289 N.C. App.—No. 2 Pages 112-270

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

NOVEMBER 30, 2023

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

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

DONNA S. STROUD

Judges

CHRIS DILLON
JOHN M. TYSON
VALERIE J. ZACHARY
HUNTER MURPHY
JOHN S. ARROWOOD
ALLEGRA K. COLLINS
TOBIAS S. HAMPSON

JEFFERY K. CARPENTER
APRIL C. WOOD
W. FRED GORE
JEFFERSON G. GRIFFIN
JULEE T. FLOOD
MICHAEL J. STADING
ALLISON J. RIGGS

Former Chief Judges

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

Former Judges

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

JAMES A. WYNN JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN IV
SANFORD L. STEELMAN JR.
MARTHA GEER
LINDA STEPHENS
WENDY M. ENOCHS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER JR.
WANDA G. BRYANT
PHIL BERGER JR.
REUBEN F. YOUNG
CHRISTOPHER BROOK
RICHARD D. DIETZ
LUCY INMAN
DARREN JACKSON

Clerk
EUGENE H. SOAR

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Executive Director
Jonathan Harris

Director
David Alan Lagos

Staff Attorneys
Michael W. Rodgers
Lauren T. Ennis
Caroline Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy
J. Eric James
Megan Shook

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ryan S. Boyce

Assistant Director
Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Jennifer C. Peterson
Niccolle C. Hernandez

COURT OF APPEALS

CASES REPORTED

FILED 6 JUNE 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Interlocutory order—partial dismissal—substantial right—possibility of inconsistent verdicts—In an action arising from a contractual dispute in which a sports marketing company (plaintiff) sued an intercollegiate sports association (defendant) to recover money owed under their contract and alleged in its complaint claims for breach of contract, unfair and deceptive trade practices, violation of the Wage and Hour Act, and unjust enrichment, where the trial court granted defendant's motion to dismiss the latter two claims but allowed plaintiff's other two claims to proceed, the court's interlocutory order was immediately appealable as affecting

a substantial right because it created the risk of inconsistent verdicts from two possible trials that would involve the same factual issues. **Jessey Sports, LLC v. Intercollegiate Men's Lacrosse Coaches Ass'n, Inc., 166.**

Interlocutory order—substantial right—applicability of collateral estoppel—colorable claim—In plaintiff's action under the Whistleblower Act, in which he alleged that he was terminated from employment at a university in retaliation for having reported health and safety concerns about his department, the trial court's interlocutory order denying defendants' motion to dismiss was immediately appealable as affecting a substantial right where defendants asserted a colorable claim that collateral estoppel principles might bar plaintiff's claim because identical issues were actually litigated in a prior administrative proceeding (and upheld on judicial review). **Semelka v. Univ. of N. Carolina, 198.**

Mootness—cross-appeal—plaintiff's claim collaterally estopped—In a whistleblower action, where plaintiff's claim that he was unlawfully terminated from his employment at a university—in retaliation for having reported health and safety concerns—was barred by collateral estoppel principles, requiring dismissal of the claim, defendants' cross-appeal was dismissed as moot. **Semelka v. Univ. of N. Carolina, 198.**

BAILMENTS

Conversion of funds—by financial advisor—not a bailee—After a financial advisor (defendant) converted funds that plaintiff had asked him to invest on her behalf, his conviction for felony conversion of property by a bailee under N.C.G.S. § 14-168.1 was vacated because, as a matter of law, he was not a bailee when he took possession of the funds. Traditionally, a bailee is required to return the exact property to the bailor, but even where exceptions to that rule exist—such as when a bailor delivers a check to a third party on the bailee's behalf—they only exist in situations where the bailee exercises a limited degree of control over the transferred property for a specific purpose. Thus, where defendant's work involved making complex discretionary judgments about plaintiff's money as a fungible asset, and where defendant was never expected to return the "identical money" received, he did not qualify as a bailee. **State v. Storm, 257.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Neglect—ceasing reunification efforts—factors—required findings—no prejudicial error—After adjudicating three children as neglected, the trial court did not abuse its discretion by ceasing reunification efforts with the children's parents where, although the trial court made inadequate findings about the aggravating circumstances listed in N.C.G.S. § 7B-901(c) to justify its disposition, the record contained ample evidence that reunification efforts would be inappropriate, and thus the court's error did not amount to prejudicial error. **In re M.S., 127.**

Neglect—findings of fact—clear, cogent, and convincing evidence—domestic violence incident—An order adjudicating three children as neglected was affirmed where clear, cogent, and convincing evidence supported the trial court's findings of fact, which included findings describing an incident of domestic violence inflicted upon the children's mother by their father. The trial court's failure to indicate the exact date that the incident occurred did not affect the underlying validity of the findings and did not constitute prejudicial error. Further, where the court found that

the mother denied the incident of domestic violence to a social worker but that the social worker noticed a bruise on the mother's arm, that finding was not based on improper hearsay evidence but on the social worker's in-court testimony regarding her observations of the bruise. **In re M.S., 127.**

Permanency planning—ceasing reunification efforts—sufficiency of evidence—In a neglect matter, in which three minor children were removed from their parents' home after the youngest suffered from an unexplained, non-accidental skull fracture at one month old, the trial court did not err by entering a permanency planning review order allowing the department of social services (DSS) to cease reunification efforts with the parents where the court's factual findings—regarding the parents' lack of progress on their case plans and continued inability to explain the cause of the skull injury—were based on sufficient competent evidence, including testimony, reports, and letters from DSS, the children's guardian ad litem, the parents' therapists, and family members. **In re N.T., 149.**

Permanency planning—guardianship to nonparent—best interests of the child—In a neglect matter, in which three minor children were removed from their parents' home after the youngest child suffered from an unexplained, non-accidental skull fracture at one month old, the trial court did not abuse its discretion by determining that guardianship with family members would be in the children's best interests. The court's factual findings regarding bests interests were supported by the same competent evidence that supported the court's decision to end reunification efforts, including testimony, reports, and letters from the department of social services, the children's guardian ad litem, the parents' therapists, and family members. **In re N.T., 149.**

Permanency planning—guardianship to nonparent—constitutionally protected parental status—In a neglect matter, in which three minor children were removed from their parents' home after the youngest child suffered from an unexplained, non-accidental skull fracture at one month old, the trial court did not err by entering a permanency planning review order awarding guardianship of the children to their paternal grandparents. The court's determination that the parents had acted inconsistently with their constitutionally protected parental rights and were not fit and proper persons to have custody of the children was supported by findings that the parents still had not provided an explanation for how the youngest child got injured and had not fully complied with all aspects of their respective case plans. Those findings, in turn, were supported by competent evidence including testimony, reports, and letters from the department of social services, the children's guardian ad litem, the parents' therapists, and family members. **In re N.T., 149.**

CHILD VISITATION

Child neglect case—disposition—no visitation—insufficient findings—After a trial court adjudicated three children as neglected, the portion of its dispositional order directing that the children's parents have no visitation was vacated and remanded where, in its findings of fact, the court failed to address whether the parents had utilized any prior visitation periods. On remand, the court needed to make written findings regarding the parents' prior visitation with the children, and the court could deny visitation only upon finding that the parents had forfeited those rights and that denying contact would be in the children's best interests. **In re M.S., 127.**

CIVIL PROCEDURE

Summons—timeliness—motion to dismiss—Where plaintiff filed his complaint "for restorative justice" and failed to cause a summons to be issued within five days pursuant to Civil Procedure Rule 4(a), the action abated. Because defendant thereafter filed a motion to dismiss before plaintiff caused a summons to be issued, the action was not revived and the trial court did not err by granting defendant's motion to dismiss. **Payin v. Foy, 195.**

CRIMINAL LAW

Habitual felon status—proof of prior convictions—out-of-state conviction—sufficiency of evidence—The State presented sufficient evidence from which the jury could conclude that defendant had been convicted of three predicate felonies to attain habitual felon status, including the indictment and judgment from defendant's prior conviction in South Carolina of grand larceny, which listed the elements of grand larceny and the statute being violated, respectively, and which demonstrated that that offense constituted a felony under the statute then in effect. **State v. Hefner, 223.**

Jury instructions—habitual felon status—predicate offense—described as "crime" versus "felony"—In its jury instructions on habitual felon status, where the trial court referred to the State's burden of proof as having to show that defendant had been convicted of the "crime"—rather than the "felony"—of grand larceny in South Carolina as one of the predicate offenses (as requested by the State due to the South Carolina judgment not explicitly stating that the offense was a felony), there was no error because the State presented evidence from which the jury could determine that the offense constituted a felony under South Carolina law at the time it was committed. **State v. Hefner, 223.**

DIVORCE

Equitable distribution—distributive award—impermissibly reduced to money judgment—In an equitable distribution case in which the trial court's prior order was vacated because the court erroneously required plaintiff to liquidate specified items of separate property to satisfy a distributive award, although the trial court did not err on remand by entering a new order also requiring plaintiff to pay a distributive award (this time without specifying how she should satisfy the award), the court nevertheless erred by reducing the distributive award to a money judgment, where it had no grounds to do so under N.C.G.S. § 50-20 since the new order constituted an initial award and the amount was not yet past due. **Crowell v. Crowell, 112.**

Equitable distribution—distributive award—prior order vacated—law of the case—new award permissible—In an equitable distribution case in which the trial court's prior order was vacated because the court erroneously required plaintiff to liquidate specified items of separate property to satisfy a distributive award, the trial court did not violate the law of the case or exceed the scope of the appellate court's holding when it entered a new order on remand with a distributive award that only incidentally or indirectly affected plaintiff's separate property. Despite plaintiff's argument that the practical effect of the new order would be to require plaintiff to liquidate separate property because she had no other means to pay the distributive award, the trial court's conclusion in its new order that plaintiff had the ability to pay the award left plaintiff the choice of whether or not to use her separate property to pay the distributive award. **Crowell v. Crowell, 112.**

not err in declining to instruct the jury on the lesser-included offense of second-degree murder, where the State satisfied its burden of proving every element of the greater offense, including premeditation and deliberation. Defendant could not negate the element of premeditation and deliberation with evidence that someone else had bullied him into killing the victim where, under the law, only provocation by the victim (not a third party) may be considered when analyzing premeditation and deliberation. Some evidence indicated that defendant was angry with the victim but originally intended only to fight the victim rather than kill him; however, defendant presented no evidence that his anger disturbed his faculties and reason, and the fact that he might have lacked the intent to kill the victim at an earlier moment was not a reflection of his state of mind at the time of the killing. **State v. Smith, 233.**

First-degree murder—sixteen-year-old defendant—jury instruction—intent, premeditation, and deliberation for adolescents—In a first-degree murder prosecution arising from events that occurred when defendant was sixteen years old, the trial court did not err in declining defendant's request for a special jury instruction that asked the jury to consider the differences between adult and adolescent brain function when determining whether defendant "intentionally killed the victim after premeditation and deliberation." Not only did defendant fail to present any evidence on adolescent brain function, but also the requested instruction was likely to mislead the jury as an incorrect statement of law, since a defendant's age is not a legally-recognized factor when analyzing whether that defendant murdered someone with premeditation and deliberation. **State v. Smith, 233.**

IDENTIFICATION OF DEFENDANTS

Photo lineup—impermissibly suggestive procedures—substantial likelihood of irreparable misidentification—murder trial—In a first-degree murder prosecution arising from a fatal shooting, the trial court's decision to admit a witness's photo lineup identification of defendant into evidence was upheld on appeal where, even if defendant had not failed to address whether police used impermissibly suggestive procedures to obtain the identification, he still failed to show that the procedures employed created a substantial likelihood of irreparable misidentification. The shooting occurred during the daytime, and the witness testified that she had seen the shooter's unobstructed face and recognized him as defendant. Further, the witness participated in the lineup less than six hours after the shooting and asserted in her identification packet that she was one-hundred percent sure that defendant was the shooter. **State v. Smith, 233.**

INDICTMENT AND INFORMATION

Habitual felon status—predicate offenses—facially valid—The indictment charging defendant with having attained habitual felon status was facially valid because it alleged three predicate felony convictions, including one of an offense defendant committed in South Carolina (grand larceny), which constituted a felony under South Carolina law at the time it was committed. **State v. Hefner, 223.**

JURY

Criminal trial—reopening voir dire—after jury selection but before jury impaneled—colloquy—waiver—In a first-degree murder prosecution, the trial court did not abuse its discretion by declining to reopen the voir dire of a juror who, after jury selection but before the jury was impaneled, expressed concern because the

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.

CROWELL v. CROWELL

[289 N.C. App. 112 (2023)]

ANDREA CROWELL, PLAINTIFF
v.
WILLIAM CROWELL, DEFENDANT

No. COA22-111

Filed 6 June 2023

1. Divorce—equitable distribution—distributive award—prior order vacated—law of the case—new award permissible

In an equitable distribution case in which the trial court's prior order was vacated because the court erroneously required plaintiff to liquidate specified items of separate property to satisfy a distributive award, the trial court did not violate the law of the case or exceed the scope of the appellate court's holding when it entered a new order on remand with a distributive award that only incidentally or indirectly affected plaintiff's separate property. Despite plaintiff's argument that the practical effect of the new order would be to require plaintiff to liquidate separate property because she had no other means to pay the distributive award, the trial court's conclusion in its new order that plaintiff had the ability to pay the award left plaintiff the choice of whether or not to use her separate property to pay the distributive award.

2. Divorce—equitable distribution—distributive award—impermissibly reduced to money judgment

In an equitable distribution case in which the trial court's prior order was vacated because the court erroneously required plaintiff to liquidate specified items of separate property to satisfy a distributive award, although the trial court did not err on remand by entering a new order also requiring plaintiff to pay a distributive award (this time without specifying how she should satisfy the award), the court nevertheless erred by reducing the distributive award to a money judgment, where it had no grounds to do so under N.C.G.S. § 50-20 since the new order constituted an initial award and the amount was not yet past due.

Appeal by Plaintiff from order entered 16 July 2021 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 4 October 2022.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, and Plumides, Romano & Johnson, PC, by Richard B. Johnson, for plaintiff-appellant.

No brief filed for defendant-appellee.

MURPHY, Judge.

In *Crowell v. Crowell*, 372 N.C. 362, 368 (2019), a previous appeal in this case, our Supreme Court held that the trial court may not specifically order Plaintiff to liquidate items of separate property to satisfy a distributive award. However, the previous holding did not prohibit the trial court from entering a distributive award that incidentally or indirectly affects Plaintiff's separate property. Where the trial court entered a new order that did not directly affect Plaintiff's separate property rights, that order did not violate the law of this case.

However, a trial court may not reduce a distributive award to a money judgment in an initial order. Here, where the end result of the previous appeal was a total vacation of the appealed order, the trial court was not permitted to initially reduce the distributive award in the new order to a money judgment on remand as no proper grounds existed to do so. Accordingly, we partially vacate the new order and remand for the entry of a proper distributive award.

BACKGROUND

Plaintiff and Defendant were married on 11 July 1998, separated on 3 September 2013, and divorced in April 2015. As of the date of separation, Plaintiff and Defendant had incurred a significant amount of marital debt. On 17 February 2014, Plaintiff filed a complaint against Defendant for equitable distribution, alimony, and postseparation support. Defendant filed an answer to the complaint and included a counterclaim for equitable distribution.

From 6 July 2016 to 8 July 2016, the issues of equitable distribution and alimony were tried in Mecklenburg County District Court. The parties had stipulated in the final pretrial order that 14212 Stewarts Bend Lane, 14228 Stewarts Bend Lane, and 14512 Myers Mill Lane were all Plaintiff's separate property, and the trial court distributed the properties, along with their underlying debts, to Plaintiff. The trial court also found the following:

> As a result of this equitable distribution Defendant[] will have more debt than property and Plaintiff[] will have to liquidate her property to pay the distributive award. . . . Neither party has any liquid marital property left. . . . There was no choice but to distribute all the debts to

> Defendant[] in his case which results in a heavy burden he may never be able to pay before his death and a distributive award owed by Plaintiff[] that she may never be able to pay before her death.

On 15 August 2016, the trial court entered its equitable distribution judgment and alimony order, denying alimony and specifically ordering Plaintiff to liquidate 14212 Stewarts Bend Lane and 14228 Stewarts Bend Lane to satisfy the distributive award to Defendant. On 14 September 2016, Plaintiff appealed from the equitable distribution judgment and alimony order; and, on 2 January 2018, this Court issued a divided opinion. *See Crowell v. Crowell*, 257 N.C. App. 264, 285 (2018). The Majority opinion held, in relevant part, that the trial court did not err by "considering" Plaintiff's separate property and ordering her to liquidate it to satisfy a distributive award to Defendant. *Id.* However, on 16 August 2019, our Supreme Court issued a unanimous opinion reversing this Court's affirmation of the equitable distribution judgment and order and remanding with further orders to remand to the trial court. *Crowell v. Crowell*, 372 N.C. 362, 368 (2019). The Court concluded that "the trial court distributed separate property . . . when it ordered Plaintiff to liquidate her separate property to pay a distributive award" and that "there is no distinction to be made between 'considering' and 'distributing' a party's separate property in making a distribution of marital property or debt where the effect of the resulting order is to divest a party of property rights she acquired before marriage." *Id.* Our Supreme Court ultimately held the trial court could not order Plaintiff to liquidate her separate property to satisfy the distributive award because "trial courts are not permitted to disturb rights in separate property in making equitable distribution award orders." *Id.* at 370.

Pursuant to our Supreme Court's holding, the trial court held a hearing on 10 February 2021; and, on 16 July 2021, the trial court issued an *Amended Equitable Distribution Judgment and Alimony Order*. The trial court concluded "Plaintiff[] has the ability to pay the distributive award as outlined herein[,]" incorporated the bulk of the 2016 order by reference, and entered the following distribution order:

> 1. Paragraph 6 (a) – (d) of the Decretal Section of the Original Order is hereby amended as follows:
>
> In order to accomplish the equitable distribution, Plaintiff[] is required to pay a distributive award of Eight Hundred Sixteen Thousand Seven Hundred Ninety-Four Dollars and no/100 ($816,794[.00]) to be paid as follows:

> a. A lump [sum] payment of Ninety Thousand Dollars and no/100 ($90,000[.00]) within sixty (60) days from [10 February 2021].
>
> b. A second lump [sum] payment of One Hundred Thousand Dollars and no/100 ($100,000[.00]) within ninety (90) days of [20 February 2021].
>
> c. A third lump [sum] payment of Two Hundred Ten Thousand Dollars and no/100 ($210,000[.00]) on or before [10 February 2022].
>
> d. The balance of Four Hundred Twenty-Four Thousand Two Hundred Ninety-Four Dollars and no/100 ([$424,294.00]) owed is reduced to judgment and shall be taxed with post judgment interest and collected in accordance with North Carolina law.
>
> 2. Except as specifically modified herein, the parties' separate property, marital property, and divisible property shall remain as it was previously classified, valued, and distributed in the [15 August 2016 order].
>
> 3. Except as specifically modified herein, the [15 August 2016 order] shall remain in full force and effect.

(Marks omitted.) Plaintiff timely appealed.

ANALYSIS

In substance, Plaintiff makes two arguments on appeal: (A) that the trial court's 16 July 2021 order was erroneous because, in effect, the order required Plaintiff to liquidate the same properties at issue in the first appeal and (B) the trial court was not authorized under the Equitable Distribution Act to reduce the distributive award in the 16 July 2021 order to a money judgment.[1] For the reasons stated below, the current order does not violate the law of this case; however, as the trial court was not authorized to reduce the distributive award in

1. Plaintiff also argues the trial court was without jurisdiction to enter injunctive relief while the matter was on appeal. However, while the Record contains Defendant's motion for injunctive relief and Plaintiff's response to that motion, nowhere does it appear that the trial court actually ruled on the motion. It was Plaintiff's duty and opportunity to supply an adequate record on appeal, and we decline to opine on an order not presented to us. *See* N.C. R. App. P. 9(a)(1)(h) (2023) ("In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal. . . . The printed record in civil actions . . . shall contain[] . . . a copy of the judgment, order, or other determination from which appeal is taken[.]").

the 2021 order to a money judgment, we vacate and remand in part for the entry of a distributive award consistent with this opinion.

A. 2021 Order

[1] Plaintiff first argues the trial court erred in entering the 16 July 2021 order because the practical effect of the order was to require Plaintiff to liquidate the same properties our Supreme Court held the trial court could not order her to liquidate during the previous appeal, thus violating the law of this case. *See Spoor v. Barth*, 257 N.C. App. 721, 728 (2018) (citing *Hayes v. City of Wilmington*, 243 N.C. 525, 536 (1956)) ("Under the law-of-the-case doctrine, when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal."). Plaintiff breaks this argument into three distinct sub-arguments: first, because the trial court's finding that the only way Plaintiff could satisfy a distributive award was to liquidate separate property was undisturbed in the previous appeal, the effect of the distributive award in the 2021 order remains violative of our Supreme Court's previous holding; second, the 2021 order attempts to change the finding of fact that Plaintiff was unable to satisfy the distributive award without liquidating the properties; and, third, the trial court exceeded the scope of the previous holding by including, without taking new evidence, that "Plaintiff[] has the ability to pay the distributive award as outlined herein."

Each of these arguments is predicated on a misreading of our Supreme Court's holding. The original order was not overturned on the basis that it had some propensity to affect Plaintiff's separate property; rather, it was overturned because "the trial court ordered [P]laintiff to *use* specific items of separate property to satisfy marital debt, *immediately* affecting her rights in that property." *Crowell*, 372 N.C. at 369 (second emphasis added). Indeed, the Court's opinion explicitly recognized that a distributive award with a collateral effect on separate property is not only permissible, but to be expected:

> [W]here a marriage is in debt, it is difficult to envision a scenario in which the making of a distributive award will not affect a party's separate property in some manner. Nevertheless, within the confines of N.C.G.S. § 50-20, the trial court in this case was only permitted to use that debt in calculating the amount of the distributive award, not to dictate how the debt was to be paid.

Id. at 371; *see also id.* at 369 n.4 (recognizing "a trial judge's undoubted authority to consider the amount of separate property held by each party in determining the amount of marital property and debt that should be distributed to each party at the conclusion of the equitable distribution process").

In light of a proper reading of the final holding in the previous appeal, each of Plaintiff's arguments fail. The trial court's 2021 order does not require Plaintiff to liquidate separate property, nor would she be required to do so if she were to obtain the funds necessary to pay the distributive award from a different source. Even if we were to take as fixed the trial court's finding that Plaintiff will only have the means to pay the current distributive award by liquidating the properties at issue in the first appeal,[2] such a finding does not itself transform the ensuing order into a command "to *use* specific items of separate property to satisfy marital debt[.]" *Id.* at 369. And the trial court's new conclusion of law that "Plaintiff[] has the ability to pay the distributive award as outlined herein" is entirely consistent with this distinction in light of Plaintiff's *ability* to liquidate the property if that is how she chooses to satisfy the distributive award. Thus, the trial court's 2021 order in no way violates the law of this case.

B. Distributive Award as a Money Judgment

[2] Plaintiff next argues the trial court erred by reducing the distributive award to a money judgment. Although much of this argument is derivative of her position that the 2021 order violates the law of the case, the bulk of it concerns the trial court's authority to reduce the distributive award to the *form* of a judgment. According to Plaintiff, the trial court was not permitted to reduce the award to judgment. We agree.

Under N.C.G.S. § 50-20, a distributive award is "payable either in a lump sum or over a period of time in fixed amounts"; no specific statutory provision authorizes payment in the form of a money judgment. N.C.G.S. § 50-20(b)(3) (2021). While we have previously suggested in dicta that, despite the lack of express statutory authorization, *past-due* equitable distribution payments may be reduced to a money judgment,

2. This proposition, we note, is based on an incorrect reading of the case's procedural history. The North Carolina Supreme Court's holding was not limited to a narrow correction of the original distribution order; rather, it reversed our partial affirmance of the trial court's order, and the other part of that mandate was to vacate. *See Crowell*, 257 N.C. App. at 285 (2018), *rev'd*, 372 N.C. at 371. In other words, the end result of the previous appeal was to fully vacate the equitable distribution order; the original findings of fact were not, as Plaintiff contends, "undisturbed on appeal."

see Romulus v. Romulus, 216 N.C. App. 28, 36-37 (2011), we only did so to an extent commensurate with the analogous statutory provisions for past-due child support and alimony payments. *See* N.C.G.S. § 50-13.4(f)(8) (2021) ("[P]ast due periodic [child support] payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments and may include provisions for periodic payments."); N.C.G.S. § 50-16.7(i) (2021) ("[P]ast-due periodic [alimony] payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments."). However, our observation in *Romulus* specifically concerned an action to enforce past-due payments and has never been extended to initial distributive awards.

Here, the distributive award at issue was not past due. The 2021 order, despite being informed by the same valuations used to create the order at issue in the first appeal and nominally having been "amended," was actually an entirely new order.[3] And, while there is precedent for the ability for an award to be past-due on remand where an award is partially, rather than fully, vacated, an appellate court must clarify such a limitation on its holding in order for that rule to apply. *See Quick v. Quick*, 305 N.C. 446, 462 (1982) ("We have vacated only that portion of the trial court order dealing with the *amount* of alimony. The parties' stipulation that plaintiff is *entitled* to alimony is in no way disturbed and remains in full force and effect for the hearing on remand."), *superseded in part by statute*, N.C.G.S. § 50-13.4(f)(9) (1983).

Without any limitation on the previous order of our Supreme Court, the award contained in the current order could not have been past due, and even the reasoning in dicta in *Romulus* would not authorize its reduction to a money judgment. We vacate the portion of the trial court's 2021 order concerning the form and amount of the distributive award—specifically, item (1) of the decretal section of the *Amended Equitable Distribution Judgment and Alimony Order*—and remand for the entry of a form of distributive award authorized by N.C.G.S. § 50-20.

CONCLUSION

As our Supreme Court's opinion in the previous appeal did not prohibit the entry of distributive awards with incidental effects on Plaintiff's separate property, the trial court's *Amended Equitable Distribution Judgment and Alimony Order* did not violate the law of this case.

---

3. For the reasons stated previously, the effect of the Supreme Court's opinion in the previous appeal was to fully vacate the original order and the distribution award it authorized. *See supra* fn. 2.

However, the trial court was not authorized to reduce the distributive award in the 2021 order to a money judgment, and we vacate and remand in part for the entry of a distributive award consistent with this opinion.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Chief Judge STROUD and Judge GORE concur.

IN THE MATTER OF A.R.B.

No. COA22-694

Filed 6 June 2023

Termination of Parental Rights—standard of proof—Rule 60(a) motion—substantive modification to original order

The trial court abused its discretion by granting petitioner-mother's Rule 60(a) motion to amend the court's original order, which terminated respondent-father's parental rights in his child, to add the correct standard of proof to the order. The addition of the standard of proof amounted to a substantive modification altering the effect of the original order, thus exceeding the scope of the Rule 60 authority to correct clerical mistakes. Where there was no transcript from the trial proceedings from which the appellate court could determine whether the trial court announced the correct standard of proof in open court, the amended order was vacated and the matter was remanded for application of the proper standard of proof.

Appeal by Respondent-Father from Order filed 6 June 2022 by Judge Emily Cowan in Henderson County District Court. Heard in the Court of Appeals 26 April 2023.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for Respondent-Appellant Father.

Emily Sutton Dezio, for Petitioner-Appellee Mother.

STADING, Judge.

Respondent-Father ("Father") appeals from the trial court's Amended Order terminating his parental rights to his child based on willful abandonment and neglect. Father argues (1) that the trial court abused its discretion in granting a Rule 60(a) motion to amend the Original Order terminating his parental rights and (2) in the alternative, that there is no clear, cogent, and convincing evidence to support the trial court's findings that Father willfully abandoned his child. For the reasons set forth below, we vacate and remand the Order of the trial court with instructions consistent with this Opinion.

I. Background

"Adam,"[1] born 23 April 2018, is the child of Petitioner-Mother, Miranda Burlseon ("Mother"), and Father, Brandon Ezequiel Johnson. At the time of Adam's birth, Mother was seventeen years old, and Father was nineteen years old. The parties were never married. Since his birth, Adam resided exclusively with Mother.

On 26 June 2018, Father initiated a custody action in Henderson County, requesting custody of Adam and child support. Mother counterclaimed for the same. In April 2019, the court awarded joint legal custody of Adam to both parties, with Adam living primarily with Mother, and Father receiving supervised visitation that would eventually progress to unsupervised visits. The court determined Father "had issues with [m]arijuana use" and ordered him to complete "a 12-panel hair follicle drug test by May 13, 2019 and to present the results of said test to [Mother]'s attorney of record."

In August 2018, when Adam was four months old, Mother began a relationship with Kemper Henderson. Throughout Adam's early years, Henderson was very involved in Adam's daily care. Mother and Henderson married on 10 October 2020 and moved to South Carolina with Adam.

In May 2019, Father attended three, two-hour-long, supervised visits with Adam at Mother's home. According to Mother, Father, and Henderson, the visits went well, and all parties were cordial and friendly with one another. On May 17, 2019, Father delivered a box of diapers and wipes to Mother and visited with Adam. After this visit, Father ceased communication with Mother and failed to attend other scheduled visitations. On 3 June 2019, Mother filed a "Motion to Show Cause and a Motion to Modify Custody based upon [Father]'s failure to contact

1. Adam is a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42.

the minor child, nor to produce the court-ordered drug test results." The matter was noticed for hearing but was never heard and removed from the district court's calendar on 14 May 2020.

On 21 June 2019, Father contacted Mother, stating he completed his follicle drug test. Mother questioned his lack of contact and failure to attend visits. Father stated Mother's attorney contacted him and told him that he could not visit Adam until he completed his drug test. Mother claims her attorney did not contact Father. Father admits this was the last time he attempted to contact Mother and that he has not seen Adam since May 2019.

On 7 December 2020, Mother petitioned for termination of Father's parental rights. After he was served, Father filed a pro-se answer on 5 February 2021 and an additional answer through appointed counsel on 24 March 2021. The district court appointed a Guardian ad Litem ("GAL"), but the court dismissed the first GAL for failure to complete services, thereby delaying the hearing. The court appointed Christopher Reed to be Adam's GAL. On 16 February 2022, with both parties present, the district court held a hearing on the petition.[2]

The court heard testimony from Father and Mother, as well as Andrea Straton, Adam's maternal grandmother, and Cindy Frickel, Father's family friend. The court also considered the GAL report, filed on 16 February 2022. The report detailed the GAL's interactions with Mother, Father, and Adam, noting that while Father loves Adam, Father "admits and recognizes that since he has not seen [Adam] since May 2019, he currently had no bond with his son, and his son would not recognize him as his father." The GAL's report concluded that it was in Adam's best interest that Father's parental rights be terminated to allow for Adam's adoption by Henderson. Ultimately, the court found that Father had abandoned and neglected Adam, and it was in Adam's best interest that Father's parental rights be terminated. The court entered the order terminating Father's rights on 25 February 2022 and Father entered a notice of appeal on 28 February 2022.

On 27 May 2022, Mother filed a Rule 60(a) motion, requesting "the court to amend the February 25, 2022 Order terminating the parental rights to clearly state the standard of review for which she made her findings of fact relating to the grounds to terminate." On 9 June 2022, the

2. A record of this proceeding, and another held on 9 June 2022, was made with an electronic recording device that subsequently malfunctioned. The assigned transcriptionist was unable to prepare a verbatim transcript, so the parties stipulated to the inclusion of summaries of the proceedings in narrative form. *See* N.C. R. App. P. 9(c)(1).

court held a hearing and determined that the language of the Order could be "made clearer to ensure that the standard of review used by the court applies not only to the best interests but also that there were grounds to terminate [Father]'s parental rights." Father's counsel objected to the change, but ultimately, the court entered an Amended Order terminating Father's parental rights. Father timely filed a notice of appeal from the Amended Order and Order granting the Rule 60(a) motion.

II. Jurisdiction

This Court has jurisdiction over Father's appeal from the Amended Order terminating his parental rights pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) and 7B-1001(a)(7) (2023).

III. Analysis

Father presents two issues on appeal: (1) whether the trial court abused its discretion in granting the Rule 60(a) motion to make a substantive, rather than clerical, change to the Termination of Parent Rights ("TPR") Order; and (2) if this Court finds the trial court did not abuse its discretion, whether there is clear, cogent, and convincing evidence to support the trial court's determination that grounds existed to terminate Father's parental rights. We first examine whether the court properly granted the Rule 60(a) motion.

A. Comparison of the Orders

We pay due deference to the principle that parents have fundamental, substantive rights under the United States Constitution that are embodied in North Carolina General Statutes and reinforced by precedential case law. In *Santosky v. Kramer*, the United States Supreme Court held that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." 455 U.S. 745, 747–48, 102 S. Ct. 1388, 1391–92 (1982). The Juvenile Code in North Carolina "provides for a two-step process for the termination of parental rights—an adjudicatory stage and a dispositional stage." *In re K.N.*, 373 N.C. 274, 277-78, 837 S.E.2d 861, 864-865 (2020) (citing N.C. Gen. Stat. §§ 7B-1109, -1110 (2017)). During the first or adjudicatory stage, the petitioner bears the burden of proving by "*clear, cogent, and convincing evidence*" the existence of one or more grounds for termination pursuant to subsection 7B-1111(a) of the General Statutes of North Carolina. N.C. Gen. Stat. § 7B-1109(e), (f) (emphasis added). Next, if a trial court finds that a ground for termination exists, it proceeds to the second or dispositional stage, at which it must "determine

whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a).

In the trial court's Original Order, the only recitation of a standard of proof was found in paragraph 26, in reference to the dispositional stage, which read: "[t]hat there is clear and convincing evidence that it is in the best interests of the minor child that the Father's parental rights be terminated." In considering Mother's 60(a) motion, the trial court recognized the deficiency in granting the Order and ultimately determined "it is best practice to grant this Motion and be clear upon the standard used at the hearing to terminate Respondent's parental rights." The amended portion reads as follows:

> THAT FURTHER, that Petitioner[-Mother] has produced the following clear, convincing and cogent evidence to support termination of the parental rights and that it is in the child's best interest to do so;
>
> . . . .
>
> 24. Based on the foregoing, the Petitioner[-Mother] has established grounds for termination of the parental rights of the Respondent[-Father] by clear, cogent, and convincing evidence. That Respondent[-Father], as a natural parent of the juvenile, has willfully abandoned the juvenile for at least six (6) consecutive months immediately preceding the filing of this Petition for Termination of Parental Rights, pursuant to the provisions of N.C. Gen. Stat. § 7B-1111(a)(7).
>
> 25. Based upon the foregoing, the Petitioner[-Mother] has established grounds for termination of the parental rights of the Respondent[-Father] by clear, cogent, and convincing evidence. That Respondent[-Father], as a natural parent of the juvenile, has neglected, pursuant to the provisions of N.C. Gen. Stat. § 7B-1111(a)(1) by:
>
> a. Abandoning the juvenile,
>
> b. Failing to provide the proper care, supervision or discipline for the juvenile, and
>
> c. Showing a lack of parental concern for the juvenile.
>
> 26. Based upon the totality of the evidence and by the clear, cogent and convincing standard of law, termination

> of the Respondent[-Father]'s parental rights is in the best interest and welfare of the juvenile.

