother argues in her brief that neither ground found by the trial court for parental rights termination in Dylan met the "clear and convincing"[3] evidence threshold. Specifically, Respondent-Mother contends she made reasonable progress under the circumstances to correct the conditions that led to the removal of Dylan, and there was no clear, cogent, and convincing evidence that supported the trial court's finding of continuing neglect. We disagree.

"The issue of whether a trial court's adjudicatory findings of fact support its conclusions of law that grounds existed to terminate parental rights pursuant to N.C. [Gen. Stat.] § 7B-1111(a) is reviewed de novo by the appellate court." *In re M.R.F.*, 378 N.C. 638, 2021-NCSC-111, ¶ 7 (internal quotation marks omitted) (cleaned up). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re A.L.*, 378 N.C. 396, 2021-NCSC-92, ¶ 16. "[A]n adjudication of any single ground for terminating a parent's rights under N.C. [Gen. Stat.] § 7B-1111(a) will suffice to support a termination order." *In re M.S.*, 378 N.C. 30, 2021-NCSC-75, ¶ 21 (citation and internal quotation marks omitted).

Under statute, a court may terminate parental rights upon a finding that:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than [twelve] months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to

3. Although Mother argues the trial court did not meet the "clear and convincing" standard of evidence, the Supreme Court's Mandate set forth that the trial court's findings must meet the "clear, cogent, and convincing" standard, and our analysis therefore turns on the latter. *See In re J.C.*, ¶ 15.

> the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C. Gen. Stat. § 7B-1111(a)(2) (2021); *see In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001); *see also In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71 ("A respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress sufficient to warrant the termination of parental rights under [N.C. Gen. Stat. §] 7B-1111(a)(2).") (internal quotation marks omitted) (cleaned up). For a respondent-parent's noncompliance with her case plan to support the termination of her parental rights, however, "there must be a nexus between the components of the court-approved case plan with which the respondent failed to comply and the conditions which led to the child's removal from the parental home." *In re J.S.*, 374 N.C. at 816, 845 S.E.2d at 71 (quoting *In re B.O.A.*, 372 N.C. 372, 384, 831 S.E.2d 305, 314 (2019)); *see also In re Y.Y.E.T.*, 205 N.C. App. 120, 131, 695 S.E.2d 517, 524 ("[T]he case plan is not just a check list. The parents must demonstrate acknowledgement and understanding of why the juvenile entered DSS custody as well as changed behaviors.").

Here, the children came into the custody of DSS in April 2016, and Respondent-Appellants were arrested in June 2016. Respondent-Appellants have been out on bond since that time, and their bond prohibited them from having contact with their children. Dylan, therefore, has been placed outside the home for more than twelve months pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). *See* N.C. Gen. Stat. § 7B-1111(a)(2) (2021).

Respondent-Appellants' case plan set forth requirements that they participate in parenting classes totaling twelve hours, and in individual counseling sessions. DSS presented evidence that Respondent-Appellants willfully failed to fulfill either of these two requirements, despite many opportunities to do so. Respondent-Appellants elected to participate in an online parenting class totaling four hours, and were repeatedly instructed by DSS that this was insufficient to fulfill the parenting class requirement of the case plan. After November 2016, DSS received no further update regarding Respondent-Appellants attending individual counseling or therapy, despite DSS's continued encouragement of Respondent-Appellants to do so. Further, Respondent-Mother communicated to the social worker that she does not trust or need counseling

and has chosen not to participate in counseling. The completion of both individual counseling and parenting classes was important under the circumstances, as one of the stated goals for Respondent-Appellants in completing these two, specific, case plan requirements was to "acknowledge why the juveniles[] came into custody of [DSS]." *See In re J.S.*, 374 N.C. at 816, 845 S.E.2d at 71; *see also In re Y.Y.E.T.*, 205 N.C. App. at 131, 695 S.E.2d at 524.

The foregoing evidence demonstrates an ability on the part of Respondent-Mother to show reasonable progress in her case plan and, not on account of poverty, an unwillingness to make the effort. *See McMillon*, 143 N.C. App. at 410, 546 S.E.2d at 175. As the aim of these two case plan requirements was to "acknowledge why the juveniles[] came into custody of [DSS][,]" there is a nexus between these components of the case plan and the conditions leading to Dylan's removal from Respondent-Appellants' home. *See In re J.S.*, 374 N.C. at 816, 845 S.E.2d at 71; *see also In re Y.Y.E.T.*, 205 N.C. App. at 131, 695 S.E.2d at 524. Accordingly, the trial court's adjudicatory finding that Respondent-Mother willfully left the juvenile in foster care or placement outside the home for more than twelve months was supported by clear, cogent, and convincing evidence, and the trial court had sufficient grounds to terminate Respondent-Mother's parental rights in Dylan. *See* N.C. Gen. Stat. § 7B-1111(a)(2) (2021). The trial court's adjudicatory finding pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) is, on its own, sufficient to support termination of Respondent-Mother's parental rights, and we need not assess Respondent-Mother's neglect argument. *See In re M.S.*, ¶ 21.

C. Best Interests of the Child

[3] Respondent-Mother argues the trial court abused its discretion when it made erroneous findings concerning Dylan's likelihood of adoption, which "possibly influence[d] the court's ultimate best interests determination."

"With regard to the trial court's assessment of a juvenile's best interests at the dispositional stage, . . . we review that decision solely for abuse of discretion." *In re R.D.*, 376 N.C. 244, 248, 852 S.E.2d 117, 122 (2020) (citation and internal quotation marks omitted). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a seasoned decision." *Id.* at 248, 852 S.E.2d at 122.

In making a determination on the best interests of a juvenile:

> After an adjudication that one or more grounds for terminating a parent's rights exist, the [trial] court shall determine

> whether terminating the parent's rights is in the juvenile's best interest. The court may consider any evidence, including hearsay evidence as defined in [N.C. Gen. Stat. §] 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2021). Our Supreme Court has provided the likelihood of adoption criterion is not dispositive as to a best interests determination, and "the trial court need not find a likelihood of adoption in order to terminate parental rights." *In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶ 28 (internal quotation marks omitted); *see also In re A.R.A.*, 373 N.C. 190, 200, 835 S.E.2d 417, 424 (2019) ("[T]he absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights.") (alteration in original) (citation omitted).

As explained above, the Supreme Court's Mandate did not require the trial court to conduct additional hearings or receive new evidence on remand. *See In re J.C.*, ¶ 15. Accordingly, it was proper for the court to consider the evidence "in the record before it" to make a best interests determination under N.C. Gen. Stat. § 7B-1110(a). *Id.* ¶ 15.

The trial court, in its written order, made relevant findings based on clear, cogent, and convincing evidence concerning Dylan and regarding subsections (3) and (4) of N.C. Gen. Stat. § 7B-1110(a). The current permanent plan for Dylan is "adoption with a concurrent plan of guardianship." The trial court made adjudicatory findings of fact 69, 71, 72, 73, 74, and 75, and dispositional findings of fact 9, 11, 15, and 41, all of

which were based on the evidence of Dylan's counseling sessions and are relevant to either the accomplishment of Dylan's permanent plan or the bond between Dylan and Respondent-Appellants. *See* N.C. Gen. Stat. § 7B-1110(a)(3)–(4) (2021).

Even if there is a lack of current, relevant evidence supporting a likelihood of Dylan's adoption, the trial court's conclusion that it would be in Dylan's best interests to terminate Respondent-Appellants' parental rights was supported by findings made by clear, cogent, and convincing evidence. It cannot be said that the trial court's decision was "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a seasoned decision." *In re R.D.*, 376 N.C. at 248, 852 S.E.2d at 122. We hold the trial court did not abuse its discretion in concluding the termination of Respondent-Mother's parental rights was in Dylan's best interests.

IV. Conclusion

After careful review, we conclude the trial court: obeyed the Supreme Court's mandate to review and reconsider the record before it under the clear, cogent, and convincing standard; found sufficient grounds to terminate Respondent-Appellants' parental rights in Dylan; and did not abuse its discretion in making its best interests determination. For the foregoing reasons, we affirm the trial court's order terminating the parental rights of Respondent-Appellants.

AFFIRMED.

Judges DILLON and WOOD concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY DAVID GUNTER

No. COA22-669

Filed 16 May 2023

1. Appeal and Error—preservation of issues—fatal defect in indictment—general motion to dismiss

In defendant's appeal from his conviction for aiding and abetting possession of a firearm by a felon, the appellate court presumed, without deciding, that defendant's general motion to dismiss for insufficiency of the evidence at trial preserved for appellate review his argument that the indictment was fatally defective.

2. Indictment and Information—aiding and abetting possession of a firearm by a felon—elements—no fatal defect

An indictment charging defendant with aiding and abetting the possession of a firearm by a felon included all the necessary elements of the crime and, therefore, was not fatally defective. Specifically, the indictment asserted that defendant "unlawfully, willfully, and feloniously" aided and abetted another man by concealing two handguns for him prior to a traffic stop, all while knowing that the other man was a convicted felon.

3. Aiding and Abetting—possession of a firearm by a felon—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss—for insufficiency of the evidence—a charge of aiding and abetting possession of a firearm by a felon, where the State presented substantial evidence showing that defendant provided two handguns to another man and then helped him by concealing the guns prior to a traffic stop, all while knowing that the other man was a convicted felon. Notably, the officers who conducted the stop testified that, when arresting defendant, defendant told them that he had only hidden the guns because he knew the other man was a convicted felon.

Appeal by defendant from judgment entered 14 October 2021 by Judge James W. Morgan in Cleveland County Superior Court. Heard in the Court of Appeals 25 April 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

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

Paul F. Herzog, for the defendant-appellant.

TYSON, Judge.

Timothy David Gunter ("Defendant") appeals from judgment entered on a jury's verdict for aiding and abetting possession of a firearm by a felon. Our review reveals no error.

I. Background

Cleveland County Sheriff's Detectives Aaron Shumate and Timothy Sims were driving in an unmarked vehicle. Detective Shumate observed a black Chevrolet pickup truck three or four car lengths ahead swerve left of the center line several times while travelling on County Line Road. The Detectives observed two occupants seated inside the pickup truck and observed the passenger reaching all around the vehicle. Detective Shumate initiated a traffic stop.

The truck pulled into a convenience store's parking lot at the intersection of Goforth Road and County Line Road. Detective Shumate approached the passenger side of the truck, while Detective Sims approached the driver's side. Detective Shumate recognized Defendant, seated in the passenger seat of the truck, based upon prior encounters with him.

Detective Shumate asked Defendant to step out of the truck, and Defendant complied with the request. Defendant placed his hands on the side of the truck, and Detective Shumate conducted a *Terry* frisk, but did not find any contraband. Defendant denied Detective Shumate's request to search the truck. Simultaneously, Detective Sims asked the driver, Conner Bryce Wellmon ("Wellmon"), to exit the vehicle. Detective Sims conducted a *Terry* frisk of Wellmon and discovered .32 caliber ammunition located inside his pocket. Detective Sims knew Wellmon was a convicted felon. Backup officers had arrived and stood with Defendant and Wellmon, while Detectives Sims and Shumate searched the truck.

Detectives opened the glove box and found a Glock handgun behind the dash of the truck. A thirty-three round 9mm magazine was found on the floorboard behind the driver's seat and a fifteen round 9mm Glock magazine was found under the passenger's seat. Loose ammunition was found scattered throughout the truck's interior cabin.

Detective Sims located a nickel-plated .32 caliber revolver under the center seat. Detective Shumate found a clear plastic baggie, on the

rear floor between the driver's and passenger's seats, which he believed contained methamphetamine. Defendant was arrested and transported to the county detention center. While being processed, Defendant told Detective Shumate he was surprised the detectives had found methamphetamine inside the truck because he had eaten it. While Detective Shumate was reading Defendant the warrant for carrying a concealed handgun, Defendant stated he had concealed the guns only because he knew Wellmon was a convicted felon.

Defendant was indicted for aiding and abetting possession of a firearm by a felon, possession of methamphetamine, and for carrying a concealed weapon. Defendant moved to dismiss for sufficiency of the evidence at the close of the State's evidence and again at the close of all evidence. The trial court denied both motions. A jury convicted Defendant of all three charges on 14 October 2021.

Defendant was sentenced as a prior record level II offender to an active term of 13 to 25 months, suspended for 24 months of supervised probation. As a condition of supervised probation, Defendant was ordered to serve 30 days in the Cleveland County Jail. Defendant appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2021).

III. Issues

Defendant challenges his conviction for aiding and abetting possession of a firearm by a felon. Defendant first argues the indictment was fatally defective. He also asserts the trial court erred by denying Defendant's motion to dismiss for insufficiency of the evidence.

IV. Fatal Defect

A. Standard of Review

[1] North Carolina Rules of Appellate Procedure 10(a)(1) delineates the procedures for preserving errors on appeal:

> 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. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1). Rule 10(a)(1) requires a defendant to "preserve the right to appeal a fatal variance." *State v. Mason*, 222 N.C. App. 223, 226, 730 S.E.2d 795, 798 (2012) (citations omitted).

Our Supreme Court held in *State v. Golder* that a defendant's blanket motion to dismiss at the close of the state's evidence and renewed again at the close of all the evidence "preserves all issues related to sufficiency of the State's evidence" arguments for appellate review. *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020) ("Because our case law places an affirmative duty upon the trial court to examine the sufficiency of the evidence against the accused for every element of each crime charged, . . . under Rule 10(a)(3), a defendant's motion to dismiss preserves all issues related to sufficiency of the State's evidence for appellate review.").

This Court explained the ambiguity about whether a defendant's general and generic motion to dismiss for insufficiency of the evidence properly preserves a defendant's fatal defect argument on appeal in *State v. Mackey*:

> Post-*Golder*, our Supreme Court has not affirmatively held whether a general motion to dismiss preserves a defendant's fatal variance objection for appeal as a "sufficiency of the State's evidence" objection under *Golder*. *Id.*; *State v. Smith*, 375 N.C. 224, 228, 846 S.E.2d 492, 494 (2020) (explaining this Court in *State v. Smith*, 258 N.C. App. 698, 812 S.E.2d 205 (2018), "concluded [ ] defendant's *fatal variance argument was not preserved* because it was not expressly presented to the trial court[,]" while also acknowledging this Court had reached its decision before our Supreme Court issued *Golder*) (emphasis supplied) (citation omitted). The Supreme Court in *Smith*, "assum[ed] without deciding that defendant's fatal variance argument was preserved[.]" *Id.* at 231, 846 S.E.2d at 496.
>
> Since *Smith* and *Golder*, criminal defendants before this Court assert "the Supreme Court in *Golder* [had] 'assumed without deciding' that 'issues concerning fatal variance are preserved by a general motion to dismiss.' " *See State v. Brantley-Phillips*, 278 N.C. App. 279, 286, 2021-NCCOA-307, ¶ 21, 862 S.E.2d 416, 422 (2021).

State v. Mackey, 287 N.C. App. 1, 6, 2022-NCCOA-715, ¶24-25, 882 S.E.2d 405, 409 (2022).

Here, like in *Mackey*, this Court again presumes, "without deciding", Defendant's general and generic motion to dismiss for sufficiency of the evidence preserved his fatal variance objections. *Id.*

B. Analysis

[2] An indictment "is fatally defective if it fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (citation and quotation marks omitted).

A defendant is guilty of aiding and abetting another person in committing a crime if: "(i) the crime was committed by some other person; (ii) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant's actions or statements caused or contributed to the commission of the crime by that other person." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (citation omitted).

N.C. Gen. Stat. § 14–415.1(a) provides: "It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm [.]" N.C. Gen. Stat. § 14–415.1(a) (2021) "Thus, the State need only prove two elements [beyond a reasonable doubt] to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686 (2007).

The indictment charging Defendant with aiding and abetting the possession of a firearm by a felon asserted Defendant did "unlawfully, willfully, and feloniously":

> Aid and abet, Conner Bryce Wellmon, by concealing two handguns for Conner Bryce Wellmon prior to a traffic stop knowing that Mr. Wellmon was convicted of obtaining property by false pretense, a class H felony with a maximum sentence of 39 months in prison. The felony was committed on 11/26/2014 and Mr. Wellmon was convicted of that felony on 08/05/2015 and he received a 6-17 month active sentence that was suspended for 30 months of supervised probation in Cleveland County file number 14 CRS 55542.

(all caps in original).

The indictments included the necessary elements for the crime of aiding and abetting the possession of a firearm by a felon. N.C. Gen. Stat.

§ 14–415.1(a); *Wood*, 185 N.C. App. at 235, 647 S.E.2d at 686. Defendant's argument is without merit and overruled.