A comparison of the two Orders reveals, inter alia, that the modifications were an intentional addition to include the constitutionally permissible standard of proof.

B. Substantive Versus Clerical Changes

This Court reviews a trial court's decision to amend an order after a Rule 60(a) motion for abuse of discretion. *In re Estate of Meetze*, 272 N.C. App. 475, 479, 847 S.E.2d 220, 224 (2020). Rule 60(a) of North Carolina's Rules of Civil Procedure states:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge order. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

N.C.G.S. § 1A-1, Rule 60(a) (2022). "Clerical mistakes" are those that do not alter the court's reasoning or determination in ruling on an order. *In re J.K.P.*, 238 N.C. App. 334, 343, 767 S.E.2d 119, 124 (2014). "While Rule 60 allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment." *In re C.N.C.B.*, 197 N.C. App. 553, 556, 678 S.E.2d 240, 242 (2009) (citations omitted). Thus, a trial court abuses its discretion if the correction "alters the effect of the original order." *In re Meetze*, 272 N.C. App. at 479, 847 S.E.2d at 224. We are now tasked with determining whether the trial court's initial omission and subsequent addition of the correct standard was a clerical mistake or a substantive modification constituting an abuse of discretion.

The existing body of case law contemplating whether a trial court is divested of jurisdiction pursuant to Rule 60(a) does not speak directly to the primary issue in this case. Available precedent considering whether a trial court exceeded the bounds of a clerical mistake and trod onto the territory of a substantive modification has considered alterations in findings of fact that change the result of an order. *See, e.g.*, *In re B.B.*, 381 N.C. 343, 873 S.E.2d 589 (2022). Father cites several cases in support of his argument in which granting a Rule 60(a) motion to amend

an order was found to be a substantive alteration. *In re B.L.H.*, 376 N.C. 118, 852 S.E.2d 91 (2020); *In re M.R.F.*, 378 N.C. 638, 862 S.E.2d 758 (2021); *Hinson v. Hinson*, 78 N.C. App. 613, 337 S.E.2d 663 (1985); *In re C.N.C.B.*, 197 N.C. App. 553, 678 S.E.2d 240 (2009); *In re J.C.*, 380 N.C. 738, 869 S.E.2d 682 (2022). However, in these cases, our State Supreme Court addressed whether excluding the standard of proof from the written order is *reversible error*—distinguished from our present case which considers whether the addition of the standard of proof is a *substantive modification* under a Rule 60(a) amendment.

In one such case, the Court held that "a trial court does not reversibly err by failing to explicitly state the statutorily-mandated standard of proof in the written termination order if . . . the trial court explicitly states the proper standard of proof in open court at the termination hearing." *In re B.L.H.*, 376 N.C. at 120–21, 852 S.E.2d at 95 (2020). In another matter, the Court considered a scenario in which the trial court did not make an announcement either in its written order or in open court about the standard of proof that it applied to make findings of fact. *In re M.R.F.*, 378 N.C. at 643, 862 S.E.2d at 762 (2021). The Court held "[i]n light of not only the failure of the trial court to announce the standard of proof which it was applying to its findings of fact but also due to petitioner's failure to present sufficient evidence to support any of the alleged grounds for the termination of the parental rights of respondent-father, we are compelled to simply, *without remand*, reverse the trial court's order." *Id.* at 642–643, 862 S.E.2d 758, 762–763 (emphasis original). More recently, the Court determined that employing the wrong standard of proof requires a reviewing court to set aside a termination of parental rights order. *In re J.C.*, 380 N.C. at 744, 689 S.E.2d at 687 (2022). Though these cases address the insufficiency of orders and are not a factual analysis of a modification under Rule 60(a), they speak directly to the importance of the trial court memorializing its employment of the correct standard of proof during the proceedings in this context.

While case law highlights the significance of substantiating the use of the correct standard of proof, well-founded principles of statutory construction provide additional guidance. "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (internal citation omitted). "It is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *In re Estate of Lunsford*, 359 N.C. 382, 391–92, 610 S.E.2d 366, 372 (2005) (internal citation omitted). "If the statutory language is clear and unambiguous, the

court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted). *Black's Law Dictionary* defines a "clerical error" as "an error resulting from a minor mistake or inadvertence. . . ." *Clerical error*, *Black's Law Dictionary* (7th ed. 2002). Such an error as the omission of the proper standard of proof can hardly fall within the realm of a clerical error or mistake.

In the matter presently before our Court, due to a malfunction of the electronic recording device, we are without an original transcript from the proceedings and left only with a "narrative of the proceedings," the Original Order, and the Amended Order. Thus, it is impossible for this Court to determine whether the trial court announced the correct standard of proof in open court. The timeline and sequence of events in this matter is also noteworthy. The adjudicatory hearing on termination was held on 16 February 2022 and the Order of Termination was entered on 25 February 2022. On 28 February 2022, Father filed his notice of appeal. It was not until 27 May 2022 that Mother filed a Rule 60(a) motion that highlighted the deficiencies in the Original Order. Then, on 9 June 2022, the trial court granted Mother's motion pursuant to Rule 60(a) and entered the Amended Order.

In the Original Order, a single reference of an imprecise, albeit acceptable articulation of the standard of proof is present in the findings of fact, which states there is "clear and convincing evidence that it is in the best interests of the minor child that the Father's parental rights be terminated." *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) ("It is well established that 'clear and convincing' and 'clear, cogent, and convincing' describe the same evidentiary standard"). Still, a comparison of the Original and Amended Orders shows that the Original Order is deficient in that "[t]he burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on *clear, cogent, and convincing* evidence." N.C. Gen. Stat. § 7B-1109 (emphasis added). Here, in contrast to the Amended Order, the Original Order fails to assert the proper standard of proof for any findings beyond the "best interests of the minor child." Moreover, an application of available Rule 60(a) case law invites us to determine whether the additional language "alters the effect of the original order." *Buncombe Cnty. ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784 (1993). The Original Order has no legal effect, while the Amended Order is legally sufficient to terminate parental rights. Absent proper employment of the appropriate standard of proof by the trial court in either the written Order or the record of the proceedings, any subsequent addition including this standard of proof was substantive and an abuse of discretion.

In addition to challenging the propriety of the Rule 60(a) motion, Father challenges the trial court's factual findings, as well as its conclusion that his abandonment of Adam was willful. We do not reach the merits of these particular arguments because we conclude the trial court's Order is invalid.

IV. Conclusion

It is not lost on this Court that the differences between the two Orders are technical. Nonetheless, considering timeless legal principles and the fundamental rights at stake, we find the modifications were substantive rather than clerical in nature and divested the trial court of jurisdiction to make such changes pursuant to Rule 60(a). Accordingly, it was an abuse of discretion to grant Mother's Rule 60(a) motion to amend the Original Order terminating Father's rights. Therefore, we vacate the trial court's Amended Order terminating Father's parental rights and remand to apply the proper standard of proof. On remand, the trial court may consider additional evidence or hear further arguments if necessary.

VACATED AND REMANDED.

Judges HAMPSON and CARPENTER concur.

IN THE MATTER OF M.S., L.S., A.S., Minor Children

No. COA22-615

Filed 6 June 2023

1. Child Abuse, Dependency, and Neglect—neglect—findings of fact—clear, cogent, and convincing evidence—domestic violence incident

An order adjudicating three children as neglected was affirmed where clear, cogent, and convincing evidence supported the trial court's findings of fact, which included findings describing an incident of domestic violence inflicted upon the children's mother by their father. The trial court's failure to indicate the exact date that the incident occurred did not affect the underlying validity of the findings and did not constitute prejudicial error. Further, where the court found that the mother denied the incident of domestic violence to a social worker but that the social worker noticed a bruise

on the mother's arm, that finding was not based on improper hearsay evidence but on the social worker's in-court testimony regarding her observations of the bruise.

2. Child Abuse, Dependency, and Neglect—neglect—ceasing reunification efforts—factors—required findings—no prejudicial error

After adjudicating three children as neglected, the trial court did not abuse its discretion by ceasing reunification efforts with the children's parents where, although the trial court made inadequate findings about the aggravating circumstances listed in N.C.G.S. § 7B-901(c) to justify its disposition, the record contained ample evidence that reunification efforts would be inappropriate, and thus the court's error did not amount to prejudicial error.

3. Child Visitation—child neglect case—disposition—no visitation—insufficient findings

After a trial court adjudicated three children as neglected, the portion of its dispositional order directing that the children's parents have no visitation was vacated and remanded where, in its findings of fact, the court failed to address whether the parents had utilized any prior visitation periods. On remand, the court needed to make written findings regarding the parents' prior visitation with the children, and the court could deny visitation only upon finding that the parents had forfeited their visitation rights and that denying visitation would be in the children's best interests.

Appeal by respondents from judgment entered 28 April 2022 by Judge Corey J. MacKinnon in Rutherford County District Court. Heard in the Court of Appeals 9 May 2023.

Hanna Frost Honeycutt, for the petitioner-appellee.

Attorney for GAL, Matthew D. Wunsche, for the other-appellee.

Gillette Law Firm PLLC, by Jeffrey William Gillette, for the respondent-appellant.

Emily Sutton Dezio, PA, by Emily S. Dezio, for the respondent-appellant.

TYSON, Judge.

Respondent-Mother ("Mother") and Respondent-Father ("Father") appeal from a disposition and adjudication order entered on 28 April 2022, which ceased DSS's reunification efforts and all visitation of Mother and Father with their three children. We affirm in part, vacate in part, and remand.

I. Background

Rutherford County Department of Social Services ("DSS") obtained custody of Mother's and Father's three children, six-year-old Micky, five-year-old Lucy, and three-year-old Annette, on 7 February 2021. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors).

DSS received a report on 8 January 2021 alleging Mother and Father suffered from substance abuse issues, engaged in a history of domestic violence, and their home lacked electricity. DSS received another report three days later alleging improper supervision of the children, alcohol abuse by Father, and asserting Mother was often covered in bruises. A third report was received in early February and alleged Father had assaulted one of the minor children while visiting Father's family in Michigan and an "amber alert" was subsequently issued.

DSS investigations revealed a history of domestic violence between Mother and Father. The youngest child, Annette, who was one year old at the time, tested positive for methamphetamines two days after being removed from Mother's and Father's home. DSS also discovered Mother's and Father's parental rights had been terminated in Michigan for five other minor children: two children were Father's biological children, two children were Mother's biological children, and one was the biological child of both Mother and Father.

Shortly after DSS began investigating, Mother agreed to reside in the local PATH shelter to protect herself and the juveniles from Father, given the recent assault charges and amber alert accusations in Michigan. Mother left the PATH shelter after only a few days. DSS filed juvenile petitions for neglect, took custody of the children, and asserted:

> The Department received reports regarding this family on January 10, 11, and February 4, 2021. These reports included concerns of domestic violence, improper discipline, improper care, and substance use. The allegations were denied by the family. Throughout the assessment it was found that the family has significant history in Michigan. The parents were TPR'd [sic] on in Michigan

> due to sexual abuse. Throughout the assessment the professional collaterals had serious concerns for the children, due to being around [Father]. The family fled Michigan when they found out they were pregnant with [Micky], for fear that Michigan DSS would take this child. Due to severe concerns of domestic violence and sexual abuse and the children not being verbal, Social Worker [sic] scheduled a medical exam for the children. Before this exam took place, the family fled to Michigan. The report received on February 4, 2021, had serious concerns of substance use and domestic violence. Social Worker [sic] has not been able to reach or locate the family since the last week of January 2021. There are serious concerns regarding the risk of harm to these children based on the history of the parent's behavior with no evidence of treatment or behavior[al] change.

An order for nonsecure custody was entered because Mother and Father had "created conditions likely to cause injury or abuse or has failed to provide or is unable to provide, adequate supervision or protection." The juveniles were adjudicated as neglected for living in an environment injurious to their welfare pursuant to N.C. Gen. Stat. § 7B-101(15)(e) (2021).

The 9 February 2021 order on need for continued nonsecure custody provided Mother and Father should receive one hour of supervised visitation each week.

Father's case plan provided he:

> a) Agrees to complete a domestic violence batterer's assessment and take classes if recommended by the provider.
>
> b) Agrees to abide by the no-contact order in place between him and the children's mother, [ ].
>
> c) Agrees to complete a Comprehensive Clinical Assessment (CCA) and follow all recommendations.
>
> d) Agrees to complete a Sex Offender Evaluation.
>
> e) Agrees to submit random drug screens within 24 hours of the request.
>
> f) Agrees to maintain appropriate housing.
>
> g) Agrees to actively seek employment and notify the Social Worker of submitted job applications and interviews.

Mother's case plan on 17 February 2021 provided she:

> a) Agrees to complete a domestic violence victim's assessment and take classes if recommended by the provider.
>
> b) Agrees to abide by the no-contact order in place between her and the children's father, [ ].
>
> c) Agrees to participate in and graduate from parenting classes.
>
> d) Agrees to complete a Comprehensive Clinical Assessment (CCA) and follow all recommendations.
>
> e) Agrees to engage in therapy.

Mother attended one hour of supervised visitation. Nothing was noted in the record of any issues arising during that visit. A DSS witness testified shortly after that visit, Annette and Lucy began experiencing asserted "sexualized behaviors." Visitation was ceased after a pre-adjudication hearing held on 16 March 2021. The pre-adjudication order found:

> 4. That the minor child and siblings have been exhibiting sexualized behaviors that are not appropriate for their ages.
>
> 5. That the Department has obtained TPR orders from the State of Michigan regarding other minor children where the respondent parents had their rights terminated due to sexual abuse of those children and allowing the sexual abuse to occur.
>
> 6. That the potential harm to the minor child is greater than the benefit of visitation occurring at this time.

A hearing was held on 22 March 2022. DSS called several witnesses, including social workers, a foster care worker, foster care parents for the children, and the officer who had dealt with several domestic violence calls at Mother's and Father's home. Certified copies of the petitions and orders terminating Mother's and Father's parental rights to other children in Michigan were entered. Evidence at trial indicated Mother failed to acknowledge Father's domestic violence:

> [DSS ATTORNEY]: And did you ask the Respondent Mother about the domestic violence?
>
> [SOCIAL WORKER]: I did.
>
> [DSS ATTORNEY]: Okay. What was her answer?

> [SOCIAL WORKER]: She denied it. I'd spoke to her multiple times just offering my help if she needed it and she continuously denied it. I believe she actually told me there was some domestic violence in the past but that he was better now.

The trial court made identical findings for all three children and found:

> 8. That the Department received a report on the 8th of January, 2021 alleging substance abuse in the home and a lack of power at the residence.
>
> 9. That the social worker went to the home and found the home to be without running water. That the home did have power.
>
> 10. That all three children and the respondent parents were at the home.
>
> 11. That another report was received on the 11th of January, 2021 alleging improper supervision and alcohol abuse.
>
> 12. That the social worker went to the residence and noticed the respondent mother to be visibly upset and that she acts differently when the respondent father is present for the conversation.
>
> 13. That there is a history of 911 calls out to the house regarding domestic violence.
>
> 14. That the respondent father was charged with disorderly conduct and assault on a female after an incident in December of 2020.
>
> 15. That during that incident Officer James Greene found the respondent father in the middle of the road yelling obscenities towards another gentleman. He stopped to talk to the respondent father and the respondent father told him that the officer should go and check on his wife.
>
> 16. Officer Greene suspected that he was under the influence based on his behaviors.
>
> 17. Office[r] Greene arrived at the home where the respondent mother and three minor children were present. He observed the respondent mother to be beaten up with a blood[y] lip and bleeding from the side of her eye. The

respondent mother stated the respondent father assaulted her. She was offered but refused medical care.

18. The assault on a female was ultimately dismissed due to the respondent mother's failure to cooperate with the prosecution.

19. That part of his bond release conditions was to not have any contact with the respondent mother. He violated this condition on multiple occasions.

20. That when questioned by the social worker about the domestic violence, the respondent acknowledged a prior history of domestic violence but denied any current issues.

21. That the Department received another report alleging the respondent father assaulting one of the minor children and the respondent mother while they were in Michigan at the paternal grandmother's house. That an amber alert was issued on the 4th of February, 2021.

22. That the family returned to North Carolina and the social worker went to the home on the 6th of February, 2021.

23. That during this home visit the respondent mother stated that " [Father] is not well right now," referring to the respondent father. She stated that he is a "whole other person" and "needs help."

24. She denied the incident of domestic violence[,] but the social worker noticed a bruise on the respondent mother's arm.

25. The respondent mother did not allow a photograph to be taken of the bruise.

26. That the respondent father was in jail on this date, but bonded out on the 7th of February, 2021. That the social worker talked to the respondent father[,] and he acknowledged a history of domestic violence but stated it was in the past.

27. That the respondent mother agreed to go to the PATH Shelter with the minor children.

28. That she ultimately did not stay at the PATH Shelter and the Department took custody of the minor children.

29. That the social worker obtained DSS records from the State of Michigan. The respondent parents had their parental rights involuntarily terminated for multiple minor children due to the respondent father sexually abusing a minor child and physically abusing another minor child. The respondent mother allowed the abuse.

30. The records also indicate a history of domestic violence between the respondent parents while residing in Michigan.

31. That there are no records to indicate the respondent father received any type of sex offender treatment to address the concerns from the prior case.

32. The respondent parents moved to North Carolina shortly after their rights were terminated in Michigan.

33. That on the 9th of February, 2021, the minor child [Annette] was drug screened and her hair was positive for methamphetamines.

34. That after the minor children were placed in the custody of the Department[,] they were placed in foster home.

35. That the minor children had significant delays and were assessed to need speech and occupation therapy. None of the minor children were able to communicate verbally.

. . . .

37. The minor child, [Lucy], was placed by herself in a foster home. The foster mother observed her to have nightmares and to be scared of the bathroom.

38. She also observed [Lucy] to push toys against her private area and that she would grind her private area on the side of the bathtub.

39. She was also observed to keep her legs tightly crossed and could be heard say "no no" at night.

40. On one occasion she was given lotion after a bath[,] and she immediately went to rub the lotion on her private area.

41. On another occasion, she was handed a phone and immediately pointed the camera at her private area.

42. That [Lucy] demonstrated sexualized behaviors that are not age appropriate.

43. That initially, [Annette] and [Micky] were placed together in a foster home.

44. The foster parents observed [Micky] to have severe physical tantrums and to be non-verbal. That he would have nightmares where he would start screaming. That he was 4 at the time.

45. That [Micky] would have food aggression.

46. That he avoided bath time and had to be carried in the bathroom to be cleaned.

47. That [Annette] was observed to have fear of everyone, especially males. That she would scream and cry a lot.

48. That she, like her siblings, did not want to take a bath. The placement had to use baby wipes to clean her for the first few weeks while in their care.

49. She also demonstrated sexualized behaviors of rubbing her private area against her car seat, high chair, and in the bathtub.

50. She had nightmares every night and would wake up drenched in sweat. She could be heard saying "no."

51. That the foster parents observed [Micky] and [Annette] not to have a sibling bond.

52. That all of the minor children have significant delays.

53. That there is a long-standing history of domestic violence between the respondent parents and these children have been exposed to the domestic violence. There was at least one incident of significant domestic violence in front of the minor children in North Carolina.

54. All three children exhibit overly sexualized behaviors for their age.

55. The Court took Judicial Notice of 20 CR 53048.

56. That the minor child named above is a neglected juvenile as defined by N.C. G[en.] S[tat.] § 7B-101(15).

During the dispositional hearing held on the same day, a foster care worker testified regarding Mother's and Father's compliance with their case plans. The possibility of other family members obtaining custody of Micky, Annette, and Lucy was also discussed.

At the disposition hearing, the trial court found these additional facts:

> 7. That as of March 22, 2022, the respondent mother has not completed any of the [case plan] items. She has not engaged in domestic violence classes even though DSS has provided her with the contact information for the program.
>
> 8. That the no contact order was dismissed and the respondent mother is now living with the respondent father again. They are both homeless or living in different motels when they have the money. They can be found walking on the trail or sitting at Wal-Mart holding signs asking for money.
>
> 9. That DSS made a referral for the respondent mother to complete her Comprehensive Clinical Assessment[,] but she never followed through with this.
>
> 10. That DSS made another referral[,] and the respondent mother completed the assessment on October 8, 2021 but did not return for services until the dates listed below: February 14, 2022 (Outpatient therapy), February 21, 2022 (outpatient therapy), March 11, 2022 (medication management) NO SHOW, March 25, 2022 (Outpatient therapy).
>
> 11. That the respondent mother has refused drug screens on two separate occasions.
>
> 12. That the respondent mother has not made any progress on her case plan. She does sometimes attend court in this matter.
>
> . . .
>
> 14. That as of March 22, 2022, the respondent father has submitted one drug screen at the beginning of the case. He completed a domestic violence batterer's assessment and was recommended to participate in batterer's classes. The respondent father has not followed through with his classes or completed any of the other items listed above.

15. That the respondent father completed an assessment for the Batterer's Intervention Program in April 2021 but did not return to begin classes. He has since been discharged.

16. That he did not obtain a sex offender evaluation.

17. That the no contact order was dismissed[,] and the respondent mother is now living with the respondent father again. They are both homeless or living in different motels when they have the money. They can be found walking on the trail or sitting at Wal-Mart holding signs asking for money.

18. That the respondent father has a criminal court date of April 11, 2022 to address the current pending charges. If convicted[,] his probation will be revoked[,] and he will be looking to serve jail time. The respondent father also has a felony charge that will be addressed after the April 11, 2022 court date.

1[9]. That the respondent father reports he is engaged in TASC services[,] but he has not signed a release for DSS to receive this information. That the respondent father's probation officer reports he is not passing drug screens.

[20]. That the respondent father has not made any progress on his case plan.

[21]. That a Court Report for the Dispositional Hearing was received into evidence and reviewed by the Court, and the facts contained in said summary are incorporated herein as further findings of fact. The Court Report, marked as Exhibit "A", is attached hereto and incorporated herein by reference.

2[2]. That the Department has made reasonable efforts towards the permanent plan of reunification in this matter.

2[3]. That reasonable efforts for reunification have been made by the agency to include: development of the Out of Home Service Agreement for the respondent mother; Child and Family Team Meetings, home visits, and other services as described in the attached court report.

2[4]. That the conditions which led to the placement of the Child in DSS custody still exist and the return of the

> Child to the home of the respondent parents would be contrary to the welfare of the Child at this time. That the respondent father is appropriate for a trial home placement.
>
> 2[5]. That it is in the best interest of the Child to remain in the custody of Rutherford County Department of Social Services.
>
> 2[6]. That the recommendation for th[ese] [juveniles] is a plan of non-reunification and to come back within 30 days to set a permanent plan for the minor child[ren].
>
> 2[7]. That both respondent parents have had their parental rights involuntarily terminated in Michigan. That neither testified in this matter.

The trial court adjudicated all minor children as neglected under N.C. Gen. Stat. § 7B-101(15) (2021). The trial court concluded DSS reunification efforts with Mother and Father was not required pursuant to N.C. Gen. Stat. § 7B-901(c) (2021), and a permanency planning hearing was scheduled within thirty days instead of the typical ninety days window. N.C. Gen. Stat. § 7B- 901(d). Mother and Father timely appealed.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issues

Father argues several findings of fact are not supported by competent evidence. He also argues the evidence, taken as a whole, fails to support an adjudication of neglect.

Father and Mother both argue the trial court erred by ceasing reunification efforts in the initial dispositional orders. They argue the trial court improperly based its decision on the involuntary termination of Mother's and Father's parental rights for the five other children in Michigan.

Father and Mother both assert the district court abused its discretion by ordering no visitation between the parents and their children.

IV. Neglect Adjudication

[1] Father challenges several findings of fact, including findings of fact 12, 14-17 and 24. He argues those findings of fact are not supported by competent evidence. Without those facts, Father argues the findings of

fact only demonstrate a "raw suspicion" of domestic violence, and no evidence exists to demonstrate direct violence.

A. Standard of Review

In reviewing an adjudication order, this Court must determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations and internal quotation marks omitted). "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

Unchallenged findings of fact are presumed to be supported by sufficient evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

B. Analysis

"The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2021).

1. Finding of Fact 12

Finding of fact 12 provides: "the social worker went to the residence and noticed the respondent mother to be visibly upset and that she acts differently when the respondent father is present for the conversation."

The DSS attorney asked the social worker about Mother's demeanor during direct examination. The social worker answered: "Most of the time when I went to the home [Mother] was upset and crying, just tearful most of the time." On redirect, the DSS attorney had the following exchange with the social worker:

> [DSS ATTORNEY]: All right. And on your first, I'm looking at your dictation again, and on your first trip out there [Father] was there when you first arrived but he had to leave for a little bit and you described that when he left . . . Respondent Mother, began to cry?
>
> [SOCIAL WORKER]: Yes.
>
> [DSS ATTORNEY]: She was upset. Do you remember that?
>
> [SOCIAL WORKER]: I do.

> [DSS ATTORNEY]: And did she state why she was upset?
>
> [SOCIAL WORKER]: She never really would. I remember specifically multiple home visits, me going and her crying for no alleged, I mean she never really gave me a reason as to why she was so upset.

The social worker testimony revealed her multiple personal observations and rationally-based perception regarding Mother's behavior. Finding of Fact 12 was based on clear, cogent, and convincing evidence. Father's argument is without merit.

2. Findings of Fact 14-17

Father also argues findings of fact 14-17 are not supported by clear, cogent, and convincing evidence. Those findings of fact collectively describe Officer Greene's encounter with Father in late 2020 and his follow-up encounter with Mother. Father asserts Officer Greene's testimony omits the date the domestic violence incident occurred, and the trial court's finding was not based on clear, cogent, and convincing evidence. Officer Greene testified to the following at trial:

> [DSS ATTORNEY]: Officer Greene, I'm going to show you a shuck, criminal file. Is this the one where you took out the charge?
>
> [OFFICER GREENE]: Yes, sir.
>
> [DSS ATTORNEY]: Okay. And can you just tell me the events of how that charge came about that day?
>
> [OFFICER GREENE]: That day we dealt with [Father]. He was in front of Tri-City Motel on the East, at the intersection of East Main Street and Ledbetter Road in our city limits of Spindale. We got a call about a subject being disruptive in the middle of the roadway. Myself and my partner, Officer Edwards, got there. [Father] was in the middle of the roadway shouting obscenities towards Tri-City Motel. We asked [Father] on several occasions to step out of the roadway. He didn't listen. We then placed him under arrest for [being] disruptive and shouting obscenities towards the hotel. And at the time during his arrest he made the comment to me that I need to go check on his wife at the residence and that's where the charge came from when I went to check on his wife at the residence after we had arrested him for the other charge.

> [DSS ATTORNEY]: Did you go, did you go check on his wife?
>
> [OFFICER GREENE]: I did, at 175 Illinois Street.
>
> [DSS ATTORNEY]: So what was the scene when you arrived?
>
> [OFFICER GREENE]: When I got there it was dark inside the residence, knocked on the door. [Mother] came to the door and let us in. Well, actually she didn't let us in. She knocked on the door and we walked [sic], was checking on her to make sure she was okay. Opened the door, seen her sitting on the couch. It was dark in there. She had her three children in there with her and she was beat up in her face, eye swelled up, bleeding from her lip, from the side of her eye. I asked her then did she need medical treatment. She didn't want medical treatment. She didn't want us to be there. I asked her what had happened and she stated that her and her husband, [Father], had got into an argument and he had assaulted her but she didn't want to press charges against him.
>
> [DSS ATTORNEY]: Did [Father], so was he being carried to the jail?
>
> [OFFICER GREENE]: Yes, he was already in custody at the county jail at the time, yes.
>
> [DSS ATTORNEY]: So when he told you to go check on his wife, I mean that's kind of an abnormal thing to say –
>
> [OFFICER GREENE]: It was.
>
> [DSS ATTORNEY]: – after being arrested. Did he offer any explanation?
>
> [OFFICER GREENE]: He didn't. He just stated a couple of times you may want to go check on my wife.

Officer Greene's testimony was based on personal observations and provided clear, competent and convincing evidence to support the trial court's findings of fact. Officer Greene was presented with the criminal file of the charges he initiated at trial and testified about what he had remembered from the encounter. Later, during the testimony of the social worker, the court acknowledged the incident had actually occurred in November 2020:

> THE COURT: Any other follow-ups? You said that it was January. Are we talking about January of '21?
>
> THE WITNESS: Yes.
>
> THE COURT: So after the criminal charge which was looks like November of –
>
> THE WITNESS: Yeah.

Whether the trial court's findings indicate the exact date the incident occurred does not affect the underlying validity of the findings. A minor error about the exact date upon which a domestic violence incident occurred is not prejudicial. *In re Clark*, 72 N.C. App. 118, 126, 323 S.E.2d 754, 759 (1984) (explaining any "ambiguity" in the evidence or findings of fact regarding the exact date of an assault are "minor" and "non-prejudicial"). Additionally, the children's court reports provide the exact day Father was arrested on 19 November 2020. Father's argument is without merit.

3. Finding of Fact 24

Father lastly asserts finding of fact 24, which provided Mother "denied the incident of domestic violence[,] but the social worker noticed a bruise on the respondent mother's arm," was based on improper hearsay evidence. Father's argument refers to the following exchange:

> [DSS ATTORNEY]: When you went to see the Respondent Mother when they got back from Michigan, did you observe any marks or bruises on her?
>
> [SOCIAL WORKER]: In reading the dictation on-call did. She observed a bruise on her arm.
>
> [DSS ATTORNEY]: Did anyone ask the Respondent Mother about the bruise?
>
> [SOCIAL WORKER]: They did. They asked what happened and –
>
> [FATHER'S ATTORNEY]: Objection. This is hearsay.
>
> THE COURT: Who – are you testifying about the conversation you had with her or –
>
> [SOCIAL WORKER]: No, just what was in dictation from the on-call social worker.
>
> [FATHER'S ATTORNEY]: I'd ask to *voir dire* (inaudible).

> THE COURT: I'm going to actually sustain the objection but, sure.

The record indicates Father objected to any testimony regarding what the social worker had *asked* Mother about the bruise, which the Court sustained as hearsay. Finding of fact 24 is instead based upon the statement elicited *prior* to the hearsay objection, which asserted the social worker had observed a bruise on Mother's arm. Father failed to object to this portion of the testimony at trial. His argument is overruled.

V. Ceasing Reunification Efforts

[2] Father and Mother each argue the trial court erred by ceasing reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c).

A. Standard of Review

If the trial court follows the factors in the statute and enters supported findings of fact, a trial court's permanency planning decision to cease reunification efforts pursuant N.C. Gen. Stat. § 7B- 901(c) is reviewed for an abuse of discretion. *In re B.R.W.*, 278 N.C. App. 382, 409, 863 S.E.2d 202, 221 (2021) (explaining "as long as the trial court considers the factors as required by N.C. Gen. Stat. § 7B-901(c) and makes the appropriate findings, we can find no abuse of discretion by the trial court's decision"), *aff'd*, 381 N.C. 61, 871 S.E.2d 764 (2022).

B. Analysis

Our General Assembly amended the statute governing dispositional hearings in 2015. The current version of the statute provides:

> (c) If the disposition order places a juvenile in the custody of a county department of social services, the court *shall direct* that *reasonable efforts for reunification* as defined in G.S. 7B-101 *shall not be required* if the court makes written findings of fact pertaining to any of the following, unless the court concludes that there is compelling evidence warranting continued reunification efforts:
>
> . . .
>
> (2) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent.

N.C. Gen. Stat. § 7B-901(c)(2) (2021) (emphasis supplied).

Here, the trial court concluded: "a ground exists under N.C.G.S. 7B-901(c) and therefore a reunification plan is not appropriate in this

matter. That no compelling interest exists to order a plan of reunification." The court made no findings on reasons, culpability, or temporal proximity of that ground to conclude "no compelling interest exists to order . . . reunification," where the constitutional safeguards and the statute mandates "the court *shall direct* that *reasonable efforts for reunification*" be made. *Id.* (emphasis supplied).

Mother argues she was not bound by her case plan because she never signed it. The record on appeal does not contain any case plan which bears the Mother's signature. Father's attorney cross-examined the foster care worker on this issue. The social worker testified each time she contacted Mother and Father she would "go over their case plans and discuss[:] are you guys working on this, what can I help you with, do I need to call and make appointments, those types of things, so they were aware of what was on their case plans."

The social worker testified Father and Mother had failed to comply with the vast majority of their case plans, and neither parent had fully completed a single item therein. The trial court found Mother had initialed many of the aspects of her purported plan, but she had failed to follow up on or complete the requirements. The trial court also found the conditions which led to the children's placement in DSS custody still existed, and Mother and Father had failed to address the issues which led to the children's removal. DSS entered into evidence certified copies of the petitions and orders from Michigan terminating Mother's and Father's parental rights to other children.

Respondents have failed to show the trial court prejudicially erred by not ordering DSS's reunification efforts be continued under N.C. Gen. Stat. § 7B-901(c)(2). *In re B.R.W.*, 278 N.C. App. at 409, 863 S.E.2d at 221.

VI. Visitation

[3] Father and Mother both assert the district court abused its discretion by ordering no visitation with their children.

A. Standard of Review

If the trial court follows the factors and mandates in the statute and case law and enters supported findings of fact, "appellate courts review the trial court's dispositional orders of visitation for an abuse of discretion, with an abuse of discretion having occurred only upon a showing that the trial court's actions are manifestly unsupported by reason." *In re L.E.W.*, 375 N.C. 124, 134, 846 S.E.2d 460, 468 (2020) (citations, internal quotation marks, and alterations omitted); *accord In re J.H.*, 244 N.C. App. 255, 269, 780 S.E.2d 228, 238 (2015) ("We review a trial court's

determination as to the best interest of the child for an abuse of discretion.") (citation and quotation marks omitted).

"Abuse of discretion exists when the challenged actions are manifestly unsupported by reason." *In re S.R.*, 207 N.C. App. 102, 110, 698 S.E.2d 535, 541 (2010) (citation and internal quotation marks omitted); *see also In re A.J.L.H.*, 384 N.C. 45, 57, 884 S.E.2d 687, 695-96 (2023).

B. Analysis

N.C. Gen. Stat. § 7B-905.1 addresses visitation between a parent and their children who are removed from their home and taken from their custody:

> An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the *juvenile's placement outside the home shall provide for visitation* that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation. The court may specify in the order conditions under which visitation may be suspended.

N.C. Gen. Stat. § 7B-905.1(a) (2021) (emphasis supplied).

An order that revokes custody or continues the placement of a juvenile outside the home must establish a visitation plan for parents unless the trial court finds "that the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation." *In re T.H.*, 232 N.C. App. 16, 34, 753 S.E.2d 207, 219 (2014) (citation and internal quotation marks omitted); *In re J.L.*, 264 N.C. App. 408, 421, 826 S.E.2d 258, 268 (2019) (explaining a trial court may only "prohibit visitation or contact by a parent . . . consistent with the juvenile's health and safety").

> [I]n the absence of findings that the parent has forfeited his or her right to visitation or that it is in the child's best interest to deny visitation, the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place, and conditions under which such visitation rights may be exercised. As a result, even if the trial court determines that visitation would be inappropriate in a particular case or that a parent has forfeited his or her right to visitation, it must still address that issue in its dispositional order and either adopt a visitation plan or specifically determine that such a plan would be inappropriate in light of the specific facts under consideration.

In re K.C., 199 N.C. App. 557, 562, 681 S.E.2d 559, 563 (2009) (citation, internal quotation marks, and alterations omitted).

When wholly denying visitation between a parent and their child, this Court has previously considered factors such as: (1) whether the parent denied visitation has a "long history with CPS"; (2) whether the issues which led to the removal of the current child are related to previous issues which led to the removal of another child; (3) whether a parent minimally participated, or failed to participate, in their case plan; (4) whether the parent failed to consistently utilize current visitation; and, (5) whether the parent relinquished their parental rights. *See In re J.L.*, 264 N.C. App. at 422, 826 S.E.2d at 268 (analyzing a trial court's compliance with N.C. Gen. Stat. § 7B-905.1 regarding the visitation provisions awarded in a permanency planning order).

In addition to the parental protections contained in the statutes, the Supreme Court of the United States has repeatedly confirmed there is a fundamental and constitutional right of parents to the "care, custody and control" of their children. *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000) (citations omitted). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158,166, 88 L. Ed. 645, 652 (1944).

> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *See, e.g.*, *Stanley v. Illinois*, 405 U. S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence

> historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course.")[.]

Troxel, 530 U.S. at 66, 147 L. Ed. 2d at 57.

DSS must overcome the constitutional and "the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* at 69, 147 L. Ed. 2d at 59 (citing *Parham*, 442 U.S. at 602, 61 L. Ed. 2d at 121). Mere disagreement with or failing to follow a DSS recommendation does not render a parent unfit, nor is necessarily conduct inconsistent with the rights of a parent. *Id.* Those decisions rest with the parent.

There is often "testimony in the record below that could have supported different factual findings and possibly, even [ ] different conclusion[s,] [b]ut an important aspect of the trial court's role as finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence." *In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019). While the trial court is "uniquely situated to make [a] credibility determination," and "appellate courts may not reweigh the underlying evidence presented at trial," the constitutional and "the traditional presumption that a fit parent will act in the best interest of his or her child" must be overcome by the State proving unfitness or conduct inconsistent with parental rights by the prescribed burden of proof. *Id.*; *Troxel*, 530 U.S. at 69, 147 L. Ed. 2d at 59 (citing *Parham*, 442 U.S. at 602, 61 L. Ed. 2d at 121).

Findings describing a parent's failure to engage with a case plan or services, even if previously agreed to, does not compel, but *may* support a finding that visitation is inconsistent with a child's health and safety and may indicate probability of future neglect without a change in the parent's circumstances, status, or conditions. *In re C.M.*, 273 N.C. App. 427, 432, 848 S.E.2d 749, 753 (2020).

Depending on proper prior notice to the parents, the adjudication, initial dispositional hearing, and permanency planning hearing can be held on the same day. *In re C.P.*, 258 N.C. App. 241, 244, 812 S.E.2d 188, 191 (2018). In *In re E.A.C.*, this Court stated: "Although the Juvenile Code has established a sequential hearing process, courts may combine and conduct the adjudicatory, dispositional, and permanency planning hearings on the same day." 278 N.C. App. 608, 614-15, 863 S.E.2d 433, 438 (2021) (citing *In re C.P.*, 258 N.C. App. at 244, 812 S.E.2d at 191).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and the North Carolina Constitution protects

"a natural parent's paramount constitutional right to custody and control of his or her children" and ensures that "the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (citations omitted).

Here, the trial court failed to address whether Mother and Father utilized any prior visitation periods. *See In re J.L.*, 264 N.C. App. at 422, 826 S.E.2d at 268. The trial court had initially ordered visitation of the children with Mother and Father. Only Mother visited her children, while under DSS supervision. The record does not reflect any issues that arose *during* the visitation.

This matter is remanded to the trial court for further consideration. The trial court is instructed to make written and supported findings of fact regarding Mother's and Father's prior utilization of visitation. *Id.* The trial court may deny visitation *only* upon a finding that Mother or Father "has forfeited their right to visitation [and] it is in the child's best interest to deny visitation." *In re T.H.*, 232 N.C. App. 16, 34, 753 S.E.2d 207, 219 (2014) (quotation marks and citation omitted).

VII. Conclusion

The trial court's findings of fact related to the adjudication and disposition of the placement of the children outside the home are supported by clear, cogent, and convincing evidence. *In re Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365; *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676; *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. That portion of the order is affirmed.

The trial court's decision to cease DSS' statutorily required reunification efforts of the children with Father and Mother is not shown to be an abuse of discretion. *In re B.R.W.*, 278 N.C. App. at 409, 863 S.E.2d at 221. The record shows no efforts by Father to relieve the conditions which led to the children's removal from the home. That portion of the order is affirmed.

The disposition order concerning visitation is vacated and remanded to the trial court for further consideration of whether Mother and Father utilized the visitation previously awarded to them and for a determination of visitation. N.C. Gen. Stat. § 7B-905.1. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges ARROWOOD and RIGGS concur.

IN RE N.T.

[289 N.C. App. 149 (2023)]

IN THE MATTER OF N.T., K.M., A.C.

No. COA22-582

Filed 6 June 2023

1. Child Abuse, Dependency, and Neglect—permanency planning—ceasing reunification efforts—sufficiency of evidence

In a neglect matter, in which three minor children were removed from their parents' home after the youngest suffered from an unexplained, non-accidental skull fracture at one month old, the trial court did not err by entering a permanency planning review order allowing the department of social services (DSS) to cease reunification efforts with the parents where the court's factual findings—regarding the parents' lack of progress on their case plans and continued inability to explain the cause of the skull injury—were based on sufficient competent evidence, including testimony, reports, and letters from DSS, the children's guardian ad litem, the parents' therapists, and family members.

2. Child Abuse, Dependency, and Neglect—permanency planning—guardianship to nonparent—constitutionally protected parental status

In a neglect matter, in which three minor children were removed from their parents' home after the youngest child suffered from an unexplained, non-accidental skull fracture at one month old, the trial court did not err by entering a permanency planning review order awarding guardianship of the children to their paternal grandparents. The court's determination that the parents had acted inconsistently with their constitutionally protected parental rights and were not fit and proper persons to have custody of the children was supported by findings that the parents still had not provided an explanation for how the youngest child got injured and had not fully complied with all aspects of their respective case plans. Those findings, in turn, were supported by competent evidence including testimony, reports, and letters from the department of social services, the children's guardian ad litem, the parents' therapists, and family members.

3. Child Abuse, Dependency, and Neglect—permanency planning—guardianship to nonparent—best interests of the child

In a neglect matter, in which three minor children were removed from their parents' home after the youngest child suffered from an

unexplained, non-accidental skull fracture at one month old, the trial court did not abuse its discretion by determining that guardianship with family members would be in the children's best interests. The court's factual findings regarding bests interests were supported by the same competent evidence that supported the court's decision to end reunification efforts, including testimony, reports, and letters from the department of social services, the children's guardian ad litem, the parents' therapists, and family members.

Appeal by Respondent-Mother and Respondent-Father from order entered 28 March 2022 by Judge David E. Sipprell in Forsyth County District Court. Heard in the Court of Appeals 10 May 2023.

Melissa Starr Livesay, Assistant County Attorney, for Petitioner-Appellee Forsyth County Department of Social Services.

Ellis & Winters LLP, by James M. Weiss, for Appellee-Guardian ad Litem.

Anné C. Wright for Respondent-Appellant Mother.

Kimberly Connor Benton for Respondent-Appellant Father.

COLLINS, Judge.

Respondent-Mother and Respondent-Father appeal from the trial court's order ceasing reunification efforts with their minor children Nate, Kat, and Amy[1] and awarding guardianship of the children to Nate's paternal grandparents. We affirm.

I. Factual and Procedural Background

Mother is the biological mother of Nate, Kat, and Amy. Father is the biological father of Nate and the caretaker of Kat and Amy.[2]

Forsyth County Department of Social Services ("DSS") received a report on 6 June 2018 that one-month old Nate had been admitted to Brenner's Children's Hospital with an unexplained skull fracture. Although Mother and Father told DSS that they were the sole caretakers for Nate, neither parent could provide an explanation for Nate's injuries.

---

1. We use pseudonyms to protect the identities of the minor children. *See* N.C. R. App. P. 42.

2. Kat and Amy's putative father is not a party to this appeal.

Nate was diagnosed with bilateral skull fractures, bilateral scalp hematomas, and a small extra-axial hemorrhage along the right cerebral portion of his brain. Dr. Stacy Thomas with Brenner's Children's Hospital opined that Nate's injuries were the result of non-accidental trauma.

DSS filed petitions on 11 June 2018 alleging that Nate was abused and neglected, and that Kat and Amy were neglected. DSS obtained non-secure custody of all three children and placed them with Nate's paternal grandparents. After a hearing on 17 October 2018, the trial court entered an order on 24 January 2019 adjudicating all three children neglected and ordering that custody remain with DSS.

Throughout the life of the case, Mother maintained that Nate's injuries were caused by birth trauma. Furthermore, at a permanency planning meeting on 4 April 2019, Father presented new information to DSS and the Guardian ad Litem ("GAL") regarding the possible cause of Nate's injuries:

> The Father placed [Nate's] car seat on the ground. [Amy] and [Kat] were in the back seat of the car arguing and the Father attempted to stop the girls from arguing when his foot hit [Nate's] car se[a]t and [Nate] slipped out of the car seat onto the ground. The Mother was in the passenger seat but did not witness the accident. The Mother asked what happened after hearing [Nate] cry, the Father stated nothing.

The trial court entered a permanency planning order on 15 May 2019, setting a primary plan of guardianship and a secondary plan of reunification. Following a hearing on 1 July 2020, the trial court entered an order on 31 August 2020 ceasing reunification efforts with Mother and Father, eliminating reunification as a secondary plan, and awarding guardianship of all three children to Nate's paternal grandparents. Both Mother and Father appealed, and this Court vacated the permanency planning order and remanded to the trial court to "determine whether Nate is an Indian Child for purposes of ICWA and to ensure compliance with ICWA's notice requirements." *In re N.T.*, 278 N.C. App. 811, 860 S.E.2d 343 (2021) (unpublished).

On remand, the trial court held an additional hearing on 21 February 2022 before entering an order on 28 March 2022 finding that ICWA did not apply, ceasing reunification efforts, eliminating reunification as a secondary plan, and awarding guardianship of all three children to Nate's paternal grandparents.

Mother and Father timely appealed.

II. Discussion

A. Standard of Review

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re M.T.*, 285 N.C. App. 305, 322, 877 S.E.2d 732, 746 (2022) (quotation marks and citations omitted). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.M.*, 276 N.C. App. 291, 299, 856 S.E.2d 904, 910 (2021) (quotation marks and citation omitted). "At the disposition stage, the trial court solely considers the best interests of the child. . . ." *In re J.H.*, 373 N.C. 264, 268, 837 S.E.2d 847, 850 (2020) (quotation marks and citation omitted).

The trial court's findings of fact are conclusive on appeal if supported by any competent evidence, notwithstanding contrary evidence in the record. *In re C.M.*, 273 N.C. App. 427, 430, 848 S.E.2d 749, 751-52 (2020). The trial court's conclusions of law are reviewed de novo. *In re K.L.*, 254 N.C. App. 269, 272-73, 802 S.E.2d 588, 591 (2017).

B. Reunification

[1] Mother and Father both contend that the trial court erred by ceasing reunification efforts and eliminating reunification as a permanent plan because the findings of fact made pursuant to N.C. Gen. Stat. § 7B-906.2 are not supported by competent evidence.

At a permanency planning hearing, reunification shall be a primary or secondary plan unless, inter alia, the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. N.C. Gen. Stat. § 7B-906.2(b) (2022). The trial court must also make written findings of fact concerning:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2022).

Here, the trial court made the following findings of fact:

> 39. The [c]ourt ordered the Respondent Mother . . . to comply with all of the following in order to correct the circumstances which caused the children's removal from her care and custody and adjudication if she wished to be reunified with the children:
>
> a. **Notify FCDSS of any changes in address, telephone number, income, employment, or household composition within 24 hours:**
>
> [Mother] has reported that none of this information has changed with the exception of her having a baby in January 2022. Since this case has been pending and [Nate], [Kat], and [Amy] have been removed, [Mother] has had three children.
>
> b. **Comply with any recommendations made as a result of the parenting capacity assessment completed and provide any and all documentation regarding how [Nate] received his injuries other than birth trauma:**
>
> [Mother] reports that she continues to attend individual counseling with Ms. Anne Doherty monthly. However, when asked if therapy was helpful or beneficial, [Mother] responded that it was not beneficial or helpful, but stated she "will keep trying it." Previously, [Mother] signed a limited release which only allowed her attorney to obtain her records. Therefore, FCDSS has never received any mental health records to be able to verify that [Mother] is attending therapy or the nature of objective of the therapy attended.
>
> On February 8, 2022, FCDSS Social Work Supervisor Burleson received release of information forms from Attorney Mortis for [Mother's] mental health records. Supervisor Burleson then requested records from Ms. Doherty. To date, FCDSS has not received any records.
>
> As of January 2022, [Mother] has not provided any additional information or documentation to FCDSS regarding how [Nate] received his injuries, other than birth trauma and the incident with the car seat that was provided to the [c]ourt at the April 12, 2019 Permanency Planning Hearing.

On February 4, 2020, FCDSS received documentation from Stokes County DSS, the county in which [Mother] and [Father] have resided since after the children's removal. The documentation shows that [Mother] told a CPS worker on September 12, 2020, "I don't know how he got the injury. I guess I should have just told them my other kid did it or something. I can't lie." More recently, on June 2, 2020, [Mother] reported that she believes that [Nate] has a medical disorder that would account for his injuries. She reported that she continues to believe that birth trauma could be a cause of his injuries.

As of January 2022, [Mother] continues to report to FCDSS that birth trauma is the cause of [Nate's] injuries.

c. **Maintain a safe and stable living environment:**

FCDSS went out to the home of [Father] and [Mother] on November 24, 2021 and observed the parents in the home with two toddlers. The home was sufficiently baby-proofed, however there were stacks of items throughout the home that were out of reach of the children at that time, however, could pose an issue as the children grow and become more mobile. The family is making plans to repurpose their garage into a room for the older girls to share, there is a bedroom for the three children who remain in [Father] and [Mother's] custody, and a bedroom for [Nate].

In her testimony, Supervisor Burleson acknowledged that she observed no safety concern in [Mother and Father's] home. However, Supervisor Burleson was not at the home to assess the safety and welfare of the three children who reside with [Mother] and [Father]. Supervisor Burleson's observation was that the home was a physically safe location for the children and there were no apparent issues with the two children who were present in the home at the time of her visit.

d. **Demonstrate the ability to meet the basic needs of [Amy], [Kat], and [Nate]:**

[Nate's paternal grandparents] report that the parents have provided items for the children, such as clothing, snacks, and toiletries and financial support.

e. **Demonstrate skills learned in parenting classes during visitation with [Amy], [Kat], and [Nate]:**

Per reports of the children, caregivers and parents, the visits have been going well and earlier in COVID it was harder to have visits in person. The family reports that they have 8 hours of visitation per week, however, when looking at the closing court order from July 2020, the parents were to get a minimum of 4 hours per week.

[Nate's paternal grandparents] have expressed that the 8 hours per week poses a hardship at times as they want to follow the [c]ourt's order, however with the parents' work schedules, 8 hours per week presents a challenge. FCDSS would be recommending no more than 4 hours per week.

[Mother] and [Father] try to make valuable use of the time to engage the older girls in activities and crafts. [Father], due to his work schedule at nights, calls the children in the morning before going to school and speaks with them.

. . . .

41. Around June 2, 2020, [Mother] reported that she was going monthly for counseling, but she stopped for two months. At that time in regards to her sessions, [Mother] reported that "They're going," "I talk to her," and "We're working on stuff." [Mother] would not provide more information to FCDSS about what she is learning in sessions or her therapeutic goals.

. . . .

44. The Respondent Father . . . was ordered to comply with all of the following in order to correct the circumstances which caused his child's removal from his care and custody and adjudication if he wished to be reunified:

a. **Notify FCDSS of any changes in address, telephone number, income, employment, or household composition within 24 hours:**

[Father] reports the only change for him is his employment. He is now employed . . . driving a forklift and currently works 2nd shift as of September 2021.

b. **Comply with any recommendations made as a result of the parenting capacity assessment completed and provide any and all documentation regarding how [Nate] received his injuries other than birth trauma:**

[Father] reports that he continues to be engaged with Mr. George Hage with Counseling and Spirituality and going monthly. FCDSS has inquired about the releases for Mr. Hage and [Father] reported FCDSS would have to get those from his attorney.

As of February 18, 2022, FCDSS had not received any releases for [Father], therefore has no records for verification that he is attending therapy or the nature or goals of any therapy attended.

[Father] has not provided any additional information or documentation to FCDSS regarding how [Nate] received his injuries, other than birth trauma and the incident with the car seat that was provided to the [c]ourt at the April 12, 2019 Permanency Planning Hearing. [Father] concurs with [Mother] that [Nate] may have a medical condition or that the injuries in question were caused by birth trauma.

c. **Maintain a safe and stable living environment:**

FCDSS went out to the home of [Father] and [Mother] on November 24, 2021 and observed the parents in the home with 2 toddlers. The home was sufficiently baby-proofed, however there were stacks of items throughout the home that were out of reach of the children at that time, however, could pose an issue as the children grow and become more mobile. The family is making plans to repurpose their garage into a room for the older girls to share, there is a bedroom for the 2 toddler and now new infant to share and then a bedroom for [Nate]. The home is in good condition and was appropriate.

d. **Demonstrate the ability to meet the basic needs of [Amy], [Kat], and [Nate]:**

[Nate's paternal grandparents] report that the parents have provided items for the children, such as clothing, snacks, and toiletries and financial support.

e. **Demonstrate skills learned in parenting classes during visitation with [Amy], [Kat], and [Nate]:**

Per reports of the children, caregivers and parents, the visits have been going well and earlier in COVID it was harder to have visits in person. The family reports that they have 8 hours of visitation per week, however, when looking at the closing court order from July 2020, the parents were to get a minimum of 4 hours per week. The relatives have expressed that the 8 hours per week poses a hardship at times as they want to follow the courts order, however if the parents' work schedules, 8 hours per week presents a challenge. FCDSS would be recommending no more than 4 hours per week. [Father] and [Mother] try to make valuable use of the time to engage the older girls in activities and crafts. [Father], due to his work schedule at nights, calls the children in the morning before going to school and after school and speaks with them.

. . . .

46. [Father] reported to FCDSS that he continues to be engaged in counseling with Mr. George Hage and he attends monthly. [Father] would not provide more information about what he is learning in sessions and or the nature or goals of his therapy. In November 2021, [Father] reported to FCDSS Social Work Supervisor Dana Burleson that he doesn't feel therapy is beneficial, stating "It provides a little bit of help towards other topics but not towards this situation." FCDSS has not received releases by [Father] to request records from Mr. Hage. FCDSS has also reached out to his attorney for assistance in obtaining signed releases. As of February 18, 2022, FCDSS has not received signed releases or records from Mr. Hage. During the hearing on February 21, 2022, [Father] provided documentation to FCDSS regarding his work with Mr. Hage.

. . . .

58. FCDSS has had difficulty throughout the life of this case in communicating with the parents. The parents have not willingly provided information when requested by FCDSS. Despite this difficulty, FCDSS has received information that the parents complied with classes and assessments.

. . . .

105. The minor children cannot return to the home or care of a parent immediately, within the next six months, or within any reasonable period of time.

106. The immediate return of the minor children to the home of a parent would be contrary to their health, safety, and welfare.

107. Further reunification efforts would be clearly unsuccessful and inconsistent with the minor children's health and safety. The children have been outside of the parents' home and care for approximately 1,350 days. The cause of [Nate's] injuries remains unknown. The causal or contributing factors leading up to and surrounding [Nate's] injuries remain unknown. It is unlikely more information will be gained by the passage of more time, and further delay to the children's permanence is not in their best interests.

114. Pursuant to NCGS §7B-906.2, the permanent plan of reunification would not be successful because:

a. The parents have not made adequate progress within a reasonable period of time towards the objective of reunification. While the parents have attended services, the intended purpose and benefit of the services has not been achieved; IE: The parents have attended therapy sessions. However, the therapy sessions have not examined the causes or circumstances surrounding [Nate's] injuries while in the parents' care.

b. The parents have not been cooperative or forthcoming with FCDSS or the GAL program. FCDSS has been unable to effectively communicate and gain necessary information from the parents.

c. The parents are present and available to the [c]ourt today. The parents have not been regularly available to FCDSS and the GAL outside of court.

d. The parents have acted in a manner that is inconsistent with the health or safety of the minor children. After more than 1,300 [days] outside the home and care of the Respondent Parents, there is no information about the cause of [Nate's] injuries or the

> circumstances which led to those injuries while in the care of [Mother] and [Father].

In making these findings, the trial court considered testimony from DSS Social Work Supervisor Dana Burleson, GAL District Administrator Melissa Bell, Nate's paternal grandfather, Mother, and Father. The trial court also considered reports from DSS, the GAL, and Mother. Finally, the trial court considered letters from Ann Doherty, Mother's therapist, and George Hage, Father's therapist. This competent evidence supports the trial court's findings of fact, even if there exists contradictory evidence in the record. *In re C.M.*, 273 N.C. App. at 430, 848 S.E.2d at 751-52; *see also In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019) ("[A]n important aspect of the trial court's role as finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence. It is in part because the trial court is uniquely situated to make this credibility determination that appellate courts may not reweigh the underlying evidence presented at trial.").

Accordingly, the trial court did not err by ceasing reunification efforts because its findings of fact under N.C. Gen. Stat. § 7B-906.2 are supported by competent evidence.

C. Guardianship

1. Unfitness/Acting Inconsistently with Constitutionally Protected Status

[2] Mother contends that "[t]he trial court should not have applied a best interest standard as in doing it failed to protect [Mother's] constitutional rights as a parent." Similarly, Father contends that the trial court erred by applying "the best interest of the child standard in awarding guardianship of Nate to the paternal grandparents as there was insufficient evidence his father was unfit or had acted inconsistently with his constitutionally protected rights as a parent."

"A parent has an interest in the companionship, custody, care, and control of his or her children that is protected by the United States Constitution." *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010) (quotation marks, brackets, and citations omitted). "So long as a parent has this paramount interest in the custody of his or her children, a custody dispute with a nonparent regarding those children may not be determined by the application of the 'best interest of the child' standard." *Id.*, 704 S.E.2d at 503 (citation omitted). "However, a parent can forfeit their right to custody of their child by unfitness or acting inconsistently with their constitutionally protected status." *In re J.M.*, 276 N.C. App. at 307, 856 S.E.2d at 915 (citation omitted). "Findings in

support of the conclusion that a parent acted inconsistently with the parent's constitutionally protected status are required to be supported by clear and convincing evidence." *In re K.L.*, 254 N.C. App. at 283, 802 S.E.2d at 597 (citation omitted).

Here, the trial court made the following relevant findings:

> 116. The Respondent [Mother] is not a fit and proper person to have the care, custody, and control of the minor children concerned. [Nate], [Kat], and [Amy] were adjudicated neglected individuals after [Nate] sustained non-accidental injuries in the care of [Mother] and [Father]. The cause of and circumstances surrounding those injuries remain unknown and unaddressed.
>
> 117. The Respondent [Mother] has acted in a manner that is inconsistent with her constitutionally protected status as a parent. While [Mother] has occasionally provided financial support and necessary items for the care of these three minor children, [Nate's paternal grandparents] have assumed the primary responsibility for financially supporting and meeting the children's needs since June 11, 2018.
>
> 118. The Respondent Father . . . is not a fit and proper person to have the care, custody, and control of the minor child [Nate]. [Nate] and his siblings [Kat] and [Amy] were adjudicated neglected juveniles after [Nate] sustained non-accidental injuries in the care of [Mother] and [Father]. The cause of and circumstances surrounding those injuries remain unknown and unaddressed.
>
> 119. The Respondent [Father] has acted in a manner that is inconsistent with his constitutionally protected status as a parent. While [Father] has occasionally provided financial support and necessary items for the care of [Nate], [Nate's paternal grandparents] have assumed the primary responsibility for financially supporting and meeting the child's daily needs since June 11, 2018.

Although labeled as findings of fact, the trial court's determinations that Mother and Father were unfit and acting inconsistently with their constitutionally protected status are conclusions of law that we review de novo. *In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018) ("If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion *de novo*." (citation omitted)).

To support these conclusions, the trial court made the following relevant findings of fact:

> 46. [Father] reported to FCDSS that he continues to be engaged in counseling with Mr. George Hage and he attends monthly. [Father] would not provide more information about what he is learning in sessions and or the nature or goals of his therapy. In November 2021, [Father] reported to FCDSS Social Work Supervisor Dana Burleson that he doesn't feel therapy is beneficial, stating "It provides a little bit of help towards other topics but not towards this situation." FCDSS has not received releases by [Father] to request records from Mr. Hage. FCDSS has also reached out to his attorney for assistance in obtaining signed releases. As of February 18, 2022, FCDSS has not received signed releases or records from Mr. Hage. During the hearing on February 21, 2022, [Father] provided documentation to FCDSS regarding his work with Mr. Hage.
>
> . . . .
>
> 59. FCDSS continues to have the same primary concern that inadequate information has been provided as to how [Nate] was injured. Without this information, FCDSS cannot adequately assess how to correct safety concerns in the parents' care or confirm that the children would now be safe if returned to the home and care of [Mother] and [Father].
>
> . . . .
>
> 92. The therapy letter provided by [Mother] reflects that her goals in therapy were "the importance of her professional communication even in a situation where she reported feeling lack of control as well as confusion and helplessness." [Mother] acknowledged the purpose of that goal was for her to be able to communicate with the Social Workers about the case without becoming angry. The second therapy goal was "adjustment to the loss of her children." [Mother] acknowledged the purpose of that goal was for her to be able to manage her feelings regarding the placement of her children in DSS custody.
>
> 93. Nothing in the letter from clinician Ann Doherty reflects that [Mother] was working on therapy goals related to exploring the effects of stress around the time

of [Nate's] injuries in 2018 or exploring the circumstances surrounding [Nate's] injuries.

94. The letter provided by [Father] reflects that his goals in therapy related to "developing a sense of peace and acceptance of the separation of his three children from him," and managing symptoms of anxiety and "occurrences of depression."

95. It appears that [Father] did speak with his therapist during two sessions on February 22, 2020 and January 15, 2022 about [Nate's] injuries. However, it appears the information shared was limited to the theory of the fall from the car seat, as presented in 2019. Counselor Hage wrote: "[W]e have also dealt with concerns and stressors related to his son's fall. [Father] reports no major incident or disorder with [Nate] from his birth up until the incident. He certainly regrets the accident happening with the child due to not buckling him with the seat belt into his car seat . . . I see the accident as something that happened in the split seconds of sudden distraction of two children fighting in the car, thereby, putting the parents in an insupportable position."

96. Nothing indicates that new information has been gained about the circumstances surrounding [Nate's] injuries or that the circumstances surrounding [Nate's] injuries were ever addressed through the Respondent Father's participation in therapy.

97. From 2019 to the present, neither [Mother] nor [Father] have provided a sufficient explanation about how [Nate] was injured while in their care, accepted responsibility for the injuries, or provided insight into the circumstances surrounding [Nate's] injuries.

98. In the absence of information about how [Nate] sustained the injuries in question and with no information about the causal and contributing factors surrounding those injuries, the [c]ourt is unable to find that the circumstances which led to the removal of [Nate], [Kat], and [Amy] from the home and care of [Mother] and [Father] and the children's subsequent adjudication have been adequately corrected such that the children can safely reunify with the parents.

The trial court made these findings after considering testimony from DSS Social Work Supervisor Dana Burleson, GAL District Administrator Melissa Bell, Nate's paternal grandfather, Mother, and Father; reports from DSS, the GAL, and Mother; and letters from Ann Doherty, Mother's therapist, and George Hage, Father's therapist. Accordingly, clear and convincing evidence supports the trial court's findings of fact.

These findings of fact, in turn, support the trial court's conclusions of law that Mother "is not a fit and proper person to have the care, custody, and control of the minor children" and that Mother "acted in a manner that is inconsistent with her constitutionally protected status as a parent." Furthermore, these findings of fact support the trial court's conclusions of law that Father "is not a fit and proper person to have the care, custody, and control of the minor child" and that Father "acted in a manner that is inconsistent with his constitutionally protected status as a parent."

2. Best Interests Determination

[3] Mother contends that "[t]he trial court's decision regarding the children's best interest is not supported by reason and is an abuse of the trial court's discretionary latitude at disposition." Furthermore, Father contends that the trial court's "determination of Nate's best interest is not supported by reason and is an abuse of the court's discretion at disposition."

Here, the trial court made the following relevant findings of fact:

> 85. [Nate] entered FCDSS custody in June 2018 after sustaining serious, life threatening injuries due to non-accidental means. The cause of the injuries, as identified by Dr. Thomas, was blunt force trauma. [Nate's] siblings [Kat] and [Amy] were present in the same home and in the care of the same adults as [Nate] when he was injured.
>
> . . . .
>
> 87. Since the children entered FCDSS custody, [Mother] and [Father] have given two explanations for how [Nate's] injuries occurred: birth trauma and a fall from a car seat.
>
> 88. Based upon the record, the theory of birth trauma was previously presented. The [c]ourt did not accept that theory, as it directed the parents to present any explanations they could offer besides birth trauma.

89. In 2019, [Father] identified a fall from a car seat onto the ground as the cause of the injuries [Nate] sustained. In 2019, FCDSS and the GAL followed up on this reported cause with Dr. Thomas, who advised the injuries were highly unlikely to have been caused by such a fall and identified blunt force trauma as the cause of the injuries.

90. At the hearing today, February 21, 2022, when asked how [Nate] sustained the injuries in question, [Mother] did not provide any new or additional information. [Mother] again referenced birth trauma. [Mother] did not elaborate as to why she believed [Nate's] injuries resulted from birth trauma, nor did she present any new evidence to support the birth trauma theory. [Mother] stated she was unwilling to exclude birth trauma as a cause of these injur[i]es until such time as she personally spoke to a doctor about her beliefs.

91. At the hearing today, February 21, 2022, when asked how [Nate] sustained the injuries in question, [Father] denied the injuries were the result of non-accidental trauma. He identified an accidental explanation, the fall from the car seat as presented in 2019. [Father] did not present any new or additional evidence or information to support his theory that car seat incident caused the injuries.

. . . .

96. Nothing indicates that new information has been gained about the circumstances surrounding [Nate's] injuries or that the circumstances surrounding [Nate's] injuries were ever addressed through the Respondent Father's participation in therapy.

97. From 2019 to the present, neither [Mother] nor [Father] have provided a sufficient explanation about how [Nate] was injured while in their care, accepted responsibility for the injuries, or provided insight into the circumstances surrounding [Nate's] injuries.

98. In the absence of information about how [Nate] sustained the injuries in question and with no information about the causal and contributing factors surrounding those injuries, the [c]ourt is unable to find that the circumstances which led to the removal of [Nate], [Kat], and

> [Amy] from the home and care of [Mother] and [Father] and the children's subsequent adjudication have been adequately corrected such that the children can safely reunify with the parents.
>
> . . . .
>
> 123. It is in the best interests of the minor children and will promote the children's health, safety, and welfare to be placed into the Guardianship of [Nate's paternal grandparents].
>
> . . . .
>
> 128. The plan of care which is in the best interests of [Nate], [Kat], and [Amy] is for [Nate's paternal grandparents] to be appointed as their Guardians, and as Guardians for [Nate's paternal grandparents] to have the physical and legal custody of the children, with visitation . . . .

These findings are supported by the same competent evidence that supported the trial court's findings regarding reunification efforts. Accordingly, the trial court did not abuse its discretion by awarding guardianship to Nate's paternal grandparents.

III. Conclusion

The trial court did not err by ceasing reunification efforts, eliminating reunification as a permanent plan, and granting guardianship of Nate, Kat, and Amy to Nate's paternal grandparents. Accordingly, we affirm.

AFFIRMED.

Judges DILLON and STADING concur.

JESSEY SPORTS, LLC, PLAINTIFF
v.
INTERCOLLEGIATE MEN'S LACROSSE COACHES ASSOCIATION, INC., DEFENDANT

No. COA22-882

Filed 6 June 2023

1. Appeal and Error—interlocutory order—partial dismissal—substantial right—possibility of inconsistent verdicts

In an action arising from a contractual dispute in which a sports marketing company (plaintiff) sued an intercollegiate sports association (defendant) to recover money owed under their contract and alleged in its complaint claims for breach of contract, unfair and deceptive trade practices, violation of the Wage and Hour Act, and unjust enrichment, where the trial court granted defendant's motion to dismiss the latter two claims but allowed plaintiff's other two claims to proceed, the court's interlocutory order was immediately appealable as affecting a substantial right because it created the risk of inconsistent verdicts from two possible trials that would involve the same factual issues.