V. Sufficiency of the Evidence

[3] Defendant argues the State was required to produce evidence of Defendant's intent, despite the absence of an intent requirement in N.C. Gen. Stat. § 14–415.1(a), because the indictment referenced Defendant's knowledge of Wellmon's prior felony conviction. Defendant cites cases wherein North Carolina's appellate courts have held insufficient evidence of intent existed to support a conviction for crimes with an specific intent element, such as burglary and breaking and entering.

A. Standard of Review

"[T]he denial of a motion to dismiss for insufficiency of the evidence is a question of law reviewed de novo (sic) by the appellate court." *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

This Court reviews whether sufficient evidence existed to support a criminal conviction by considering the evidence "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Golder*, 374 N.C. at 250, 839 S.E.2d at 790 (citation and internal quotation marks omitted).

B. Analysis

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citation and internal quotation marks omitted).

Possession of a firearm by a felon only requires the State to prove two elements: "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *Wood*, 185 N.C. App. at 235, 647 S.E.2d at 686.

> Possession of a firearm may be actual or constructive. Actual possession requires that the defendant have physical or personal custody of the firearm. In contrast, the defendant has constructive possession of the firearm when the weapon is not in the defendant's physical custody, but the defendant is aware of its presence and has both the

> power and intent to control its disposition or use. When the defendant does not have exclusive possession of the location where the firearm is found, the State is required to show other incriminating circumstances in order to establish constructive possession. Constructive possession depends on the totality of the circumstances in each case.

State v. Taylor, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010) (internal citations omitted).

Here, the State presented evidence which tended to show Defendant had provided the .32 caliber revolver to Wellmon. The State also presented evidence which tended to show Defendant knew of Wellmon's prior felony conviction. Detective Shumate testified that, when he arrested Defendant for concealing a handgun, Defendant "uttered that he [had] only concealed the guns because he knew Conner Wellmon was a convicted felon." Detective Sims corroborated this information, testifying Defendant stated "the only reason that [he] even hid the gun or threw the guns and concealed them was because [he] thought Mr. Wellmon was a felon and [he] didn't want him to get in trouble."

The State's evidence sufficiently supports Defendant's conviction for aiding and abetting the possession of a firearm by a felon. *Winkler*, 368 N.C. at 574, 780 S.E.2d at 826; *Wood*, 185 N.C. App. at 235, 647 S.E.2d at 686; *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764. Defendant's argument is without merit.

VI. Conclusion

The indictment charging Defendant with aiding and abetting the possession of a firearm by a felon included the necessary elements outlined in N.C. Gen. Stat. § 14–415.1(a). *Wood*, 185 N.C. App. at 235, 647 S.E.2d at 686. Defendant's argument asserting his indictment was fatally defective is overruled.

The State presented sufficient evidence for the trial court to overrule Defendant's motion to dismiss and submit the charge to the jury. *Winkler*, 368 N.C. at 574, 780 S.E.2d at 826; *Wood*, 185 N.C. App. at 235, 647 S.E.2d at 686; *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764.

Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. We find no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges COLLINS and RIGGS concur.

STATE OF NORTH CAROLINA
v.
KEITH D. MAHATHA, DEFENDANT

No. COA20-656

Filed 16 May 2023

1. Evidence—disclosure of evidence by State—untimely disclosure—sanctions—exculpatory value of evidence

In defendant's trial for charges arising from allegations that he assaulted his girlfriend, the trial court did not abuse its discretion by denying defendant's motion for a mistrial premised on the State's late disclosure of discoverable material under N.C.G.S. § 15A-910 where defendant failed to identify any exculpatory value in the recorded jail phone calls. In addition, pursuant to the statute, even when a disclosure violation occurs, sanctions are not mandatory. The appellate court did not consider defendant's arguments regarding evidence that was admitted without objection.

2. Constitutional Law—effective assistance of counsel—implied concession of guilt—less serious offense—no error

In defendant's trial for charges arising from allegations that he assaulted his girlfriend with a firearm, where defense counsel neither expressed nor implied that defendant must be guilty of one of the less serious charged crimes, assault on a female, and where defense counsel did not completely omit any of the charged crimes from his request that the jury find defendant not guilty during his closing argument, defense counsel did not concede defendant's guilt and therefore did not render ineffective assistance of counsel.

Appeal by Defendant from judgments entered 13 February 2020 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 26 May 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Sarah N. Tackett, for the State.

Richard J. Costanza for defendant-appellee.

MURPHY, Judge.

Under N.C.G.S. § 15A-910, a criminal defendant may move for sanctions, including a mistrial, where the State fails to abide by its obligation

to timely disclose exculpatory evidence. However, sanctions under N.C.G.S. § 15A-910 are not mandatory, even where a disclosure violation occurs. Here, where the only files reviewable on appeal and not timely disclosed by the State were recorded calls from a jail with no exculpatory value, the trial court did not abuse its discretion in denying Defendant's motion for a mistrial on the basis that the State violated its duty to disclose.

Additionally, where a defendant claims on appeal that he received ineffective assistance of counsel due to his counsel conceding his guilt without his consent, a new trial is warranted only where counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense. Here, the Record reveals that defense counsel neither expressed nor implied that there was no other conclusion than Defendant's guilt of one of the charged crimes, nor did counsel completely omit any of the crimes of which he asked the jury to find Defendant not guilty during his closing argument. We therefore conclude that defense counsel did not concede Defendant's guilt and that, consequently, Defendant did not receive ineffective assistance of counsel.

BACKGROUND

This case arises out of Defendant Keith D. Mahatha's convictions for communicating threats, possession of a firearm by a felon, assault on a female, and assault with a deadly weapon inflicting serious injury ("AWDWISI") on 13 February 2020. Defendant is alleged to have assaulted his then-girlfriend because she would not show him her phone.

Around 12:30 a.m. on 14 October 2018, Defendant and the victim arrived home to the victim's second-floor apartment in Greensboro where they had resided together since June 2018. Defendant had been upset with her earlier that day because he wanted to access her personal cell phone, and a heated argument ensued once the two were at home and Defendant continued to demand access. Tired and wanting to go to bed, the victim got into bed to go to sleep for the night. Defendant then allegedly grabbed his gun, pointed it at the victim's head, and stated, "[b]itch, you're going to unlock this phone, or I'm going to kill you," before hitting her forehead with the butt of his gun—a gun the victim testified that Defendant carried "on him just about at all times." The victim then screamed and attempted to get away from Defendant by hiding in her bathroom, but Defendant grabbed her and dragged her into the living room where he again demanded she unlock her phone. She refused to unlock the phone, and Defendant responded by punching her in the face four or five times, blackening her eye.

Fearing Defendant would kill her, the victim slid her phone underneath a couch and ran outside the apartment, injuring her ankle jumping down the last few stairs after she believed she heard him open the door and come after her. The victim, wearing only the undergarments she had worn to bed, fearfully hobbled on one foot into the parking lot and hid underneath a car. She was found by neighbors who lived in her apartment complex and who eventually called 911. Although police did not find Defendant that evening, arrest warrants for Defendant were issued for communicating threats, assault by pointing a gun, AWDWISI, assault on a female, possession of firearm by a felon, and attempted breaking or entering. On 7 January 2019, a Guilford County Grand Jury returned true bills of indictment charging Defendant with these offenses.

Almost a week before trial, the State provided defense counsel with 16 officer bodycam footage videos, a police report, and handwritten notes from an interview with the victim. The State asked counsel if he needed more time to prepare, but defense counsel "reluctantly indicated" that the time remaining under the then-current schedule was sufficient. When the State indicated its intent to play portions of the bodycam footage for the jury, defense counsel stated that he had no "discovery-related objections to anything." Defense counsel also did not object to the admission of the footage when later offered into evidence, and the evidence was admitted.

On the first morning of trial, the State provided an additional 63 photographs of the crime scene and the victim's injuries, as well as a lab report from an analyst with the Greensboro Police Department, all of which were sent to the State only after the State became aware that morning that the pictures had been inadvertently mislabeled under a different case number. Defense counsel again stated that he had no "discovery-related objections to anything" on the first day of trial and did not object to the admission of this further evidence when introduced by the State at trial. The evidence was admitted.

On the second day of trial, the State indicated that it had come into possession of 29 recordings of phone calls Defendant made to the victim while he was in jail and provided the calls to defense counsel. The prosecutor did not acquire the recordings until the second day of the trial because he did not realize that the calls occurred while Defendant was in custody and were therefore likely recorded.[1] The State expressed its intention to play only one recording that had been previously referred to

1. The prosecutor had instead believed the calls occurred in the three-day window between the alleged incident and Defendant's arrest.

during the victim's testimony. After listening to the recording during the lunch break, defense counsel raised a discovery-related objection and requested the trial court exclude the call as the sanction for the State's allegedly untimely disclosure. Nonetheless, the trial court allowed the State to play the recording for the jury.

Defendant moved for a mistrial at the close of the State's evidence, alleging violations of due process rights to meaningful cross-examination and a fair trial due to the alleged discovery violations. The trial court denied Defendant's mistrial motion. Defense counsel then indicated to the court that Defendant did not wish to testify in his own defense and did not intend to present any evidence. The trial proceeded to closing arguments, where defense counsel made several statements—reproduced *infra*—that Defendant argues implicitly conceded his guilt of assault on a female.

On 13 February 2020, Defendant was found guilty of communicating threats, AWDWISI, assault on a female, and possession of a firearm by a felon.[2] Defendant timely appeals.

ANALYSIS

Defendant presents two main arguments on appeal: first, that the trial court abused its discretion by denying his motion for a mistrial; and, second, that he received ineffective assistance of counsel when his trial counsel implicitly conceded he was guilty of assault on a female.

A. Motion for Mistrial

[1] Defendant argues the trial court abused its discretion by denying his motion for a mistrial, which was premised upon the State's late disclosure of discoverable material under N.C.G.S. § 15A-910. The material at issue included "(1) 16 body-worn camera videos on 5 February 2020, the Thursday preceding the start of the Defendant's trial; (2) 63 crime scene photographs and a lab report on 11 February 2020, the first day of trial; and (3) 29 recorded jail phone calls between [] Defendant and [the victim] on 12 February 2020, the second day of trial."

Under N.C.G.S. § 15A-1061, a trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.G.G.S. § 15A-1061 (2021). "We review a trial court's denial

2. Defendant, however, was acquitted of attempted breaking or entering and assault by pointing a gun.

of a defendant's motion for mistrial for abuse of discretion." *State v. Crump*, 273 N.C. App. 336, 339 (2020) (citing *State v. Hester*, 216 N.C. App. 286, 290 (2011)), *disc. rev. denied*, 377 N.C. 567 (2021); *see also State v. King*, 343 N.C. 29, 44 (1996) ("It is well settled that a motion for a mistrial and the determination of whether [the] defendant's case has been irreparably and substantially prejudiced is within the trial court's sound discretion."). " 'Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hauser*, 271 N.C. App. 496, 498 (2020) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

Defendant argues that, because the State violated its statutory duty of disclosure and gave Defendant's counsel insufficient time to prepare his defense, the trial court abused its discretion by denying Defendant's motion for a mistrial. According to Defendant, in determining whether he was prejudiced, the court "did not consider the cumulative effect o[f] the late production of discovery on the eve of and during trial—material that would require hours of review by defense counsel." Defendant contends prejudice should be presumed from the late production because there was no likelihood his counsel could have provided effective assistance given the large amount of evidence and the insufficient opportunity for counsel to assess the material's evidentiary value, conduct any necessary further investigation, and adjust counsel's existing trial strategy.

In response to Defendant's argument, the State contends the trial court did not abuse its discretion in denying the motion for mistrial because the State did not violate its duty to disclose; and, consequently, the trial court properly allowed the admission of the body camera video, crime scene photos, lab report, and phone recordings. The State also contends that, even if the call was erroneously admitted, Defendant was not prejudiced and the error was harmless beyond a reasonable doubt.

The State's statutory duty to disclose is detailed in N.C.G.S. § 15A-903, which provides the following in pertinent part:

> (a) Upon motion of the defendant, the court must order:
>
> (1) The State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant.

> a. The term "file" includes the defendant's statements, the codefendant's statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

N.C.G.S. § 15A-903(a)(1)(a.) (2022). Moreover, under N.C.G.S. § 15A-903(b), if "the State voluntarily provides disclosure . . . , the disclosure shall be to the same extent as required by [N.C.G.S. § 15A-903(a)]." N.C.G.S. § 15A-903(b) (2022). "If at any time during the course of the proceedings the court determines that a party has failed to comply[,]" the court "may (1) [o]rder the party to permit the discovery or inspection, [] (2) [g]rant a continuance or recess, [] (3) [p]rohibit the party from introducing evidence not disclosed, [] (3a) [d]eclare a mistrial, [] (3b) [d]ismiss the charge, with or without prejudice, or (4) [e]nter other appropriate orders." N.C.G.S. § 15A-910(a) (2021). "Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply . . . ." N.C.G.S. § 15A-910(b) (2021).

We must therefore determine whether the State failed to comply with its statutory duty to disclose discoverable material and, if so, whether the trial court abused its discretion by not granting Defendant's motion for a mistrial as an appropriate sanction pursuant to N.C.G.S. § 15A-910(a)(3a). As an initial matter, however, we first address which of the alleged discovery violations we may review on appeal, as the State argues appellate review of Defendant's arguments concerning the bodycam footage, crime scene photographs, and lab report is improper given Defendant's failure to object to their admission at trial.

1. Reviewability

As stated earlier, the disclosed material at issue falls into three categories: body camera videos, which were disclosed shortly before the start of the trial; photographs and a lab report, which were disclosed on the first day of trial; and Defendant's recorded jail phone calls, which were disclosed on the second day of trial. However, our review is limited only to the material to which Defendant raised an objection during trial. *See, e.g.*, *State v. Grooms*, 353 N.C. 50, 76 (2000); *State v. Hartley*, 212 N.C. App. 1, 5-6, *disc. rev. denied*, 365 N.C. 339 (2011).

"When the defendant does not inform the trial court of any potential unfair surprise, the defendant cannot properly contend that the trial court's failure to impose sanctions is an abuse of discretion." *State*

v. Taylor, 332 N.C. 372, 384 (1992). Here, Defendant did not object during trial to the admission of the bodycam footage, photographs, or lab report, nor did he raise any concerns about untimely disclosure of this evidence prior to the start of trial. When it provided defense counsel the bodycam footage, the prosecution asked if the defense needed more time to prepare, but counsel denied needing a continuance to prepare for trial. On the morning of trial, when the State indicated its intent to play portions of the footage for the jury and introduce several of the photographs into evidence, defense counsel stated that he had "no discovery-related objections to anything." When the videos and pictures were later offered into evidence, defense counsel stated again that he had no objection, and the evidence was admitted.[3] " 'Having failed to draw the trial court's attention to the alleged discovery violation, [Defendant] denied the court an opportunity to consider the matter and take appropriate steps.' " *State v. Early*, 194 N.C. App. 594, 605 (2009) (quoting *State v. Herring*, 322 N.C. 733, 748 (1988)). " 'As such, [D]efendant cannot properly contend that the trial court's failure to impose sanctions is an abuse of discretion.' " *Id.* (quoting *Taylor*, 332 N.C. at 384). We therefore cannot consider discovery violations concerning the bodycam footage, crime scene photographs, and lab report.

However, as the State concedes on appeal, Defendant did raise an objection to the admission of his recorded jail calls. Accordingly, we review Defendant's arguments related to the calls, which requires us to determine whether the State violated its duty to disclose and, if so, whether the trial court abused its discretion in rejecting the requested sanction of a mistrial. *See supra*.