2. Employer and Employee—contractual dispute—Wage and Hour Act claim—definition of "employee"—not inclusive of corporations

In an action arising from a contractual dispute in which a sports marketing company (plaintiff) sued an intercollegiate sports association (defendant) to recover money owed under their contract, the trial court properly dismissed plaintiff's claim under the Wage and Hour Act because plaintiff, as a corporate entity, was not an individual and therefore was not defendant's "employee" as defined by the Act.

3. Unjust Enrichment—essential elements—sufficiency of allegations—alternative to breach of contract

In an action arising from a contractual dispute in which a sports marketing company (plaintiff) sued an intercollegiate sports association (defendant) to recover money owed under their contract, the trial court erred by denying plaintiff's claim for unjust enrichment, where plaintiff sufficiently alleged each element of the claim in its complaint, including that plaintiff conferred a measurable benefit on defendant by soliciting potential sponsors and procuring sponsorship agreements, that defendant was aware of and consciously accepted the benefits provided by plaintiff, and that plaintiff did not

provide the benefits officiously or gratuitously. Despite defendant's argument, the fact that plaintiff asserted its claim for unjust enrichment as an alternative to its breach of contract claim was not an appropriate basis for dismissal.

Appeal by Plaintiff from an order entered 27 May 2022 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 April 2023.

Devore, Acton & Stafford, P.A., by Joseph R. Pellington, Corey V. Parton, and Walton H. Walker, for Plaintiff.

Ekstrand & Ekstrand LLP, by Robert C. Ekstrand, for Defendant.

WOOD, Judge.

We are asked to review an interlocutory order granting a dismissal, pursuant to Rule 12(b)(6), of claims alleging unjust enrichment and violations of the Wage and Hour Act. For the reasons outlined below, we affirm the dismissal of the Wage and Hour Act claim and reverse the dismissal of the unjust enrichment claim.

I. Background

The Intercollegiate Men's Lacrosse Coaches Association ("IMLCA") entered a contract with Jessey Sports, LLC in 2020. The Contract provided that Jessey Sports would obtain sponsorships, grants, and other sources of revenue for the IMLCA for a term of five years; however, either party could terminate the contract upon ninety days' notice. The IMLCA agreed to pay Jessey Sports $3,000 per month and thirty percent of net revenue received from sponsorships and grants obtained by Jessey Sports.

In August 2021, the IMLCA notified Jessey Sports of its intent to terminate their contract. On 28 October 2021, Jessey Sports filed an action to recover money allegedly owed for the months of July through November under allegations of breach of contract, unfair and deceptive trade practices, violation of the Wage and Hour Act, and unjust enrichment. The IMLCA moved to dismiss these four claims under Rule 12(b)(6) for failure to state claims upon which relief could be granted. On 27 May 2022, the trial court denied the motion to dismiss the breach of contract and unfair and deceptive trade practices claims but granted the motion to dismiss the Wage and Hour Act and unjust enrichment

claims. Jessey Sports appeals from the order granting the IMLCA's motion to dismiss these latter two claims.

II. Jurisdiction

[1] Though the trial court dismissed the Wage and Hour Act and unjust enrichment claims, it did not dismiss the remaining two claims. The trial court's dismissal order, therefore, is not a final judgment upon which appeal as of right may ordinarily be taken. N.C. Gen. Stat. § 7A-27(b)(1) (2022). "A judgment is final which decides the case upon its merits, without any reservation for other and future directions of the court, so that it is not necessary to bring the case again before the court." *Sanders v. May*, 173 N.C. 47, 49, 91 S.E. 526, 527 (1917) (citation omitted). Instead, the order is interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

There are two circumstances under which an interlocutory order may be appealed.

> First, the trial court may certify [pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b)] that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. Second, a party may appeal an interlocutory order that affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.

Davis v. Davis, 360 N.C. 518, 524-25, 631 S.E.2d 114, 119 (2006) (internal citations and quotation marks omitted).

The trial court here did not certify the order for immediate appeal; we therefore look to see if the dismissal order "affects some substantial right." *Id.* Jessey Sports asserts that the order affects a substantial right in that it presents the risk of inconsistent verdicts stemming from two separate trials upon the same facts and issues. We agree.

"[T]he right to avoid the possibility of two trials on the same issues is a substantial right that may support immediate appeal." *Alexander Hamilton Life Ins. Co. of Am. v. J&H Marsh & McClennan, Inc.*, 142 N.C. App. 699, 701, 543 S.E.2d 898, 900 (2001) (citing *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982)). However, this rule is abrogated when "there are no factual issues common to the claim determined and the claims remaining." *Id.*

We agree with Plaintiff that the Wage and Hour Act claim involves the same underlying facts as the breach of contract claim. These common facts include the parties' contractual relationship with each other and the same alleged misconduct.

As in *Panos v. Timco Engine Center, Inc.*, "[i]f we dismiss Plaintiff's appeal with respect to the N.C. Wage and Hour Act claim and a later appeal is successful, Plaintiff will be required to present the same evidence of Defendant's breach of the employment agreement that he will present on his remaining breach of contract claim." 197 N.C. App. 510, 515, 677 S.E.2d 868, 873 (2009). This Court reviewed that interlocutory order due to the risk that "the same evidence [might] be presented to different juries on the same factual issue, which could result in inconsistent verdicts." *Id.* We likewise hold that an appeal of the trial court's dismissal order here affects a substantial right due to the risk of inconsistent verdicts from two different trials on the same factual issues and therefore review the merits of Plaintiff's appeal pursuant to N.C. Gen. Stat. § 7(b)(3)(a). In our discretion, we also address the merits of the unjust enrichment claim "[i]n the interests of judicial economy." *Id.*

III. Standard of Review

We review *de novo* orders granting motions to dismiss under Rule 12(b)(6). *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009). When reviewing an order granting a motion to dismiss under Rule 12(b)(6), we must determine whether "the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Block v. Cnty. of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E2d 838, 840 (1987)). Dismissal is proper "when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

IV. Discussion

Jessey Sports argues that it was an "employee" of the ICMLA such that the trial court erred in dismissing Jessey Sports' claim under the Wage and Hour Act. Jessey Sports further argues that the trial court

erred in dismissing its claim for unjust enrichment despite the presence of an express agreement between the parties. We review each of these arguments in turn.

A. Wage and Hour Act

[2] The Wage and Hour Act applies to employer-employee relationships. N.C. Gen. Stat. § 95-25.1(b) (2022). Under this act, "employer" is defined broadly as "any person acting directly or indirectly in the interest of an employer in relation to an employee." § 95-25.2(5). A "person," as used here, can include "an individual, partnership, association, corporation," and other entities. § 95-25.2(11). An "employee," by contrast, is defined more narrowly as "any *individual* employed by an employer." § 95-25.2(4) (emphasis added). Jessey Sports argues that, though it is a limited liability corporation, it is considered an "individual" and thus an "employee" under the Wage and Hour Act so as to be afforded the same benefits. Put another way, Jessey Sports claims to have been an employee of the ICMLA. We disagree.

This Court and our Supreme Court have never held that a corporate entity is considered an "individual" under the Wage and Hour Act, and we refuse to do so now. Indeed, to do so would subvert the plain language of the statute. Though the Wage and Hour Act includes entities such as corporations in its definition of "employer," entities are notably absent from the definition of "employee." This interpretation is consistent with this Court's holding that "a corporation is not an individual under North Carolina law." *HSBC Bank USA v. PRMC, Inc.*, 249 N.C. App. 255, 259, 790 S.E.2d 583, 586 (2016).

Jessey Sports attempts to support its position by citing to certain federal caselaw that hold a corporation could be considered an employee under the similar Fair Labor Standards Act. However, we find this reasoning unpersuasive. Jessey Sports lacked standing to bring this claim, and the trial court properly dismissed it.

B. Unjust Enrichment

[3] Jessey Sports next argues that the trial court improperly dismissed its claim for unjust enrichment. Generally, "where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation." *Krawiec v. Manly*, 370 N.C. 602, 615, 811 S.E.2d 542, 551 (2018) (quoting *Atl. Coast Line R.R. Co. v. State Highway Comm'n*, 268 N.C. 92, 95-96, 150 S.E.2d 70, 73 (1966)). Our Supreme Court in *Booe v. Shadrick* summarized the law supporting a claim for unjust enrichment as follows:

> A claim of this type is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law. A quasi contract or a contract implied in law is not a contract. The claim is not based on a promise but is imposed by law to prevent an unjust enrichment. If there is a contract between the parties the contract governs the claim and the law will not imply a contract.

322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). "Under a claim for unjust enrichment, a plaintiff must establish certain essential elements: (1) a measurable benefit was conferred on the defendant, (2) the defendant consciously accepted that benefit, and (3) the benefit was not conferred officiously or gratuitously." *Lake Toxaway Cmty. Ass'n v. RYF Enters., LLC*, 226 N.C. App. 483, 490, 742 S.E.2d 555, 561 (2013) (quoting *Primerica Life Ins. Co. v. James Massengill & Sons Constr. Co.*, 211 N.C. App. 252, 259-60, 712 S.E.2d 670, 677 (2011)).

Here, Jessey Sports included in its complaint allegations that it

> conferred upon [the IMLCA] a measurable benefit by providing services including, but not limited to, identifying and soliciting potential sponsors, negotiating and procuring sponsorship agreements, maintaining and enhancing relationships with current sponsors, and other performed work and conferred benefits as stated herein.
>
> [The IMLCA] was aware that [Jessey Sports] was furnishing it valuable services and consciously accepted, and continues to accept, the benefits of Plaintiff's work and performance.
>
> [Jessey Sports] did not provide its services to [the IMLCA] officiously or gratuitously.

From these, and other allegations, Jessey Sports asked that the trial court "[f]ind that [the IMLCA] committed breach of contract against [Jessey Sports] or, alternatively, that [the IMLCA] was unjustly enriched to [Jessey Sports's] detriment."

Taken as true, these allegations support the necessary elements for a claim of unjust enrichment and would allow the claim to survive a motion to dismiss under Rule 12(b)(6).

The IMLCA argues that the trial court properly dismissed the unjust enrichment claim because Jessey Sports also pleaded claims, such as the breach of contract claim, that alleged an express contract. Thus, the IMLCA argues that Jessey Sports cannot plead both unjust enrichment and

breach of contract where one theory requires an implied contract and the other requires an express contract. We disagree. In actions alleging breach of contract, plaintiffs may also plead unjust enrichment "in the alternative." *James River Equip., Inc. v. Mecklenburg Utils., Inc.*, 179 N.C. App. 414, 419, 634 S.E.2d 557, 560 (2006). This is consistent with our "[l]iberal pleading rules [which] permit pleading in the alternative." *Catoe v. Helms Constr. & Concrete Co.*, 91 N.C. App. 492, 498, 372 S.E.2d 331, 335 (1988).

Jessey Sports pleaded unjust enrichment "alternatively" to its breach of contract claim and alleged facts sufficient to support an unjust enrichment claim. We therefore hold that the trial court improperly dismissed Jessey Sports's claim for unjust enrichment.

V. Conclusion

The trial court properly dismissed Jessey Sports's Wage and Hour Act claim. However, it erred in dismissing the unjust enrichment claim for failure to state a claim upon which relief could be granted where the claim was made in the alternative to a breach of contract claim and otherwise alleged facts sufficient to support the claim. Consequently, we affirm the dismissal of the Wage and Hour Act claim, reverse the dismissal of the unjust enrichment claim, and remand to the trial court for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges GRIFFIN and GORE concur.

KASSEL v. RIENTH

[289 N.C. App. 173 (2023)]

RICHARD KASSEL, AND WIFE, SUSAN KASSEL, PLAINTIFFS
v.
KENNETH RIENTH, AND WIFE, CATHERINE RIENTH, DEFENDANTS

No. COA22-825

Filed 6 June 2023

1. Real Property—real estate purchase contract—consent order—no judicial determination of parties' rights

The trial court did not err by interpreting a consent order as a court-approved standard real estate purchase contract subject to the rules of contract interpretation (rather than a court order enforceable only through contempt powers) where the plain language of the consent order and the facts of the case showed that the judge who signed the order merely approved the parties' agreement and set it out in a judgment, without making a judicial determination of the parties' respective rights. The judge's use of terminology like "upon greater weight of the evidence" and "concludes as a matter of law" did not outweigh the overwhelming evidence that the judge merely approved the agreement of the parties.

2. Real Property—real estate purchase contract—consent order—reasonable time to perform

Having properly interpreted a consent order as a court-approved standard real estate purchase contract subject to the rules of contract interpretation, the trial court did not err by interpreting the consent order—which contained a provision that closing would take place sixty days after the filing of the consent order—as allowing a reasonable time to perform where it did not contain a "time is of the essence" clause.

3. Real Property—real estate purchase contract—consent order—specific performance—findings of fact

In a real estate dispute involving a consent order that the trial court properly interpreted as a court-approved standard real estate purchase contract subject to the rules of contract interpretation, the trial court did not abuse its discretion in granting plaintiffs' motion for specific performance where the court made adequate findings of fact showing that plaintiffs were ready, willing, and able to perform according to the consent order. The numerous findings of fact challenged by defendants were supported by competent evidence.

4. Real Property—real estate purchase contract—consent order —Rule 11 motion for sanctions

In a real estate dispute involving a consent order that the trial court properly interpreted as a court-approved standard real estate purchase contract subject to the rules of contract interpretation, the trial court did not err by denying defendants' Rule 11 motion for sanctions, which defendants filed in response to plaintiffs' Rule 60 motion, where the plaintiffs undertook a reasonable inquiry and believed their position was well grounded, plaintiffs reasonably believed a mutual mistake existed between the parties, and there was no evidence that plaintiffs filed the motion for improper purposes.

Appeal by defendants-appellants from order entered 14 March 2022 by Judge J. Stanley Carmical in Brunswick County Superior Court. Heard in the Court of Appeals 26 April 2023.

Law Offices of G. Grady Richardson, Jr., P.C., by Susan Groves Renton and G. Grady Richardson, Jr., for defendants-appellants.

The Del Re Law Firm, by Benedict J. Del Re, Jr., for plaintiffs-appellees.

FLOOD, Judge.

Kenneth and Catherine Rienth ("Defendants") appeal from the 14 March 2022 Order for Specific Performance (the "March Order"). On appeal, Defendants argue the trial court erred by: (1) interpreting the consent order as a standard real estate purchase contract and not an order of the court; (2) inserting words into the unambiguous consent order; (3) making findings of fact that are unsupported by the evidence; and (4) denying their motion for sanctions. After careful review, we find no error.

I. Factual and Procedural Background

On 13 February 2020, Richard and Susan Kassel ("Plaintiffs") entered into a Lease Agreement and Option to Purchase (the "Lease Agreement") Defendants' home (the "Home") located at 3227 St. Andrews Circle SE, Southport, North Carolina. Per the Lease Agreement, Plaintiffs would lease the Home for a term of one year, beginning on 15 February 2020, with the right to purchase the Home at any time prior to the expiration of the Lease Agreement.

On 3 August 2020, a hurricane substantially damaged the Home, resulting in the need to replace the roof. Defendants did not name Plaintiffs as an additional insured party on the Home and had difficulty obtaining insurance proceeds on repairs made by Plaintiffs. Plaintiffs alleged Defendants refused to pay those funds in an attempt to profit from the storm repairs.

On 22 January 2021, Plaintiffs sent Defendants written notice of their intent to close with a cash sale on the Home. Plaintiffs hired Sandra Darby ("Ms. Darby") as their closing attorney, and Defendants hired Zach Clouser ("Mr. Clouser") as their closing attorney. The closing date was scheduled for 14 February 2021, but the parties were unable to close on the sale.

On 16 February 2021, after it became clear to Plaintiffs that Defendants were not going to close on the Home, Plaintiffs filed a Claim of Lien with the Brunswick County Clerk of Court for $13,512.87. This "mechanic's lien" was filed against the Home to secure the costs they expended to repair the roof damaged by the hurricane. Subsequently, Excel Roofing filed their own mechanic's lien for the roofing work they completed on the Home.

On 8 April 2021, Plaintiffs filed a Complaint in Brunswick County Superior Court for breach of the Lease Agreement, breach of offer to purchase, specific performance, breach of duty of good faith, and damages. In their Complaint, Plaintiffs alleged Clay Collier ("Mr. Collier") contacted Ms. Darby and represented himself as the attorney for Defendants. Plaintiffs alleged the sale of the Home did not take place because Defendants did not procure and provide the documents necessary to close on the Home and continued to demand more money related to the costs of repairing the roof.

In June 2021, after ongoing negotiations, Plaintiffs' current counsel, Benedict Del Re ("Mr. Del Re") drafted a consent order (the "Consent Order") memorializing Plaintiffs' and Defendants' resolution of issues and agreement to close. After drafting the Consent Order, Mr. Del Re sent the Consent Order to Defendants for their approval and signature. Defendants signed the Consent Order on 21 June 2021 and sent it to Plaintiffs for their signature. The Consent Order, which was "the result of arm's length negotiation" between parties, was intended to resolve all claims between the parties and grant Plaintiffs' claim for specific performance. Per the Consent Order, Defendants were responsible for satisfying Excel Roofing's mechanic's lien, and Plaintiffs were responsible for "satisfy[ing] the [mechanic's] lien for $13,512.87." Defendants

were also responsible for providing proper execution and delivery of all documents necessary to complete the closing transaction. The parties further agreed rent would be abated from the time the Consent Order was filed until the closing was complete.

On 22 June 2021, Mr. Del Re emailed then-attorney for Defendants, Mr. Collier, summarizing what Defendants needed to complete in order to close. It is unclear from the Record whether Mr. Collier responded to this email, but Mr. Del Re sent a follow up email on 24 June 2021, stating:

> This is just not working. The mortgage company is going to back out of the financing which will cause further delay . . . . I have no order, nor lien cancellation, no response on [Plaintiffs'] lien payment.

On 28 June 2021, Mr. Clouser sent the seller documents and the receipt for Excel Roofing's mechanic's lien payoff to Mack Hewett ("Mr. Hewett"), who took over closing responsibilities from Ms. Darby on behalf of Plaintiffs. Later that afternoon, the lender emailed Mr. Clouser requesting a list of items the lender needed "ASAP" to secure financing. Mr. Clouser responded that he was not doing the closing, and that last he heard, Mr. Hewett was responsible for the closing.

On 7 July 2021, Judge Disbrow signed the Consent Order, and it was filed with the clerk the same day. The Consent Order did not specify the date for closing, but it stipulated closing was to occur sixty days after the Consent Order was filed, which would have been 7 September 2021.[1] Defendants sent a request for a closing date but were told Plaintiffs were waiting on lender confirmation. Plaintiffs did not communicate a closing date to Defendants, but Plaintiffs worked with the lender through the month of August to complete the transaction. On 9 August 2021, Plaintiffs emailed Mr. Hewett that they had "scheduled a closing for [12 August 2021,]" but due to final documents being "held-up," closing on this date would not be feasible. It is unclear from the Record who was responsible for holding up these documents.

On 8 September 2021, Mr. Del Re emailed Mr. Collier to schedule the closing date for 10 September 2021. Mr. Collier responded, "I am not acting as [sellers'] attorney for the closing; that is [Mr.] Clouser who, according to [Defendants] has tried to contact [Mr. Hewett] and got no response. The deadline for closing was yesterday."

---

1. Sixty days after 7 July 2021 would have been 5 September 2021 but this day was a Sunday and the following day was Labor Day.

On 9 September 2021, Mr. Clouser emailed Mr. Del Re and Mr. Hewett the following: "As of last evening I was told not to release the seller documents because the deadline expired as far as the closing date. I just got off the phone with [Mr. Hewett] and let him know, since I received an additional email today that stated the same." On 10 September 2021, Mr. Clouser sent another email that stated: "[Plaintiffs] told me to not release documents or order an updated payoff statement. They said the date that closing was required expired." The parties attempted to resolve issues related to the closing but were unable to reach a resolution.

On 1 November 2021, Plaintiffs filed a Motion for Clarification and a Motion for Relief from Final Entry of Judgment/Order under Rule 60 of the North Carolina Rules of Civil Procedure (the "Rule 60 Motion"), requesting the trial court extend the closing date. In their Motion, Plaintiffs alleged the delay in closing was due to Defendants' delay in "consenting to inspections and providing verification of rents paid by Plaintiffs, delays in loan commitment due to title issues surrounding the cancellation of a mechanic's lien in the Clerk's office (official record), unexpected delays, and other delays not the fault of the Plaintiffs[.]"

On 20 December 2021, Defendants filed a Motion to Enforce the Consent Order, which included a motion to eject Plaintiffs from the Home and restore possession to Defendants. Defendants further requested an award of Rule 11 sanctions (the "Rule 11 Motion") against Plaintiffs and Mr. Del Re for the Rule 60 Motion. In response, Plaintiffs filed an Objection to Defendants' Motion and a Countermotion for Specific Performance.

On 14 March 2022, Judge Carmical entered the March Order granting Plaintiffs' Motion for Specific Performance and denying Defendants' Rule 11 Motion. The March Order concluded as a matter of law that the Consent Order "was intended to be a recital of the parties' agreement . . . [and] should be considered a court-approved contract and be subject to the normal rules of contract interpretation." The trial court further concluded:

> Where a contract for the sale of real property does not include an explicit provision that time is of the essence for execution of the contract terms, the 'the dates stated in an offer to purchase and contract agreement serve on as guidelines, and such dates are not binding on the parties.'

The trial court did not rule on the Rule 60 Motion filed by Plaintiffs.

On 12 April 2022, Defendants filed timely notice of appeal.

II. Jurisdiction

This Court has jurisdiction to hear this appeal as a final order from a superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Analysis

A. Consent Order

[1] Defendants' first two issues on appeal are whether the trial court erred in (1) interpreting the Consent Order as a standard real estate contract and not a court order and (2) rewriting the Consent Order's explicit deadline for Plaintiffs to close on the purchase of the Home by allowing Plaintiffs "a reasonable time to perform." To address these issues, we are required to determine whether the Consent Order is a court-approved contract subject to regular principles of contract interpretation, or an order of the court enforceable only through contempt powers. Traditionally, consent orders have been considered "merely a recital of the parties' agreement and not an adjudication of rights. This type of judgment does not contain findings of fact and conclusions of law because the judge merely sanctions the agreement of the parties." *Rockingham Cnty. DSS ex rel. Walker v. Tate*, 202 N.C. App. 747, 750, 689 S.E.2d 913, 915 (2010). The question before us, therefore, is whether the inclusion of findings of fact and conclusions of law in the Consent Order transformed it from a court-approved recitation of the parties' agreement into a binding order of the court subject to enforcement only through contempt powers. In answering this question, we first examine diverging views of this State's jurisprudence regarding consent orders.

North Carolina's jurisprudence regarding consent orders has long agreed "the general rule is that a consent judgment is the contract of the parties entered upon the record with the sanction of the court." *Handy Sanitary Dist. v. Badin Shores Resort Owners Ass'n, Inc.*, 225 N.C. App. 296, 298, 737 S.E.2d 795, 798 (2013); *see also In re Smith's Will*, 249 N.C. 563, 568–69, 107 S.E.2d 89, 93–94 (1959) (consent judgment was nothing more than a contract not punishable by contempt); *Yount v. Lowe*, 288 N.C. 90, 96, 215 S.E.2d 563, 567 (1975) ("The decisions of this State have gone very far in approval of the principle that a judgment by consent is but a contract between the parties . . . ."); *Crane v. Greene*, 114 N.C. App. 105, 441 S.E.2d 144 (1994); *Potter v. Hileman Lab'y, Inc.*, 150 N.C. App. 326, 564 S.E.2d 259 (2002); *Duke Energy Corp. v. Malcolm*, 178 N.C. App. 62, 630 S.E.2d 693 (2006).

There appears, however, to be a split in our jurisprudence in how a court determines the proper remedy for a breach or violation of a consent order. One line of cases has concluded that, when a consent order

contains findings of fact and conclusions of law, it is an order of the court only actionable through contempt powers. In *Potter*, we reasoned:

> A consent judgment is the contract of the parties entered upon the record with the sanction of the court. Thus, it is both an order of the court and a contract between the parties. If a consent judgment is merely a recital of the parties' agreement and not an adjudication of rights, it is not enforceable through the contempt powers of the court, but only through a breach of contract action.

150 N.C. App. at 334, 564 S.E.2d at 265 (citations omitted). In *Potter*, we determined the consent order was not a "mere recital of the parties' " agreement—and was an order of the court—because the consent order contained findings of fact and an order based on those findings. *Id.* at 334, 564 S.E.2d at 265. In the opposite vein, in *Ibele v. Tate*, we found a consent order was *not* an order of the court because it did not contain findings of fact or conclusions of law but was merely a recitation of the parties' settlement agreement. 163 N.C. App. 779, 781, 594 S.E.2d 793, 795 (2004).

In another line of cases, our jurisprudence has definitively held consent orders are court-approved contracts subject to principles of contract interpretation, not contempt powers, without indicating whether the consent order contained findings of fact. *Cf. Duke Energy Corp. v. Malcolm*, 178 N.C. App. 62, 65, 630 S.E.2d 693, 695 (2006) ("Consent judgments delineating easement rights are foremost contracts."); *see also Reaves v. Hayes*, 174 N.C. App. 341, 343–44, 620 S.E.2d 726, 728–29 (2005) ("A consent judgment is a contract between the parties entered upon the records of the court with the approval and sanction of a court of competent jurisdiction. It is construed as any other contract. . . . Thus, a consent judgment '*must* be enforced according to contract principles.' ") (emphasis added); *Hemric v. Gore*, 154 N.C. App. 393, 397, 572 S.E.2d 245, 257 (2002); ("A consent judgment is a contract between the parties entered upon the record with the sanction of the trial court and is enforceable by means of an action for breach of contract and not contempt."); *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) ("A consent judgment is a court-approved contract subject to the rules of contract interpretation.").

In a third line of cases, this Court reviewed the four-corners of the consent judgment at issue to determine whether it was more appropriately considered a court-approved contract or an order of the court. In *Crane*, this Court considered whether the trial court merely approved the agreement of the parties or went beyond the original agreement and

made a judicial determination of the parties' respective rights. 114 N.C. App. at 106, 441 S.E.2d at 144–45 ("In the ordinary case, when a court merely approves the agreement of the parties and sets it out in the judgment, a judicial determination is obviated, and the judgment is nothing more than a contract which is enforceable only by means of an action for breach of contract."). Even though the consent order at issue did not contain findings of fact or conclusions of law, the Court did not conclude this was dispositive of the consent order being a court-approved contract. *Id.* at 107, 441 S.E.2d at 145. Instead, the *Crane* Court reasoned the introduction to the consent order "*clearly*" stated its purpose:

> THIS MATTER coming on before the undersigned Superior Court Judge at the October 8, 1990 Civil Session of the Avery County Superior Court, and it appearing to the Court *that the parties, acting through their attorneys and pro se respectively, have agreed to resolve all matters* pertaining to the above-captioned action as set forth below.
>
> THEREFORE, IT IS HEREBY, ORDERED, ADJUDGED AND DECREED.

Id. at 106–107, 441 S.E.2d 145 (second emphasis added). We found the consent judgment was a court-approved contract because the judgment, "[o]n its face," did not reflect a determination by the trial court of either issues of fact or conclusions of law, but merely recited the parties' agreement. *Id.* at 106–107, 441 S.E.2d at 145 ("Viewed from its four corners, it is clear that the order . . . is merely a recital of the parties' agreement and not an adjudication of rights.").

In *Nohejl v. First Homes of Craven County Inc.*, this Court held, based on "*the facts of [the] case*," the trial court had the power to enforce a consent order through contempt. 120 N.C. App. 188, 189, 461 S.E.2d 10, 11 (1995) (emphasis added). The consent order provided it could be enforced "by specific performance, contempt, or any method that may be available." *Id.* at 189, 461 S.E.2d at 11.[2] Distinguishing from the consent order at issue in *Crane*, the *Nohejl* Court concluded the consent order *was* an order of the court because it was entered by

2. It is worth noting, the plaintiffs in *Nohejl* filed a motion to hold the defendant in contempt based on the consent order. It seems, based on the wording of the consent order at issue, the Court would have also affirmed an order for specific performance had the plaintiffs requested and been granted specific performance by the trial court. This Court determined the appropriate remedy based on the plain-language of the Consent Order, which lends further support to our conclusion that findings of fact alone are not dispositive.

the trial court and contained written findings of fact and an order based on those findings. *Id.* at 190–91, 461 S.E.2d at 12.

In *PCI Energy Services, Inc. v. Wachs Technology Services, Inc.*, this Court once again considered whether a consent judgment that contained findings of fact and conclusions of law was a court-approved contract or an order of the court. 122 N.C. App. 436, 439, 470 S.E.2d 565, 566 (1996). We found the procedural history of the case to be significant, specifically noting the same trial judge who entered the consent order had previously entered a preliminary injunction in the case. *Id.* at 439, 470 S.E.2d at 567. We also found the language of the consent order to be significant. *Id.* at 439, 470 S.E.2d at 567. Similar to *Crane*, the consent order at issue in *PCI Energy* stated, "*the parties have entered into a Settlement Agreement* which can be made the subject of this Consent Agreement." *Id.* at 439, 470 S.E.2d at 567 (emphasis added). The trial court, however, went a step further than that in *Crane* and "explicitly 'approve[d,] . . . adopt[ed,] . . . incorporat[ed] and . . . made an enforceable judgment of the Court,' the terms of the settlement agreement." *Id.* at 439, 470 S.E.2d at 567 (alterations in original). We ultimately held, "[b]y 'adopting' and 'incorporating' the settlement agreement, the [trial] court transformed the parties' agreement into the [trial] court's own determination of the parties' respective rights and obligations[,]" and "did not merely 'rubber stamp' the parties' private agreement[.]" *Id.* at 439–40, 470 S.E.2d at 567.

Nohejl, *Crane*, and *PCI Energy* lend support to our conclusion that findings of fact and conclusions of law are not dispositive of whether a consent order is a court-approved contract enforceable through a breach of contract action, or an order of the court enforceable through contempt powers. Instead, a court must consider whether, on its face, the order goes beyond a "mere[] recital" of the parties' agreement, *see Crane*, 114 N.C. App. at 107, 441 S.E.2d at 145, the facts of each individual case, *see Nohejl*, 120 N.C. App. at 189, 461 S.E.2d at 11, and the procedural history surrounding the litigation. *See PCI Energy*, 122 N.C. App. at 439, 470 S.E.2d at 567.

Turning to the case *sub judice*, we conclude the above-referenced considerations weigh in favor of the Consent Order being a court-approved contract subject to standard rules of contract interpretation. First, the plain language of the Consent Order shows the court "merely approve[d] the agreement of the parties and set[] it out in the judgment." *See Crane*, 114 N.C. App. at 106, 441 S.E.2d at 145. Similar to the consent order at issue in *Crane*, the Consent Order in this case states, "*the parties have reached an agreement* regarding resolution of

the issues plead in the Complaint and Counterclaim . . . ." (emphasis added). The plain language of the Consent Order affirms that it is the result of a mutual agreement reached by the parties. The Consent Order was not an adjudication of parties' respective rights, but rather was the result of an "arm's length negotiation" between parties.

Second, based on the facts of this case, it appears that Judge Disbrow approved the agreement reached by the parties, and did not make a judicial determination of the parties' respective rights. *See Crane*, 114 N.C. App. at 106, 441 S.E.2d at 145. Judge Disbrow signed the Consent Order after it had been drafted and signed by the parties and notarized. Judge Disbrow did not "adopt" or "incorporate" the terms of the settlement agreement into the Consent Order; he signed the Consent Order exactly as it was presented to him by the parties. *See PCI Energy*, at 439, 470 S.E.2d at 567. Notably, Defendants had already signed and notarized the Consent Order on 21 June 2021 before it was presented to Judge Disbrow. Judge Disbrow could not have "transformed the parties' agreement" into his "own determination of the parties' respective rights and obligations" without sending it back to Defendants for approval and signature. *See id.* at 439, 470 S.E.2d at 567.

Third, from our review of the language of the Consent Order, it appears that Judge Disbrow essentially "rubber stamped" the agreement reached by the parties. *See PCI Energy*, 122 N.C. App. at 439, 470 S.E.2d at 566. The first six findings of fact identify the parties, summarize the Complaint, and summarize the option to purchase. Finding of Fact 7 explains the "terms of the agreement" reached by the parties, including the sixty days to close provision. The remaining findings of fact are standard contract provisions including: a merger clause, representations of warranties, effect of the agreement on successors and assigns, modifications, and choice of law. The Consent Order lacks any evidence that Judge Disbrow "transformed" it by "incorporating," or "adopting" provisions of the parties' agreement into his own determination of their respective rights. *See PCI Energy*, 122 N.C. App. at 439–40, 470 S.E.2d at 567. The Consent Order *was* the parties' agreement in its entirety.

Although the Consent Order uses language that could imply the trial court's independent insertion of findings of fact or conclusions of law—e.g., "upon greater weight of the evidence and the Record," "entry of judgment," "concludes as a matter of law," "it is ordered, adjudged and decreed," and "hereby made an Order of the Court"—such terminology does not outweigh the overwhelming evidence that the trial court merely approved the agreement of the parties and did not make a judicial determination of their respective rights. *See Crane*, 114 N.C. App. at 107, 441

S.E.2d at 145. The language from the Consent Order is not unlike that seen in *Crane*, where this Court used the terms "ordered, adjudged and decreed" and concluded the consent order was not an adjudication of the parties' rights. *See Crane*, 114 N.C. App. at 107, 441 S.E.2d at 145.

Not only does our jurisprudence indicate that the Consent Order here is a court-approved contract, but likewise, Defendants' filing also indicates they viewed it similarly. Defendants filed a Motion to Enforce the Court Order, not a motion to hold Plaintiffs in contempt for failing to comply with the Consent Order. Thus, Defendants themselves likely viewed the Consent Order as a real estate contract between the parties, not a court order enforceable through contempt powers. At trial, Defendants *acknowledged* that they could have filed a motion for contempt, and that they ultimately decided not to because it would not have afforded them any relief.

Therefore, we find the Consent Order was a court-approved contract subject to the usual principles of contract interpretation. *See Reaves*, 174 N.C. App. at 343, 620 S.E.2d at 728.

B. Modification of the Consent Order

[2] Defendants next argue the trial court erred by inserting Plaintiffs' requested language of "reasonable time to perform" into the unambiguous Consent Order. The trial court, however, did not "insert" language into the Consent Order as Defendants contend. The trial court *interpreted* the Consent Order as allowing a "reasonable time to perform" because the Consent Order did not have a "time is of the essence" clause. Having determined the Consent Order was a court-approved contract subject to principles of contract interpretation, we hold the trial court's interpretation was correct.