2. Alleged Discovery Violation

With respect to the duty to disclose under N.C.G.S. § 15A-903, "Defendant's rights to discovery are statutory. Constitutional rights are not implicated in determining whether the State complied with these

3. In response to the State's contention that he failed to raise an objection concerning the bodycam footage, photographs, and lab report, Defendant argues that his trial counsel's decision to not pursue sanctions for the alleged late disclosure of this material was "consistent with Rule 12 of the North Carolina General Rules of Practice, which requires lawyers to treat opposing counsel with 'candor and fairness.' " According to Defendant, his trial counsel "could have sought the full gamut of remedies set out in [N.C.G.S.] § 15A-910" but instead "overlooked the State's late disclosures and did not seek the imposition of sanctions." Defendant claims his trial counsel's "professionalism should not shield the State from scrutiny over their late disclosures and its impact on the ability to effectively represent [] Defendant." However, well-established law demands defense counsel raise an objection to bring the discovery issue to the trial court's attention and, thus, to allow us to review the denial of Defendant's motion for an abuse of discretion. *See State v. Herring*, 322 N.C. 733, 748 (1988); *Taylor*, 332 N.C. at 384.

discovery statutes."[4] *State v. Ellis*, 205 N.C. App. 650, 655 (2010). " 'There is no general constitutional or common law right to discovery in criminal cases.' " *Id.* (quoting *State v. Haselden*, 357 N.C. 1, 12, *cert. denied*, 540 U.S. 988 (2003)). " 'The purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate.' " *Id.* (quoting *State v. Payne*, 327 N.C. 194, 202 (1990), *cert. denied*, 498 U.S. 1092 (1991)). "[O]nce . . . the State has provided discovery there is a continuing duty to provide discovery and disclosure." *Id.*

Defendant contends that his counsel was not, as required by N.C.G.S. § 15A-903(a)(1), provided with the recorded jail phone calls that were "in the possession of the various law investigative agencies having custody of the Defendant or those charged with investigating the offenses for which he stood trial." According to Defendant, during trial, both the prosecutor and defense counsel noted a voluntary discovery request was made on Defendant's behalf in April 2019, and the State's continuing discovery obligation was deemed to have been made under an order of the trial court once the prosecution turned over some evidence in response to the request. Defendant argues that he "was entitled to this material in a timely manner" because exculpatory evidence must be provided in such a manner that defense counsel has sufficient time to "effectively use it." (Emphasis omitted.)

We do not accept one of the critical premises underlying this argument; namely, that the calls were exculpatory. Defendant claims the "exculpatory value" of the calls—which were Defendant's own conversations—"would have been a factor in the decision to offer defense evidence; specifically, defense counsel and [] Defendant could have decided [] Defendant would testify, after which defense counsel could seek the admission of the statements made by [] Defendant during the calls which could corroborate his trial testimony." But Defendant's appellate counsel, after having months between his appointment and the date on which he filed Defendant's brief, does not identify any single specific statement that would have corroborated Defendant's testimony as to any contested issue at trial. Defendant offers nothing more than speculation to support his claim that he may have chosen to testify if his counsel was given more time to listen to the calls, and Defendant has not identified any particular testimony he could have provided that would have been exculpatory when paired with the content of any of the calls. Moreover, although Defendant identifies the potential role

4. Defendant has not raised any constitutional arguments concerning the State's duty to disclose.

of the calls in impeaching the alleged victim's testimony at trial as a separate basis for their exculpatory value, Defendant has not pointed to any statement made by the victim within the recordings that contradicted her testimony or otherwise had impeachment value.

Defendant's inability to identify the evidence's exculpatory value demonstrates that the trial court did not abuse its discretion; despite the volume of material, an inability to access a series of non-exculpatory phone calls would not have "result[ed] in substantial and irreparable prejudice to [] [D]efendant's case." N.C.G.S. § 15A-1061 (2021); *cf. State v. Canady*, 355 N.C. 242, 252-53 (2002) (holding exculpatory evidence was improperly withheld where there was a "reasonable probability that if [the] defendant had access to informants who had names of others involved in the [crime at issue], such information could have swayed the jury to reach a different outcome").

Nor does the statutory scheme governing the State's duty to disclose provide any further basis to find the trial court abused its discretion. As stated earlier, when the State fails to timely comply with its duty of disclosure, the trial court "*may* (1) [o]rder the party to permit the discovery or inspection, [] (2) [g]rant a continuance or recess, [] (3) [p]rohibit the party from introducing evidence not disclosed, [] (3a) [d]eclare a mistrial, [] (3b) [d]ismiss the charge, with or without prejudice, or (4) [e]nter other appropriate orders." N.C.G.S. § 15A-910(a) (2021) (emphasis added). The plain language of the statute makes clear that the trial court also has the discretion not to enter *any* sanctions. *See* N.C.G.S. § 15A-910(d) (2021) (emphasis added) ("*If the court imposes any sanction*, it must make specific findings justifying the imposed sanction."). Accordingly, despite the State's untimely disclosure, the trial court ruled well within the options provided to it under N.C.G.S. § 15A-910 not to declare a mistrial.

B. Effective Assistance of Counsel

[2] Defendant next argues he received ineffective assistance of counsel due to his trial counsel's alleged implicit concession that he was guilty of assault on a female. Defendant relies on *State v. Harbison*, 315 N.C. 175 (1985), and *State v. McAllister*, 375 N.C. 455 (2020), to contend he received *per se* ineffective assistance of counsel. At oral argument, Defendant's appellate counsel confirmed that this ineffective assistance argument is limited to alleging *Harbison* error.

1. Standard of Review

"We review *per se* ineffective assistance of counsel claims *de novo*." *State v. Moore*, 286 N.C. App. 341, 345 (2022) (citing *State v. Harbison*,

315 N.C. 175 (1985)); *see also State v. Wilson*, 236 N.C. App. 472, 475-78 (2014) (applying the *de novo* standard to the defendant's claim that his trial counsel's statements amounted to *Harbison* error).

2. *Harbison* Error

We recently provided a concise description of the applicable law for cases where the defendant has alleged ineffective assistance of counsel based on a *Harbison* error:

> A defendant claiming ineffective assistance of counsel must ordinarily show both that counsel's performance was deficient, and that counsel's deficient performance prejudiced the defense. [*Strickland v. Washington*, 466 U.S. 668, 687 (1984)]. However, "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Harbison*, 315 N.C. at 180[] . . . . Statements by defense counsel "must be viewed in context to determine whether the statement was, in fact, a concession of defendant's guilt of a crime[.]" *State v. Mills*, 205 N.C. App. 577, 587[] . . . (2010) (citation omitted). Where "defense counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense, *Harbison* error exists unless the defendant has previously consented to such a trial strategy." [*McAllister*, 375 N.C. at 475]. "[T]he trial court must be satisfied that, prior to any admissions of guilt at trial by a defendant's counsel, the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision." *State v. Foreman*, 270 N.C. App. 784, 790[] . . . (2020) (citation omitted).

Moore, 286 N.C. App. at 345. Our Supreme Court has "emphasize[d] that a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence." *McAllister*, 375 N.C. at 476.

In *McAllister*, our Supreme Court "extended *Harbison* to instances where defense counsel does not expressly request that the jury convict the defendant of a charge, but impliedly concedes the defendant's guilt to a charged offense." *State v. Guin*, 282 N.C. App. 160, 169 (2022). In that case, the defendant was tried for assault on a female, assault by strangulation, second-degree sexual offense, and second-degree rape.

See McAllister, 375 N.C. at 458-59. In its case-in-chief, the State played for the jury a videotaped police interview with the defendant in which the defendant admitted that he and the victim got into a rough "tussle," but he denied sexually assaulting her. *Id.* at 458. The defendant also stated in the interview, "[I]f I smacked [her] ass up, then I smacked [her]; I can take the rap for that." *Id.* During his closing argument, the defendant's counsel referenced the defendant's statements from the interview. Defense counsel stated to the jury, "[T]hings got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives." *Id.* at 460. Defense counsel told the jury that the defendant "was being honest" during the interview. *Id.* Throughout his closing argument, "counsel never expressly mentioned [or asked the jury to find the defendant not guilty of] the charge of assault on a female but repeatedly addressed the other three charges against [the] defendant." *Id.* at 473.

In reviewing the remarks, our Supreme Court held that *Harbison* error occurs not only where there is an express concession of guilt, but also where counsel's statements "cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense":

> [A] *Harbison* violation . . . encompass[es] situations in which defense counsel impliedly concedes his client's guilt without prior authorization.
>
> . . .
>
> Although an overt admission of the defendant's guilt by counsel is the clearest type of *Harbison* error, it is not the exclusive manner in which a per se violation of the defendant's right to effective assistance of counsel can occur. In cases where—as here—defense counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense, *Harbison* error exists unless the defendant has previously consented to such a trial strategy. In such cases, the defendant is prejudiced in the same manner and to the same degree as if the admission of guilt had been overtly made. Thus, our decision in this case is faithful to the rationale underling *Harbison*.
>
> . . .
>
> [U]nder *Harbison* and its progeny[,] defense counsel was required to obtain the informed consent of [the]

> defendant before embarking on such a strategy that implicitly acknowledged to the jury his guilt of a separately charged offense.

Id. at 473-75. Our Supreme Court concluded that the defense counsel's statements constituted error under *Harbison* as "an implied concession of guilt." *Id.* at 476.

In concluding that the defense counsel's statements constituted *Harbison* error, our Supreme Court considered the defense counsel's statements to implicitly admit the defendant's guilt for three core reasons. "First, defense counsel attested to the accuracy of the admissions made by [the] defendant in his videotaped statement by informing the jurors that [the] defendant was 'being honest.' " *Id.* at 474. "Second, [the] defendant's attorney not only reminded the jury that [the] defendant had admitted he 'did wrong' during the altercation in which [the victim] got 'hurt,' but defense counsel then proceeded to also state his own personal opinion that 'God knows he did [wrong]'—thereby implying that there was no justification for [the] defendant's use of force against [the victim]." *Id.* Third, "at the very end of his closing argument, defense counsel asked the jury to find [the] defendant not guilty of every offense for which he had been charged except for the assault on a female offense." *Id.*

Here, Defendant argues that statements made by his defense counsel "track[] very closely" with those made by the defense counsel in *McAllister*. Defendant cites two statements from his counsel's closing argument. First, immediately after beginning the closing with "[l]adies and gentlemen, [Defendant] is not guilty of assault with a deadly weapon inflicting serious injury, he's not guilty of possession of a firearm by a felon, he's not guilty of assault by pointing a gun, because [Defendant] did not have a firearm[,]" Defendant's counsel made the following argument:

> Now, I -- I somewhat envy you because of the important role that you're about to serve, but I also empathize with how difficult what you're about to do is. Because I told you in the beginning that this was a case about nuance. Not everything is this sexy black-and-white scenario of good versus evil. This is a case where you may find that [Defendant] did something, did something terrible, did something to someone who maybe didn't deserve it. No one does. No one deserves to have what may or may not have happened to Ms. Golden. Nobody. And no one is going to stand up here and tell you that it's okay or that any of that behavior, if true, is okay. It's not.

Second, later in his closing argument, Defendant's counsel stated,

> You know what? You can believe that he committed an assault. I'm not asking you to find him guilty of assault on a female, but you can believe that he committed a non-gun-related assault. And everything the State said still makes sense. Honestly, it makes better sense. It explains why he didn't try to get the hell out of Dodge immediately and toss a gun. If you believe that [Defendant] went too far, committed an assault, and then tried to go find her, whether it was to continue the argument or not, you could believe that if the man's on probation and the police roll up, he's going to get in trouble for that. So yes, of course, he would leave. It doesn't -- it doesn't mean he's leaving just because there's a gun.

These are the only statements on which Defendant relies to argue his counsel implicitly conceded he was guilty of assault on a female.

Defendant asserts several reasons for why these statements parallel those in *McAllister*. First, Defendant claims counsel told the jury they could find the Defendant did something terrible, which was a "not-so-subtle reference to the Defendant assaulting [the victim]." Defendant contends that counsel provided his personal opinion about Defendant's actions by telling the jury that no one deserved what happened to the victim and that "no one is going to stand up here and tell you that it's okay or that any kind of that behavior, if true, is okay. It's not." According to Defendant, in *McAllister*, the Court was troubled by defense counsel's similar offering of his personal opinion about his client's culpability for assault. Second, Defendant claims "[a]nother commonality is that defense counsel in both cases urged the respective juries to find their clients not guilty of the more serious offenses." Defendant argues that his counsel "only made a cursory argument about the [assault on a female] count, saying that while he was not telling the jury to convict his client for that offense (and attempted breaking or entering and communicating threats), they should '[d]o what you believe the law requires you to do.' " We are not persuaded by either reason.

First, Defendant is incorrect that his counsel referenced Defendant as assaulting the victim and that his counsel gave his personal opinion implying there was no conclusion other than Defendant's guilt, as in *McAllister*. A core element of our Supreme Court's reasoning in *McAllister* was that the defense counsel "not only reminded the jury that [the] defendant had admitted he 'did wrong' during the altercation in which [the victim] got 'hurt,' but defense counsel then proceeded to

also state his own personal opinion that 'God knows he did [wrong]'—thereby implying that there was no justification for [the] defendant's use of force against [the victim]." *McAllister*, 375 N.C. at 474; *see also Guin*, 2022-NCCOA-133, at ¶ 37 (referring to this reason as one of "three core reasons" the Court found the statements problematic). Here, the two excerpts from closing arguments cited by Defendant neither express nor imply that there was no other outcome other than that Defendant was guilty of assault on a female. Instead, Defendant's counsel expressly stated, "I'm not asking you to find him guilty of assault on a female." Counsel made this clear after he stated that "you can believe that he committed a non-gun-related assault[,] . . . [a]nd everything the State said still makes sense." Nor does the other excerpt cited by Defendant concede Defendant's guilt, explicitly or implicitly; rather, at worst, it expresses that the jury "may or may not" find Defendant guilty of an offense.[5] As such, the statements do not rise to the level of those in *McAllister*.

Second, while Defendant's counsel urged the jury to find Defendant not guilty of the more serious offenses, Defendant himself makes clear that counsel did not completely omit the assault on a female count from the counts on which he asked the jury to find Defendant not guilty. In contrast, as our Supreme Court expressly stated in *McAllister*, defense counsel "overtly s[ought] a not guilty verdict as to the three more serious charges" but "omitt[ed] mention of the assault on a female charge" by "not expressly mentioning that charge *at all during the entire closing argument* . . . ." *McAllister*, 375 N.C. at 474 (emphasis added). The Court thus concluded that "the only logical inference in the eyes of the jury would have been that defense counsel was implicitly conceding defendant's guilt as to that charge." *Id.* Here, however, we cannot say that the only logical inference to be drawn from defense counsel's argument was a concession of Defendant's guilt as to the assault on a female

5. We are cognizant that some of defense counsel's remarks may have implicitly acknowledged the *likelihood* that the jury would believe the State as to some charges and not others. For example, before clarifying that he was "not asking [the jury] to find [Defendant] guilty of assault on a female[,]" defense counsel remarked that the jury "can believe that [Defendant] committed a non-gun-related assault[,] . . . [a]nd everything the State said still makes sense." However, we emphasize that the distinction between differentiating charges by evidentiary support, as defense counsel did in this case, and an *actual* concession, express or implied, is more than a formality or commitment to literalism. Just as critical to the effective performance of counsel as the commitment not to concede on a client's behalf is the ability to argue nuance to a jury that may otherwise—as defense counsel suggested—be tempted to think in "black-and-white" terms. Without the ability to argue, in the hypothetical, that a jury could find a client guilty of one charge and not another, a criminal defense attorney's work would be reduced to a parody of itself, hamstringing the credibility of its own arguments.

charge because counsel did not completely omit mention of this charge; indeed, he asked the jury to "return a verdict of not guilty" shortly after discussing this charge in the closing argument. We therefore conclude that Defendant's reliance on *McAllister* is unconvincing, and we do not believe Defendant has demonstrated *Harbison* error.

CONCLUSION

For the foregoing reasons, Defendant has not shown that the trial court abused its discretion by denying his motion for a mistrial, nor has he demonstrated that his trial counsel implicitly conceded his guilt of assault on a female.

NO ERROR.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JOSHUA DAVID REBER

No. COA22-130

Filed 16 May 2023

1. Evidence—prior bad acts—child rape trial—text messages with girlfriend—highly prejudicial—new trial granted

Where the trial court committed plain error in a trial for multiple counts each of rape of a child and sexual offense with a child (based on acts alleged to have occurred when the victim was between eight and eleven years old) by allowing the State to introduce text message exchanges between defendant and a former girlfriend as Rule 404(b) evidence, defendant was entitled to a new trial. Neither exchange—one of which was in regard to a sexual encounter that occurred when defendant's girlfriend was intoxicated and which she could not later remember, and the other of which was in regard to a plan to meet at a motel and to have defendant's daughter keep the meeting a secret from defendant's family—was sufficiently similar to the events giving rise to the criminal charges at issue. Therefore, their introduction was highly prejudicial and likely impacted the jury verdict, particularly in a case where, since there was no physical evidence of the crimes or eyewitnesses, the outcome of the case was dependent upon the jury's perception of the credibility of each witness.