"The trial court's determination of whether the language in a consent judgment is ambiguous . . . is a question of law and therefore our review of that determination is *de novo*." *Hemric v. Groce*, 169 N.C. App. 69, 75, 609 S.E.2d 276, 282 (2005). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

> As a general rule, the language of a contract should be interpreted as written; however, there is a well-settled exception, the "reasonable time to perform rule," that applies to contracts for the sale of real property. With respect to these realty sales contracts, it has long been held that in the absence of a "time is of the essence" provision, time is

> not of the essence, the dates stated in an offer to purchase and contract agreement serve only as guidelines, and such dates are not binding on the parties.

Harris v. Steward, 193 N.C. App. 142, 146, 666 S.E.2d 804, 807 (2008) (citations omitted).

Here, the Consent Order, which pertains to the sale of real property, includes a provision that closing would take place sixty days after the filing of the Consent Order. No provision for, or indication that "time is of the essence" was included in the Consent Order.

Thus, the trial court did not err by interpreting the Consent Order, absent a "time is of the essence clause," as allowing closing "within a reasonable time." *See Harris*, 193 N.C. App. at 146, 666 S.E.2d at 807.

C. Competent Evidence to Support Specific Performance

[3] Defendants also argue the trial court lacked competent evidence to support its March Order. We disagree.

> The sole function of the equitable remedy of specific performance is to compel a party to do that which in good conscience he ought to do without court compulsion. The remedy rests in the sound discretion of the trial court and is conclusive on appeal absent a showing of a palpable abuse of discretion.

Munchak Corp. v. Caldwell, 46 N.C. App. 414, 418, 265 S.E.2d 654, 657 (1980) (citations omitted). "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am.*, 245 N.C. App. 25, 31, 781 S.E.2d 840, 844 (2016) (citation omitted).

"In reviewing a trial [court]'s findings of fact, we are strictly limited to determining whether the [court's] underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *Reeder v. Carter*, 226 N.C. App. 270, 274, 740 S.E.2d 913, 917 (2013) (citation and internal quotation marks omitted). "Findings of fact are conclusive if supported by competent evidence, irrespective of evidence to the contrary." *Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007) (citation omitted). The trial court does not need to find that *all* the facts support a specific conclusion of law; rather it must find facts necessary to establish the cause of action, that may lead to the cause

of action failing, or necessary to establish a defendant's affirmative defense. *Carolina Mulching Co. v. Raleigh-Wilmington Invs. II, LLC*, 378 N.C. 100, 105, 851 S.E.2d 496, 500 (2021).

"The party claiming the right to specific performance must show the existence of a valid contract, its terms, and either full performance on his part or that he is ready, willing and able to perform." *Ball v. Maynard*, 184 N.C. App. 99, 107, 645 S.E.2d 890, 896 (2007) (citation omitted).

1. Finding of Fact 1

First, Defendants argue Finding of Fact 1 incorrectly refers to only two of the six causes of action set forth in Plaintiffs' Complaint, which prevents a correct interpretation of the Consent Order and an understanding of what it was intended to resolve.

Finding of Fact 1 provides:

> 1. Plaintiffs filed an action for Breach of Contract and Specific Performance to enforce an offer to Purchase Contract for real estate owned by Defendants dated February 14, 2020 located at 3227 St. Andrew's Circle in Southport, N.C. 28462.

Plaintiffs' Complaint asserted six causes of action including: breach of the Lease Agreement, breach of offer to purchase and contract, specific performance, reasonable attorney's fees pursuant to N.C. Gen. Stat. § 46A-3, punitive damages pursuant to N.C. Gen. Stat. § 1D-1, and breach of duty to act in good faith. The Consent Order itself described only an action for "Breach of Contract, Specific Performance, and *other claims, equitable remedies and monetary damages* . . . ." (emphasis added). The claims relevant to interpreting the Consent Order and what it was intended to resolve are breach of contract and specific performance.

Thus, there was no error in omitting the remaining four claims, and if there was error, it was harmless because the March Order adequately establishes the relevant causes of action. *See Carolina Mulching Co.*, 378 N.C. at 106, 851 S.E.2d at 500.

2. Findings of Fact 4 and 5

Second, Defendants argue Findings of Fact 4 and 5 incorrectly interpret the Consent Order, state facts that are not grounded in law, and do not address the proper legal standard to be applied in this case. Defendants specifically argue Finding of Fact 4 misleadingly omits that the findings of fact in the Consent Order were made "upon greater weight of the evidence."

Findings of Fact 4 and 5 provide:

> 4. The [Consent] Order at issue in this case was prefaced with "[t]he Court finds that the parties have reached an agreement regarding the resolution of the issues plead in the Complaint and Counterclaim …" and made its findings of conclusions based "upon the stipulations of counsel and consent of the parties." The [Consent] Order does not include a provision that it is enforceable through the contempt powers of the court.
>
> 5. There is no indication that there was a hearing where evidence was taken, or that independent findings or conclusions of law were made by the Judge. Defendants state in their [brief] that "Plaintiffs and Defendants reached an agreement settling all matters, claim, disputes and actions in the Lawsuit by mutual agreement and entry into the Consent Order." In addition, the Defendants state that Plaintiffs' attorney drafted all of the provisions of the [Consent] Order and that Defendants did not change any of those terms.

Finding of Fact 4 quotes language directly from the Consent Order. The omission that the findings were made "upon the greater weight of the evidence" does not render the finding unsupported by competent evidence. The trial court heard sufficient evidence showing no hearing was held on the Consent Order, Judge Disbrow signed the Consent Order after it had been drafted and signed by the parties, Defendants' brief states the parties reached an agreement settling all matters, and Mr. Del Re drafted the terms of the Consent Order. Based on this overwhelming evidence, we hold the parties intended the Consent Order to be a contract. The trial court gave more weight to "upon the stipulations of counsel and consent of the parties" than it did "upon greater weight of the evidence," which is not an error. *See Burrell*, 185 N.C. App. at 697, 649 S.E.2d at 442.

Findings of Fact 4 and 5, therefore, are supported by the language of the Consent Order. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

3. Finding of Fact 6

Third, Defendants argues the trial court erred in Finding of Fact 6 because Defendants did not make any statements agreeing that the Consent Order was meant to be a court-approved contract.

Finding of Fact 6 provides:

> 6. The July 7, 2021 [Consent] Order on its face, along with the statements of both parties, demonstrate that the [Consent] Order was intended to be a recital of the parties' agreement, with no adjudication on the part of the Court. Therefore, the [Consent] Order should be considered a court-approved contract and be subject to the normal rules of contract interpretation.

While Defendants' counsel may have stated "it's not a contract. It's an order[,]" Finding of Fact 6 states that the "statements of both parties, *demonstrate* that the [Consent] Order was intended to be a recital of the parties' agreement, with no adjudication on the part of the Court." (emphasis added). In Defendants' motion to enforce the Consent Order they stated: "Plaintiff[s] and Defendants reached an agreement," the Consent Order was drafted with "all terms and provisions," and the Consent Order was signed by Defendants prior to receiving Judge Disbrow's signature. Taken together, these representations by Defendants show both parties intended the Consent Order to be a court-approved contract.

Accordingly, Finding of Fact 6 is supported by competent evidence. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

4. Findings of Fact 9 and 15

Fourth, Defendants argue Finding of Fact 9 "erroneously describes the email sent by [Mr. Del Re] on 8 September 2021 . . . as 'confirming' the closing date." Defendants further argue Findings of Fact 9 and 15 are not supported by competent evidence because Defendants did not refuse to tender a deed at closing.

Findings of Fact 9 and 15 provide:

> 9. The [Consent] Order was entered on July 7, 2021, meaning the 60-day deadline expired on September 7, 2021. On September 8, 2021, Plaintiffs sent an email to Defendants confirming a closing date of September 10, 2021. Defendants responded that the deadline for closing was the day before. The sellers never tendered the deed. Plaintiffs allege, and Defendants have not disputed, that the mortgage company was ready to fund the loan.
>
> . . . .

> 15. The [Consent] Order did not provide "time was not [sic] of the essence" and Plaintiffs were ready to tender the balance of the purchase price and close within a reasonable period of time. Defendants then refused to tender the deed at settlement, in breach of the [Consent] Order.

The email sent on 8 September 2021 was sent with the intent of confirming the closing date. Plaintiffs may have been incorrect about the date of the closing, but that does not change the intent behind the 8 September 2021 email, which was to confirm a closing date of 10 September 2021.

As for Defendants refusing to tender the deed, this is also supported by the evidence. The portion of Finding of Fact 9 that states, "Defendants never tendered the deed[,]" is supported by email evidence that Defendants did not tender the deed. Plaintiffs were prepared to go forward with the closing, albeit late, but Defendants, either directly or through counsel, refused to tender the deed.

Thus, Findings of Fact 9 and 15 are supported by competent evidence. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

5. Finding of Fact 10

Fifth, Defendants argue the trial court erred in Finding of Fact 10 because it incorrectly states a conclusion of law as fact. Specifically, Defendants argue that the finding "[Plaintiffs] are entitled to specific performance" is a conclusion of law, not a finding of fact. Further, Defendants argue the finding incorrectly states delays were the fault of Defendants. Finding of Fact 10 states:

> 10. Plaintiffs allege in their filings that the closing date was set by the Lenders and Plaintiffs' closing attorney and that they were ready to tender the balance of the purchase price and receive the deed to the property. There is no indication, and it is not alleged by Defendants, that Plaintiffs are not "ready, willing, and able to perform." Plaintiffs have demonstrated that they are entitled to specific performance and that the sale of the property should be completed as intended by the [Consent] Order. 10. [sic] Plaintiffs allege that "due to delays in [D]efendants consenting to inspections and providing verification of rents paid by the Plaintiffs, delays in loan commitment due to title issues surrounding the cancellation of the mechanic's lien in the clerk's office, unexpected

> delays and other delays not the fault of [P]laintiffs[,]" they were not ready for closing until September 10, 2021.

"If a finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law which is reviewable [*de novo*] on appeal." *See Burrell*, 185 N.C. App. at 697, 649 S.E.2d at 442.

At trial, Plaintiffs were able to show the existence of a valid contract and its terms, and that they were ready, willing, and able to perform. As we previously concluded, absent a "time is of the essence" clause, Plaintiffs had a "reasonable time to perform," and their two-day delay in closing does not render them any less willing and able to perform. *See Ball*, 184 N.C. App. at 107, 645 S.E.2d at 896. The conclusion of law that Plaintiffs were entitled to specific performance, therefore, was not an error. *See Burrell*, 185 N.C. App. at 697, 649 S.E.2d at 442.

Moreover, the remaining portions of Finding of Fact 10 are not independent findings made by the trial court but are merely a summary of the arguments made by Plaintiffs in their motion, and the finding is supported by Plaintiffs' motion.

Accordingly, Finding of Fact 10 is supported by competent evidence. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

6. Findings of Fact 11, 12, 13, and 14

Sixth, Defendants argue competent evidence refutes Findings of Fact 11, 12, 13, and 14 because Defendants did not make "time is of the essence" arguments, the delays in closing were Plaintiffs' fault, and the focus on "reasonable" or "of the essence" was reached under a misapprehension of the law. Defendants further argue Findings of Fact 11, 12, and 13 are not supported by the evidence because there were no "required prerequisites," and any delays were Plaintiffs' fault. We disagree.

The challenged Findings of Fact state:

> 11. Defendants allege that the time was "of the essence" in the contract and that because the Plaintiffs did not close on or before September 7, 2021, they were not in compliance with the terms of the [C]onsent [O]rder. Defendants do not contend that the delay was the fault of the Plaintiffs, Defendants contend there was a delay in closing and because the mandatory closing deadline was missed, Defendants are entitled to refuse to close on the contract.
>
> 12. The [Consent] Order does not contain an explicit "time is of the essence provision[.]" The provision at issue in

> the parties' dispute is accompanied by a list of required prerequisites to complete the contract that depend on the actions of third parties, such as the Lender. Because there is no "time is of the essence provision" the "reasonable time to perform rule" applies to the requirements of the [Consent] Order. Plaintiffs have alleged several reasons outside of their control as to why their ability to close was delayed, and Defendant[s] had not contested those reasons. Some of the reasons alleged by Plaintiffs are due to Defendants [sic] own failure to act as needed to effectuate the intent of the [Consent] Order.
>
> 13. The delay in closing was three (3) days past the 60-day deadline period, not a significant amount of time. Plaintiffs have adequately demonstrated that they did not "delay or tarry" in complying with the contract and that they complied within a reasonable period of time.

The Consent Order provided:

> 7. That the parties have reached a settlement of the dispute in this matter with the substantive terms of the agreement as follows:
>
> a. Defendants, by and through Counsel will, within Five (5) days of the entry of this Order, satisfy the lien at the Office of the Clerk of Court filed by Excel Roofing, secure a notarized Affidavit from the lien claimant that the lien has been satisfied by an authorized agent of Excel Roofing to be filed with the Clerk of Court in the Lien Docket, and secure a further Subcontractor's notarized lien waiver of all liens to be provided to the mortgage lender of the Plaintiff[s]. . . from the lien holder.
>
> b. That the Plaintiffs will, within Five (5) days of the entry of this Order, satisfy the lien for $13,512.87 filed February 16, 2021 in 21 M 59 at the Office of the Clerk of Court and provide a notarized Affidavit from the Plaintiff (or entity) that the lien has been satisfied by an authorized agent of Plaintiff to be filed with the Clerk of Court in the Lien Docket, and secure a further affidavit and General Lien Waiver of all liens to be provided to the mortgage lender of the Plaintiff . . . to the Defendants [sic].
>
> c. That on a date to be set by the Plaintiff's Lender in conjunction with the Plaintiff's Attorney, not to exceed 60 days

> from the entry of the Order, Plaintiff[s] will tender the balance of the $337,500 purchase price being $312,500.00 with $25,000 having been credit [sic] to buyers as a deposit having been received, with adjustments for insurance (Flood, Hazard, Wind and Hail), County and City taxes and property owners due, other prorations and any other regular and customary expense adjustments, and any additional costs and expenses for document preparation, title insurance, revenue stamps any other regular and customary expenses paid by the buyer and seller for closing of real property in Brunswick County, State of North Carolina. That Defendants, on said date, will provide the proper execution and delivery to the closing attorney of all documents *necessary to complete the transaction contemplated by this Contract, including the deed, settlement statement, deed of trust and other loan or conveyance documents and waivers. That all parties will cooperate in the requests of the Lender for documents, assignments of insurance, etc. and any other forms necessary to close the loan and facilitate the closing to include the permission for any necessary inspections for the loan and the property closing.* That the transfer of the property will be free of all liens and encumbrances by a general Warranty Deed, allowing Plaintiff's [sic] lender a First secured position in the property. That further rent is abated.

(emphasis added).

Defendants may not have raised "time is of the essence" arguments in their motions or at the hearing, but in the Record, there are two emails Defendants sent Plaintiffs where Defendants stated, "time was of the essence." First, in an email sent from Defendants' counsel to Mr. Del Re on 27 October 2021, Defendants' counsel stated: "If you have any serious and meaningful offer on behalf of the [Plaintiffs] to resolve this matter, let me know. Time is of the essence." (emphasis in original). In this context, we read "time is of the essence" to refer to Mr. Del Re's response to the email rather than the performance of the contract being "of the essence." The second communication, however, does support the trial court's findings that Defendants alleged time was of the essence to fulfill the Consent Order. In the second correspondence, a settlement communication sent from Defendants' counsel to Mr. Del Re on 29 October 2021, Defendants' counsel stated, "[t]he [Plaintiffs] pay the lump sum of [redacted] time being of the essence . . . ." (emphasis in

original). This communication lends support to the trial court's finding that Defendants did in fact allege "time was of the essence[.]" To be clear, the Consent Order did not contain a "time is of the essence" clause and Finding of Fact 11 does not contradict this. Finding of Fact 11 only states Defendants argued "time was of the essence," which we conclude was supported by competent evidence for the reasons explained. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

As for the "prerequisites," it is clear from the plain language of the Consent Order that both parties were required to fulfill certain obligations prior to closing. Defendants were required to satisfy the mechanic's lien filed by Excel Roofing, Plaintiffs were responsible for satisfying the mechanic's lien they had filed on the Home, and both parties were responsible for procuring various documents and cooperating with the lender. This challenged portion of the Finding of Fact 12, therefore, is supported by competent evidence. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

Additional evidence indicates both parties were responsible for the delay. The Record shows the lender requested a thirty-day extension on the purchase contract. Plaintiffs emailed Mr. Hewett on 9 August 2021 advising him that Plaintiffs had scheduled a closing for 12 August 2021, but this would not be able to occur as the lender could not finalize the loan documents due to a delay in the Property Owners Association providing a statement of dues paid on the Home. On 11 August 2021, Plaintiffs stated in an email to their counsel, "[n]ot to my surprise—title issues are holding us up." Moreover, on 4 October 2021, Mr. Del Re sent Defendants' counsel an email, which stated:

> Let me know you received the documents showing that the loan was approved and ready to close in September. Those emails also reflect that the settlement lawyer is the one who picked the date of closing pursuant to the [C]onsent [O]rder.

While the email referencing the lender-set closing date was omitted from the Record, Defendants' counsel's response is further evidence such an email existed. In response to the aforementioned email sent on 4 October 2021, Defendants' counsel represented:

> Confirming that I did receive your fax and reported to [Defendants] via email that it appeared the delay this time was not caused by you[] or [Plaintiffs] and that is appears [Plaintiffs] had funding to close.

The portions of Findings of Fact 11, 12, and 13 that state delays were not the fault of Plaintiffs, therefore, are supported by competent evidence. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

Finally, Defendants argue the trial court erred in Findings of Fact 11, 12, and 13 because the focus on the timing being "reasonable" or "of the essence" was reached as a misapprehension of law by treating the Consent Order as a real estate contract. Having affirmed the trial court's conclusion that absent a "time is of the essence" clause, Plaintiffs were entitled to a reasonable amount of time to perform, we conclude these findings are supported by competent evidence. *See Reeder*, 226 N.C. App. at 274, 740 S.E.2d at 917.

Accordingly, we hold the trial court did not abuse its discretion in granting Plaintiffs' Motion for Specific Performance because the trial court made adequate findings of fact showing Plaintiffs were ready, willing, and able to perform according to the Consent Order. *See Greenshields*, 245 N.C. App. at 31, 781 S.E.2d at 844; *Ball*, 184 N.C. App. at 107, 645 S.E.2d at 896.

D. Motion for Sanctions

[4] Lastly, Defendants argue the trial court erred by denying their Rule 11 Motion.[3] Defendants filed the Rule 11 Motion alleging Plaintiffs' Rule 60 Motion was "not well-grounded in fact, not warranted by existing law, and/or was interposed for the improper purposes of annoying Defendants and their counsel, causing unnecessary delay . . . and needlessly increasing the Defendants' cost of litigation." We disagree.

"This Court exercises a de novo review of the question of whether to impose Rule 11 sanctions." *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365 (1994). A Rule 11 analysis includes three parts: whether the document is (1) factually sufficient; (2) legally sufficient; and (3) filed for an improper purpose. *Id.* at 635, 442 S.E.2d at 365. "A violation of any one of these requirements mandates the imposition of sanctions under Rule 11." *Id.* at 635, 442 S.E.2d at 365. "The totality of the circumstances determine[s] whether Rule 11 sanctions are merited." *Williams v. Hinton*, 127 N.C. App. 421, 423, 490 S.E.2d 239, 241 (1997).

---

3. Plaintiffs seemingly withdrew their Rule 60 Motion during the hearing and requested the trial court, instead, grant an order of specific performance. The trial court did not rule on the Rule 60 Motion but granted the request for specific performance and denied Defendants' Rule 11 Motion. Finding no case law indicating a withdrawn motion renders a motion for sanctions moot, we review the merits of Defendants' argument.

"In determining factual sufficiency, we must decide '(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact.' " *In re Thompson*, 232 N.C. App. 224, 230, 754 S.E.2d 168, 173 (2014) (citation omitted). As for legal sufficiency, this Court is required to first "look at 'the facial plausibility of the [motion] and *only then*, if the [motion] is implausible under existing law, to the issue of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the [motion] was warranted by existing law.' " *Id.* at 230, 754 S.E.2d at 173 (emphasis added) (citation omitted). "An objective standard is used to determine whether a [motion] has been interposed for an improper purpose, with the burden on the movant to prove such improper purposes." *Id.* at 230, 754 S.E.2d at 173 (citation and internal quotation marks omitted).

First, Defendants argue Plaintiffs' Rule 60 Motion is not factually sufficient because there was no "mutual mistake" in the Consent Order, the parties agreed on how to interpret the Consent Order and the closing mechanics, there was no newly discovered evidence presented by Plaintiffs, and no extraordinary circumstances were alleged. After a thorough review of the Rule 60 Motion, the Record, and the hearing transcripts, we conclude Plaintiffs undertook a reasonable inquiry of the facts and believed their position was well grounded in those facts. Further, the contents of the Rule 60 Motion are supported by the Record. *See In re Thompson*, 232 N.C. App. at 230, 754 S.E.2d at 173.

Second, Defendants argue Plaintiffs' Rule 60 Motion is not legally sufficient because Plaintiffs could not have reasonably believed a "mutual mistake" existed between the parties. Evidence in the Record, however, supports Plaintiffs' belief that both parties were mistaken about the closing date. First, there is evidence Plaintiffs were diligently working through the month of August. Plaintiffs corresponded with the lender regarding outstanding documents, Plaintiffs had scheduled a closing for 12 August 2021, and based on the email evidence in the Record, Plaintiffs' communications did not evince a concern that closing on 10 September 2021 would be an issue. While Plaintiffs could have been more prompt by not waiting until 8 September 2021 to communicate that closing would not occur until 10 September 2021, it is not apparent that they knew of Defendants' intention to firmly interpret the closing date. Further, because we affirmed the trial court's March Order interpreting the Consent Order as a court-approved real estate contract, which would provide a reasonable time for closing the property purchase, we also hold the Rule 60 Motion was legally sufficient. *See In re Thompson*, 232 N.C. App. 224, 230, 754 S.E.2d 168, 173.

Third, Defendants argue the Rule 60 Motion was interposed for improper purposes of harassing Defendants and needlessly costing them attorneys' fees. We see no evidence of this in the Record nor have Defendants adequately shown improper purposes. *See In re Thompson*, 232 N.C. App. 224, 230, 754 S.E.2d 168, 173 (the burden is on the moving party to show a Rule 60 motion was filed for improper purposes).

Having found Plaintiffs' Rule 60 Motion was factually sufficient, legally sufficient, and not filed for improper purposes, we therefore conclude the trial court did not err in denying Defendants' Rule 11 Motion. *See Dodd*, 114 N.C. App. at 635, 442 S.E.2d at 365.

IV. Conclusion

The trial court did not err in interpreting the Consent Order as a court-approved contract, interpreting the Consent Order as allowing for performance in a reasonable amount of time, granting specific performance in favor of Plaintiffs, or denying Defendants' Rule 11 Motion. For the foregoing reasons, we hold the trial court did not err in granting Plaintiffs' Countermotion for Specific Performance.

AFFIRMED.

Judges DILLON and WOOD concur.

VINCENT K. PAYIN, PLAINTIFF
v.
JEFFREY PIERCE FOY, DEFENDANT

No. COA22-735

Filed 6 June 2023

Civil Procedure—summons—timeliness—motion to dismiss

Where plaintiff filed his complaint "for restorative justice" and failed to cause a summons to be issued within five days pursuant to Civil Procedure Rule 4(a), the action abated. Because defendant thereafter filed a motion to dismiss before plaintiff caused a summons to be issued, the action was not revived and the trial court did not err by granting defendant's motion to dismiss.

Appeal by Plaintiff from order entered 3 February 2022 by Judge Ned W. Mangum in Wake County District Court. Heard in the Court of Appeals 11 April 2023.

Vincent K. Payin, pro se, Plaintiff-Appellant.

No brief filed for Defendant-Appellee.

COLLINS, Judge.

Plaintiff Vincent K. Payin appeals from a 3 February 2022 order dismissing his "Complaint For[] [R]estorative Justice" against Defendant Jeffrey Pierce Foy for Plaintiff's failure to properly effectuate service of the summons and complaint upon Defendant and because the complaint was time barred by the applicable statute of limitations. For the reasons stated herein, we affirm.

I. Background

This appeal arises from Plaintiff's attempt to collect a debt allegedly owed to him by Decedent David Foy's Estate, which was being administered by Defendant, Decedent's son.

According to Plaintiff, he was hired to provide homecare services to Decedent in 2011. When Decedent's health insurance expired in February 2016, Plaintiff and Decedent entered into a verbal agreement whereby Decedent would pay Plaintiff out-of-pocket for continued homecare services.

Decedent died intestate on 24 May 2017. A notice to creditors of Decedent's Estate was published in accordance with law, providing that all claims against the Estate must be submitted to Defendant by 10 March 2018 (the "creditor deadline"). Plaintiff submitted a claim against the Estate for $22,866.45 on 28 March 2018, eighteen days past the creditor deadline. On 10 April 2018, Plaintiff received a letter from Defendant informing him that his claim against Decedent's Estate had been rejected. Plaintiff filed a Rule 60(b)(1) & (6) Motion to Reopen Decedent's Estate.[1] The motion was denied on 17 June 2019 for Defendant's failure to timely submit the claim and for his failure to timely commence an action to recover on the claim after receiving written notice of the claim's rejection.

On 25 October 2021, Plaintiff filed his complaint for restorative justice in Wake County District Court. A summons was not issued on that date or within five days. Plaintiff sent a copy of the complaint to Defendant's former attorney, Terrell Thomas. However, Thomas was not representing Defendant in this matter and had not agreed to accept service on Defendant's behalf. On or around 24 November 2021, Defendant filed a

1. This motion is not in the record but is referenced in the order denying the motion.

Rule 12 Motion to Dismiss for, among other things, Plaintiff's failure to cause a summons to be issued. On 2 December 2021, thirty-five days after the complaint had been filed, Plaintiff caused a summons to be issued in the name of Defendant. Plaintiff attempted to effectuate service of the summons and the complaint upon Defendant, but this attempt failed as he sent the documents to Defendant's former address where Defendant no longer resided.

After a hearing on 3 February 2022 on Defendant's motion to dismiss, Plaintiff's complaint was dismissed by order entered that day. Plaintiff timely appealed to this Court.

II. Discussion

Plaintiff first argues that the trial court erred by dismissing his complaint because the issuance and service of process was proper.

"A civil action is commenced by filing a complaint with the court." N.C. Gen. Stat. § 1A-1, Rule 3 (2021). "Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days." *Id.* § 1A-1, Rule 4(a) (2021). When a summons is not issued within five days, the action abates and is deemed never to have commenced. *Roshelli v. Sperry*, 57 N.C. App. 305, 308, 291 S.E.2d 355, 357 (1982). However, a properly issued and served summons can revive and commence a new action on the date of its issuance, unless defendant moves to dismiss the action prior to issuance and service of the summons. *Stokes v. Wilson & Redding Law Firm*, 72 N.C. App. 107, 111, 323 S.E.2d 470, 474 (1984); *Roshelli*, 57 N.C. App. at 308, 291 S.E.2d at 357.

Here, Plaintiff filed his complaint on 25 October 2021. A summons was not issued within five days and the action abated. Defendant filed his motion to dismiss the action on 29 November 2021, several days before Plaintiff caused a summons to be issued on 2 December 2021. Accordingly, the action was not revived upon the issuance of the summons and the trial court did not err by granting Defendant's motion to dismiss. *See Stokes*, 72 N.C. App. at 111, 323 S.E.2d at 474. In light of this conclusion, we need not reach Plaintiff's remaining arguments.

III. Conclusion

Because Plaintiff failed to cause a summons to be timely issued in the name of Defendant, the trial court did not err by dismissing Plaintiff's complaint. The trial court's order is affirmed.

AFFIRMED.

Chief Judge STROUD and Judge FLOOD concur.

SEMELKA v. UNIV. OF N. CAROLINA

[289 N.C. App. 198 (2023)]

RICHARD C. SEMELKA, M.D., PLAINTIFF
v.
THE UNIVERSITY OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE INSTITUTION OF THE STATE OF NORTH CAROLINA; THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, A CONSTITUENT INSTITUTION OF THE UNIVERSITY OF NORTH CAROLINA; CAROL L. FOLT, SUED IN HER INDIVIDUAL AND OFFICIAL CAPACITIES; JAMES WARREN DEAN, JR., SUED IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; WILLIAM L. ROPER, SUED IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; ARVIL WESLEY BURKS, JR., SUED IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; AND MATTHEW A. MAURO, SUED IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS

No. COA22-831

Filed 6 June 2023

1. Appeal and Error—interlocutory order—substantial right—applicability of collateral estoppel—colorable claim

In plaintiff's action under the Whistleblower Act, in which he alleged that he was terminated from employment at a university in retaliation for having reported health and safety concerns about his department, the trial court's interlocutory order denying defendants' motion to dismiss was immediately appealable as affecting a substantial right where defendants asserted a colorable claim that collateral estoppel principles might bar plaintiff's claim because identical issues were actually litigated in a prior administrative proceeding (and upheld on judicial review).

2. Employer and Employee—whistleblower claim—unlawful termination—causal connection—retaliatory motive

Plaintiff's claim pursuant to the Whistleblower Act that he was terminated from employment in retaliation for having reported health and safety concerns about his department should have been dismissed where he failed to establish a prima facie case. In particular, plaintiff could not satisfy the third element of a whistleblower claim—that there existed a causal connection between his report to university administration and his subsequent termination—given facts that his termination for misconduct was based on misrepresentations he made when seeking reimbursement for $30,000 in personal legal fees.

3. Appeal and Error—mootness—cross-appeal—plaintiff's claim collaterally estopped

In a whistleblower action, where plaintiff's claim that he was unlawfully terminated from his employment at a university—in retaliation for having reported health and safety concerns—was barred by collateral estoppel principles, requiring dismissal of the claim, defendants' cross-appeal was dismissed as moot.

Appeal by defendants and cross-appeal by plaintiff from order entered 24 March 2022 by Judge Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 12 April 2023.

Law Office of Mark L. Hayes, by Mark L. Hayes; and Bailey & Dixon, LLP, by J. Heydt Philbeck, for plaintiff.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for defendants.

Office of University Counsel, by Marla S. Bowman, for defendant-the University of North Carolina at Chapel Hill.

ARROWOOD, Judge.

The University of North Carolina ("UNC"), the University of North Carolina at Chapel Hill ("UNC-CH"), Carol L. Folt ("Chancellor Folt"), James Warren Dean, Jr. ("Provost Dean"), William L. Roper ("Dr. Roper"), Arvil Wesley Burks, Jr. ("Dr. Burks"), and Matthew A. Mauro ("Dr. Mauro") (collectively, "defendants") appeal from the trial court's order denying their motion to dismiss.[1] Richard C. Semelka, M.D. ("plaintiff"), cross-appeals. After careful review, we reverse the trial court's order denying defendants' motion to dismiss and dismiss plaintiff's cross-appeal.

I. Background

Litigation arising from plaintiff's termination of employment from UNC-CH is before this Court for the third time on appeal. Plaintiff exhausted the administrative remedies available under the Administrative Procedures Act, N.C. Gen. Stat. § 150B-1 *et seq.*, by petitioning for judicial review of the final termination decision made by UNC-CH's Board of Governors ("BOG"). This Court upheld the trial court's order affirming plaintiff's discharge in *Semelka v. Univ. of N. Carolina*, 275 N.C. App. 662, 854 S.E.2d 34 (2020) ("*Semelka I*"), *disc. review denied*, 380 N.C. 289, 867 S.E.2d 678 (mem.), *and disc. review dismissed*, 867 S.E.2d 684 (mem.) (2022). The facts underlying plaintiff's

1. Chancellor Folt, Provost Dean, Dr. Roper, Dr. Mauro, and Dr. Burks (collectively, "the individual defendants") were sued in both their official and individual capacities. Chancellor Folt, Provost Dean, and Dr. Roper are no longer employed at UNC-CH. Presently, Dr. Burks serves as Dean of the School of Medicine, Vice Chancellor for Medical Affairs, and CEO of the UNC Health Care System; Dr. Mauro serves as the James H. Scatliff Distinguished Professor of Radiology and President of UNC Faculty Physicians.

termination, including facts discovered in the administrative action, tend to establish the following.[2]

Plaintiff was formerly employed as a tenured professor within the Department of Radiology at UNC-CH's School of Medicine. On 8 January 2016, plaintiff sent a letter to Chancellor Folt expressing various health and safety concerns within the Department of Radiology and, as Chair of the Radiology Department, Dr. Mauro's "repeated failure to properly address[,]" "or otherwise protect patients and staff[,]" from the harmful conditions created by certain colleagues within the School of Medicine. Plaintiff's letter, which was incorporated into his complaint, also alleged Dr. Mauro "[r]etaliat[ed] against [him] . . . by not appointing [him] as the [D]ivision [C]hief of Abdominal Imaging, but rather select[ing] the only outside candidate that applied."

On 21 January 2016, on behalf of Chancellor Folt, Provost Dean responded to plaintiff's letter. Provost Dean informed plaintiff that his previously communicated concerns were " 'thorough[ly] investigat[ed][,]' " but since they pertained to former colleagues, further disciplinary action was unwarranted. With respect to plaintiff's concerns involving a current faculty member, Provost Dean stated that the matter was also investigated, but found to be without merit. Regarding plaintiff's appointment as Division Chief, Provost Dean stated, " 'any personnel decision is open to a number of interpretations' " and " 'based on a number of factors[,]' " but should plaintiff wish to pursue further action, he may contact the University Faculty Grievance Committee for assistance. Provost Dean also offered to meet with plaintiff " 'to further discuss his concerns.' "

Plaintiff "opted not to file a grievance or contact the Ombuds Office[,]" but instead obtained legal counsel for the purported purpose "of assisting him in presenting his health, safety, and work environment concerns directly to UNC-CH's Board of Trustees[.]" In February 2016, plaintiff retained the legal services of Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C. ("Mintz Levin").