2. Criminal Law—prosecutor's closing argument—child rape trial—nature of defendant's time with the victim

The trial court was not required to intervene ex mero motu during the prosecutor's closing argument in defendant's trial for multiple counts each of rape of a child and sexual offense with a child regarding several comments by the prosecutor: (1) describing the video game that defendant and the victim played together as having a mature rating and that being "full of gore, smoking, profanity, and sex scenes," which were legitimate inferences from the evidence; (2) referencing the victim's cross-examination by defendant's attorney, which did not denigrate the defense attorney and was not grossly improper; and (3) remarking on the short amount of time defendant had spent in jail due to being released soon after his arrest when defendant's grandmother provided bond money, which was not grossly improper and was part of the evidence since defendant had testified that he had been out of jail on bond since his arrest.

3. Criminal Law—prosecutor's closing argument—child rape trial—remarks on sexual history—unsupported and inflammatory

The trial court erred in defendant's trial for multiple counts each of rape of a child and sexual offense with a child by failing to intervene ex mero motu during the prosecutor's closing argument when the prosecutor remarked on defendant's use or lack of use of condoms during sexual intercourse and when he discussed defendant's sexual history with his girlfriend, both of which were grossly improper and inflammatory. The prosecutor's inferences that defendant was spreading sexually transmitted diseases was not supported by the evidence and served only to inflame the passions or prejudice of the jury, and the inference that defendant manipulated his girlfriend was an impermissible character attack based on improperly admitted evidence (the introduction of which constituted plain error entitling defendant to a new trial).

Judge DILLON dissenting.

Appeal by Defendant from judgments entered 9 August 2021 by Judge Forrest D. Bridges in Ashe County Superior Court. Heard in the Court of Appeals 19 October 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Margaret A. Force, for the State.

Daniel M. Blau, for the Defendant.

WOOD, Judge.

Joshua Reber ("Defendant") appeals from judgments finding him guilty of several counts of rape of a child and sex offense with a child. For the reasons stated herein, we reverse the trial court's judgment and remand for a new trial.

I. Factual and Procedural Background

In 2009, Defendant and his daughter, Beth,[1] moved to North Carolina to live with his grandparents in Ashe County so Defendant's grandparents could help with childcare while Defendant worked. That same year, when Defendant was twenty years old, he became friends with Sherry and Troy, a married couple he knew because they worked together at a group home for individuals with mental disabilities. Defendant became close to the couple and their five children, and he was treated like a member of their family. Because of his close relationship with the family, Defendant and his daughter spent a significant amount of time at Troy and Sherry's home and often spent the night at their home. During their friendship, he and his daughter lived with the family for approximately a month. Troy and Defendant would hunt together, and Troy would bring along his daughter, Khloe, after she turned four years old. Khloe and her sister visited Defendant's grandparents' home a few times to play with Beth, and, on one occasion, the two sisters stayed the night in Beth's room. Khloe also liked to play a video game called Call of Duty with Defendant when she came to Defendant's grandparents' home.

In late September or early October 2015, when Khloe was eleven years old, she told a boyfriend that Defendant had engaged in sexual activities with her and was encouraged by him to report these events to her mother. Khloe then told her mother, Sherry, that Defendant had been "messing with her." In response to Khloe's allegations, Sherry contacted the Ashe County Sheriff Department and filed a report with Captain Carolyn Gentry ("Captain Gentry"). Captain Gentry arranged for Khloe to be interviewed and to have a medical exam.

On 15 October 2015, Detective Graybeal of the Wilkes County Sheriff's Department, a forensic interviewer at the Safe Spot Child Advocacy Center, interviewed Khloe. During the interview, Khloe stated that the abuse first occurred when she was eight years old while she was alone with Defendant in a deer blind. She reported that one night, after using a spotlight to hunt, Defendant started massaging her, penetrated

1. Pseudonyms are used here to protect the identity of juveniles.

her vagina with his finger, and later rubbed her chest under her shirt. Khloe also described additional sexual acts that she claimed took place over the next three years, including multiple incidents of vaginal sex, digital penetration, and oral sex with such acts occurring in the deer blind, on her family's couch, in her bedroom, and in the bathroom at her home. Khloe also stated that sexual acts occurred at Defendant's home to include his bedroom, a smoking spot outside, and the woods. Khloe reported to Detective Graybeal that she and Defendant sent nude photos to each other on Snapchat and chatted over Facebook messenger. According to Khloe, the sexual abuse stopped before her eleventh birthday in April 2015. At the child advocacy center, Dr. Suttle conducted a medical exam of Khloe. The medical exam consisted of a head-to-toe assessment and included a genital exam and an anal exam.

On 4 November 2015, Defendant was arrested for several counts of sexual offense with a child and rape of a child. On 19 November 2015, Captain Gentry obtained a search warrant for Defendant's phone. Defendant was indicted on 25 April 2016 on four counts of Rape of a Child in 15 CRS 50792-93 and six counts of Sex Offense with a Child in 15 CRS 50794-96. Defendant was tried before a jury during the 2 August 2021 criminal session of Ashe County Superior Court with Superior Court Judge Forrest D. Bridges presiding.

During trial, several witnesses testified. Khloe, seventeen years old at the time of trial, testified that she first met Defendant when she was four or five years old and viewed him as a brother with whom she wrestled, hunted, and played videogames. However, Khloe testified that when she reached puberty at age eight, Defendant began to engage in sexual activities with her. She reported that the first incident occurred one evening when she, Defendant, and her father were watching television together in the living room at 3 a.m. Khloe testified that after her father went to bed, Defendant suggested that they move outside to hunt for coyotes, and they entered the deer blind. In the deer blind, Defendant proceeded to massage her chest and buttocks and penetrated her vagina with his finger. Khloe described that she "didn't know how to feel honestly" as she was "scared, nervous, but I had a crush on him before it and, you know, I looked at it like, well, maybe he likes me too, and it's kind of exciting."

According to Khloe, their relationship changed, and she began to view Defendant as a boyfriend, to the point where she did not have "any boyfriends at school." Khloe further testified that when she was between the ages of eight and eleven, the sexual touching occurred at least weekly and took place in the deer blind, the woods located behind

her parents' home, her parents' living room, the bathroom, her bedroom, Defendant's bedroom, and outside of his grandparents' home. Khloe recounted that when she slept over at Defendant's grandparents' home, she would sneak into Defendant's bedroom located on the main level of the home, where they engaged in sexual acts. Khloe testified that she and Defendant played videogames in his bedroom at his grandparents' home, and would wait until everyone left the home, so that "whenever they left, that's when things escalated."

Khloe recounted that on a particular occasion, Defendant's grandmother took Khloe's sister and Beth to church, while Khloe stayed behind with Defendant, so that they "had a little time to [them]selves," which allowed Defendant to "be a little more further with it." Khloe stated that Defendant came over to her parents' home three or four times a week, and at least once a week, they would engage in sexual intercourse in the deer blind. Khloe also alleged that she and Defendant engaged in sexual acts in her family's bathroom, the only bathroom in the home, during the night. She testified Defendant never used a condom during these sexual activities and there were times when Defendant ejaculated into her mouth, into the toilet, or into leftover bottles. Defendant told Khloe not to tell her father about their sexual activities "because he didn't want their relationship to be ruined between them" and not tell anyone else, lest "he would go to prison."

During cross-examination, Khloe testified that, within the two weeks before trial, she watched the interview conducted on 15 October 2015 and explained, "The only reason why I watched the videos is because I didn't remember nothing for six years. So I had to just really remember everything . . . . because this happened so many times, like the littlest details I probably had done forgot about." When asked about her truthfulness, Khloe stated that she did not need to make up any lies to get attention from her parents.

Khloe's mother, Sherry, also testified that she viewed Defendant as one of her own kids and treated him as part of her family. She stated that all of her children viewed Defendant as a big brother. Sherry testified that she thought Defendant and Khloe had "a brother-sister relationship" before Khloe disclosed the abuse to her. Sherry testified that after Khloe told her about these alleged events, she observed a change in her daughter. Khloe was bullied, depressed, and suicidal and started cutting herself, but Sherry testified that she did not notice any of these behaviors prior to Khloe telling her what had occurred. Sherry also described Khloe as a "normal 8- to 11-year-old" child during the period of these alleged acts. Sherry testified that, in 2010, she quit working and stayed at home "all of the time" to care for the children.

Defendant's grandmother, Mrs. Swann, testified that when Defendant and his daughter moved in with her and her husband, she stopped working to stay home and take care of Beth. Mrs. Swann stated that during the times Khloe came over to her home, her sister was always with her, and Mrs. Swann was home during those visits. During the single time that Khloe and her sister slept over, the three girls slept in Beth's room located in the basement. Mrs. Swann's bedroom was also located in the basement and next to Beth's room. Mrs. Swann testified that, during the relevant period, their dachshunds, which were normally kept in the basement, barked "if anybody moved down there." Mrs. Swann stated that Khloe was never left home alone with Defendant while the rest of the family went to church, and, in fact, both she and her sister had attended church with Mrs. Swann on the one occasion they slept over. When Khloe and Defendant played video games in his bedroom, Mrs. Swann testified that the door was always open and, from a vantage point in the kitchen, she could clearly see into it. According to Mrs. Swann, she and her husband required doors to be kept open when other children were in their home.

Neither Khloe's mother nor Defendant's grandmother testified to ever having seen any questionable behavior from Defendant or any inappropriate interaction between Defendant and Khloe.

At trial, the State called an expert witness, Ms. Browning of the Safe Spot Child Advocacy Center, to discuss the results of Khloe's 22 October 2015 medical exam, though Ms. Browning was not the medical provider who examined Khloe on 22 October 2015 and had not met her. According to Dr. Suttle's medical report, she did not observe anything specific during the physical exam, which, according to Ms. Brown, would include instances of torn hymenal tissue, evidence of an STD, or pregnancy.

However, Ms. Browning testified that the lack of significant findings during the genital exam does not rule out the possibility of sexual abuse because "it's very few children who have experienced sexual abuse that have any kind of injuries" since injuries can heal very quickly or there was never an injury there in the first place. Nevertheless, Dr. Suttle's report listed "no physical evidence of sex[ual] abuse found." On cross-examination, Ms. Browning conceded, "In other words, it was an unremarkable or normal exam for a child [Khloe's] age when it was done on October 22, 2015."

Agent Anderson of the SBI testified that he conducted a forensic examination of Defendant's cell phone on 15 March 2016. After reviewing the data extraction, Agent Anderson testified that he did not find

evidence of nude photographs having been exchanged between Khloe and Defendant. He also discovered that the phone did not appear to have been activated until May 2015, one month after the alleged abuse had stopped. Agent Anderson found thousands of text messages between Defendant and his girlfriend at that time, Danielle, but no communications between Defendant and Khloe. Agent Anderson testified that he attempted to do a data extraction from Khloe's tablet but was unsuccessful due to technical issues.

The Defense called as a witness Sgt. Lewis, a retired sergeant from the Ashe County Sheriff's Office who assisted Captain Gentry on this case. Sgt. Lewis was assigned to take photographs of Defendant's genital area in order to verify Khloe's claims regarding the location of alleged moles on Defendant's body. Sgt. Lewis testified that he did not observe any evidence of a mole in Defendant's pubic line or on his penis.

At trial, Defendant testified on his own behalf. Defendant testified about his and his daughter's close relationship with Sherry and Troy and their children, and that he spent quite a bit of time over at their home. He explained that Troy and Sherry's home only had one bathroom. He further testified he was Facebook friends with all of Troy's family who had Facebook accounts, including Khloe and he was first introduced to Call of Duty, a video game, by Troy's sons. Defendant recounted that Troy and Sherry had marital discord, and, consequently, Troy would leave their home for a couple of weeks at a time. During those times, Defendant would visit him at his father's home. Defendant testified he never spent the night at their home during the periods of time Troy was not living there. If Defendant slept over, he would sleep on the couch located in the living room, while Beth slept in the room shared by Khloe and her sisters.

Defendant testified that at the request of her parents, he had taken Khloe hunting in the family's backyard, around 2:00 or 3:00 p.m., but would return from hunting by nightfall. Defendant testified that he and Khloe did not hunt deer in the evening because it was illegal to hunt deer after dark. Defendant testified he was never alone with Khloe in Troy's deer blind at night, but that there were times when they would go out together to the picnic table and spotlight for coyotes. Defendant denied ever engaging in any sexual activities with Khloe.

Defendant also recounted that Khloe had visited his grandparents' home with her sister two or three times but had never come alone. Defendant testified that he and Khloe had played video games in a bedroom but that the bedroom door was open and that Khloe never came into his room at any other time. Defendant further reported that Khloe

would never have stayed home from church when she spent the night because his "grandparents don't allow that." Defendant testified that his grandmother stayed at home most of the time in order to watch Beth and other children who visited and that she had a habit of "peeking in and checking in," as well as walking past doors and looking in when visitors came to her home.

Defendant testified that, since moving to North Carolina, he had girlfriends with whom he had sexual relationships and that none of these sexual interactions occurred at his grandparents' home. Defendant also reported that he engaged in contraceptive practices including using a condom, and, when a condom was not available, Defendant utilized the pull-out method.

When asked about his cellphone, Defendant testified that it could have been in May 2015 that he bought the phone upon which the search warrant was executed, but he did not buy it in order to hide any previous contact with Khloe. Defendant testified he never used Snapchat during the period between 2012 and 2015. While Defendant might have downloaded the application to chat with Danielle on one occasion in 2015, Defendant stated he did not communicate with Khloe over Snapchat. Defendant and Khloe did exchange messages over Facebook messenger, but Defendant explained that the messages were not sexual in nature. Defendant denied exchanging nude photos with Khloe over any method of communication.

On cross-examination, Defendant was asked by the State prosecutor about his relationship with Danielle, at which point Defendant testified that they had slept together once before entering into a relationship. The prosecutor questioned Defendant about several text message exchanges with Danielle. In an exchange on 5 July 2015, during a discussion about the size of Danielle's breasts, Defendant mentioned that he had seen her breasts once before they began dating. The texts that were read aloud during the trial stated that Danielle did not "remember taking [her] shirt off," at which Defendant replied, "You didn't, but we were messing around on the couch, and you let me pull them out at the top of the top." Danielle responded that she did not remember the incident, and Defendant texted, "You did get drunk pretty fast." The prosecutor then asked:

> Q: She was so drunk, she couldn't remember taking her shirt off, and you had sex with her?
>
> A: No, I mean, we were drinking with her and her cousin.

> Q: She was so drunk, she couldn't remember taking her shirt off?

Defense counsel objected to the prosecutor's last question, and the court sustained the objection. The prosecutor also questioned Defendant about another text message exchange in which he and Danielle discussed trying to find a place to engage in sexual activity because Defendant's grandparents prohibited Defendant's girlfriends from staying at their home. In the exchange, Defendant proposed: "We could go get another motel [room] but I hope [Beth] doesn't say anything to my grandparents." Danielle asked Defendant if he could "ask her not to say anything?"; Defendant responded, "Yeah, but she has a big mouth[,] but I can try."

On 9 August 2021, the jury found Defendant guilty of four counts of rape of a child and six counts of sex offense with a child. The trial court consolidated the charges in 15 CRS 50792-93, sentencing Defendant to an active term of 300-420 months, and then consolidated the charges in 15 CRS 50794-96, sentencing Defendant to a consecutive active term of 300-420 months. Defendant gave oral notice of appeal in open court and filed a written notice of appeal on 13 August 2021.

II. Analysis

A. Introduction of Defendant's Text Messages into Evidence.

[1] On appeal, Defendant argues that the trial court committed plain error by allowing the State to introduce into evidence two text message exchanges between Defendant and Danielle. Defendant contends that the first text message conversation, which discussed Defendant's prior sexual encounter with Danielle when she was intoxicated, was not relevant "to show that he had any plan or intent to sexually assault [Khloe]." Additionally, Defendant argues that the text conversation in which he and Danielle discussed a plan to meet at a motel and in which he considered asking his daughter not to report this plan to her great-grandparents does not indicate that he "had a plan or intent to abuse [Khloe]." According to Defendant, such evidence showcasing his prior sexual relationship was inadmissible for any valid Rule 404(b) purpose; thus, this improper character evidence was prejudicial. We agree.

"[T]o 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). Where an objection about the admissibility of evidence is not preserved at trial, the issue may be raised on appeal based on

"plain error" if the defendant shows that the admission was a fundamental error with a "probable impact on the jury's finding that the defendant was guilty" and "absent the error the jury probably would have reached a different verdict." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "The plain error rule applies only in truly exceptional cases." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

Under Rule 404(b), evidence tending to show a defendant committed other wrongs, crimes, or acts, and his propensity to commit such acts, is admissible, provided it is relevant for some purpose other than to show the propensity or disposition of a defendant "to commit an offense of the nature of the crime charged." *State v. Al-Bayyinah*, 356 N.C. 150, 153-54, 567 S.E.2d 120, 122 (2002) (citing *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)). "[T]he admissibility of evidence of a prior crime must be closely scrutinized since this type of evidence may put before the jury crimes or bad acts allegedly committed by the defendant for which he has neither been indicted nor convicted." *State v. Jones*, 322 N.C. 585, 588, 369 S.E.2d 822, 824 (1988).

Examples of purposes for which evidence of other crimes, wrongs, or acts is admissible include: "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident," but the enumerated list of permissible purposes in the rule is not exclusive. *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987); N.C. Gen. Stat. § 8C-1, R. 404(b) (2022). Accordingly, evidence of " 'other crimes, wrongs, or acts' . . . need only be 'relevant to any fact or issue other than the character of the accused' to be admissible." *State v. Gordon*, 228 N.C. App. 335, 338, 745 S.E.2d 361, 364 (2013) (quoting *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986)).

Even if relevant, 404(b) evidence is also "constrained by the requirements of similarity and temporal proximity." *Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123, *appeal after new trial*, 359 N.C. 741, 616 S.E.2d 500 (2005). "Evidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes 'substantial evidence tending to support a reasonable finding by the jury that the defendant committed the *similar* act.' " *Id.* at 155, 567 S.E.2d at 123 (citing *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890 (1991)).

Under Rule 404(b) a prior act or crime is sufficiently similar to warrant admissibility if there are "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both." *Stager*, 329 N.C. at 304, 406 S.E.2d at 890-91 (citations omitted). The similarities are not required to "rise to the level of the

unique and bizarre." *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593 (1988).

In *State v. Dunston*, appealing his convictions of first-degree sex offense with a child and taking indecent liberties with a child, the defendant argued that the trial court erred in admitting his wife's testimony that she and defendant engaged in anal sex. 161 N.C. App. 468, 469, 588 S.E.2d 540, 542 (2003). This Court determined that a defendant who "engaged in and liked consensual anal sex with an adult, whom he married, [was] not by itself sufficiently similar to engaging in anal sex with an underage victim beyond the characteristics inherent to both, i.e., they both involve anal sex, to be admissible under Rule 404(b)." *Id.* at 473, 588 S.E.2d at 544-45. Finding the evidence "was not relevant for any purpose other than to prove defendant's propensity to engage in anal sex," this Court held the trial court erred in admitting this testimony. *Id.*

Additionally, in *State v. Davis*, this Court held that a defendant who previously "wrote about having non-consensual anal intercourse with an adult woman whom he knew" did not constitute a prior action that was substantially similar to his present charges involving "anal penetration of defendant's six-year-old son" as the only overlapping fact between the two actions was anal intercourse. *State v. Davis*, 222 N.C. App. 562, 567, 731 S.E.2d 236, 240 (2012). We further stated:

> While 'the Court has been markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b), . . . [n]evertheless, the Court has insisted the prior offenses be similar and not too remote in time.' *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 419-20 (1986). Here, apart from the fact that anal intercourse was involved, the acts bore no resemblance to each other, involving different genders, radically different ages, different relationships between the parties, and different types of force.

Id. at 568, 731 S.E2d at 241.

Here, the charged crimes involve a girl between the ages of eight and eleven years old when the alleged sexual abuse occurred. In contrast, the 404(b) evidence involved a text message conversation between Defendant and a former girlfriend discussing an isolated, consensual sexual encounter they shared before formally dating. Further, there is no similarity in how the charged crimes and these 404(b) offenses came to occur other than the allegation that both involved sexual intercourse.

While the text message conversation mentioned that Danielle had been drinking during the time of their sexual encounter, there is no record evidence that Defendant provided Khloe with alcohol or that she was impaired during the alleged sexual offenses. Likewise, the locations of the alleged offenses and the 404(b) offense are dissimilar: there is no evidence that Defendant and Khloe participated in drinking and afterwards, engaged in sexual activities while others were present. In contrast, Defendant, Danielle, and her cousin drank together culminating with Defendant and Danielle "messing around on the couch." The evidence, presented through a text message conversation, that Defendant previously engaged in consensual sexual intercourse with an adult woman who had been drinking is not sufficiently similar to show that Defendant possessed any plan or intent to engage in sexual acts with Khloe.

Additionally, Defendant and Danielle's text exchanges regarding a plan to meet at a motel and his possibly asking his daughter not to report this plan to his grandparents is not sufficiently similar to the charged offenses. The text message exchange, which was admitted into evidence, involved Defendant considering whether to ask that his daughter not tell his religious grandparents that he was having consensual sexual intercourse with an adult woman with whom he was in a relationship. However, there is no evidence that Defendant actually had this discussion with his daughter. Even though Defendant's daughter is similar in age to Khloe, contemplating asking his child to withhold highly personal information from relatives is not sufficiently similar where Defendant is alleged to have asked Khloe not to disclose her own sexual abuse. We hold that Defendant's text message exchanges with Danielle do not give rise to any inference that Defendant "would be desirous of or obtain sexual gratification" from sexual intercourse with an eight-to- eleven-year-old girl. *Davis*, 222 N.C. App. at 570, 731 S.E.2d at 241-42.

We further agree that "Rule 404(b) evidence carries an inherent risk of prejudice; by its very nature, it informs the jury about the defendant's prior bad acts and impugns his character." As this Court has previously recognized, the improper admission of a prior sexual deviance by a defendant

> tends to bolster an alleged victim's testimony that an assault occurred *and* that the defendant was the perpetrator, since such evidence informs the jury that the defendant has committed sexual assault in the past. This evidence further tends to diminish the defendant's credibility, and creates the possibility that the jury will convict

> the defendant based upon the prior bad act instead of solely on properly admitted evidence.

State v. Gray, 210 N.C. App. 493, 521, 709 S.E.2d 477, 496 (2011). Here, the evidence portraying Defendant as manipulative by (1) engaging in sexual intercourse with a woman who had been drinking alcohol, and (2) for contemplating asking his daughter to not share his plans to meet a girlfriend at a motel so they could engage in sexual intercourse is highly prejudicial and impermissibly attacked Defendant's character.

Given the sensitive and potentially inflammatory nature of the Rule 404(b) evidence, "it is highly probable this testimony was prejudicial to defendant, especially in light of the inconsistent and unclear nature of the remaining evidence in this case." *Dunston*, 161 N.C. App. at 473-74, 588 S.E.2d at 545. Here, Khloe testified she had sexual intercourse with Defendant between the ages of eight to eleven, but the State's witness, Ms. Browning, testified that Khloe's 2015 medical exam found no physical evidence of sexual abuse, sexually transmitted diseases, or pregnancy, and the physical exam was characterized as "an unremarkable or normal exam for a child [of Khloe's] age when it was done."

Further, there were no eyewitnesses to the several years of alleged abuse, despite both Khloe's mother and Defendant's grandmother continuously being present at their respective homes to watch the children in their care. Neither Khloe's mother nor Defendant's grandmother testified that they had ever seen any questionable behavior or inappropriate interactions between Defendant and Khloe. Additionally, Agent Anderson testified that after conducting a data extraction on Defendant's cell phone, he was unable to find any evidence of nude photograph exchanges or locate any history of communications between Defendant and Khloe. Sgt. Lewis also provided testimony that he did not personally observe a mole in Defendant's pubic line or on his penis, in contradiction to Khloe's description of Defendant's body.

Finally, Defendant denied the allegations against him and testified to events which rebutted Khloe's testimony. Thus, the outcome of the case "depended upon the jury's perception of the truthfulness of each witness." *State v. Maxwell*, 96 N.C. App. 19, 25, 384 S.E.2d 553, 557 (1989). The improperly admitted evidence bolstered Khloe's testimony, diminished Defendant's credibility, and made it more likely that the jury would convict Defendant based on his character, rather than the facts presented. *Gray*, 210 N.C. App. at 521, 709 S.E.2d at 496.

The trial court therefore erred, under the facts and circumstances of the instant case, in admitting evidence of Defendant's text message

exchanges with a previous girlfriend under Rule 404(b) of the North Carolina Rules of Evidence. Because this error tended to be highly prejudicial to Defendant, such that it had a probable impact on the jury's finding that he was guilty, Defendant is entitled to a new trial. *Dunston*, 161 N.C. App. at 474, 588 S.E.2d at 545.

B. State Prosecutor's Closing Argument.

[2] Next, Defendant argues that the trial court erred by failing to intervene *ex mero motu* in response to several statements made by the State prosecutor during his closing argument. While we disagree with a portion of Defendant's argument, part of his argument has merit.

During closing arguments, a lawyer is "to provide the jury with a summation of the evidence, which in turn serves to sharpen and clarify the issues for resolution by the trier of fact and should be limited to relevant legal issues." *State v. Jones*, 355 N.C. 117, 127, 558 S.E.2d 97, 103 (2002) (cleaned up). In a criminal jury trial, our General Assembly has enacted specific guidelines for closing arguments:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230 (2022). "[A]rgument of counsel must be left largely to the control and discretion of the presiding judge and . . . counsel must be allowed wide latitude in the argument of hotly contested cases." *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975). Nonetheless, this wide latitude is limited: a closing argument must: "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *Jones*, 355 N.C. at 135, 558 S.E.2d at 108.

Because Defendant's attorney did not object to the State's closing argument, "defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. 'To establish such an abuse, defendant must show

that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.' " *State v. Tart*, 372 N.C. 73, 80-81, 824 S.E.2d 837, 842 (2019) (quoting *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998)). "Even when a reviewing court determines that a trial court erred in failing to intervene *ex mero motu*, a new trial will be granted only if 'the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court.' " *Id.* at 82, 824 S.E.2d at 842 (quoting *Jones*, 355 N.C. at 131, 558 S.E.2d at 106). In order to assess whether this level of prejudice against Defendant has been shown, the challenged statements are considered "in context and in light of the overall factual circumstances to which they refer." *Id.* at 82, 824 S.E.2d at 843 (citation omitted).

Defendant identifies several portions in the State's closing argument which he asserts is grossly improper. First, in recounting Defendant's relationship with Khloe and the time they spent together, the State Prosecutor stated:

> [T]he evidence is uncontradicted from his own house, he played Call of Duty with her, video games. Call of Duty, a video game with a mature rating, a war game where you use a control to shoot and kill people. It's full of gore, smoking, profanity, sex scenes. And he is doing this with a girl who has not even reached the fifth grade yet.

Defendant argues that there was no evidence introduced at trial that "the game had a mature rating, or that it involved shooting other people, or that it contained gore, smoking, profanity, or sex scenes." We disagree. In the above cited instance, the State prosecutor's statement represented legitimate inferences from the evidence that was presented by the testimonies of Defendant, Khloe, and the SBI Agent in describing the video game. Call of Duty is a well-known video game. To the extent that the State described details about the game that go beyond common knowledge, the remarks were not grossly improper or so extreme and of such a magnitude that their inclusion in the State's argument prejudiced Defendant by rendering the proceedings fundamentally unfair.

Next, Defendant contests the State prosecutor's statement regarding Khloe's decision to testify against Defendant and referred to Defendant's trial attorney:

> [Khloe] got up on that stand knowing that [Defendant's attorney] has her recorded interview from that October of 2015 date and that she's going to try to cast her in the

> worst light she can, and that she's going to try to trip her up . . . [Khloe] got on that stand knowing what she was facing[.]

Defendant argues that these remarks were improper and denigrated the trial attorney's role as defense counsel. We disagree. The prosecutor's remarks did not denigrate Defendant's attorney or her duty to confront witnesses, as it described the process of cross-examination and thus, was not grossly improper.

Next, Defendant objects to the prosecutor's remarks concerning Defendant's grandmother providing the bond money for Defendant to be released from jail shortly after his arrest: "[H]e only spent a few days in jail before she posted his bond and he got out. He got out shortly after that nontestimonial identification order. Free as a bird." Defendant argues that this comment "had no connection to the evidence in the case," and encouraged the jury to convict him "because he had suffered no consequences to that point." Again, we disagree as the remark about Defendant's limited time in jail was connected to the evidence where Defendant testified that he had been out of jail on bond since his arrest, and, thus, this statement cannot be classified as an extreme or grossly improper comment.

[3] Next, Defendant argues that the prosecutor made two grossly improper remarks during closing argument which warranted intervention *ex mero motu* by the trial court. During closing, the State prosecutor discussed Defendant's use of birth control during sexual intercourse and remarked:

> An eight- to eleven- year-old child having sex with a man 16 years her senior who by his own testimony is sleeping with other women in this community with no protection. You think about that. You think about an eight- or nine-year old walking around pregnant. You think about an eight- or nine-year-old poking around with herpes or gonorrhea or syphilis or Aids [sic].

The State prosecutor also addressed Defendant's sexual history with Danielle, and their text message exchange discussing their first sexual engagement:

> Who is [Defendant]? . . . Danielle, a woman who when he was developing a friendship, his first sexual encounter with her involved taking her boobs out of her shirt and having intercourse with her and you've seen the text

> messages to show that she was too drunk to even remember it[,] to even remember taking her shirt off.

We agree that the prosecutor's comments concerning Defendant's condom usage and sexually transmitted diseases were unsupported and inflammatory, as it appealed "to passions or prejudice." *Tart*, 372 N.C. at 80, 824 S.E.2d at 842 (quoting *Jones*, 355 N.C. at 135, 558 S.E.2d at 108). While Defendant testified that he usually wore condoms with his adult sexual partners, there was no evidence that he or any of his sexual partners had herpes, gonorrhea, syphilis, or AIDS. The prosecutor's statements that Defendant was sleeping around with women in the community with no protection and possibly spreading sexually transmitted diseases was unsupported and inflammatory. Additionally, the record evidence does not show that Khloe became pregnant or contracted any type of sexually transmitted disease from Defendant. In fact, based on Dr. Suttle's medical examination there were no significant findings of lesions, tears, venereal disease, or pregnancy present in Khloe's medical exam.

This remark "cannot be construed as anything but a thinly veiled attempt to appeal to the jury's emotions" by inferring that Defendant had impregnated Khloe and given sexually transmitted diseases to her as a result of unprotected sexual intercourse. The prosecutor's argument was improper as "it referred to events and circumstances outside the record" and "attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice." *Jones*, 355 N.C. at 132, 558 S.E.2d at 107. Additionally, the State's remarks about Defendant's sexual history with Danielle were impermissible character attacks based on improperly admitted evidence. Such comments are so highly prejudicial and tend to infect the trial with such unfairness, that the trial court erred by failing to intervene *ex mero motu* or otherwise instruct the jury to disregard them.

The impact of the prosecutor's statements in question, which conjure up inaccurate images of Defendant as sexually manipulative, promiscuous, and a carrier of sexually transmitted diseases, is too contaminating to be easily removed from the jury's consciousness, thus infecting the entire trial. Consequently, we hold the disparaging remarks made by the State prosecutor were grossly improper and prejudicial, and the trial court erred by failing to intervene *ex mero motu* in response to the grossly improper and prejudicial statements made by the State prosecutor during his closing argument. As we have already held Defendant is entitled to a new trial, it is unnecessary to address Defendant's remaining arguments. *State v. Dunston*, 161 N.C. App. 468, 474, 588 S.E.2d 540, 545 (2003).

III. Conclusion

For the reasons stated above, we conclude that, due to the plain errors made by the trial court, Defendant is entitled to a new trial. Therefore, we reverse and remand for a new trial. It is ordered.

REVERSED AND REMANDED.

Judge COLLINS concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

Because I believe that Defendant has failed to show reversible error, I respectfully dissent.

The majority takes issue with the prosecution's cross examination of Defendant concerning his sexual encounters with an adult woman friend which included an encounter when the woman was drunk. However, Defendant's counsel did not object to the questioning. Arguably, the questioning was not error, as the defense opened the door to the questioning by asking Defendant on direct about his relationship with this adult woman. Even if the questioning about Defendant's inappropriate behavior with the adult woman was inadmissible under our Rules of Evidence, I do not believe the trial court committed error by failing to intervene.

The majority also takes issue with the prosecutor's statements during closing regarding Defendant's sexual relationship with the adult woman that was outside any evidence presented, notably that Defendant could have transmitted an STD or impregnated the pre-teen victim. Perhaps these statements were inappropriate. However, Defendant's counsel did not object or ask for any instruction concerning these statements. And, assuming these statements were inappropriate, I do not believe the trial court erred by failing to intervene when the prosecutor made these statements during closing.