On 13 July 2016, plaintiff submitted an expense reimbursement request to Bob Collichio ("Mr. Collichio"), the Department of Radiology's Associate Chair for Administration, seeking reimbursement for

---

2. Plaintiff challenges the use of outside materials as we are reviewing a motion to dismiss, however, "[t]his Court has long recognized that a court may take judicial notice of its own records in another interrelated proceeding where the parties are the same, the issues are the same and the interrelated case is referred to in the case under consideration." *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 202, 274 S.E.2d 221, 223 (1981) (citations omitted). Plaintiff also referred to the administrative action in his complaint.

approximately $30,000 in legal fees from the Radiology Department's Operating Fund.[3] In a series of follow-up emails, plaintiff explained his stated reasons for requesting the reimbursement were due to legal consultations he sought in reference to his professional work and were related to his university duties. Plaintiff acknowledged that some prior consultations may have appeared personal in nature, but he contended no more than one and a half hours were expended on personal matters.

Mr. Collichio requested assistance from UNC-CH's Office of University Counsel ("OUC") due to the "unusual" nature of plaintiff's request. On 25 July 2016, Mr. Collichio requested additional documentation and more detailed information relating to plaintiff's relationship with Mintz Levin to determine which legal expenses were "strictly business-related" and potentially reimbursable. Plaintiff provided Mr. Collichio with partially redacted invoices and a copy of the Mintz Levin engagement letter dated 5 February 2016. On 5 August 2016, plaintiff informed Mr. Collichio of his intention to terminate Mintz Levin and "expressed frustration that his reimbursement request had still not been approved[.]" Plaintiff learned on 23 August 2016 that he would not be reimbursed.

Also in August 2016, at the request of OUC, UNC-CH's Chief Audit Officer and Director of the Internal Audit Department, Phyllis Petree ("Ms. Petree") initiated an investigation into plaintiff's reimbursement request to determine whether plaintiff's stated reasons for retaining Mintz Levin were truly for university-related purposes. In addition to investigating plaintiff's relationship with Mintz Levin, Ms. Petree conducted an audit into previous travel and business expenses paid to plaintiff between July 2010 and September 2016. The audit revealed that on multiple occasions dating from 2010, plaintiff received reimbursements for nine trips which were " 'primarily personal in nature and were not reimbursable as business travel.' " It appeared that plaintiff had developed a pattern of planning personal vacations, and shortly before the trip was scheduled to begin, plaintiff would attempt to schedule work meetings with colleagues abroad to justify multiple days of travel

3. The Radiology Department Operating Fund operates in accordance with the UNC School of Medicine Faculty Affairs Code ("Faculty Affairs Code") and the Policy on Clinical Department Faculty Providing Expert Legal Services and Testimony ("Expert Legal Services Policy"). Under these policies, clinical departments within the School of Medicine have an established Departmental Operating Fund to hold income generated by faculty members for outside professional services. The Faculty Affairs Code expressly provides that such funds belong to the Radiology Department and are designed to be "used for professional purposes[.]" However, the Faculty Hearings Committee noted a "lack of clarity . . . on how such funds can and should be used."

reimbursement requests. Furthermore, the investigation into plaintiff's relationship with Mintz Levin ultimately revealed that plaintiff misrepresented the nature of his reimbursement request in an improper attempt to have the university pay for personal legal expenses. As a result of her findings, Ms. Petree concluded, " 'the primary purpose of the law firm engagement giving rise to the legal fees in question was for personal matters, though [plaintiff] initially represented that the fees were for consultation related to cybersecurity and to his University duties.' "

Ms. Petree's final audit report was issued to Chancellor Folt on 5 January 2017. In a letter dated 11 January 2017, relying on the findings provided by Ms. Petree, Provost Dean informed plaintiff of UNC-CH's intent to discharge him due to misconduct pursuant to Section 3 of the *Trustee Policies and Regulations Governing Academic Tenure in the University of North Carolina at Chapel Hill* (the "Tenure Policy"). The letter stated that plaintiff submitted a reimbursement request for approximately $30,000 in legal fees, "knowingly misrepresenting that these expenses were incurred for legal advice regarding" his professional work, "when, instead, these legal services were obtained for primarily personal reasons, including pursuing possible legal action against the University." The letter further stated plaintiff had established a "pattern of dishonesty and false representations" due to his history of "seeking full reimbursement from the University" for primarily personal trips and "other costs that cannot be validated due to inadequate documentation[,]" or were not applicable for reimbursement under "state and University policy." Provost Dean estimated that the total amount of "impermissible reimbursements" were "in excess of $27,000." Plaintiff's behavior was described as "unethical conduct" "sufficiently serious as to adversely reflect on [his] honesty, trustworthiness and fitness to be a faculty member." Plaintiff responded on 17 January 2017, and informed Provost Dean of his intent to appeal the discharge decision to the Faculty Hearings Committee (or "the Committee") pursuant to the Tenure Policy.

A hearing regarding plaintiff's appeal was conducted over the course of three days beginning on 23 March 2017 and concluding on 12 April 2017. The stated issues before the Committee included determining whether UNC-CH could prove by the "clear and convincing standard" "whether permissible grounds for [plaintiff]'s discharge exist[ed] under the Tenure Policy and whether those grounds were, in fact, the basis of the University's decision to discharge." Pursuant to Section 3(a)(1) of the Tenure Policy, misconduct justifying discharge may "be either (i) sufficiently related to a faculty member's academic responsibilities as to disqualify the individual from effective performance of university duties,

or (ii) sufficiently serious as to adversely reflect on the individual's honesty, trustworthiness or fitness to be a faculty member[.]"

The Faculty Hearings Committee heard testimony from thirteen witnesses, including plaintiff, and examined other documentary evidence relating to plaintiff's termination. Plaintiff's "central defense . . . was that UNC-CH was retaliating against him for raising prior safety concerns within the Department [of Radiology]." Findings and recommendations of the Committee were issued to Chancellor Folt on 23 May 2017. The Faculty Hearings Committee ultimately rejected plaintiff's retaliation claim finding "no evidence" of retaliation. In pertinent part, the Committee discovered: "[d]espite [plaintiff]'s broad statements in his communication with Mr. Collichio, the specificity of his emails to Mintz Levin . . . make clear that [plaintiff] originally consulted outside counsel because he was considering legal action against the University."

Moreover, the Committee stated:

> We searched and asked specific questions looking for behavior that would indicate some sort of retaliation against [plaintiff] for bringing his safety concerns to the attention of those in the School of Medicine and University administration. We could find no evidence to indicate the University took employment action against [plaintiff] because of his complaints. We could find no evidence that Provost Dean relied on anything other than the grounds found in the Tenure Policy as the basis for his discharge of [plaintiff].

Accordingly, the Committee concluded:

> [Plaintiff]'s choice to seek reimbursement for $30,000 worth of legal fees and his description of the need for this outside legal consultation as being related to various activities such as writing books or considering new safety procedures was disingenuous and dishonest. Indeed, he eventually admitted to Ms. Petree that a significant portion (40%) of his conversations with Mintz Levin were related to taking legal action against the University . . . . Such conduct constitutes misconduct of such a nature as to adversely reflect on [plaintiff]'s honesty, trustworthiness and fitness to be a faculty member. Therefore, we find [plaintiff]'s conduct was of such a nature as to indicate that he is unfit to continue as a member of the faculty. We were not convinced that the travel improprieties noted

> by Ms. Petree by themselves rose to the level requiring discharge since those requests were clear, did reference at least some University-related meetings, and went through multiple levels of review before being granted.

On 9 June 2017, Chancellor Folt notified plaintiff of her decision to accept the findings and recommendations of the Faculty Hearings Committee. Chancellor Folt agreed that plaintiff engaged in misconduct "sufficiently serious" "to render [him] unfit to serve as a member of the faculty" and further concurred with the Committee's absence of findings evidencing retaliation. Pursuant to Section 8 of the Tenure Policy, plaintiff appealed Chancellor Folt's discharge decision to the Board of Trustees ("BOT") on 19 June 2017.

In its decision rendered 1 August 2017, the BOT affirmed Chancellor Folt's decision. Plaintiff appealed the BOT's decision to the BOG on 10 August 2017. The BOG affirmed the dismissal decision on 12 September 2018, concluding "there [wa]s sufficient evidence in the record to determine that [plaintiff] knowingly misrepresented that multiple reimbursement requests for legal and travel expenses were for university purposes when, in fact, substantial portions of the expenses were for personal purposes, constituting misconduct under Section 603(1) of *The Code* [*of the Board of Governors of The University of North Carolina*]."[4] Similarly, the BOG found no "evidence to support [plaintiff]'s claim that UNC-CH selected another candidate for the Division Chief position or chose to discharge [plaintiff]" in an act of retaliation "against him for reporting safety concerns about colleagues to UNC-CH administrators."

Pursuant to N.C. Gen. Stat. § 150B-43, plaintiff petitioned for judicial review of the BOG's final decision to Orange County Superior Court. The trial court conducted a *de novo* review of the legal issues and a whole record review of the factual evidence to determine whether plaintiff's dismissal was supported by substantial evidence in the record. The proposed issues before the trial court included:

> 1. Whether the evidence was sufficient to support [plaintiff]'s dismissal from UNC-CH's School of Medicine based on misconduct.
>
> 2. Whether the decision was properly made and consistent with the requirements of Section 603 of [*The Code*] where [plaintiff] claimed that UNC-CH administrators

4. *The Code of the Board of Governors of The University of North Carolina* ("The Code") is incorporated into the Tenure Policy.

> engaged in unethical and illegal conduct related to [plaintiff]'s discharge from employment, including retaliating against him for his reports of safety concerns related to colleagues; and
>
> 3. Whether UNC-CH administrators erred by halting [plaintiff]'s pay after the campus-based review process ended with the decision of the [BOT] to uphold [plaintiff]'s dismissal from employment from UNC-CH.

Per order entered 25 April 2019, the trial court affirmed plaintiff's termination but found UNC-CH wrongfully discontinued his salary in August 2017, stating "[plaintiff] should have been paid through the September 12, 2018 decision of the BOG." With respect to plaintiff's termination, the trial court concluded:

> [T]he decision to discharge [plaintiff] based on misconduct is supported by substantial evidence in the record and is not arbitrary, capricious, or an abuse of discretion. Specifically, substantial evidence in the record supports the conclusion that [plaintiff] submitted to UNC-CH for reimbursement legal fees of approximately $30,000, knowingly, misrepresenting that such expenses were for University business when in fact these legal services were obtained for primarily personal reasons. Substantial evidence in the record further supports that such conduct, as detailed above, constitutes misconduct warranting dismissal, as set forth in Section 603 of *The Code* and in Section 3 of UNC-CH's Tenure Policy.

Plaintiff appealed the trial court's order and UNC cross-appealed the trial court's conclusion of law relating to the discontinuation of plaintiff's salary. *Semelka I*, 275 N.C. App. at 670, 854 S.E.2d at 40. This Court affirmed the trial court's order and held that substantial evidence supported the conclusion that plaintiff engaged in misconduct justifying discharge, discharge was not an excessive discipline in violation of *The Code*, and the BOG's decision to terminate was not an " 'unjust and arbitrary application of disciplinary penalties[.]' " *Id.* at 676-79, 854 S.E.2d at 43-45. We also affirmed the trial court's conclusion that "UNC violated its own policies when it ceased [plaintiff]'s pay at the date of the BOT decision before the BOG issued its ultimate decision." *Id.* at 682, 854 S.E.2d at 47.

Plaintiff commenced the instant action on 11 January 2018 by filing a complaint in Orange County Superior Court (the "Orange County

complaint") alleging defendants' initiation of dismissal proceedings against him were retaliatory in violation of the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84 *et seq*. (the "Whistleblower Act"). On 10 August 2018, plaintiff voluntarily dismissed the Orange County complaint pursuant to N.C. R. Civ. P. 41(a)(1) and filed a fundamentally similar complaint in Wake County Superior Court (the "Wake County complaint") on 24 August 2018.

Defendants filed a motion to dismiss the Wake County complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6) on 28 September 2018, asserting, among other things, Wake County was an improper venue. Ruling solely on the issue of venue, the trial court denied defendants' motion in an order entered 19 June 2019. In an opinion filed 31 December 2020, we vacated and remanded the trial court's order with instructions to transfer the action to Orange County Superior Court. *Semelka v. Univ. of N. Carolina*, 275 N.C. App. 683, 689, 854 S.E.2d 47, 51 (2020) ("*Semelka II*"). Per order entered 18 August 2021, the case was transferred to Orange County.

Proceedings in the instant case resumed upon plaintiff's scheduling of defendants' original motion to dismiss the Wake County complaint for a hearing on 14 February 2022. Due to uncertainty regarding whether the Wake County motion to dismiss was properly before the trial court, defendants filed an amended motion to dismiss on 9 February 2022.

The day of the scheduled hearing, defendants filed a second amended motion to dismiss in order to incorporate new legal arguments based on our Supreme Court's order denying plaintiff's request for discretionary review rendered 9 February 2022. Plaintiff challenged the validity of the second amended motion to dismiss arguing defendants are prohibited from amending their motion. The trial court, considering the denial of discretionary review a "significant development[,]" accepted defendants' second amended motion to dismiss finding one month an adequate amount of time for plaintiff to brief and oppose a new argument. Accordingly, the trial court acknowledged defendants' original motion and amended motion to dismiss as withdrawn and scheduled a hearing on the second amended motion to dismiss for the following month.

Defendants' second amended motion to dismiss was heard at the 14 March 2022 session of Orange County Superior Court, Judge Baddour presiding. Defendants argued that the trial court lacked jurisdiction to hear plaintiff's whistleblower complaint as the question of plaintiff's discharge being the result of unlawful retaliation was addressed throughout the administrative process. Defendants attached multiple exhibits

to their motion, including: the BOG's decision affirming plaintiff's discharge, plaintiff's petition for judicial review, the trial court's order affirming the BOG's decision to discharge, selected documents from the administrative appeal, and *Semelka I*.

Plaintiff's counsel countered defendants' arguments substantively, but procedurally argued defendants' second amended motion to dismiss ought to be treated as invalid as the Rules of Civil Procedure do not provide an avenue for parties to amend their motions prior to filing an answer. Plaintiff also attached various documents in opposition to defendants' second amended motion to dismiss, including: UNC's notice of intent to discharge dated 11 January 2017, plaintiff's request for a hearing before the Faculty Hearings Committee, the Tenure Policy, and the complete transcript from the Committee hearing.

The trial court entered an order on 24 March 2022 denying defendants' motion in part but granting dismissal of all claims against the individual defendants in their individual capacities. Defendants filed a notice of appeal on 20 April 2022 and plaintiff cross-appealed on 22 April 2022.

II. Discussion

At the outset, we must address the interlocutory nature of defendants' appeal.

A. Interlocutory Order

[1] An order denying a motion to dismiss is interlocutory because it leaves the matter for further action by the trial court. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (citation omitted) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "an interlocutory order may be appealed immediately . . . if (i) the trial court certifies the case for immediate appeal pursuant to N.C. [Gen. Stat.] § 1A-1, Rule 54(b), or (ii) the order 'affects a substantial right of the appellant that would be lost without immediate review.' " *McIntyre v. McIntyre*, 175 N.C. App. 558, 562, 623 S.E.2d 828, 831 (2006) (citation omitted).

Defendants concede this appeal as interlocutory, but contend a substantial right is affected as they "ma[k]e a colorable assertion of

collateral estoppel" and "are facing a second trial on issues already resolved in [*Semelka I*][.]" Our case law establishes that a trial court's order rejecting the affirmative defense of collateral estoppel can affect a substantial right, however, "incantation of the [doctrine of collateral estoppel] does not . . . automatically entitle a party to an interlocutory appeal[.]" *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 533-34 (citation omitted), *writ of supersedeas and disc. review denied*, 361 N.C. 567, 650 S.E.2d 602 (mem.) (2007). Thus, we must preliminarily determine whether defendants have made a colorable argument that the doctrine applies in this context in order to allow us to exercise jurisdiction over this appeal.

Although *Semelka I* consists of an administrative action, "it is axiomatic that no one ought to be twice vexed for the same cause[,]" and "[t]his fundamental principle of law applies to administrative decisions." *In re Mitchell*, 88 N.C. App. 602, 604, 364 S.E.2d 177, 179 (1988) (citations omitted). Determining whether an administrative decision enjoys the protections of "*res judicata* depends upon its nature; decisions that are 'judicial' or 'quasi-judicial' can have that effect, decisions that are simply 'administrative' or 'legislative' do not." *Id.* at 605, 364 S.E.2d at 179 (citation omitted). The distinction between a quasi-judicial determination and an administrative one "is not precisely defined," but "courts have consistently found decisions to be quasi-judicial when the administrative body adequately notifies and hears before sanctioning, and when it adequately provides under legislative authority for the proceeding's finality and review." *Id.* (citations omitted).

Here, as illustrated by the facts set forth above, plaintiff appealed Provost Dean's discharge decision pursuant to "Section 3(b)(4) of the Tenure Policy." The appeal was held in accordance with the Tenure Policy, heard before a neutral panel of five faculty members, and plaintiff was represented by counsel. *The Code*, as incorporated into the Tenure Policy, allowed plaintiff to appeal the termination decision to the BOG and N.C. Gen. Stat. § 150B-43 provided plaintiff the right to petition for judicial review. Accordingly, collateral estoppel may apply in the present case as the facts of *Semelka I* were established in a quasi-judicial forum as provided under legislative authority.

"The companion doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) have been developed by the courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (citation omitted).

> Under the collateral estoppel doctrine, parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination. The doctrine is designed to prevent repetitious lawsuits, and parties have a *substantial right* to avoid litigating issues that have already been determined by final judgment.

Turner v. Hammocks Beach Corp., 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (emphasis added) (alteration, citation, and internal quotation marks omitted). "An issue is actually litigated, for purposes of collateral estoppel . . . if it is properly raised in the pleadings or otherwise submitted for determination and is in fact determined." *Williams v. Peabody*, 217 N.C. App. 1, 6, 719 S.E.2d 88, 93 (2011) (citation, brackets, and internal quotation marks omitted). "A very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical[;] [i]f they are not identical, then the doctrine of collateral estoppel does not apply." *Id.* (citation and internal quotation marks omitted).

On the other hand, "the rules for determining whether the parties in question are or were in privity with parties in the prior action are not as well defined." *State v. Summers*, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000). Our case law describes "privity" as " somewhat elusive" because "no definition of the word . . . can be applied in all cases." *Id.* (citation and internal quotation marks omitted) (quoting *Masters v. Dunstan*, 256 N.C. 520, 524, 124 S.E.2d 574, 577 (1962)). When considering whether privity exists, we must "look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest." *Williams*, 217 N.C. App. at 8, 719 S.E.2d at 94 (citation and internal quotation marks omitted). " 'In general, 'privity involves a person so identified in interest with another that he represents the same legal right' previously represented at trial.' " *Summers*, 351 N.C. at 623, 528 S.E.2d at 20 (citations omitted).

To determine whether collateral estoppel applies in the present case we must first determine whether the individual defendants stand in privity with the respondents of *Semelka I*, UNC and UNC-CH. Plaintiff argues the individual defendants do not share privity as they "had no ability to direct the course of the litigation" and cannot be bound by a judgment to which they were not named parties. This application of privity is incorrect.

Plaintiff's recitation of privity derives from case law established prior to our Supreme Court's elimination of the mutuality requirement

of collateral estoppel in *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986). Contrary to plaintiff's contention, "[w]here a litigant seeks to assert collateral estoppel defensively," mutuality of estoppel is not required. *Johnson v. Smith*, 97 N.C. App. 450, 453, 388 S.E.2d 582, 584 (citation omitted), *disc. review denied*, 326 N.C. 596, 393 S.E.2d 878 (mem.) (1990). Thus, "the litigant invoking collateral estoppel need not have been a party to or in privity with a party to the first lawsuit 'as long as the party to be collaterally estopped had a full and fair opportunity to litigate the issue in the earlier action.' " *Id.* (citation omitted). Here, it is apparent that plaintiff received a full and fair opportunity to challenge his discharge as a three-day hearing was held before the Faculty Hearings Committee.

Likewise, plaintiff's complaint in the instant case, along with a review of the circumstances underlying plaintiff's termination, lead us to conclude that *Semelka I* involved identical issues previously litigated, actually determined, and necessary to the overall disposition regarding plaintiff's discharge. As indicated above, the issues presented to the Faculty Hearings Committee included determining "whether permissible grounds for [plaintiff]'s discharge existe[d] under the Tenure Policy and whether those grounds were, in fact, the basis of the University's decision to discharge." The Committee's findings illustrate that a critical component of their overall decision regarding plaintiff's termination included examining potential retaliation on behalf of the individual defendants due to plaintiff bringing his "long-standing concerns about safety" in the Radiology Department to the attention of university administration, a central feature of plaintiff's complaint in the instant case. In fact, the Committee noted that they were "struck by the seriousness" of plaintiff's allegations yet found "sufficient evidence . . . that the University ha[d] met its burden in acknowledging and investigating [plaintiff]'s concerns."

In sum, *Semelka I* upheld plaintiff's termination, was a final judgment on the merits, and facts relating to plaintiff's termination being the result of retaliation were actually litigated and necessary to the judgment. *See City of Asheville v. State*, 192 N.C. App. 1, 14, 665 S.E.2d 103, 115 (2008) (citation omitted) (" '[A]ny right, fact, or question in issue and directly adjudicated on or necessarily involved in the determination of an action . . . on the merits is conclusively settled . . . and cannot again be litigated between the parties and privies.' "), *appeal dismissed and disc. review denied*, 672 S.E.2d 685 (mem.) (2009). We disagree with plaintiff's assertion that collateral estoppel may not apply to *Semelka I* because the administrative forum hardly "provide[d] [him] with a full opportunity to litigate his case." It is well-settled that a party is not entitled to

relitigate facts previously determined in a prior action, even if that prior action was held in an administrative capacity. *Swain v. Efland*, 145 N.C. App. 383, 389, 550 S.E.2d 530, 535 (finding parties cannot maintain both an administrative action and an action in superior court as "this would allow [parties] two bites of the apple, could lead to the possibility that different forums would reach opposite decisions, as well as engender needless litigation"), *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (mem.) (2001); *See also Univ. of Tenn. v. Elliott*, 478 U.S. 788, 797, 92 L. Ed. 2d 635, 645 (1986) ("[I]t is sound policy to apply principles of issue preclusion to the fact-finding of administrative bodies acting in a judicial capacity.").

Accordingly, we conclude that defendants' motion to dismiss raises a colorable assertion of collateral estoppel and defendants' appeal is properly before this Court. Having determined that findings from *Semelka I* may serve as a bar to plaintiff's whistleblower action, we now turn to address the merits of defendants' appeal.

B. Standard of Review

Defendants moved to dismiss plaintiff's complaint pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2022) (lack of subject matter jurisdiction); N.C. Gen. Stat. § 1A-1 Rule 12(b)(2) (2022) (lack of personal jurisdiction); N.C. Gen. Stat. § 1A-1 Rule 12(b)(6) (2022) (failure to state a claim upon which relief can be granted). However, defendants' arguments on appeal focus exclusively on the doctrine of collateral estoppel and plaintiff's ability to state a claim under the Whistleblower Act. Thus, we focus our analysis on Rule 12(b)(6). *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 32, 738 S.E.2d 819, 822 ("Because in this case the fact that defendant argues plaintiff is collaterally estopped from contesting relates to plaintiff's ability to state a claim, rather than a jurisdictional issue, it is properly analyzed under Rule 12(b)(6)[.]"), *disc. review denied*, 367 N.C. 236, 748 S.E.2d 544 (mem.) (2013).

This Court conducts a *de novo* review of a trial court's order on a motion to dismiss. *Sykes v. Blue Cross and Blue Shield of N.C.*, 372 N.C. 318, 324, 828 S.E.2d 489, 494 (citation omitted), *reh'g denied*, 372 N.C. 710, 830 S.E.2d 823 (mem.) (2019). "In doing so, the Court must consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.' " *Id.* (citations omitted). However, dismissal is proper when: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that

necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

C. Plaintiff's Whistleblower Claims

[2] Defendants argue the trial court erred in denying their motion to dismiss as plaintiff is precluded from establishing the elements of his whistleblower claims because *Semelka I* determined that his discharge was (1) "proper" and (2) "not retaliatory[.]" We agree.

In order to assert a *prima facie* showing of retaliatory termination in violation of the Whistleblower Act, "a plaintiff must establish: (1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken[.]" *Manickavasagar v. N.C. Dep't of Pub. Safety*, 238 N.C. App. 418, 428, 767 S.E.2d 652, 658 (2014) (citation omitted). "There are at least three distinct ways for a plaintiff to establish a causal connection between the protected activity and the adverse employment action under the Whistleblower Act." *Newberne v. Dep't of Crime Control and Pub. Safety*, 359 N.C. 782, 790, 618 S.E.2d 201, 207 (2005).

"First, a plaintiff may rely on the employer's 'admission that it took adverse action against the plaintiff solely because of the plaintiff's protected activity.' " *Id.* (citation and brackets omitted). "Second, a plaintiff may seek to establish by circumstantial evidence that the adverse employment action was retaliatory and that the employer's proffered explanation for the action was pretextual." *Id.* (citation omitted).

> [O]nce a plaintiff establishes a prime facie case of unlawful retaliation, the burden shifts to the defendant to articulate a lawful reason for the employment action at issue. If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. The ultimate burden of persuasion rests at all times with the plaintiff.

Id. at 791, 618 S.E.2d at 207-208 (citations omitted).

> Third, when the employer claims to have had a good reason for taking the adverse action but the employee has direct evidence of a retaliatory motive, a plaintiff may seek to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken. Cases in this category are commonly referred to as "mixed motive" cases.

Id. at 791, 618 S.E.2d at 208 (citations and internal quotation marks omitted). Contrary to the burden-shifting analysis of cases in the second category, "the ultimate burden of persuasion in a 'mixed motive' case may be allocated to the defendant once a plaintiff has established a prima facie case." *Id.* at 792, 618 S.E.2d at 208. "In order to shift the burden to the defendant, however, the plaintiff must first demonstrate 'by *direct evidence* that an illegitimate criterion was a substantial factor in the decision.' " *Id.* (emphasis in original) (citations omitted).

In the case *sub judice*, the question we are tasked with considering is plaintiff's ability to satisfy the third element of a whistleblower action: a causal connection between his report of health and safety concerns to university administration and his subsequent termination. *See id.* Plaintiff argues, primarily, that he is not collaterally estopped from pursuing a whistleblower claim as *Semelka I* did not involve a cause of action under the Whistleblower Act and only concerned questions of violation under the Tenure Policy. Specifically, plaintiff contends retaliation was only mentioned in context and due to its immateriality, plaintiff may still successfully prove his discharge was an act of unlawful retaliation. We disagree.

Plaintiff's arguments rest on the third theory of causation established by our Supreme Court in *Newberne*. Plaintiff argues that although he was terminated for violating the Tenure Policy, he may still "seek to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken." *Newberne*, 359 N.C. at 791, 618 S.E.2d at 208 (citation omitted). However, plaintiff's contention is misplaced as cases under the "mixed motive" theory of causation require plaintiffs to satisfy the initial burden that the "protected conduct was a 'substantial' or 'motivating' factor for the adverse employment action" with "*direct evidence* that an illegitimate criterion was a substantial factor in [the adverse action]." *Id.* at 792, 618 S.E.2d at 208 (emphasis in original) (citations omitted). Only upon this initial showing does the burden shift to defendant to "prove by a preponderance of the evidence that it would have reached the same decision as to [the employment action at issue] even in the absence of the protected conduct." *Id.* at 791-92, 618 S.E.2d at 208 (citations and internal quotation marks omitted). Here, a review of the allegations contained in the complaint, in addition to certain facts established in *Semelka I*, indicate plaintiff's inability to prove his report of health and safety concerns to Chancellor Folt played a substantial factor in his termination.

Plaintiff's complaint states that he retained the legal services of Mintz Levin "for purposes of assisting him in presenting" his concerns to the BOT "in an effort to protect . . . patients and staff." Plaintiff purportedly sought reimbursement of the legal fees because "his primary purpose in retaining [legal services] was not for personal benefit, but ultimately for the benefit of UNC-CH's School of Medicine." As alleged by plaintiff, it was this retention of legal counsel which led defendants to unlawfully retaliate against him. In fact, plaintiff contends,"[a]t no time did [he] ever exhibit a 'pattern of dishonesty' related to" his legal reimbursement request, yet defendants utilized this as a "pretext to retaliate against [him] for" reporting "health, safety, and hostile work environment concerns to [Chancellor Folt]" and "seeking to report the same to the [BOT] and potentially [the BOG]." Plaintiff argues that, in essence, the audit and internal investigation was used to wrongly characterize his request for reimbursement of legal fees as a violation of the Tenure Policy.

We disagree with plaintiff's interpretation of the facts underlying his termination. Despite plaintiff's assertion that the internal investigation was used as a pretext for retaliation, the facts indicate that the audit was conducted due to the "unusual" nature of plaintiff's request for reimbursement of legal fees and the ambiguity of his stated reasons for the reimbursement. Plaintiff reported to Mr. Collichio that the legal services were retained for consultations "concerning a book he might write, safety standards, drug development, staff burn-out and IRB issues." When plaintiff was asked for further explanation pertaining to his request, he provided partially redacted invoices and vague emails. Only then did Ms. Petree decide to conduct an audit to "ascertain whether his stated reasons for engaging Mintz Levin were indeed true" and not "for personal purposes." It was only upon a review of plaintiff's own communications with Mintz Levin did the audit reveal that plaintiff was discussing the potential of "large monetary settlements and promotions that he would like . . . in order for him to refrain from publicly disclosing his safety concerns." Consequently, the Faculty Hearings Committee concluded that despite plaintiff's ambiguity in his stated reasons for the reimbursement, "the specificity of his emails . . . dated January 1 and 6, 2016, make clear that [plaintiff] originally consulted with outside counsel because he was considering legal action against the University." Thus, the Committee ultimately concluded that plaintiff's deliberate obscurity of the need for outside legal consultation was "disingenuous and dishonest" and "constitute[d] misconduct of such a nature as to adversely reflect on [plaintiff]'s honesty, trustworthiness, and fitness to be a faculty member."

In conclusion, plaintiff cannot establish a *prima facie* case of whistleblower retaliation as his discharge was the result of legitimate, non-retaliatory reasons related to his misrepresentations in seeking reimbursement for $30,000 in personal legal fees. *Newberne*, 359 N.C. at 795, 618 S.E.2d at 210 (emphasis added) (citation omitted) ("[A] trial court ruling on a Rule 12(b)(6) motion to dismiss a whistleblowing claim should look at the face of the complaint to determine whether the factual allegations, if true, would sustain a claim for relief under *any* viable theory of causation."). Accordingly, plaintiff's arguments to the contrary are overruled.

III. Cross-Appeal

[3] On cross-appeal, plaintiff contends defendants' second amended motion to dismiss is a "nullity[,]" therefore the trial court's order dismissing claims against the individual defendants in their individual capacities is error. As indicated above, plaintiff is collaterally estopped from pursuing a cause of action under the Whistleblower Act, accordingly, remaining arguments pertaining to claims against the individual defendants are moot.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's order denying defendants' motion to dismiss. Plaintiff's cross-appeal is dismissed as moot.

REVERSED; CROSS-APPEAL DISMISSED.

Judges HAMPSON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
CLARENCE RAY GIDDERON

No. COA22-681

Filed 6 June 2023

Jury—criminal trial—reopening voir dire—after jury selection but before jury impaneled—colloquy—waiver

In a first-degree murder prosecution, the trial court did not abuse its discretion by declining to reopen the voir dire of a juror who, after jury selection but before the jury was impaneled, expressed concern because the other jurors had been asked questions during voir dire that she had not been asked. The trial judge conducted a colloquy with the juror confirming that, regardless of any unasked questions during voir dire, she would be able to serve as a fair and impartial juror. Further, defense counsel did not request additional voir dire when, after the court finished its colloquy with the juror, the court gave the parties an opportunity to do so; thus, defense counsel waived the right to raise the issue on appeal.

Appeal by defendant from judgment entered 3 December 2021 by Judge William A. Wood in Guilford County Superior Court. Heard in the Court of Appeals 9 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Francisco J. Benzoni for the State.

Jarvis John Edgerton, IV, for the defendant-appellant.

TYSON, Judge.

Clarence Ray Gidderon ("Defendant") appeals from judgment entered on a jury's verdict for first-degree murder sentencing him to life imprisonment without possibility of parole. Our review reveals no error.

I. Background

Defendant was involved in a relationship with forty-seven-year-old Paige Rickard ("Rickard"). Rickard lived with her aunt, Robin Clodfelter. According to Clodfelter, Defendant was "extremely jealous and controlling over [Rickard]."

Defendant ate dinner with Rickard and Clodfelter on 29 March 2018 at a local church. Clodfelter's refrigerator was broken. She planned to visit a neighbor's house on the way home to obtain a couple cups of ice for the evening. Clodfelter walked behind Rickard and Defendant, and she heard Rickard ask Defendant to leave. Other neighbors also heard Defendant and Rickard arguing loudly as they walked by.

Defendant continued to walk beside Rickard, getting closer and closer to her. Clodfelter heard Defendant say: "Don't play me." Shortly thereafter, Defendant drew a knife and stabbed Rickard in the stomach. Clodfelter contemplated attacking Defendant, but determined she could not overcome him. She heard a cup fall out of Rickard's hand. Clodfelter ran to the closest neighbor's house and called 911. Law enforcement officers arrived shortly thereafter, Rickard was rushed to the hospital, and officers collected evidence from the crime scene. Defendant was taken into custody.

Rickard sustained five sharp force internal injuries on the left side of her body, which inflicted major damage to her spleen. She also suffered from an incised wound on her forehead. Rickard died several days later from complications arising from those wounds.

A jury indicted Defendant for first-degree murder on 11 June 2018. Defendant pled not guilty, and a trial was held. After jury selection, but before the jury was impaneled, Juror Six approached the court deputies. The juror stated she was concerned because other jurors had been asked questions during *voir dire* that she had not been asked.

Sheriff's Deputy Clapp immediately brought Juror Number 6's concerns to the court's attention:

> THE COURT: All right. Deputy Butler-Moore and Deputy Clapp have brought to my attention – I believe it comes through Deputy Clapp more than Deputy Butler-Moore. But Juror Number 6, who's Ms. Mackenzie on my list, Cory [sic] Mackenzie, C-O-R-A (verbatim) Mackenzie, has indicated to Deputy Clapp that there was a question that some of the other jurors w[ere] asked that she was not asked, but gave no indication that the information she has would have affected her ability to be fair in this case. Is that correct, Deputy Clapp?
>
> THE BAILIFF: Yes, Your Honor.
>
> THE COURT: Did she indicate to you in any way that the information she had would affect her ability to be fair?

THE BAILIFF: No, Your Honor.

THE COURT: But she did indicate that questions were asked of some jurors that were not asked of her; is that correct?