Even assuming the above-described testimony and prosecutor statements constituted error, I do not believe the error constituted plain error. It is certainly *possible* a juror may have some reasonable doubt that the abuse occurred *until* hearing the inappropriate testimony regarding Defendant's encounter with his adult friend and the

inappropriate statements during prosecutor's closing. Indeed, the State's case relied primarily on the victim's credibility, as there was no physical or third-party eyewitness evidence of the abuse. But I do not believe Defendant has met his burden to show that the jury's verdict *probably* would have been different had the jury not heard this testimony or statements.[1]

I have reviewed the other arguments raised by Defendant and conclude that none of them warrant a new trial. Accordingly, my vote is "no error."

STATE OF NORTH CAROLINA
v.
TYQUEAN QUA'SHED SHARPE, DEFENDANT

No. COA22-491

Filed 16 May 2023

Firearms and Other Weapons—possession of a firearm by a felon—constructive possession—sufficiency of evidence

In a prosecution for possession of a firearm by a felon arising from a traffic stop, during which police found a rifle inside the rear passenger compartment of a vehicle while defendant sat in the front passenger seat as one of four passengers, the trial court improperly denied defendant's motion to dismiss where there was insufficient evidence that defendant constructively possessed the rifle. The State's evidence failed to show that defendant—who neither owned the vehicle nor was driving it at the time—was in exclusive possession of the vehicle when police found the rifle, and therefore the State was not entitled to an inference of constructive possession sufficient to submit the case to the jury. Further, although the State presented evidence of additional incriminating circumstances, any link between defendant and the rifle created by these circumstances was speculative at best.

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1. See my dissent in *State v. Watkins*, 277 N.C. App. 386, 857 S.E.2d 36 (2021), discussing how the burden to show plain error, as established by our Supreme Court, is higher than the burden set by the United States Supreme Court to show ineffective assistance of counsel: Plain error requires a showing that a different result *probably* would have occurred, whereas an IAC error merely requires a showing a *reasonable probability* that the result would have been different.

Appeal by Defendant from Judgments entered 14 July 2021 by Judge Thomas D. Haigwood in Nash County Superior Court. Heard in the Court of Appeals 22 February 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Kellie E. Army, for the State.

Shawn R. Evans for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Tyquean Qua'shed Sharpe (Defendant) appeals from Judgments entered 14 July 2021 upon jury verdicts finding him guilty of Possession of a Firearm by a Felon and Misdemeanor Resisting a Public Officer. On appeal to this Court, Defendant only challenges his conviction for Possession of a Firearm by a Felon. As such, we conclude there was no error in Defendant's Misdemeanor Resisting a Public Officer conviction and limit our analysis to the sole argument raised by Defendant. The Record before us tends to reflect the following:

On 14 September 2020, Defendant was indicted for Possession of a Firearm by a Felon and Misdemeanor Resisting a Public Officer. The matter came on for trial on 13 July 2021. The State's evidence presented at trial tends to reflect the following:

On 11 May 2020, the Problem Oriented Response Team (PORT) of the Rocky Mount Police Department, whose purpose is to focus on high crime areas, was monitoring social media. PORT was aware of several shootings in the area and was attempting to prevent retaliatory shooting by locating individuals that may have been involved in the incidents. PORT identified Defendant as one of those possible individuals. Officers with PORT observed Defendant—via social media—"looking at weapons, firearms, ammunition, things of that nature" at a local retail store. Shortly thereafter, the Officers with PORT located Defendant and initiated a traffic stop; Corporal Chad Creech (Corporal Creech) and Officer Cameron McFadden (Officer McFadden) both testified the stop was conducted to prevent the occurrence of "retaliation shootings." The vehicle stopped at a gas station. Defendant was one of four occupants inside the vehicle, sitting in the front passenger seat. Once the vehicle was stopped, Defendant exited the vehicle and went inside the gas station. Officer McFadden attempted to conduct a frisk of Defendant, but Defendant refused to cooperate; did not comply with the officer's

commands; and began resisting. Eventually, Officer McFadden resorted to tasing Defendant in order "to get him to comply." Defendant was then handcuffed and detained in a patrol vehicle.

After Defendant was detained, Corporal Creech conducted a search of the vehicle and discovered "a box of bullets in the middle of the floorboard, in between the front – front driver and front passenger, in the middle; a bottle of Hennessy in the front seat; and there was a rifle in the back seat." Further, Corporal Creech testified, the rifle "was at an angle, not longways, but like facing the driver and the passenger, like in between the driver and the passenger, facing up towards the back passenger, not laying flat on the seat." No DNA evidence or fingerprints were recovered from the firearm or introduced into evidence.

At the close of the State's evidence, Defendant moved to dismiss the charge of Possession of a Firearm by a Felon for insufficient evidence. The trial court denied the Motion. Defendant presented evidence, including the driver of the vehicle testifying the rifle found in the backseat belonged to Qadarius Grimes (Grimes), one of the other occupants of the vehicle. Grimes testified that the rifle found in the vehicle belonged to Grimes, and further, he stated he told the officers at the time of the traffic stop the rifle belonged to him. Defendant testified the vehicle belonged to his mother. Defendant testified he did not have a license and his mother only permitted use of the vehicle if someone else was driving. Defendant testified his mother had required him to bring the vehicle home after she saw Defendant driving the vehicle earlier that day via livestream on social media. At the close of all the evidence, Defendant renewed his Motion to Dismiss. The trial court again denied the Motion. On 14 July 2021, the jury returned a verdict finding Defendant guilty of Possession of a Firearm by a Felon and Misdemeanor Resisting a Public Officer. That same day, the trial court entered two Judgments against Defendant. The first Judgment sentenced Defendant to a 17 to 30 month active sentence for the Possession of a Firearm by a Felon conviction. The second Judgment, for the Misdemeanor Resisting a Public Officer conviction, sentenced Defendant to a consecutive 60-day sentence to be suspended for 18 months of supervised probation upon release from his active sentence. Defendant provided Notice of Appeal in open court.

Issue

The dispositive issue on appeal is whether the trial court erred in denying Defendant's Motion to Dismiss the charge of Possession of a Firearm by a Felon.

Analysis

Defendant contends the trial court erred in denying his Motion to Dismiss the charge of Possession of a Firearm by a Felon due to insufficiency of the evidence. Specifically, Defendant contends the State failed to establish his constructive possession of the firearm located in the backseat of the vehicle. We agree.

We review a trial court's denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). However, "[u]pon 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. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citation and quotation marks omitted). "Evidence is not substantial if it arouses only a suspicion about the facts to be proved, even if the suspicion is strong." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986) (citing *State v. Malloy*, 309 N.C. 176, 305 S.E.2d 718 (1983)).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). If the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *Malloy*, 309 N.C. at 179, 305 S.E.2d at 720. "Only defendant's evidence which does not contradict and is not inconsistent with the state's evidence may be considered favorable to defendant if it explains or clarifies the state's evidence or rebuts inferences favorable to the state." *Sumpter*, 318 N.C. at 107-08, 347 S.E.2d at 399 (citations omitted).

N.C. Gen. Stat. § 14-415.1(a) provides: "[i]t shall be unlawful for any person who has been convicted of a felony to . . . possess, or have in his custody, care, or control any firearm . . . ." N.C. Gen. Stat. § 14-415.1(a) (2021). "In order to obtain a conviction for possession of a firearm by a felon, the State must establish that (1) the defendant has been convicted of or has pled guilty to a felony and (2) the defendant, subsequent to the conviction or guilty [plea], possessed a firearm." *State v. Taylor*, 203

N.C. App. 448, 458-59, 691 S.E.2d 755, 764 (2010) (citations omitted). Here, Defendant does not contest his status as a felon.

Thus, the only question is whether there is evidence Defendant possessed the firearm in question on the date of his arrest.

> Possession of a firearm may be actual or constructive. Actual possession requires that the defendant have physical or personal custody of the firearm. In contrast, the defendant has constructive possession of the firearm when the weapon is not in the defendant's physical custody, but the defendant is aware of its presence and has both the power and intent to control its disposition or use. When the defendant does not have exclusive possession of the location where the firearm is found, the State is required to show other incriminating circumstances in order to establish constructive possession. Constructive possession depends on the totality of the circumstances in each case.

Id. at 459, 691 S.E.2d at 764 (citations omitted).

In this case, in the absence of any evidence Defendant had physical or personal custody of the firearm, the State proceeded on a theory of constructive possession. Therefore, the State was required to prove Defendant had the "power and intent to control" the disposition or use of the firearm. *Id.* On appeal, the State first contends the evidence supported a finding Defendant had exclusive possession of the vehicle because he was "custodian" of the vehicle. As such, the State contends it is entitled to an inference of constructive possession of the firearm sufficient to submit the charge to the jury.

In particular, the State primarily relies on *State v. Mitchell* for the proposition:

> "[A]n inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the [contraband] was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where [contraband] was found *is sufficient, in and of itself*, to give rise to the inference of knowledge and possession sufficient to go to the jury."

224 N.C. App. 171, 177, 735 S.E.2d 438, 443 (2012) (quoting *State v. Best*, 214 N.C. App. 39, 47, 713 S.E.2d 556, 562 (2011)). Here, the State presented no evidence Defendant owned the vehicle.[1] Moreover, the evidence shows Defendant was not the driver of the vehicle. Nevertheless, the State contends Defendant was the "custodian" of the vehicle—notwithstanding the fact he was not driving the vehicle—and had exclusive possession of the vehicle because "Defendant's mother was the owner of the car and allowed him to use it if he had a driver." The State offers no support for this assertion.

However, in *State v. Mitchell*, the defendant was the driver of a borrowed car. *Id.* Likewise, in *Best*, cited by *Mitchell*, "the revolver was found in a van driven by Defendant[.]" *Best*, 214 N.C. App. at 47, 713 S.E.2d at 562. In fact, tracing back the quote relied on by the State from *Mitchell* reveals that in each case "custodian of the vehicle" referred directly to the *driver* of a borrowed vehicle. *See State v. Hudson*, 206 N.C. App. 482, 490, 696 S.E.2d 577, 583 (2010); *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984). Indeed, none of these cases provide any definition or authority for what "custodian of the vehicle" means or from where the phrase is derived. Ultimately, we trace the roots of the *Mitchell* Court's quote to *State v. Glaze*, which makes no mention of "custodian of the vehicle" and stands for the proposition:

> The driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Thus, where contraband material is under the control of an accused, even though the accused is the borrower of a vehicle, this fact is sufficient to give rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury.

24 N.C. App. 60, 64, 210 S.E.2d 124, 127 (1974). *Glaze* and its progeny may be read together to establish the driver of a borrowed vehicle is a custodian of the vehicle and has the same power to control the contents of the vehicle as the owner. In fact, on the other hand, this Court has at least suggested that where a defendant is only a passenger, "despite having legal ownership of the vehicle, defendant exercised no control over the car at the time the rifle was found." *State v. Bailey*, 233 N.C. App. 688, 693, 757 S.E.2d 491, 494 (2014).

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1. In fact, the only evidence related to ownership was in Defendant's evidence the vehicle belonged to his mother.

Nevertheless, we presume, without deciding, the State's position is correct: that a passenger in a vehicle may also constitute a custodian of the vehicle when the passenger was the permitted user of the vehicle by the owner. Here, the evidence—drawing inferences favorable to the State from Defendant's evidence—tends to show Defendant was permitted to use the vehicle by his mother. As such, the evidence could support an inference Defendant was a custodian of the vehicle. However, under our existing case law, the driver was *also* a custodian of the vehicle. As such, the evidence fails to show Defendant was in *exclusive* possession of the vehicle at the time the rifle was found. Moreover, then, the State is not entitled to any presumption of "knowledge and possession" of the firearm sufficient to submit the case to the jury.

While the evidence reflects Defendant was not in exclusive possession of the vehicle, the State may still establish constructive possession through evidence of "other incriminating circumstances." *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764. Indeed, this case is analogous to *State v. Alston*, 131 N.C. App. 514, 508 S.E.2d 315 (1998). There, the defendant was the front seat passenger in a vehicle driven by the defendant's wife. *Id.* at 515, 508 S.E.2d at 316. The vehicle was owned by the defendant's brother. *Id.* at 516, 508 S.E.2d at 317. The firearm used to support the charge of possession of a firearm by a felon was found in the center console of the vehicle. *Id.* at 515, 508 S.E.2d at 316-17. With respect to constructive possession of the firearm, this Court observed: "Possession of an item may be either sole or joint; however, joint or shared possession exists only upon a showing of some independent and incriminating circumstance, beyond mere association or presence, linking the person(s) to the item[.]" *Id.* at 519, 508 S.E.2d at 318. This Court explained: "Both [d]efendant and his wife had equal access to the handgun, but there is no evidence otherwise linking the handgun to [d]efendant." *Id.* at 519, 508 S.E.2d 319. Our Court concluded: "Accordingly, there is not substantial evidence in this record that Defendant had the possession, control, or custody of the handgun." *Id.* Consequently, we held the trial court should have dismissed the charge of possession of a firearm by a felon. *Id.*

Likewise, in *Bailey*, this Court held a charge of possession of a firearm by a felon should have been dismissed for insufficient evidence. *Bailey*, 233 N.C. App. at 693, 757 S.E.2d at 494. There, the defendant, the owner of the vehicle, was in the front passenger seat. *Id.* The rifle at issue was in the rear passenger area of the vehicle. *Id.* This Court concluded "the only evidence linking defendant to the rifle was his presence in the vehicle and his knowledge that the gun was in the backseat." *Id.*

Similarly, in the case *sub judice*, the evidence shows Defendant was not the driver of the vehicle, but sitting in the front passenger seat

and the firearm was located in the rear passenger compartment. Unlike *Alston* and *Bailey*, here, there were four adults in the vehicle—with two in the rear seat, including a passenger in the seat behind Defendant where the rifle was found. Also, unlike *Alston* and *Bailey*—where there was evidence the defendants' wife and girlfriend, respectively, were the registered owners of the firearms—here, from the State's perspective, there was no evidence of ownership of the rifle.[2] In this case, then, as in *Alston* and *Bailey*, the evidence, taken in the light most favorable to the State, shows the only evidence linking Defendant to the rifle was his presence and awareness of the firearm in the car. This evidence is insufficient to show Defendant was in constructive possession of the rifle.[3]

The State, however, contends there is evidence of additional incriminating circumstances: "Defendant was driving the car sometime earlier in the day, was observed examining weapons, and was among the individuals identified by PORT as a retaliatory shooting concern."[4] The State contends these circumstances are sufficient to support a finding of constructive possession of the firearm. We disagree.

Any linkage between Defendant and the rifle created by these circumstances is, at best, speculative and conjectural. *See State v. Angram*, 270 N.C. App. 82, 87, 839 S.E.2d 865, 868 (2020) ("Although circumstantial evidence may be sufficient to prove a crime, pure speculation is not, and the State's argument is based upon speculation." (citation omitted)). There was no evidence Defendant was in possession—actual or constructive—of the rifle while he was driving the vehicle earlier in the day. It is highly speculative to assume the fact Defendant was observed examining or looking at firearms in a store means he later possessed the rifle. There was no evidence of any firearm purchase or that Defendant

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2. The only evidence of ownership was in Defendant's evidence through the testimony of Grimes that the rifle belonged to him. However, this evidence is not considered in our review of the Motion to Dismiss.

3. The State cites to *State v. Wirt*, 263 N.C. App. 370, 822 S.E.2d 668 (2018), to contend Defendant's proximity to the firearm may constitute sufficient evidence of constructive possession. However, in that case, the defendant was the driver of a pickup truck, which would create the inference of knowledge and possession. *Id.* at 374, 822 S.E.2d at 671. Further, the firearm was found under the front passenger seat and the defendant had been observed earlier riding in the front passenger seat. *Id.* at 376, 822 S.E.2d at 672. The Court also found incriminating circumstances from the evidence the defendant and his passenger had been involved in drug dealing using the truck. *Id.*

4. The State does not contend the bullets found in the center console constituted an additional incriminating circumstance linking Defendant to the rifle. Indeed, it appears from the evidence the bullets were for a totally different firearm belonging to the driver of the vehicle.

took any firearm from the store. There was no evidence the rifle was purchased at the store. The State also did not present evidence of DNA or fingerprints linking Defendant to the firearm. Finally, the fact Defendant was identified as a "retaliatory shooting concern" may well arouse suspicion Defendant was in possession of a firearm, but mere suspicion does not constitute sufficient evidence to survive a motion to dismiss. *See Malloy*, 309 N.C. 179, 305 S.E.2d 720 (If the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.").