THE BAILIFF: Yes, sir.

THE COURT: Did she make any other comments?

THE BAILIFF: No, Your Honor.

The trial court called Juror Number 6 into open court and asked her additional questions.

THE COURT: I just wanted to ask you a few questions. Deputy Clapp and Deputy Butler-Moore both indicated that you attempted to give them some information; is that correct?

JUROR C. MACKENZIE (6): Yes. I realized that the line of questioning from the defense moved on because someone else had maybe a greater concern, but I didn't share some information that I think was related to some of your earlier questions.

THE COURT: Well, let me ask you some questions about that.

JUROR C. MACKENZIE (6): Okay.

THE COURT: Do you feel you could be a fair juror in this case?

JUROR C. MACKENZIE (6): I do.

THE COURT: Okay. And your concern is that some questions were asked of some jurors that perhaps were not asked of other jurors?

JUROR C. MACKENZIE (6): Yes.

THE COURT: But there was a – kind of a catch-all question asked by one or both of the attorneys, is there anything else that would affect your ability to be fair or words to that effect, and you did not speak up; is that correct?

JUROR C. MACKENZIE (6): I don't remember that sort of open-ended question from the defense. I do remember the DA asking if there was anything in his line of questioning.

> THE COURT: And whatever this information is that you were not provided perhaps because the specific question was not asked, in your opinion, does not affect your ability to be fair; is that correct?
>
> JUROR C. MACKENZIE (6): I don't think so.
>
> THE COURT: All right. Thank you, ma'am.
>
> JUROR C. MACKENZIE (6): Okay.
>
> (Juror C. Mackenzie departed the courtroom at 2:06 p.m.)
>
> THE COURT: Anything on that issue with Juror Number 6, [District Attorney]?
>
> [DISTRICT ATTORNEY]: No, Your Honor.
>
> THE COURT: [Defense Counsel]?
>
> [DEFENSE COUNSEL]: No, Your Honor.
>
> THE COURT: All right. Well, we can bring all the jurors in, Deputy Clapp, or if someone could let Deputy Butler-Moore know.

Based upon the above colloquy, the trial court denied Defendant's request to re-open the *voir dire* for Juror Number 6, allowed Juror Number 6 to continue to serve on the jury, and impaneled the jury for trial.

The jury's verdict unanimously found Defendant to be guilty of first-degree murder on 3 December 2021. Defendant was sentenced as a prior record level VI offender to life imprisonment without possibility of parole. Defendant appeals.

II. Jurisdiction

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

III. Failure to Reopen Jury *Voir Dire*

Defendant argues the trial court abused its discretion by declining to reopen the *voir dire* of Juror Number 6 and failing to conduct an adequate inquiry or investigation.

A. Standard of Review

"The nature and extent of the inquiry made of prospective jurors on *voir dire* ordinarily rests within the sound discretion of the

trial court." *State v. Bond*, 345 N.C. 1, 17, 478 S.E.2d 163, 171 (1996) (citation omitted).

"In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby." *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559 (citations omitted), *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). "An abuse of discretion is shown only where the court's ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* at 267, 439 S.E.2d 558 (citations and internal quotation marks omitted).

B. Analysis

1. N.C. Gen. Stat. § 15A-1214

Our criminal procedure statutes provide:

> (g) If at any time after a juror has been accepted by a party, and *before the jury is impaneled*, it is discovered that the juror has made an incorrect statement during *voir dire* or that *some other good reason exists*:
>
> > (1) *The judge may examine*, or permit counsel to examine, *the juror to determine whether there is a basis for challenge for cause.*

N.C. Gen. Stat. § 15A-1214(g)(1) (2021) (emphasis supplied).

"[T]he decision whether to reopen examination of a juror previously accepted by the parties is a matter within the sound discretion of the trial court." *State v. Freeman*, 314 N.C. 432, 437, 333 S.E.2d 743, 747 (1985) (citing N.C. Gen. Stat. § 15A-1214(g)(1)) (explaining that, while the decision to reopen jury *voir dire* rests within the discretion of the trial court, once *voir dire* has been reopened, either party is allowed to exercise any remaining preemptory challenges for cause); *State v. Locklear*, 349 N.C. 118, 142, 505 S.E.2d 277, 291 (1998) (explaining "the extent and manner of the inquiry [by counsel] rests within the trial court's discretion").

2. State v. Boggess

Our Supreme Court explained a trial judge's role after a juror has been accepted, but before the jury has been impaneled, in *State v. Boggess*:

> [A] trial judge has leeway to make an initial inquiry when allegations are received before a jury has been impaneled that would, if true, establish grounds for reopening *voir dire* under N.C.G.S. § 15A–1214(g). As part of this initial

> investigation, the judge may question any involved juror and may consult with counsel out of the juror's presence. Based on information thus developed, the judge has discretion to reopen *voir dire* or take other steps suggested by the circumstances. Because the jury has not been impaneled and other potential jurors are still available, minimal disruption occurs if the judge resolves any doubts in favor of reopening *voir dire* and accords counsel the right to exercise any remaining peremptory challenges. If the judge at any point allows the attorneys to question the juror directly, *voir dire* has necessarily been reopened and the procedures set out in N.C.G.S. § 15A–1214(g)(1)–(3) are triggered. "[O]nce the examination of a juror has been reopened, 'the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror.' "

358 N.C. 676, 683, 600 S.E.2d 453, 457 (2004) (citation omitted).

3. State v. Adams

This Court also examined whether the trial court abused its discretion by failing to reopen *voir dire* in *State v. Adams*. 285 N.C. App. 379, 877 S.E.2d 721 (2022). In *Adams*, one of the jurors expressed his belief "Defendants should 'answer the questions themselves' " after he was selected to serve on the jury but before the jury was impaneled. *Id.* at 391, 877 S.E.2d at 730. The trial judge first called the juror to clarify his opinion, instructed the juror about a defendant's right to refrain from testifying, and gave the juror time to re-evaluate his opinion. *Id.*

The trial court ultimately denied defendant's motion to re-open jury *voir dire* "after inquiring into Juror Clark's opinion and only after determining Juror Clark would be able to follow the law." *Id.* at 393, 877 S.E.2d at 731. The trial court further explained "that reopening *voir dire* would 'open[ ] a Pandora's box' and cause delays during Defendants' trial, Defense counsel for both parties had already passed on Juror Clark, and Juror Clark gave repeated affirmations that he understood and could apply the law." *Id.* This Court affirmed the trial court's decision and concluded the trial court reached a reasoned decision and did not abuse its discretion. *Id.*

The facts before us are similar to those in *Adams*. Like in *Adams*, the trial judge called Juror Number 6 before the court and questioned her regarding the statements she had made to the deputies. *Adams*, 285 N.C. App. at 391, 877 S.E.2d at 730. The trial judge confirmed, regardless

of whether defense counsel asked Juror Number 6 the same questions as other jurors, that those unasked questions would not affect Juror Number 6's ability to serve as a fair and impartial juror. Juror Number 6 never expressed doubts about her impartiality, ability to serve as a juror, find the facts, and to fairly apply the law. To the contrary, the trial court's questioning further confirmed and solidified Juror Number 6's commitment to serve as a fair and impartial juror.

The decision whether to re-open *voir dire* rested within the trial court's discretion. Juror Number 6 had been selected by both parties without challenge and the jury was not yet impaneled. N.C. Gen. Stat. § 15A-1214(g)(1) (2021); *Boggess*, 358 N.C. at 683, 600 S.E.2d at 457 (citing *Id.* § 15A-1214(g)(1)); *Bond*, 345 N.C. at 17, 478 S.E.2d at 171; *Lee*, 335 N.C. at 268, 439 S.E.2d at 559; *Freeman*, 314 N.C. at 437, 333 S.E.2d at 747; *Locklear*, 349 N.C. at 142, 505 S.E.2d at 291. Defendant has failed to carry his burden on appeal to show any abuse in the trial court's exercise of its discretion. *Lee*, 335 N.C. at 267-68, 439 S.E.2d at 558-59; *Adams*, 285 N.C. App. at 393, 877 S.E.2d at 731.

The trial court provided counsel on both sides with the opportunity to request further *voir dire*, and both parties' counsel expressly declined the opportunity. *Id.* Defense counsel also failed to request additional *voir dire* when asked by the trial court and waived the right to challenge the issue on appeal. N.C. R. App. P. 10(a)(1). Defendant's argument is overruled.

IV. Conclusion

The decision whether to re-open *voir dire* rests within the trial court's sound discretion. N.C. Gen. Stat. § 15A-1214(g)(1); *Boggess*, 358 N.C. at 683, 600 S.E.2d at 457 (citing *Id.* § 15A-1214(g)(1)); *Bond*, 345 N.C. at 17, 478 S.E.2d at 171; *Lee*, 335 N.C. at 268, 439 S.E.2d at 559; *Freeman*, 314 N.C. at 437, 333 S.E.2d at 747; *Locklear*, 349 N.C. at 142, 505 S.E.2d at 291.

The trial court conducted a timely inquiry under the statute into Juror Number 6's comments, concerns, questions, and beliefs prior to impaneling the jury. *Adams*, 285 N.C. App. at 393, 877 S.E.2d at 731. Defendant has failed to show any abuse in the trial court's exercise of discretion in questioning Juror Number 6. *Id.*; *Lee*, 335 N.C. at 267-68, 439 S.E.2d at 558-59.

Defendant also failed to request re-opening of *voir dire* and expressly waived re-opening when asked by the trial court. N.C. R. App. P. 10(a)(1).

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 ARROWOOD and RIGGS concur.

STATE OF NORTH CAROLINA
v.
RICHARD LEE HEFNER

No. COA22-435

Filed 6 June 2023

1. Criminal Law—jury instructions—habitual felon status—predicate offense—described as "crime" versus "felony"

In its jury instructions on habitual felon status, where the trial court referred to the State's burden of proof as having to show that defendant had been convicted of the "crime"—rather than the "felony"—of grand larceny in South Carolina as one of the predicate offenses (as requested by the State due to the South Carolina judgment not explicitly stating that the offense was a felony), there was no error because the State presented evidence from which the jury could determine that the offense constituted a felony under South Carolina law at the time it was committed.

2. Criminal Law—habitual felon status—proof of prior convictions—out-of-state conviction—sufficiency of evidence

The State presented sufficient evidence from which the jury could conclude that defendant had been convicted of three predicate felonies to attain habitual felon status, including the indictment and judgment from defendant's prior conviction in South Carolina of grand larceny, which listed the elements of grand larceny and the statute being violated, respectively, and which demonstrated that that offense constituted a felony under the statute then in effect.

3. Indictment and Information—habitual felon status—predicate offenses—facially valid

The indictment charging defendant with having attained habitual felon status was facially valid because it alleged three predicate

felony convictions, including one of an offense defendant committed in South Carolina (grand larceny), which constituted a felony under South Carolina law at the time it was committed.

Appeal by Defendant from judgment entered 28 May 2021 by Judge Thomas H. Lock in Jackson County Superior Court. Heard in the Court of Appeals 29 November 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Appellate Defender Glenn Gerding by Assistant Appellate Defender Katherine Jane Allen, for Defendant.

WOOD, Judge.

Richard Hefner ("Defendant") appeals from a judgment entered 28 May 2021 after being sentenced as a habitual felon. Based upon our reasoning below, we find no error in sentencing.

I. Factual and Procedural Background

On the evening of 29 December 2018, Defendant and his girlfriend, Ms. Jones, arrived at a Walmart in Sylva, North Carolina, with no items in their possession. The couple made their way back to the electronics section of the store and began looking at televisions. Defendant placed the television, a 43-inch Hisense valued at $278.00, in their shopping cart. When the television was placed into the shopping cart, an anti-theft device known as "spider-wire" was still on the device. Once the television was placed in the shopping cart, the couple proceeded to the front of the store. Briefly separating, Ms. Jones pushed the television through a closed cash register while Defendant walked through self-checkout. The two then met again at the exit. When asked by a store greeter to provide the receipt for the television, Defendant stated that they had attempted to return the device but were denied a refund. Defendant and Ms. Jones left Walmart with the television, placing the device in their vehicle. After Defendant and Ms. Jones left with the television, spider-wire was discovered in a toy aisle the two had walked down before leaving the store.

Subsequently, Defendant was arrested and Defendant was indicted by a grand jury on 1 July 2019 for felony larceny and possession of stolen goods. On this same day, the State obtained an indictment against Defendant charging him with attaining habitual felon status. On 8 December 2020, the State gave notice of its intent to seek an aggravated

sentence against Defendant based on four aggravating factors: Defendant was joined with more than one person in committing the offense and was not charged with committing a conspiracy; Defendant committed the offense while on pretrial release on another charge; Defendant has been found by a North Carolina court to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence; and the offense committed was during the time in which Defendant was on supervised or unsupervised probation, parole, or post-release supervision.

On 15 March 2021, the State obtained a superseding indictment on the attaining habitual felon status charge. The indictment alleged the following predicate felonies: (1) the felony of grand larceny in violation of South Carolina Code of Laws Section 16-13-30 which Defendant committed on 27 August 2005 and of which he was convicted on 25 October 2005; (2) the felony of possession of a stolen motor vehicle in violation of N.C. Gen. Stat. § 20-106 which Defendant committed on 5 November 2009 and of which he was convicted on 28 April 2010; and (3) the felony of possession of methamphetamine in violation of N.C. Gen. Stat. § 90-95(a)(3) which Defendant committed on 18 October 2016 and of which he was convicted on 3 July 2017.

Defendant was tried during the 24 May 2021 Criminal Session of Jackson County Superior Court and appeared *pro se* with appointed stand-by counsel, although he elected to be represented by counsel during one day of the jury trial. During the trial, the State called as its witness Mr. Kilby, the loss prevention employee for Walmart. Mr. Kilby testified that an hour before Defendant and Ms. Jones arrived at the store, he had inspected the televisions to ensure all of these devices were secured in spider-wire. Mr. Kilby recalled that when he observed Defendant and Ms. Jones walk towards the store's exit, he noticed that the television in their shopping cart was missing its spider-wire. Mr. Kilby confirmed that no 43-inch television had been purchased while Defendant and Ms. Jones were present in the store.

Testifying on his own behalf, Defendant stated that on the day in question, Ms. Jones told him she had purchased a television online and needed to pick it up at Walmart. Defendant testified that when they arrived at Walmart, they located the electronics section, and he placed the television in their shopping cart. According to Defendant, he then went to the bathroom. Once he returned, Defendant testified that he and Ms. Jones began arguing over the television purchase, at which point Ms. Jones decided to return the item. Defendant attempted to return the television without a receipt at the Customer Service desk but was told it must be returned at the Electronics Department. Defendant further

testified that Ms. Jones then changed her mind and elected to keep the television, and the couple moved towards the store's exit. Defendant stated that when they left, he showed the receipt of the television purchase to the Walmart greeter.

On 27 May 2021, the jury found Defendant guilty of felony larceny and felony possession of stolen goods. During the habitual felon phase of trial, the State introduced the following evidence of the South Carolina conviction: the arrest warrant, indictment, and judgment for grand larceny. The State called Jackson County Assistant Clerk Stevie Bradley to authenticate the exhibits for Defendant's three predicate felony convictions. Ms. Bradley testified that the South Carolina judgment reflected that "[t]he crime is grand larceny."

During the charge conference for the habitual felon trial, the State noted that the South Carolina judgment for grand larceny did not explicitly state that the charge was a felony, but the South Carolina statute in effect at the time Defendant committed the crime identified the offense as a felony, and this offense is substantially similar to North Carolina's offense of felony larceny. Further, the State argued that the question of whether the South Carolina conviction was a felony or a misdemeanor was a question of law, not a question of fact for the jury. The State also requested that the trial court replace the word "felony" with "crime" when giving the pattern jury instruction for habitual felon status, N.C.P.I.–Crim. 203.10, as it related to the South Carolina felony.

Defendant objected during the charge conference and stated: "Yeah, I just would like to say if it doesn't state in the actual code itself it's not a felony, I would like for it to stay the same, it's not a felony." Defendant's objection was overruled. The trial court concluded that the South Carolina conviction was a felony and agreed to instruct the jury as requested. The trial court instructed the jury as follows:

> For you to find the defendant guilty of being a habitual felon, the State must prove three things beyond a reasonable doubt. First, that on October 25, 2005, the defendant in the Court of General Sessions for Cherokee County, South Carolina, was convicted of the crime of grand larceny that was committed on August 27th, 2005, in violation of the law of the State of South Carolina.

On 28 May 2021, the jury found Defendant guilty of attaining habitual felon status. On this same day, Defendant admitted to the existence of two aggravating factors and an additional record point for purposes of sentencing; in exchange, the State dismissed other pending charges.

The trial court arrested judgment on the possession of stolen goods conviction. Additionally, the trial court found the existence of two aggravating factors, found Defendant to have 16 prior record points, and a prior record level of V. Defendant was sentenced in the aggravated range of 120-156 months incarceration. Defendant gave oral notice of appeal in open court.

II. Analysis

On appeal, Defendant challenges his habitual felon status based upon his 2005 South Carolina conviction, arguing that it "cannot constitute a predicate conviction for habitual felon purposes because, after June of 2010, the offense charged in the South Carolina indictment is no longer a felony in South Carolina." Based upon this alleged error, Defendant argues that (1) the trial court erred in its instruction to the jury on habitual felon status; (2) there was insufficient evidence to convict him of attaining habitual felon status; and (3) the indictment charging him with attaining habitual felon status was fatally defective. We review each of these arguments in turn.

A. Jury Instructions.

[1] First, Defendant argues that the trial court "deprived the jury of its fact-finding responsibilities by failing to instruct the jury that it had to determine whether he had been convicted of an offense which was a felony in South Carolina at the relevant time." Defendant contends that because the jury was instructed that they could find Defendant had attained habitual felon status if it found he was convicted of an offense which was a "crime" in South Carolina, not every essential element of the charged habitual felon status was submitted to the jury. Defendant further argues that since the "2005 South Carolina indictment obtained against [him] alleged conduct which was no longer a felony under South Carolina law in 2018" – the time period which Defendant committed the criminal conduct the State sought to habitualize – "the omission of this essential element was not harmless beyond a reasonable doubt." We disagree.

Whether the trial court erred in instructing the jury over the defendant's objection is a question of law reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Pursuant to N.C. Gen. Stat. § 14-7.1, a defendant who has been convicted of or pleaded guilty to three predicate felony offenses in any federal or state court "is declared to be [a] habitual felon and may be charged as a status offender[.]" N.C. Gen. Stat. § 14-7.1(a). A felony includes the following: (1) a felony in North Carolina; (2) an "offense that is a felony under the laws of another

state or sovereign that is substantially similar to an offense that is a felony in North Carolina" regardless of the sentence imposed; (3) an "offense that is a crime under the laws of another state or sovereign that does not classify any crimes as felonies" provided the offense meets several enumerated requirements; and (4) an "offense that is a felony under federal law[,]" excluding certain offenses related to intoxicating liquors. N.C. Gen. Stat. § 14-7.1(b)(1)–(4).

On the issue of whether the jury should have determined that the South Carolina grand larceny conviction was a felony, the State argues, "[w]hile the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court, whether a prior out-of-state conviction exists and whether it is a felony are questions of fact." However, the State makes a distinction that in this case, the "ultimate inquiry, is whether the jury was properly instructed and could determine whether the offense was a felony." We agree with this distinction.

The relevant statute, N.C. Gen. Stat. § 14-7.1 was amended in 2017 to include a subsection which addressed jurisdictions, such as New Jersey,[1] that do not distinguish between felonies or misdemeanors. 2017 N.C. Sess. Law 176, § 2(a) ("S.B. 384"). In jurisdictions which do not "classify any crimes as felonies," the amended statute provides the mechanism whereby convictions from those other jurisdictions can be treated as predicate felony convictions for attaining the status of habitual felon in North Carolina. N.C. Gen. Stat. § 14-7.1(b)(3). As a result of the N.C. Gen. Stat. § 14-7.1 amendment, the pattern jury instruction for habitual felon was also amended in 2019 to reflect this change to the statute. In keeping with the amended statute, the amended patterned jury instruction provides the option to use "crime" instead of "felony" language, such that it reads:

> For you to find the defendant guilty of being a habitual felon, the State must prove three things beyond a reasonable doubt:
>
> First, that on (name date) the defendant, in (name court) [was convicted of] [pled guilty to] the [felony] [crime] of

1. It is true that the New Jersey criminal code does not use the term "felony." *State v. Smith*, 181 A.2d 761, 767 (N.J. 1962), *cert. denied*, 374 U.S. 835, 83 S. Ct. 1879, 10 [L. Ed.] 2d 1055 (1963). Instead, all crimes are classified as a crime of the first, second, third, or fourth degree. N.J. Stat. Ann. § 2C:43-1 (2011).

> (name felony or crime), that was committed on (name date) in violation of the law of the [State of North Carolina] [State of (name other state)] [United States].

N.C.P.I.-Crim. 203.10. According to Defendant, without citing case law or any other authority, the option to use "crime" instead of "felony" is only "applicable when the jurisdiction from which the predicate conviction was obtained does not classify any crimes as felonies and the conviction cannot thus be identified as a felony in the jury instructions." In opposition, the State argues that the amended pattern jury instruction for habitual felon status gives the option of using either "felony" or "crime" as language to indicate predicate offenses, and that "this Court has not held that the use of 'crime' in other contexts constitutes error."

An error in a jury instruction is prejudicial and requires a new trial only if a defendant meets his or her burden of establishing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a). Assuming arguendo that the trial court's use of the word "crime" to instruct the jury on the charge of habitual felon was erroneous, we believe that the jury could still determine that Defendant's earlier South Carolina predicate offense constituted a felony under the applicable statute, so that there is not a reasonable possibility that the jury would have reached a different result. At trial, the State presented evidence showing that Defendant was convicted in 2005 of a felony – grand larceny – under South Carolina law.

In 2005, the relevant South Carolina statute stated:

> (A) Simple larceny of any article of goods, choses in action, bank bills, bills receivable, chattels, or other article of personalty of which by law larceny may be committed, or of any fixture, part, or product of the soil severed from the soil by an unlawful act, or has a value of one thousand dollars or less, is petit larceny, a misdemeanor, triable in the magistrate's court. Upon conviction, the person must be fined or imprisoned not more than is permitted by law without presentment or indictment by the grand jury.
>
> (B) Larceny of goods, chattels, instruments, or other personalty valued in excess of one thousand dollars is grand larceny. Upon conviction, the person is guilty of a felony and must be fined in the discretion of the court or imprisoned not more than:

> (1) five years if the value of the personalty is more than one thousand dollars but less than five thousand dollars;
>
> (2) ten years if the value of the personalty is five thousand dollars or more.

S.C. Code Ann. § 16-13-30 (2005). The statute distinguished between petit larceny and grand larceny and set grand larceny as larceny of goods valued in excess of $1,000.00. In 2010, the South Carolina General Assembly amended the above statute to change the requisite monetary amount from $1,000.00 to $2,000.00. S.C. Code Ann. § 16-13-30 (2010).

However, Defendant's sentence and the incidents of his punishments are governed by statutes in effect at the time the crimes were committed. *See Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17, 22 (1981). Thus, the older version of the statute was in effect at the time Defendant committed the grand larceny crime and he had been convicted and sentenced already by the time of the new 2010 Amendment. Moreover, the relevant 2010 changes to S.C. Code Ann. § 16-13-30, via the session law, also included a savings clause which provided that the "amendment to § 16-13-30 does not affect liability incurred under the prior version of the statute." *State v. Brown*, 402 S.C. 119, 740 S.E.2d 493, 497 (S.C. 2013). While the monetary amount required to establish grand larceny was raised in an amendment five years after Defendant's conviction, the 2010 amendment did not change the classification of grand larceny as a felony. We, therefore, hold that because Defendant's 2005 South Carolina conviction for grand larceny constituted a felony during the time in which the offense was committed and was not reclassified by a later statutory amendment, it serves as a valid predicate conviction for Defendant attaining habitual felon status.

B. Attainment of habitual felon status.

[2] Next, Defendant argues the State failed to prove Defendant attained habitual felon status because the State did not put on sufficient evidence as to each element of the offense. Referencing previous contentions made in his first issue on appeal, Defendant again argues that "the State offered no evidence to prove to the jury beyond a reasonable doubt that [his] 2005 South Carolina conviction for grand larceny is a felony under the laws of South Carolina."

Defendant acknowledges in his brief that at trial, he did not move to dismiss the charge for insufficient evidence when the State rested and at the close of evidence; therefore, his insufficiency claim was not preserved for appellate review pursuant to Rule 10 of our Rules of Appellate

Procedure. N.C. R. App. P. 10. In turn, Defendant requests this Court to invoke Rule 2 of our Rules of Appellate Procedure to review the merits of his claim. In our discretion and in order to prevent manifest injustice to Defendant, we invoke Rule 2 to reach Defendant's raised issue. *State v. Batchelor*, 190 N.C. App. 369, 378, 660 S.E.2d 158, 164 (2008).

In this case, the State presented substantial evidence of Defendant's felony conviction for grand larceny in South Carolina. During the trial, the State introduced into evidence a certified copy of an indictment for the South Carolina offense alleging the following:

> That [Defendant] did in Cherokee County, on or about August 26, 2005, with the intent to permanently deprive the owner, take and carry away diamond ring from her 1994 Honda Accord valued at more than one thousand dollars, belonging to Priscilla Smith, in violation of 16-13-30 Code of Laws of South Carolina, 1976, as amended.

The State also admitted a copy of the judgment for the above offense which shows that Defendant pled guilty to grand larceny and that this offense is "in violation of § 16-13-30 of the S.C. Code of Laws[.]" Thus, the indictment listed the elements of grand larceny and the judgment described the offense as grand larceny, and together, these court records established the statute which was violated. As we have determined prior, the crime charged in South Carolina against Defendant constitutes a felony under the laws of South Carolina. Hence, Defendant's previous felony conviction serves as a valid predicate offense for the sentencing as a habitual felon. This offense was a felony because "grand larceny" is a felony under this statute. Based upon the record before us, the State presented sufficient evidence to demonstrate that Defendant's South Carolina grand larceny conviction was a predicate felony offense for his attaining habitual felon status.

C. Habitual Felon Indictment.

[3] Finally, Defendant argues that his habitual felon indictment was fatally defective because the indictment failed to allege three predicate felony convictions. Defendant continues to point to the 2010 amendment to South Carolina statute § 16-13-30 to argue that he is no longer charged with a crime that is a felony in South Carolina, so that the previous conviction does not serve as a valid predicate conviction for habitual felon purposes. According to Defendant, as a result of this invalid predicate offense, the indictment "failed to allege the essential elements of habitual felon status, rendering the indictment fatally defective and legally insufficient to confer jurisdiction upon the trial court." Thus,

Defendant argues that the trial court erred in trying him for attaining habitual felon status and entering judgment and commitment against him on the habitual felon indictment. We disagree.

This Court reviews *de novo* the sufficiency of an indictment. *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019). An indictment "is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and explicit manner[.]" N.C. Gen. Stat. § 15-153. For a habitual felon status indictment, N.C. Gen. Stat. § 14-7.3 provides:

> [a]n indictment which charges a person with being [a] habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

N.C. Gen. Stat. § 14-7.3.

In this case, Defendant's habitual felon status indictment did not fail to charge an essential element as it related to the South Carolina conviction. The indictment clearly alleged the prior felony; the date the prior felony was committed; the name of the state against whom the felony was committed; the date that conviction was returned for the felony; and the identity of the court wherein the conviction took place. For the reasons discussed above, the evidence further established that Defendant's 2005 conviction of grand larceny serves as a valid predicate felony offense. The habitual felon indictment was therefore not fatally defective, because it laid out all essential elements of the offense, particularly that of the South Carolina predicate conviction. *See State v. Briggs*, 137 N.C. App. 125, 131, 526 S.E.2d 678, 682 (2000). Therefore, Defendant's argument is overruled.

III. Conclusion

We hold Defendant received a fair trial, free from prejudicial error, and find no error in sentencing.

NO ERROR.

Judges ZACHARY and GORE concur.

STATE OF NORTH CAROLINA
v.
DAVON SMITH

No. COA22-719

Filed 6 June 2023

1. Homicide—first-degree murder—jury instruction—lesser-included offense—premeditation and deliberation

The trial court in a first-degree murder prosecution did not err in declining to instruct the jury on the lesser-included offense of second-degree murder, where the State satisfied its burden of proving every element of the greater offense, including premeditation and deliberation. Defendant could not negate the element of premeditation and deliberation with evidence that someone else had bullied him into killing the victim where, under the law, only provocation by the victim (not a third party) may be considered when analyzing premeditation and deliberation. Some evidence indicated that defendant was angry with the victim but originally intended only to fight the victim rather than kill him; however, defendant presented no evidence that his anger disturbed his faculties and reason, and the fact that he might have lacked the intent to kill the victim at an earlier moment was not a reflection of his state of mind at the time of the killing.

2. Homicide—first-degree murder—sixteen-year-old defendant—jury instruction—intent, premeditation, and deliberation for adolescents

In a first-degree murder prosecution arising from events that occurred when defendant was sixteen years old, the trial court did not err in declining defendant's request for a special jury instruction that asked the jury to consider the differences between adult and adolescent brain function when determining whether defendant "intentionally killed the victim after premeditation and deliberation." Not only did defendant fail to present any evidence on adolescent brain function, but also the requested instruction was likely to mislead the jury as an incorrect statement of law, since a defendant's age is not a legally-recognized factor when analyzing whether that defendant murdered someone with premeditation and deliberation.

3. Evidence—hearsay—exception—recorded recollection—Rule 403 analysis—murder trial—witness's police interview—photo lineup identification

In a first-degree murder prosecution arising from a fatal shooting, the trial court did not err by admitting a video of a witness's police interview into evidence along with her photo lineup identification of defendant, as both constituted recorded recollections falling under the hearsay exception in Evidence Rule 803(5). The interview occurred only two days after the shooting, and therefore the witness spoke to police while her memory of the events was still fresh. Both the interview and the lineup identification correctly reflected the witness's knowledge where, although she denied remembering most of the interview and did not testify that her statements to police were correct, she also did not disavow her statements and even testified that "I told [police] the truth if I talked to them." Additionally, she identified her signature and initials on the pre-trial identification paperwork, and acknowledged identifying defendant during the lineup. Finally, because the evidence was highly probative of defendant's motive for shooting the victim, the court did not abuse its discretion in admitting the evidence over defendant's Rule 403 objection.

4. Identification of Defendants—photo lineup—impermissibly suggestive procedures—substantial likelihood of irreparable misidentification—murder trial

In a first-degree murder prosecution arising from a fatal shooting, the trial court's decision to admit a witness's photo lineup identification of defendant into evidence was upheld on appeal where, even if defendant had not failed to address whether police used impermissibly suggestive procedures to obtain the identification, he still failed to show that the procedures employed created a substantial likelihood of irreparable misidentification. The shooting occurred during the daytime, and the witness testified that she had seen the shooter's unobstructed face and recognized him as defendant. Further, the witness participated in the lineup less than six hours after the shooting and asserted in her identification packet that she was one-hundred percent sure that defendant was the shooter.

5. Evidence—murder trial—witness identifications of defendant—lay opinion testimony—that witnesses were forthcoming and unequivocal—plain error analysis

In a first-degree murder prosecution, where witnesses to a fatal shooting had identified defendant as the shooter to law enforcement,

the trial court did not commit plain error by allowing the detectives who interviewed the witnesses to testify that the witnesses were "forthcoming" and "unequivocal" when they identified defendant. Lay testimony concerning a witness's demeanor does not constitute an improper opinion as to that witness's credibility; at any rate, given other overwhelming evidence of defendant's guilt, the admission of the detectives' testimony could not have had a probable impact on the jury's verdict.

Judge MURPHY concurring in Parts II-A through II-D and concurring in result only in Parts II-E and II-F.

Appeal by defendant from judgment entered 24 June 2021 by Judge Forrest D. Bridges in Buncombe County Superior Court. Heard in the Court of Appeals 22 February 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

ARROWOOD, Judge.

Davon Smith ("defendant") appeals from judgment entered upon his conviction for first-degree murder. Defendant contents the trial court erred by: (1) failing to instruct the jury on second-degree murder; (2) failing to instruct the jury on intent, premeditation, and deliberation for adolescents; (3) admitting a video interview and identification of a witness; (4) admitting an identification of another witness because investigators were improperly suggestive during the interview; and (5) permitting officers to testify the witnesses were forthcoming when they identified defendant because that invaded the province of the jury. Defendant further contends that the "cumulative prejudice" of these alleged errors entitles him to a new trial. For the following reasons, we hold the trial court did not err.

I. Background

At 12:15 p.m. on 25 June 2017, Asheville Police Department ("APD") was dispatched to a shooting at the Pisgah View Apartments. Upon arrival, law enforcement located a victim "on the ground behind" one of the apartment buildings. The victim was "in a large pool of blood" and

surrounded by a crowd of people, some of whom were attempting to render aid. The victim was transported by EMS to the hospital but was later pronounced deceased.

The victim was identified as Rondy Samuel Shields, III ("Mr. Shields"), also known as "ManMan[.]" An autopsy revealed Mr. Shields was shot once, and the bullet "entered on the right side of [his] back . . . then exited . . . through the front of [his] neck." His cause of death was determined to be a gunshot wound to the back. Although five shell casings from a 40-caliber Smith & Wesson firearm were recovered from the scene, the casings produced no identifiable latent prints.

As part of the investigation, law enforcement also obtained a video of the shooting from one of the cameras at the apartment complex. The video showed two apartment complexes separated by a street, with a parked gold sedan in the lower right portion of the screen. At the beginning of the video, Mr. Shields can be seen in the distance walking up the street towards the camera. While Mr. Shields is walking, a woman in a pink shirt walks up to the gold sedan, and two vehicles drive by, a silver vehicle followed by a dark colored sedan. Although the silver vehicle leaves the view of the camera, the black sedan stops abruptly and then backs up. Then, as a person in a black hoodie comes into view in the bottom right-hand corner of the video, a female in a red shirt emerges from the back passenger side of the gold sedan.

When Mr. Shields sees the person in the black hoodie, he pauses, takes a few steps back, then starts running away behind the apartment complex. Although the woman in the red shirt approaches the person in the black hoodie and attempts to stop them, the person in the hoodie runs a few steps while shooting in the direction of Mr. Shields. A woman in a blue shirt emerges from the driver's seat of the gold sedan and the other woman from the vehicle begin to run away. As most are running away, another person in a white shirt, dark-colored jacket, and shorts emerges from the bottom right corner of the screen and runs towards the shooter. Then, the shooter and the person in the shorts both run out of frame in the same direction. From the video, law enforcement identified potential witnesses, and a suspect vehicle which they believed to be the vehicle defendant exited before the shooting occurred.