In this case, the evidence, without more, is not sufficient to support a finding Defendant, while seated in the front passenger seat and one of four occupants, was in constructive possession of a firearm found in the rear passenger compartment of a vehicle not owned or operated by Defendant. Thus, the State failed to present sufficient evidence to establish Defendant's constructive possession of the firearm. Therefore, the trial court erred in denying Defendant's Motion to Dismiss for insufficient evidence. Consequently, we reverse the trial court's Judgment for the conviction of Possession of a Firearm by a Felon.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in the 14 July 2021 Judgment for the conviction of Misdemeanor Resisting a Public Officer (20 CRS 51426); however, we reverse the 14 July 2021 Judgment for the conviction of Possession of a Firearm by a Felon (20 CRS 51425) and remand this matter for resentencing for Misdemeanor Resisting a Public Officer.

NO ERROR IN PART; REVERSED IN PART. REMANDED FOR RESENTENCING.

Judges COLLINS and WOOD concur.

STATE v. WHITE

[289 N.C. App. 93 (2023)]

STATE OF NORTH CAROLINA
v.
ORIENTIA JAMES WHITE

No. COA22-369

Filed 16 May 2023

Larceny—sufficiency of evidence—false pretenses—single taking—electronics in infant car seat box

There was sufficient evidence to convict defendant of both felony larceny and obtaining property by false pretenses where the State's evidence showed that defendant entered a Walmart with co-conspirators, took an $89 infant car seat out of its box, placed nearly $10,000 of electronic merchandise inside the car seat box, and paid for the car seat box at the self-checkout kiosk, knowing that the box actually contained the electronic merchandise. The single-taking rule was not violated because felony larceny and obtaining property by false pretenses are separate and distinguishable offenses. In addition, the trial court did not violate N.C.G.S. § 14-100(a) by submitting felony larceny and obtaining property by false pretenses to the jury as separate counts to be considered independently because the two offenses are not mutually exclusive.

Appeal by defendant from judgments entered 26 August 2021 by Judge Jonathan Wade Perry in Union County Superior Court. Heard in the Court of Appeals 21 February 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Wendy J. Lindberg, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

ZACHARY, Judge.

Defendant Orentia[1] James White appeals from judgments entered upon a jury's verdicts finding him guilty of felony larceny; conspiracy to commit felony larceny; and obtaining property by false pretenses; and upon his guilty plea to having attained habitual felon status. After careful review, we conclude that Defendant received a fair trial, free from error.

1. The judgments appealed from spell Defendant's name as "Orientia" but the record reflects that Defendant's name is spelled "Orentia."

I. Background

On 17 December 2018, when they arrived for work at approximately 7:00 a.m., employees of the Walmart in Monroe discovered that a locked display case in the electronics department had been opened and nearly emptied. The display case, which was usually filled to its capacity with Beats and Apple merchandise, was later determined to be missing 70 items worth a total of $9,898.80.

Walmart management contacted the Monroe Police Department and instructed the store's asset protection department "to conduct video surveillance to find out what happened[.]" Meanwhile, an employee found a Beats speaker on the floor in the crafts department, the section of the store adjacent to the electronics department. There, the employee also discovered a car seat out of its box, which "was unusual because [Walmart] cannot sell car seats out of the box."

Surveillance footage captured between 1:03 and 1:48 a.m. showed the actions of three suspects: two men—one of whom would later be identified as Defendant—and a woman.[2] The three individuals entered the store and the two men headed to the electronics department. The unidentified female suspect approached the two male suspects pushing a shopping cart that contained a plastic storage bin and a child's car seat box. The two unidentified suspects pushed the shopping cart past the Beats display case and turned into the adjacent aisle, where they removed the car seat box from the shopping cart and placed it out of the camera's view. Defendant followed behind them, stopping at the display case. As Defendant perused the display case, the two unidentified suspects pushed the shopping cart—now containing only the plastic storage bin without the car seat box—and walked away. About a minute later, the unidentified male suspect joined Defendant at the display case; Defendant had his back to the camera, obscuring his actions at the display case. The two men then moved away from the display case, and Defendant walked alone up the aisle where the car seat box had been placed. Over the next few minutes, the suspects appeared to browse as lone shoppers, periodically disappearing from the surveillance footage and reappearing soon thereafter.

The unidentified female suspect reappeared with the shopping cart containing the plastic storage bin, and pushed it up to the display case. She placed the plastic bin on the ground in front of the display case and emptied its merchandise into the plastic bin while Defendant browsed in

2. The two other suspects appear not to have subsequently been identified or charged.

the adjacent aisle. She then pushed the plastic bin up the adjacent aisle, where she met Defendant, who crouched down next to her. The female suspect then returned to the now-empty shopping cart and pushed it out of the camera's view while Defendant remained crouching near the plastic bin in the adjacent aisle. After a few minutes, the female suspect reappeared, pushing the empty shopping cart up to Defendant, who placed the car seat box in the shopping cart before the female suspect pushed the cart away. Defendant walked up the other end of the aisle and followed after her on his own.

A few minutes later, another surveillance camera captured the female suspect approaching an exit door, pushing the shopping cart containing the car seat box. However, due to the early morning hour, the door did not open, so she pushed the cart away from the door. A few minutes later, another surveillance camera recorded the three suspects apparently purchasing the car seat at a self-checkout kiosk. Cameras in the parking lot captured the three suspects exiting the store, loading the car seat box into a vehicle in the parking lot, and driving off together.

On 8 April 2019, a Union County grand jury returned true bills of indictment charging Defendant with one count each of felony larceny, conspiracy to commit felony larceny, obtaining property by false pretenses, and having attained habitual felon status. The grand jury returned superseding indictments on the same charges on 4 November 2019.

On 23 August 2021, the matter came on for trial in Union County Superior Court. At the close of the State's evidence, Defendant moved to dismiss the charges against him, which the trial court denied. Defendant did not present any evidence, and he renewed his motion to dismiss at the close of all evidence. The trial court again denied Defendant's motion to dismiss.

The trial court instructed the jury on the offenses of felony larceny, conspiracy to commit felony larceny, and obtaining property by false pretenses. The jury returned guilty verdicts for all three offenses. Thereafter, Defendant pleaded guilty to attaining the status of habitual felon.

The trial court entered two judgments, sentencing Defendant as a habitual felon in the mitigated range to two consecutive terms of 75 to 102 months in the custody of the North Carolina Division of Adult Correction, and ordering that court costs and restitution of $9,898.80 to Walmart be entered as a civil judgment. Defendant gave oral notice of appeal.

II. Discussion

Defendant argues that the trial court erred by denying his motion to dismiss because there was insufficient evidence to support the charges of both felony larceny and obtaining property by false pretenses. Alternatively, in the event that this Court finds that his motion to dismiss argument was not preserved for appellate review, Defendant argues that the trial court erred by instructing the jury on both the charge of felony larceny and the charge of obtaining property by false pretenses.

A. Preservation

"Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure provides that, in a criminal case, to preserve an issue concerning the sufficiency of the State's evidence, the defendant must make a motion to dismiss the action at trial." *State v. Golder*, 374 N.C. 238, 245, 839 S.E.2d 782, 787 (2020) (citation and internal quotation marks omitted); N.C. R. App. P. 10(a)(3). Our Supreme Court recently held that "Rule 10(a)(3) does not require that the defendant assert a specific ground for a motion to dismiss for insufficiency of the evidence." *Golder*, 374 N.C. at 245–46, 839 S.E.2d at 788. Accordingly, "a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." *Id.* at 246, 839 S.E.2d at 788.

In the case at bar, Defendant moved to dismiss all charges at the close of the State's evidence, and he renewed his motion to dismiss at the close of all evidence. Accordingly, Defendant properly preserved this issue, and we need not address his alternative argument. *See id.*

B. Standard of Review

Our standard of review of a trial court's denial of a motion to dismiss is well established:

> In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion. In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. In other words, if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination, to support a

> finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo.

State v. Blagg, 377 N.C. 482, 487–88, 858 S.E.2d 268, 273 (2021) (citation omitted).

C. Analysis

Defendant argues that the trial court should have dismissed either the charge of felony larceny or the charge of obtaining property by false pretenses under the "single taking rule." "The 'single taking rule' prevents a defendant from being charged or convicted multiple times for a single continuous act or transaction." *State v. Buchanan*, 262 N.C. App. 303, 306, 821 S.E.2d 890, 892 (2018). "[A] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992) (citation omitted). The "single taking rule" also applies to indictments charging the offense of obtaining property by false pretenses. *Buchanan*, 262 N.C. App. at 306, 821 S.E.2d at 892.

In *Adams*, for example, the defendant was charged with both felonious larceny of a firearm and felonious larceny of property stolen pursuant to a breaking or entering. 331 N.C. at 332, 416 S.E.2d at 388. The evidence at trial tended to show that the firearm that was the subject of the first larceny charge was among the property that was the subject of the second larceny charge. *Id.* Our Supreme Court concluded that the "defendant was improperly convicted and sentenced for both larceny of a firearm and felonious larceny of that same firearm pursuant to a breaking or entering." *Id.* at 333, 416 S.E.2d at 389.

However, in each of the cases upon which Defendant relies, including *Adams*, the defendant was charged with *either* larceny offenses *or* obtaining property by false pretenses, but not both. *See id.*; *see also State v. Posner*, 277 N.C. App. 117, 120, 857 S.E.2d 870, 873 (2021) (one count of felony larceny of property pursuant to a breaking or entering and one count of felony larceny of a firearm); *Buchanan*, 262 N.C. App. at 308, 821 S.E.2d at 893 (two counts of obtaining property by false pretenses); *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 682 (1985) (three counts of larceny of firearms and one count of felony larceny). Unlike

those cases, in the case before us Defendant was charged with both larceny *and* obtaining property by false pretenses.

This Court has recognized that "the crimes of larceny and obtaining property by false pretenses . . . are separate and distinguishable offenses." *State v. Kelly*, 75 N.C. App. 461, 463, 331 S.E.2d 227, 229 (1985). "The essential elements of larceny are that the defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Campbell*, 373 N.C. 216, 221, 835 S.E.2d 844, 848 (2019) (citation and internal quotation marks omitted). By contrast, obtaining property by false pretenses comprises the following elements: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Pierce*, 279 N.C. App. 494, 499, 865 S.E.2d 335, 339 (2021) (citation omitted). "A key element of obtaining property by false pretenses is that an intentionally false and deceptive representation of a fact or event has been made." *Kelly*, 75 N.C. App. at 464, 331 S.E.2d at 230. This reveals a significant distinction between the two offenses: "A false and deceptive representation is not an element of larceny." *Id.*

Here, Defendant made such a "false and deceptive representation of a fact": he represented to Walmart[3] that he was purchasing a car seat for $89.00, rather than $9,898.80 worth of misappropriated merchandise secreted inside the car seat's box. As the State persuasively argues in its appellate brief, had Defendant and his co-conspirators attempted to take the merchandise and carried it out of the store without involving the car seat box, under the "single taking" rule "the proper charges would have been one count of felony larceny and one count of conspiracy to commit felony larceny, not 70[.]"

However, as the State correctly observes, Defendant and his co-conspirators committed the separate and distinguishable offense of obtaining property by false pretenses "by removing an infant car seat from its box, loading that box with the stolen [merchandise], and taking that box to the checkout counter, where they paid the value for an infant car seat knowing that it was not the value of the items inside the box." By selecting a large box and removing its original contents, Defendant and his co-conspirators were able to represent to Walmart that they were purchasing an item worth less than one percent of the actual value of

3. For the purposes of N.C. Gen. Stat. § 14-100, the term "person" includes a "corporation." N.C. Gen. Stat. § 14-100(c) (2021).

the merchandise it contained. As the State notes: "Defendant's actions by paying the value for a box that represented an $89.00 item knowing there were multiple, more valuable items inside the box at the time was conduct sufficient to support a false representation being made." We agree with the State's contention that it "provided substantial evidence of every element of *both* crimes" of felony larceny and obtaining property by false pretenses.

Defendant further argues that N.C. Gen. Stat. § 14-100 prohibited the trial court "from submitting felony larceny and obtaining property by false pretenses as two separate counts for the jury to consider independently and return two separate verdicts on." For support, Defendant points to the portion of § 14-100(a) that provides:

> [I]f, on the trial of anyone indicted for [obtaining property by false pretenses], it shall be proved that he obtained the property in such manner as to amount to larceny or embezzlement, the jury shall have submitted to them such other felony proved; and no person tried for such felony shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts.

N.C. Gen. Stat. § 14-100(a) (2021).

Our Supreme Court has interpreted this provision with respect to embezzlement, holding:

> Where . . . there is substantial evidence tending to support both embezzlement and false pretenses arising from the same transaction, the State is not required to elect between the offenses. Indeed, if the evidence at trial conflicts, and some of it tends to show false pretenses but other evidence tends to show that the same transaction amounted to embezzlement, the trial court should submit both charges for the jury's consideration. In doing so, however, the trial court must instruct the jury that it may convict the defendant only of one of the offenses or the other, but not of both. If, on the other hand, the evidence at trial tends only to show embezzlement or tends only to show false pretenses, the trial court must submit only the charge supported by evidence for the jury's consideration.

State v. Speckman, 326 N.C. 576, 579, 391 S.E.2d 165, 167 (1990).

Defendant posits that because N.C. Gen. Stat. § 14-100(a) "applies equally to 'larceny or embezzlement,' the *Speckman* discussion is

equally relevant in the larceny context." Accordingly, Defendant contends that, "[a]t most, the trial court in this case was authorized under *Speckman* to submit felony larceny and obtaining property by false pretenses as mutually exclusive options for the jury to return a verdict on." We disagree.

Defendant overlooks a critical principle underlying the *Speckman* Court's reasoning: the crimes of embezzlement and obtaining property by false pretenses are mutually exclusive. As the *Speckman* Court explained, in order "to constitute embezzlement, the property in question initially *must be acquired lawfully*, pursuant to a trust relationship, and then wrongfully converted"; in order to constitute false pretenses, however, "the property *must be acquired unlawfully* at the outset, pursuant to a false representation." *Id.* at 578, 391 S.E.2d at 166–67 (emphases added). Because "property cannot be obtained simultaneously pursuant to both lawful and unlawful means, guilt of either embezzlement or false pretenses necessarily excludes guilt of the other." *Id.* at 578, 391 S.E.2d at 167. This mutual exclusivity was the basis for the *Speckman* Court's holding that "a defendant may not be convicted of both embezzlement and false pretenses arising from the same act or transaction[.]" *Id.*

By contrast, the crimes of larceny and obtaining property by false pretenses are not mutually exclusive. As previously discussed, "the crimes of larceny and obtaining property by false pretenses . . . are separate and distinguishable offenses." *Kelly*, 75 N.C. App. at 463, 331 S.E.2d at 229. Accordingly, Defendant is incorrect to assert that *Speckman* "is equally relevant in the larceny context." As we previously explained: "A false and deceptive representation is not an element of larceny." *Kelly*, 75 N.C. App. at 464, 331 S.E.2d at 230.

In the larceny indictment, the State alleged that Defendant did "steal, take and carry away a quantity of headphones and an I-Pod, without the consent of the possessor and knowing that he was not entitled to it, with the intent to deprive the possessor of its use permanently[.]" And in the indictment for obtaining property by false pretenses, the State alleged that Defendant obtained "a quantity of headphones and an I-Pod" by the following false and intentionally deceptive scheme:

> [D]efendant took a car seat out of [its] box while in Wal-Mart. . . . [D]efendant placed a quantity of headphones and an I-Pod in the empty car seat box. . . . [D]efendant then rang up and paid for the car seat box knowing a car seat was not in the box and he never paid for the quantity of headphones and I-Pod that were actually in the box.

This was a false representation of a material fact which was intended to deceive, and which did in fact deceive.

(Emphasis added).

The offenses of larceny and obtaining property by false pretenses are not mutually exclusive, neither in their elements, as explained above, nor as alleged in the instant indictments. Furthermore, as previously discussed, viewed in the light most favorable to the State, we conclude that the State presented "substantial evidence of each essential element of [each] crime and that [D]efendant is the perpetrator." *Blagg*, 377 N.C. at 487, 858 S.E.2d at 273 (citation omitted). Accordingly, the trial court did not err in denying Defendant's motion to dismiss, or in submitting both offenses to the jury "to consider independently and return two separate verdicts on."

III. Conclusion

For the foregoing reasons, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges FLOOD and RIGGS concur.

STATE OF NORTH CAROLINA
v.
CODY BLAKE WILKIE, DEFENDANT

No. COA22-94

Filed 16 May 2023

Homicide—second-degree murder—sufficiency of evidence—circumstantial

In defendant's trial resulting in his conviction for second-degree murder, the trial court did not err in denying defendant's motion to dismiss where there was substantial evidence that defendant was the perpetrator of the offense. The State presented evidence that witnesses found defendant standing with a pistol next to a dump truck and that defendant told the witnesses that the dead victim was inside the truck; furthermore, the victim had a fatal gunshot wound to the head, defendant knew and worked with the victim,

and defendant was seen with the victim shortly before the victim's death. Defendant failed to cite any case supporting his contention that the circumstantial evidence against him was insufficient.

Appeal by defendant from judgment entered 22 January 2021 by Judge V. Bradford Long in Superior Court, Randolph County. Heard in the Court of Appeals 20 September 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc Bernstein, for the State.

Anne Bleyman for defendant-appellant.

STROUD, Chief Judge.

Defendant appeals the judgment convicting him of second-degree murder. Because there was substantial evidence Defendant was the perpetrator of the offense, we conclude there was no error.

I. Background

The State's evidence tended to show that in June of 2018, Mr. Andy Moody and Defendant were driving two separate trucks at a dump site. Mr. Randall Long, who owns a trucking company, noticed Defendant was not driving the dump truck well: "I mean he was -- it was like -- I know when you get in somebody's truck for the first time, it takes -- you know, you got to learn that truck. But it was some clanging, and I mean it was pretty bad. It wasn't normal." After other issues with Defendant's difficulties driving the dump truck, Mr. Long told Mr. Moody, "you need to do something or that truck ain't going to make it all day." Defendant then "had to ride with" Mr. Moody the rest of the day. Eventually, Mr. Moody and Defendant left the dump site together.

In the middle of the night of June 5, Mr. Wayne Munsell was driving when he saw Defendant, an acquaintance, at an intersection standing next to a dump truck. Mr. Munsell stopped, and Defendant told Mr. Munsell he thought his truck was out of gas. Mr. Munsell agreed to give Defendant a ride to get gas when Mr. Michael Everwine approached in his vehicle. Mr. Munsell noticed Defendant had a pistol.

Defendant and Mr. Munsell left the dump truck and Mr. Everwine to get gas, and Defendant stated that if Mr. Everwine looked in the dump truck, "it's on him because there's a dead guy in there." Defendant then told Mr. Munsell the "dead guy" was Mr. Moody and referred to Mr.

Moody as "the anti-Christ." Mr. Munsell dropped Defendant off and went back to the dump truck where he found a man with a gunshot wound. 911 was called and the man was airlifted out. The man was identified as Mr. Moody, who died from "a gunshot wound of the head."

Defendant was indicted for first-degree murder, found guilty by a jury of second-degree murder, and sentenced by the trial court. Defendant appeals. During the pendency of this appeal, Defendant also filed a letter with this Court alleging ineffective assistance of appellate counsel.

II. First-Degree Murder

At the close of the State's evidence at trial, Defendant made a motion to dismiss which the trial court denied. Defendant's only argument on appeal is that the State failed to present sufficient evidence to prove Defendant shot Mr. Moody, and therefore the trial court erred in denying his motion to dismiss.

> The standard of review on a motion to dismiss is 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. In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom.

State v. Angram, 270 N.C. App. 82, 83, 839 S.E.2d 865, 866 (2020) (citation omitted).

While often motions to dismiss require consideration of the elements of the crime, here Defendant only contests that he was "the perpetrator of the offense." *Id.* Defendant essentially contends that because there is no direct evidence he shot Mr. Moody, the circumstantial evidence is not enough to survive his motion to dismiss. But it is well established that we review the sufficiency of circumstantial evidence in the same manner as direct evidence:

> Circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. A court's review of the sufficiency of the evidence is identical whether the evidence is circumstantial or direct. It is for the jury to weigh the evidence.

State v. Lee, 213 N.C. App. 392, 396, 713 S.E.2d 174, 177 (2011) (citations, quotation marks, and brackets omitted).

Defendant's argument regarding the evidence is subdivided into six sections: an introduction, the standard of review, an analysis, an argument for why the issue is preserved, an argument for the alleged error being prejudicial, and a conclusion. Thus, the substantive argument portion of Defendant's argument is the "Analysis[,]" and in these seven pages he does not cite a single case supporting his contention that the circumstantial evidence against him would not be sufficient to submit to the jury for consideration. Further, Defendant's only cited law beyond defining murder and the jury's duty, is regarding how his "extrajudicial confession" alone is not enough to constitute sufficient evidence. But Defendant ignores the evidence beyond his statements to Mr. Munsell. The remaining evidence shows that Defendant knew and worked with Mr. Moody; he was seen with Mr. Moody shortly before his death; he was discharged from a job by Mr. Moody on 5 June 2018, the very day of the murder; Defendant was found by the dump truck containing Mr. Moody's body; and Defendant possessed a gun immediately after leaving the dump truck.

The State was not required to produce an eyewitness to the shooting or physical evidence linking Defendant to the gun as Defendant implies, considering the other substantial evidence. Viewing the evidence in the light most favorable to the State, as we must, *Angram*, 270 N.C. App. at 83, 839 S.E.2d at 866, the circumstantial evidence in this case served as "proof of a chain of facts and circumstances indicating the guilt[,]" *Lee*, 213 N.C. App. at 396, 713 S.E.2d at 177, of Defendant as "the perpetrator of the offense." *Angram*, 270 N.C. App. at 83, 839 S.E.2d at 866. This argument is overruled.

Finally, we also note that during the pendency of Defendant's appeal, in December 2022, Defendant wrote a letter to this Court requesting "a new appeal and new appeal lawyer." Defendant was apparently under the erroneous impression that his appeal had already concluded and his conviction had been upheld. Generously construing Defendant's letter, he appears to allege his appellate counsel was biased against him due to a letter he wrote to her. But Defendant was mistaken as to the status of his appeal at the time of his letter, as he claims that "[i]n September [he] was notified that appeal lawyer had filed a brief on his behalf *and that the Court of Appeals had affirmed his conviction*[.]" (Emphasis added.) Further, many of Defendant's arguments seem to stem from issues with his trial counsel rather than his appellate counsel. Although Defendant's letter was indexed as a motion for appropriate relief with this Court,

the substance of the letter did not raise any cognizable claim this Court would have jurisdiction to address when it was filed. Therefore, this opinion does not address the contentions of Defendant's letter and does not prevent Defendant from filing any motions as he may deem fit, including a motion for appropriate relief before the trial court.

III. Conclusion

Because there was substantial evidence Defendant murdered Mr. Moody, the trial court properly denied his motion to dismiss.

NO ERROR.

Judges ZACHARY and MURPHY concur.

VETRIVEL THIAGARAJAN, PLAINTIFF
v.
SARALA JAGANATHAN, DEFENDANT

No. COA22-745

Filed 16 May 2023

Appeal and Error—notice of appeal—timeliness—applicable deadline under Rule 3(c)

An appeal from an equitable distribution order was dismissed as untimely where defendant did not—as required under Appellate Rule 3(c)(1)—file her notice of appeal within thirty days after the trial court entered the order. Although defendant did file her notice of appeal exactly thirty days after plaintiff served her a copy of the order, which would have made defendant's notice timely under Appellate Rule 3(c)(2), plaintiff served the copy of the order within the three-day window prescribed by Civil Procedure Rule 58 (the calculation of which included only business days, pursuant to Appellate Rule 6(a)), and therefore Appellate Rule 3(c)(1) governed the timeliness of defendant's notice of appeal.

Appeal by defendant from order entered 4 February 2022 by Judge Rashad Hauter in Wake County District Court. Heard in the Court of Appeals 7 February 2023.

Julyan Law Firm, PLLC, by McKenzie M. L. Canty, for plaintiff-appellee.

John M. Kirby for defendant-appellant.

ZACHARY, Judge.

Defendant Sarala Jaganathan appeals from the trial court's equitable distribution order ("the Order") providing for an unequal distribution of the parties' marital assets. After careful review, we conclude that Defendant did not timely notice her appeal of the Order, leaving this Court without jurisdiction to review this matter. Therefore, we dismiss Defendant's appeal.

I. Background

This matter arises out of an equitable distribution proceeding, which culminated in the Order entered by the trial court on 4 February 2022. On 9 February 2022, Plaintiff's counsel filed a certificate of service, stating that counsel served a copy of the Order upon Defendant by first-class mail on that day. Defendant filed her notice of appeal on 11 March 2022.

II. Discussion

Appellate Rule 3(c) provides the deadlines for filing notice of appeal in civil cases. N.C. R. App. P. 3(c). Compliance with Appellate Rule 3(c) is no mere technicality; it is jurisdictional and, therefore, critical. *See Magazian v. Creagh*, 234 N.C. App. 511, 513, 759 S.E.2d 130, 131 (2014) ("Failure to file a timely notice of appeal is a jurisdictional flaw which requires dismissal."). In civil actions, the notice of appeal must be filed "within thirty days *after entry of judgment* if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure." N.C. R. App. P. 3(c)(1) (emphasis added). However, if the appealing party has not been served with a copy of the judgment within Rule 58's three-day window, then the party must file and serve notice of appeal "within thirty days *after service upon the party* of a copy of the judgment[.]" N.C. R. App. P. 3(c)(2) (emphasis added).

Here, the trial court entered its Order on 4 February 2022. Plaintiff served Defendant with a copy of the Order by first-class mail on 9 February. Defendant then filed notice of appeal on 11 March 2022, more than 30 days after the 4 February entry of the Order, but exactly 30 days after Plaintiff served her by first-class mail on 9 February. Thus, the question presented is whether the computation of the timeliness of Defendant's notice of appeal is governed by Appellate Rule 3(c)(1) or 3(c)(2), with the answer depending upon whether Defendant was served with a copy of the Order within the three-day period prescribed

by Rule 58 of the Rules of Civil Procedure. *See* N.C. R. App. P. 3(c)(1)–(2). If Appellate Rule 3(c)(1) applies, Defendant's notice of appeal was untimely, and her appeal must be dismissed; under Appellate Rule 3(c)(2), however, Defendant's notice of appeal would be timely, and properly before us.

We first address the date of entry of the trial court's Order. Rule 58 of the Rules of Civil Procedure states that "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5." N.C. Gen. Stat. § 1A-1, Rule 58 (2021). "The purposes of the requirements of Rule 58 are to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered." *Manone v. Coffee*, 217 N.C. App. 619, 621, 720 S.E.2d 781, 783 (2011) (citation omitted). In the present case, the date of entry is easily identifiable: the trial court reduced the Order to writing, signed it, and filed it on 4 February 2022. We thus base our analysis of the timeliness of Defendant's notice of appeal upon this date of entry.

Next, we determine the date on which Plaintiff served a copy of the Order upon Defendant. Rule 58 provides, in pertinent part:

> The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. *Service and proof of service shall be in accordance with Rule 5* [of the Rules of Civil Procedure].

N.C. Gen. Stat. § 1A-1, Rule 58 (emphasis added).

Rule 5, in turn, permits service by first-class mail upon a party, which was the method utilized by Plaintiff's counsel in this case. *See id.* § 1A-1, Rule 5(b)(2)(b). Service by mail is "complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service." *Id.* § 1A-1, Rule 5(b). Thus, under Rule 5(b)(2)(b), Defendant was served by mail upon Plaintiff's deposit of the copy of the Order in the United States Mail on 9 February 2022. *See id.*

The next critical factor is whether the 9 February service date fell "within the three-day period prescribed by Rule 58[.]" N.C. R. App. P. 3(c)(1). Importantly, this calculation includes only *business* days: "In computing any period of time prescribed or allowed by" the Rules of Civil Procedure, such as the three-day period prescribed by Rule 58, "[w]hen the period of time prescribed or allowed is less than seven days,

intermediate Saturdays, Sundays, and holidays shall be excluded in the computation" of days. N.C. Gen. Stat. § 1A-1, Rule 6(a).

Appellate Rule 3(c)(1) applies where a copy of the judgment is served "within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure[,]" N.C. R. App. P. 3(c)(1); hence, the time computation under Appellate Rule 3(c) is governed by Rule 6(a) of the Rules of Civil Procedure. Accordingly, our computation of this three-day period excludes weekends and court holidays. *See Magazian*, 234 N.C. App. at 513, 759 S.E.2d at 131 ("The three[-]day period [within which to serve a copy of a judgment] excludes weekends and court holidays.").

In *Magazian*, the appellant appealed from an order entered on a Friday, but acknowledged that he received actual notice of the order on the following Wednesday. *Id.* This Court deemed the service to have occurred on the date when he received that actual notice, and concluded that he "received actual notice within three days of entry of the order, excluding the intervening Saturday and Sunday. Therefore, to be timely, the Rules of Appellate Procedure required [the appellant] to file his notice of appeal within 30 days of entry of the order." *Id.* Because the appellant did not do so, this Court concluded that "the appeal [wa]s not timely" and dismissed for lack of jurisdiction. *Id.*

The timeline of the instant case mirrors that in *Magazian*. Here, the trial court entered the Order on Friday, 4 February 2022. The following Wednesday, 9 February 2022, Plaintiff served Defendant with a copy of the Order by first-class mail. Excluding the intermediate Saturday and Sunday from our calculation of the timeline, as we must, *id.*, Plaintiff served Defendant by mail on the third business day following the trial court's entry of the Order.

Because Defendant was "served with a copy of the [Order] within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure[,]" Appellate Rule 3(c)(1) governs the timeliness of Defendant's notice of appeal, rather than Appellate Rule 3(c)(2). N.C. R. App. P. 3(c)(1). As such, Defendant was required to file her notice of appeal within 30 days after entry of the Order, rather than 30 days after Plaintiff's service by mail. *See id.*

Defendant filed her notice of appeal on 11 March, more than 30 days after the 4 February entry of the Order, and therefore, her notice of appeal was untimely. Consequently, we must dismiss this appeal. *See Magazian*, 234 N.C. App. at 513, 759 S.E.2d at 131.

III. Conclusion

For the foregoing reasons, Defendant failed to properly invoke the jurisdiction of this Court. We dismiss Defendant's appeal.

DISMISSED.

Judges TYSON and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 MAY 2023)

ANDERSON v. N.C. 4504 GRAHAM NEWTON RD. TR. No. 22-61	Wake (21CVS2310)	Dismissed
IN RE A.M.B. No. 22-505	Johnston (19JT299)	Affirmed
IN RE A.N.T. No. 22-752	New Hanover (20JT188) (20JT189)	Affirmed
IN RE C.P. No. 22-760	Alleghany (20JT3)	Affirmed
IN RE D.M.C. No. 22-593	Beaufort (20JT120)	Affirmed
IN RE H.M. No. 22-552	Union (19JT176)	Affirmed
IN RE J.A.M. No. 22-687	Guilford (18JT94) (18JT95) (18JT96)	Affirmed
IN RE J.E.H. No. 22-590	Stanly (20JT27) (20JT28)	Affirmed
IN RE J.R. No. 22-404	Wake (20JT20-22)	Affirmed
IN RE R.D.R. No. 22-777	Forsyth (21JT58) (21JT59) (21JT60)	Reversed
IN RE S.H. No. 22-698	Robeson (19JT400) (20JT17)	Affirmed.
IN RE S.Y. No. 22-653	Iredell (18JT256) (18JT257) (18JT258)	Affirmed
MOONEY v. FASTENAL CO. No. 22-940	Buncombe (22CVS549)	Dismissed

STATE v. BROWN No. 22-850	Cleveland (21CRS51432) (21CRS51433) (21CRS51436) (21CRS51437)	No Error
STATE v. BRYANT No. 22-820	Alamance (20CRS53307)	Remanded For Correction Of Clerical Error.
STATE v. CANOY No. 22-1038	Carteret (21CRS52881-82)	Dismissed
STATE v. CEPHUS No. 22-886	Dare (21CRS50700) (22CRS25)	No Error in part, Dismissed in part
STATE v. CREECH No. 22-679	Brunswick (19CRS53929)	No Prejudicial Error
STATE v. HARRIS No. 22-728	Wake (19CRS220756)	No Error
STATE v. HUMPHREY No. 22-558	Onslow (20CRS54637-38)	NO PLAIN ERROR; INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM DISMISSED WITHOUT PREJUDICE
STATE v. LUCAS No. 22-612	Nash (20CRS52740) (21CRS656)	Vacated and Remanded
STATE v. PARKER No. 22-574	Mecklenburg (20CRS15960)	No Prejudicial Error
STATE v. RIVERA No. 22-720	Catawba (16CRS3923) (16CRS3924) (17CRS100) (18CRS4225) (18CRS4226)	NO PREJUDICIAL ERROR
STATE v. TURNER No. 22-887	Pender (21CRS50192)	Dismissed
STEPHENS-BEY v. DUKE UNIV. MED. CTR. No. 22-1017	Durham (22CVS2875)	Dismissed.

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