One potential witness identified from the video was Samantha Pulliam ("Ms. Pulliam"). Ms. Pulliam went to APD the afternoon of the shooting for an interview with Detective Jonathan Morgan ("Detective Morgan") and Detective Tracy Crowe ("Detective Crowe"). During the interview, Ms. Pulliam wrote out a statement and looked at photographs

of potential suspects, ultimately identifying defendant as the shooter. Ms. Pulliam's written statement read:

> I was sittin [sic] in Pisgah View pickin [sic] up my granddaughter [and her] mother Mellasia. A silver car pulled up the shooter "Bop" got out click [sic] the gun I grabbed his arm tried to stop him and he just kept shootin [sic] even after (ManMan) was [on] the ground then he got back in the car and left with 2 guys an [sic] possibly a female.

Furthermore, Ms. Pulliam identified Mahogany Fair ("Ms. Fair"), also known as "Hog," as someone who was on scene and picked her out of a photo lineup. That evening, Detective Morgan obtained a warrant for defendant's arrest for the first-degree murder of Mr. Shields. At the time of the shooting, defendant had just turned sixteen.

The next day, 26 June 2017, a silver Chevrolet Impala, believed to be the suspect vehicle from the surveillance video, was located at a different apartment complex. Pursuant to a search warrant, the vehicle was searched "for possible touch DNA[,]" processed for latent fingerprints, and trace taped. Although the fingerprints from the vehicle were not of "useful quality[,]" they were entered into the automated fingerprint identification system. The prints produced no potential suspects.

On 27 June 2017, Detectives Morgan and Crowe interviewed Mellasia Skyes ("Ms. Skyes"), someone Ms. Pulliam identified as being a witness to the shooting. Although Ms. Skyes initially denied knowing the shooter, she eventually admitted defendant, also known as "Bop," was her cousin, and identified him as the shooter in a lineup. Ms. Skyes stated in her recorded interview that Mr. Shields and defendant were arguing over Latrina or Trina ("Trina"), defendant's fourteen-year-old sister who allegedly had sex with Mr. Shields. Ms. Skyes further stated she had calmed defendant down earlier that day, but Ms. Fair was encouraging him to harm Mr. Shields. Ms. Skyes said that during the shooting and when defendant got out of the car, she heard someone yelling at defendant not to "let it slide."

Although law enforcement attempted to locate defendant for several months, they were unsuccessful until November. On 8 November 2017, U.S. Marshals, who were assisting in the search for defendant, got information that defendant was at a Motel 6 off Tunnel Road in room 123. Motel 6 records showed the room was rented 6 November to a Chad Case. Defendant was located inside the motel room, in the bathroom. The lights in the bathroom were off and defendant was "in the bathtub against the corner." Thereafter, on 4 December 2017, a Buncombe

County grand jury indicted defendant for first-degree murder and possession of a handgun by a minor.

The matter came on for trial in the Buncombe County Superior Court on 7 June 2021, Judge Bridges presiding. The State did not proceed with the possession of a handgun by a minor charge, so the only matter for trial was the first-degree murder charge.

As an initial matter, the trial court addressed defendant's pre-trial motions. Defendant filed a motion in limine, requesting an order prohibiting the State "from calling witnesses, including but not limited to [Ms. Pulliam] and [Ms. Skyes], to testify[,]" arguing there was "substantial likelihood the witnesses w[ould] deny or contradict their prior statements to law enforcement[.]" Defendant further requested the State be prohibited "from asking Ms. Pulliam questions about . . . defendant being the shooter[,]" or alternatively a *voir dire* of witnesses.

In court, defendant's attorney stated that he and his investigator spoke with Ms. Pulliam, and she told them she could not identify defendant and he was concerned the witness would contradict their prior statement and the State would impeach her with the prior statement. Defense counsel said that if the State was on notice of the contradiction, admission of the prior statement would be improper. The court denied the *voir dire* request, but found the State was "on notice" and "may be bound by what [Ms. Pulliam] says."

The court also addressed defendant's motion to suppress pretrial and in-court identification evidence. In this motion, defendant argued the lineup identification by Ms. Pulliam should be suppressed due to violations of the Eyewitness Identification Reform Act ("the Act"), Ms. Skyes's lineup identification should be suppressed for due process concerns, and both witnesses should not be allowed to do in-court identifications. Specifically, as to Ms. Pulliam, defendant argued the fact that Ms. Pulliam was not alone during the photo lineup, and her boyfriend was allowed to stay in the room with her, was a "substantial violation" of the Act, requiring suppression of both the lineup and any in-court identification. Both of defendant's pre-trial motions were denied.

Before the trial began, the State requested a show cause order and an arrest warrant for Ms. Pulliam, who was subpoenaed to be in court to testify but "failed to appear pursuant to the subpoena." Later that day, Ms. Pulliam was located, taken into custody, and brought to the courthouse to testify.

Ms. Pulliam testified that on 25 June 2017, she was with Ms. Skyes, who she identified as the woman in the video wearing the red shirt, and

Ms. Skyes's friends Nadia and Trina at the Pisgah View Apartments. Ms. Pulliam testified that she got "a glimpse" of the shooter's face and that she had "seen him previously in the" apartment complex. Although Ms. Pulliam stated she "didn't know" defendant, she was familiar with who he was "in passing" and recognized him as "Bop." Ms. Pulliam further testified that she did go to APD on the day of the shooting, but only because law enforcement "told [her] that [she] was on camera and that [she] had no choice." Ms. Pulliam's statement from her interview was admitted into evidence and published to the jury.

When questioned about the lineup identification that she also did that day, Ms. Pulliam stated she picked the person "that looked the closest" but she "wasn't a hundred percent [sure][.]" She further testified that she initialed the photograph of defendant in the lineup "because that resembled who it was and it turned out to be the same guy . . . sitting [in the courtroom] [that day]." When asked whether she saw the person in the courtroom that was shooting on 25 June 2017, Ms. Pulliam stated "correct[,]" and when asked to identify that person, she identified defendant. Ms. Pulliam also testified she did not see or hear Mr. Shields do anything to provoke defendant.

On cross, Ms. Pulliam denied telling defense counsel and his investigator that she could not identify defendant and stated the shooter did not have anything obstructing their face. When defense counsel showed Ms. Pulliam the video again and asked whether it appeared the shooter had on a mask, she admitted it did, "[f]rom that angle[.]" Furthermore, Ms. Pulliam acknowledged that during her interview she told detectives she grabbed the shooter, even though the video did not show that, but stated she "thought that [she] grabbed him because that's what [she] intended to do was [to] try to stop the situation." Lastly, Ms. Pulliam testified that she "thought [defendant] was arguing with his sister[,] [Trina,] again."

Next, the State called Ms. Skyes to the stand. Although Ms. Skyes testified she recalled being at the Pisgah View Apartments on 25 June 2017 with Ms. Pulliam and her friend Nadia, Ms. Skyes stated she did not "remember nothing [sic] from that day at all[,]" and denied Trina was there. Ms. Skyes further testified that she did not remember her interview with detectives on 27 June 2017 and stated three times that reading the transcript of the interview would not refresh her recollection. Ms. Skyes did, however, remember doing the photo lineup and picking out a picture of defendant, her cousin, but stated she did not think she was picking out the perpetrator. Furthermore, she testified she did not recall telling Detective Morgan she was very confident the person she identified in the lineup was the perpetrator.

Although Ms. Skyes stated she did recall going to the APD, she did not remember the substance of the interview. Ms. Skyes testified she "told [detectives] the truth if [she] talked to them[,]" but then later stated she did not remember if she told detectives the truth. At this point, the State moved to "admit [Ms. Skyes] recorded interview as a recorded recollection since she ha[d] insufficient knowledge to testify about [the interview.]" Outside the presence of the jury, the defense vehemently objected to the admission of the video, arguing the exception did not apply in this situation, the video would present a Constitutional confrontation issue, and under Rule 403, the probative value of the video interview was substantially outweighed by unfair prejudice.

The trial court, based on "the totality of the circumstances[,]" found the State satisfied the requirements of Rule 803(5) and the recorded interview could be played for the jury, but the transcript of the interview could not be admitted. Ms. Skyes was recalled to the stand and the recorded interview was played for the jury over defense counsel's objection.

After the video was played, Ms. Skyes testified that it did not refresh her recollection of her interview. Ms. Skyes did, however, acknowledge her signature on the photo lineup identification, but did not remember the other pictures in the lineup. The photo lineup identification where Ms. Skyes identified defendant as the shooter on 27 June 2017 was admitted into evidence over defense's objection.

During cross-examination, when asked whether the shooter had on a mask, Ms. Skyes testified they did, but then stated she thought so, but she did not remember. This was the first time Ms. Skyes ever mentioned the shooter wearing a mask. Furthermore, when asked if she continuously testified she could not remember anything because she "knew at the time [of the interview]" she could not ID the shooter because she "couldn't really see that person's face[,]" Ms. Skyes replied in the affirmative, and stated she was "just scared and ready to get out of the room."

The detectives who conducted the interviews of Ms. Skyes and Ms. Pulliam also testified for the State. Detective Crowe testified that Ms. Skyes was not forthcoming and "standoffish" at the beginning of the interview, but once her demeanor and story changed, she did not waver in her narrative and was unequivocal about the person they were discussing. Detective Morgan testified that Ms. Pulliam was cooperative and forthcoming in her interview, but that she "appeared much more reluctant to testify . . . in court[.]" Detective Morgan also testified that as part of the investigation, detectives identified a Facebook page belonging to defendant under the name "KaPo Bop." The "profile image" on the

account was a photograph of defendant, and on 5 May 2017 a photograph of defendant with Ms. Fair was uploaded to his Facebook account.

Sarah Ellis ("Ms. Ellis"), a forensic scientist with the North Carolina State Crime Lab, testified as to the DNA results from the Chevrolet Impala. Ms. Ellis tested "a swab from [the] driver's side front door interior of [the] Chevy Impala, a swab from [the] driver['s] side rear door interior of the same vehicle, a swab from [the] passenger side rear interior, and a swab from the passenger side front door interior" for DNA. Although most of the swabs produced DNA profiles that "were inconclusive due to complexity and/or insufficient quality of DNA recovered[,]" the swab from the rear passenger side interior produced a DNA profile that was a mixture of three contributors. Defendant and Mr. Shields were excluded as contributors to the major DNA profile, but the minor profile "was inconclusive due to complexity and/or insufficient quality of DNA."

The State also introduced, over defense's objection, three of defendant's recorded jail calls, from 11 November 2017 and 12 November 2017. In the calls, defendant discussed "Hog," inquired about how law enforcement got the Motel 6 room number, and stated he "ain't gonna [sic] run no more." Lastly, Chad Case ("Mr. Case") testified for the State. Mr. Case testified that on 6 November 2017, while he was at the BP on Tunnel Road, "[a] guy and a girl" approached him and offered him money to rent a room for them at the Motel 6 using his ID. Mr. Case booked the room in exchange for thirty dollars.

Defendant made a motion to dismiss at the close of the State's evidence, and at the close of all evidence, arguing the State presented insufficient evidence. Both motions were denied. Defendant did not present any evidence.

At the charge conference, defense counsel requested an instruction on the lesser-included offenses of involuntary manslaughter and second-degree murder. Defense counsel argued Ms. Skyes's statements in her interview that defendant "didn't want to shoot [Mr. Shields][,]" but someone was "in his ear . . . telling him to[,]" and that "witnesses [at the shooting] were egging him on," along with the fact that Mr. Shields was "having some kind of relationship with [defendant's] sister" all "warrant[ed] an instruction on manslaughter because that's classic heat of passion[.]" Defense counsel also requested a special instruction "on intent, premeditation and deliberation for adolescents[.]" The trial court declined to provide either instruction.

As part of the State's closing, they utilized a PowerPoint presentation of the evidence presented, including wording from Ms. Skyes's recorded interview. The defense objected, arguing the wording was "verbatim wording from the transcript that [the court] rule[d] was not to be admitted as an exhibit" and moved for a mistrial. The trial court found this was not the transcript, but a tool created by the State, and once brought to the court's attention the State was instructed to "take [it] down[,]" and a curative instruction was provided. Defendant's motion for a mistrial was denied.

On 22 June 2017, the jury found defendant guilty of first-degree murder and a sentencing hearing was set for 24 June 2021. Prior to the sentencing hearing, the State and defendant's counsel stipulated to several mitigating factors, including defendant's age at the time of the offense. Following the sentencing hearing, defendant was sentenced to life imprisonment with the possibility of parole. Defendant gave oral notice of appeal in open court.

II. Discussion

On appeal, defendant raises six issues. Specifically, defendant argues the trial court erred by: (1) failing to instruct the jury on second-degree murder; (2) failing to give the instruction on intent, premeditation, and deliberation for adolescents; (3) admitting the recorded interview with Ms. Skyes and her identification of defendant as the shooter; (4) admitting Ms. Pulliam's identification of defendant as the shooter when detectives used "impermissibly suggestive" interview tactics; and (5) permitting detectives to testify Ms. Pulliam and Ms. Skyes were "forthcoming and unequivocal when they identified" defendant as the shooter because this invaded the province of the jury. Defendant further argues that the "cumulative prejudice from the trial court's errors" entitle him to a new trial. We address each of defendant's arguments in turn.

A. Second-Degree Murder Jury Instruction

[1] First, defendant argues the trial court erred by failing to instruct the jury on the lesser-included offense of second-degree murder. Specifically, defendant contends the jury could have found defendant did not act with premeditation and deliberation since defendant was sixteen at the time, there was evidence defendant "react[ed] impulsively to the repeated provocation from [Ms.] Fair[,]" defendant had learned of Mr. Shield's relationship with his underage sister, and defendant "smoked marijuana on the day of the shooting." We disagree.

As an initial matter, we address two issues defendant raised in his brief. First, we note that although defendant claims he used marijuana

"earlier on the day of the shooting[,]" voluntary intoxication can only "negate the evidence of . . . specific intent if it is shown that the defendant was so intoxicated *at the time he committed the crime* that he was utterly unable to form the necessary specific intent." *State v. Williams*, 308 N.C. 47, 71, 301 S.E.2d 335, 350 (emphasis added) (citations omitted), *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). "Evidence of mere intoxication, however, is not enough[.]" *State v. Williams*, 343 N.C. 345, 365, 471 S.E.2d 379, 390 (1996), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618, *reh'g denied*, 519 U.S. 1156, 137 L. Ed. 2d 231 (1997). Furthermore, voluntary intoxication is an affirmative defense, so evidence of "intoxication to a degree sufficient to negate *mens rea*" is the burden of defendant. *State v. Chapman*, 359 N.C. 328, 378, 611 S.E.2d 794, 830 (2005) (citation omitted). Here, no evidence of such intoxication was presented to the jury, nor does defendant make any argument that he was so intoxicated that he could not form intent.

Furthermore, although age may be a "factor" in the *Miranda* analysis, *J.D.B. v. North Carolina*, 564 U.S. 261, 277, 180 L. Ed. 2d 310, 326-27 (2011), and in sentencing, *Roper v. Simmons*, 543 U.S. 551, 568, 161 L. Ed. 2d 1, 21 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 838, 101 L. Ed. 2d 702, 720 (1988), defendant has presented no case law that his age alone negates any element of first-degree murder. Accordingly, we need not consider these issues, and instead address whether defendant was entitled to an instruction based on his other arguments.

Since this alleged error was preserved for appeal, we review the trial court's decision *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted) ("Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo*, by this Court."). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citation omitted).

> If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree . . . and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Sterling, 233 N.C. App. 730, 732-33, 758 S.E.2d 884, 886 (citation omitted), *disc. review denied and appeal dismissed*, 367 N.C. 523, 763 S.E.2d 142 (mem.) (2014).

"The substantive elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation." *State v. Guin*, 282 N.C. App. 160, 166, 870 S.E.2d 285, 290 (citation, internal quotation marks, and brackets omitted), *disc. review denied*, 876 S.E.2d 281 (mem.) (2022). By contrast, the elements of second-degree murder are: "(1) [the] unlawful killing (2) of a human being (3) with malice, but without premeditation and deliberation." *State v. Vassey*, 154 N.C. App. 384, 390, 572 S.E.2d 248, 252 (2002) (citation omitted), *disc. review denied*, 356 N.C. 692, 579 S.E.2d 96 (mem.), *and cert. denied*, 357 N.C. 469, 587 S.E.2d 339 (mem.) (2003).

Premeditation is a "thought beforehand for some length of time, however short." *State v. Horskins*, 228 N.C. App. 217, 221, 743 S.E.2d 704, 708 (citation omitted), *disc. review denied*, 367 N.C. 273, 752 S.E.2d 481 (mem.) (2013). However, murder is "committed with deliberation if it is done in a 'cool state of blood,' without legal provocation, and in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose." *Id.* at 221, 743 S.E.2d at 708 (citation omitted).

> "Cool state of blood" does not mean the absence of passion and emotion, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time *unless such anger or emotion was such as to disturb the faculties and reason*.

Id. at 221-22, 743 S.E.2d at 708-709 (emphasis added) (citation omitted).

"[P]remeditation and deliberation are not usually susceptible of direct proof and are therefore, susceptible of proof by circumstances from which the facts sought to be proven may be inferred." *State v. Faust*, 254 N.C. 101, 107, 118 S.E.2d 769, 772-73 (citations and quotation marks omitted), *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961). Factors relevant to the determination of whether the defendant acted with premeditation and deliberation include:

> Want of provocation on the part of deceased. The conduct of defendant before and after the killing. Threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased. The

> dealing of lethal blows after deceased has been felled and rendered helpless.

Id. at 107, 118 S.E.2d at 773 (citations omitted). "Additional factors include the nature and number of the victim's wounds, whether the defendant left the deceased to die without attempting to obtain assistance for the deceased, whether he disposed of the murder weapon, and whether the defendant later lied about what happened." *Horskins*, 228 N.C. App. at 222, 743 S.E.2d at 709 (citing *State v. Hunt*, 330 N.C. 425, 428-29, 410 S.E.2d 478, 481 (1991) (citations and quotation marks omitted)). "Premeditation and deliberation may [also] be inferred from the multiple shots fired by defendant." *Chapman*, 359 N.C. at 376, 611 S.E.2d at 828 (citations omitted).

Here, the State satisfied its burden of proving every element of the offense of first-degree murder and, despite defendant's argument, there was no evidence to negate any element, therefore the trial court did not err by declining to instruct the jury on second-degree murder. *See Sterling*, 233 N.C. App. at 733, 758 S.E.2d at 886; *see also State v. Leazer*, 353 N.C. 234, 240, 539 S.E.2d 922, 926 (2000) (citation omitted) ("Because there was positive, uncontradicted evidence of each element of first-degree murder, an instruction on second-degree murder was not required."). " 'A defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the [S]tate's evidence but not all of it.' " *Leazer*, 353 N.C. at 240, 539 S.E.2d at 926 (citation omitted). Furthermore " 'mere speculation [as to the rationales for defendant's behavior] is not sufficient to negate evidence of premeditation and deliberation.' " *Id.* (alterations in original) (citation omitted). Here, the evidence tended to show defendant arrived at the scene armed, fired multiple times as Ms. Shields' back was turned and he was attempting to flee, Mr. Shields did not provoke defendant at the time of the shooting, and defendant fled the scene leaving Mr. Shields to die.

Still, defendant argues a second-degree murder instruction was warranted since the jury could have found he acted without premeditation and deliberation because he had, at some indeterminate time earlier in the day, told Ms. Skyes he was only going to fight Mr. Shields, because he acted after being provoked and bullied by Ms. Fair, and because he "was angry at Mr. Shields for having sex with his younger sister[.]"

Defendant's argument regarding Ms. Fair is not supported by a review of the law related to provocation. Our case law recognizes evidence of provocation by the *deceased* may be considered in the

deliberation analysis, but provocation by a third-party is not. *State v. Elliott*, 344 N.C. 242, 271, 475 S.E.2d 202, 214 (1996) (emphasis added) (finding the trial court did not err by narrowing the scope to lack of provocation "by the deceased" since the instruction was based on pattern jury instructions and consistent with case law), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997). This concept is consistent with our Supreme Court's established holding that duress and coercion are not valid defenses to first-degree murder, as the influence of a third person cannot excuse murder in the first-degree. *State v. Dowell*, 106 N.C. 722, 11 S.E. 525, 526 (1890) (" 'And, therefore, though a man may be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent.' "); *State v. Cheek*, 351 N.C. 48, 61, 520 S.E.2d 545, 553 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000).

Defendant's second argument, that Ms. Skyes's interview showed he was "angry" at Mr. Shields but agreed he was only going to fight the victim, is likewise without merit. Our case law holds that deliberation occurs in a "cool state of blood" if done in furtherance of revenge, even if defendant is angry at the time of the killing, as long as defendant's emotions are not "such as to disturb the faculties and reason." *Horskins*, 228 N.C. App. at 221-22, 743 S.E.2d at 708-709. Defendant presented no evidence his anger amounted to such a level. *See State v. Bedford*, 208 N.C. App. 414, 419, 702 S.E.2d 522, 528 (2010).

In fact, the interview with Ms. Skyes which defendant relies upon does not help this argument but hinders it. Ms. Skyes stated in the interview she had "talked [defendant] out of it and [she] had calmed him down earlier that day" and told defendant to "fight" Mr. Shields, but not shoot him, and defendant agreed. This statement is not sufficient to negate the element of premeditation and deliberation and to warrant an instruction of second-degree murder. Even if in some moment earlier in that day defendant did not have the intent to kill Mr. Shields, this is not a reflection of his state of mind and intent at the time of the shooting, as premeditation only requires some "thought beforehand . . . however short." *Horskins*, 228 N.C. App. at 221-22, 743 S.E.2d at 708. This argument is particularly unpersuasive when, later that day, defendant arrived at the crime scene with a gun and proceeded to fire five shots at the victim with the fatal shot striking him in the back as he ran away. Accordingly, we hold the trial court did not err by declining to provide defendant's requested instruction for second-degree murder.

B. Special Jury Instruction

[2] Next, defendant argues the trial court erred in failing to provide his requested special instruction on intent, premeditation, and deliberation for adolescents. Specifically, defendant contends this "novel" instruction "would have enabled the jury to determine . . . whether [defendant] had the necessary *mens rea* for first-degree murder[,]" and defendant was prejudiced by the by the trial court's failure to provide the instruction. We disagree.

"A trial court should give a specific jury instruction when '(1) the requested instruction [i]s a correct statement of law and (2) [i]s supported by the evidence, and . . . (3) the [pattern jury] instruction . . ., considered in its entirety, fail[s] to encompass the substance of the law requested and (4) such failure likely misle[ads] the jury.' " *State v. Steele*, 281 N.C. App. 472, 482, 868 S.E.2d 876, 884 (alterations in original) (citation omitted), *disc. review denied*, 878 S.E.2d 809 (mem.) (2022). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *State v. Guerrero*, 279 N.C. App. 236, 241, 864 S.E.2d 793, 798 (citation and internal quotation marks omitted). "[W]here the request for a specific instruction raises a question of law, 'the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court.' " *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) (citation omitted).

Here, defendant requested an instruction which stated, in pertinent part:

> In this case, you may examine the defendant's actions and words, and all of the circumstances surrounding the offense, to determine what the defendant's state of mind was at the time of the offense. However, the law recognizes that juveniles are not the same as adults. An adult is presumed to be in full possession of his senses and knowledgeable of the consequences of his actions. By contrast, the brains of adolescents are not fully developed in the areas that control impulses, foresee consequences, and temper emotions. Additionally, adolescents often lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.
>
> You should consider all the circumstances in the case, any reasonable inference you draw from the evidence, and differences between the way that adult and adolescent brains

> functions in determining whether the State has proved beyond a reasonable doubt that defendant intentionally killed the victim after premeditation and deliberation.

The trial court refused to provide this instruction, stating no evidence of adolescent brain development had been presented and although case law made a distinction between adults and juveniles for sentencing purposes, this was not an appropriate determination for the jury.

Although we agree the Supreme Court of the United States has stated "children are constitutionally different from adults for purposes of *sentencing*[,]" it has never found this difference relevant to a finding of guilt. *Miller v. Alabama*, 567 U.S. 460, 471, 183 L. Ed. 2d 407, 418 (2012) (emphasis added). In fact, the Supreme Court has articulated their decisions do not "suggest an absence of legal responsibility where crime is committed by a minor." *Eddings v. Oklahoma*, 455 U.S. 104, 116, 71 L. Ed. 2d 1, 12 (1982). Defendant concedes that no court has held such and we decline to announce a new legal precedent.

Here, even if the statements in defendant's proposed instructions are, arguably supported by current scientific research, they are not supported by the evidence, since no evidence was presented on adolescent brain function, and they are not a correct statement of the law. The instruction for first-degree murder provided by the trial court fully encompassed the elements of the offense. *Guin*, 282 N.C. App. at 166, 870 S.E.2d at 290; *see Steele*, 281 N.C. App. at 482, 868 S.E.2d at 884. Defendant's age is not considered nor contemplated in the analysis of premeditation and deliberation, therefore, this instruction would be incorrect and likely to mislead the jury. *Guin*, 282 N.C. App. at 166, 870 S.E.2d at 290; *see State v. Palmer*, 273 N.C. App. 169, 173, 847 S.E.2d 449, 452 (2020) (finding "[t]he trial court did not err in denying [d]efendant's request for a special jury instruction on lawful possession of a controlled substance where the requested instruction improperly characterized an exception as an element"); *see also Steele*, 281 N.C. App. at 483, 868 S.E.2d at 884. Accordingly, the trial court did not err.

C. Ms. Skyes's Interview and Identification

[3] Defendant next contends the trial court erred by playing the video of Ms. Skyes's 27 June 2017 interview and introducing her photo lineup identification of defendant because both were inadmissible hearsay and violated Rule 403. We note that this is the evidence that defendant extensively relies upon in his argument for the instruction on second-degree murder addressed above. This argument is without merit.

1. Hearsay Exception

"The admission of evidence alleged to be hearsay is reviewed *de novo* when preserved by an objection." *State v. Harris*, 253 N.C. App. 322, 327, 800 S.E.2d 676, 680 (citation omitted), *disc. review denied*, 370 N.C. 70, 803 S.E.2d 388 (mem.) (2017). "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (citation omitted), *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (mem.) (2001).

"Evidence of an out-of-court statement of a witness . . . may be offered as substantive evidence" if the evidence is "offered for the truth of the matter asserted and qualifie[s] as an exception under [North Carolina] hearsay rules." *State v. Ford*, 136 N.C. App. 634, 640, n. 1, 525 S.E.2d 218, 222, n.1 (2000). "Evidence which falls within a 'firmly rooted' hearsay exception is sufficiently reliable to prevent violation of a defendant's right to confrontation." *State v. Valentine*, 357 N.C. 512, 520, 591 S.E.2d 846, 854 (2003) (citations omitted); *State v. Leggett*, 135 N.C. App. 168, 175, 519 S.E.2d 328, 333 (1999) (finding Rule 803(5) is firmly rooted in North Carolina), *disc. review denied and appeal dismissed*, 351 N.C. 365, 542 S.E.2d 650 (mem.) (2000).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2022). Although "hearsay is not admissible[,]" our statutes provide exceptions to this general rule. *Id.* § 8C-1, Rules 802-803 (2022). One such exception is for recorded recollections. The relevant statute allows for the admission of such evidence if it meets the following criteria:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Id. § 8C-1, Rule 803(5) ("the Rule"). "While the Rule speaks of a 'memorandum or record,' the word record is broadly construed to include both audio and video recordings." *State v. Thomas*, 281 N.C. App. 159, 166, 867 S.E.2d 377, 385 (2021) (citations omitted), *disc. review denied*, 878 S.E.2d 808 (mem.) (2022).

Before hearsay can be admitted under this exception, the party offering the evidence must show: (1) the evidence "pertain[s] to matters about which the declarant once had knowledge;" (2) the declarant does not now have sufficient recollection of the matters; and (3) the evidence was made by declarant, or if made by someone other than declarant, was "examined and adopted . . . when the matters were fresh in [declarant's] memory[,]" and "reflect[ed] [declarant's] knowledge correctly." *State v. Love*, 156 N.C. App. 309, 314, 576 S.E.2d 709, 712 (2003) (citation omitted); *State v. Brown*, 258 N.C. App. 58, 68, 811 S.E.2d 224, 230-31, *disc. review denied*, 371 N.C. 340, 813 S.E.2d 853 (mem.) (2018). However, "the mere fact a statement is recorded is not enough to meet the requirement the statements contained therein reflected the witness's knowledge accurately at the time." *Thomas*, 281 N.C. App. at 167, 867 S.E.2d at 386 (citation omitted).

Here, defendant takes issue with two criteria: (1) "Ms. Skyes did not testify" that the matters were fresh in her mind when she participated in the interview and photo lineup; and (2) the interview and lineup did not correctly reflect her knowledge of the shooting. As to defendant's first issue, the trial court concluded Ms. Skyes's statement was made "only two days" after the shooting, and thus was made "while her memory of those events were still fresh[.]" Ms. Skyes's testimony to such a fact was not required, and the trial court can conclude from the fact that the interview occurred two days after the shooting that the matter was fresh in her memory at the time. *State v. Nickerson*, 320 N.C. 603, 608, 359 S.E.2d 760, 762 (1987) (finding the trial court "could properly conclude" the witness's statement, "made approximately five weeks after the incident[,]" was fresh in the witness's memory at the time the statement was made despite the defendant's contention that this was not shown).

Next, we consider whether the interview and lineup correctly reflect Ms. Skyes's knowledge of the event.

> The caselaw on whether the record correctly reflected the witness's knowledge at the time involves the far sides of the spectrum. On the one end, this Court has ruled the record did not correctly reflect the witness's knowledge at the time where the witness disagreed with or disavowed their prior statements on the stand.

Thomas, 281 N.C. App. at 167, 867 S.E.2d at 386 (citations omitted). However, "this Court has ruled that the record accurately reflected the witness's knowledge at the time when the person testified they recorded all the information they had at the time." *Id.* at 168, 867 S.E.2d at 386. In cases where the witness "did not testify the statements were correct

at the time, but [they] likewise did not disavow the statements on the stand[,]" unless the witness makes "any direct statements indicating she was lying," the court can find the witness relayed information that correctly represented their knowledge. *Id.* (finding the witness's testimony that she was "laying it all out" in her previous statement and no direct statement she was lying were enough for the court to properly conclude the hearsay statement correctly reflected her knowledge). Furthermore, "[t]his Court previously considered signing and dating a statement . . . to support a finding that the written statement correctly reflected the witness's prior knowledge." *Id.* at 169, 867 S.E.2d at 387.

Here, Ms. Skyes testified that she remembered being at the Pisgah View Apartments on 25 June 2017, she identified herself as the person in the red shirt in the surveillance footage, and she stated she did recall participating in a photo lineup and identified her signature and initials on the lineup packet. Ms. Skyes testified she picked out the photograph of defendant because detectives asked her to pick out "Bop[,]" but she did not think she was identifying the perpetrator. Furthermore, Ms. Skyes testified she did recall going to APD and speaking with detectives on 27 June, but repeatedly testified she did not remember the substance of the interview. Ms. Skyes also refused to review the transcript of the interview to refresh her recollection. When asked whether she told detectives the truth that day, she testified, "[y]es, I hope so. I don't remember nothing [sic] from that day. I told them the truth if I talked to them." However, later on direct examination when asked whether she told detectives the truth during her interview, Ms. Skyes stated she "didn't remember nothing [sic] from four years ago[.]"

We find no error in the trial court's decision. Although Ms. Skyes did not testify her statements to detectives in the interview were correct, she did not disavow her statements before the trial court made its decision, and at one point testified she told law enforcement the truth if she spoke to them. *See Thomas*, 281 N.C. App. at 167, 867 S.E.2d at 386. Furthermore, Ms. Skyes identified her signature and initials on the pre-trial identification paperwork, and acknowledged she picked out defendant, even though she claimed she did not think she was picking out the perpetrator. Accordingly, we find the interview and photo lineup were properly admitted.

Defendant further argues the trial court erred in admitting the video and playing it for the jury because it "violated" the rule of "proscription" which states that if admissible, the evidence can be read into the evidence but not offered as an exhibit unless offered by the other party. Defendant acknowledges that video evidence is a "record"

under the exception and does not provide any legal basis for this contention. Nor does defendant provide any basis for their contention that the State's PowerPoint slides containing quotes from the interview, which were taken down and a corrective instruction given, violated the Rule. Accordingly, this argument is likewise without merit.

2. Rule 403

Lastly, defendant contends the lineup and the interview, even if admissible, violated North Carolina Rule of Evidence 403 ("Rule 403"). "Rulings under [Rule 403] are discretionary, and a trial court's decision on motions made pursuant to Rule 403 are binding on appeal, unless the dissatisfied party shows that the trial court abused its discretion." *Chapman*, 359 N.C. at 348, 611 S.E.2d at 811 (citations omitted). "A trial court will not be reversed for an abuse of discretion absent 'a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 46, 530 S.E.2d 281, 288 (2000) (citations omitted), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001).

Under Rule 403, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2022). "Unfair prejudice . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. Wilkerson*, 363 N.C. 382, 418, 683 S.E.2d 174, 196 (2009) (citation and internal quotation marks omitted), *cert. denied*, 559 U.S. 1074, 176 L. Ed. 2d 734 (2010).

Here, the trial court did not abuse its discretion in admitting the interview over defense's Rule 403 objection since it was highly probative of defendant's motive. Although the State is not required to prove motive for a first-degree murder, "[t]he existence of a motive is . . . a circumstance tending to make it more probable that the person in question did the act, hence evidence of motive is always admissible where the doing of the act is in dispute." *State v. Coffey*, 326 N.C. 268, 280, 389 S.E.2d 48, 55 (1990) (citations and internal quotation marks omitted). Considering the high probative value of the interview and the information it contained about defendant's issue with Mr. Shields, we do not think it is substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion.

D. Ms. Pulliam's Identification

[4] Defendant next argues the trial court erred by admitting Ms. Pulliam's in-court and photo lineup identification of defendant "because

the procedures used by investigators to obtain the identification were so impermissibly suggestive that there was a substantial likelihood of irreparable misidentification."

As an initial matter, defendant makes several references to the recorded interview of Ms. Pulliam, which was not shown to the jury. Although it was admitted during the pre-trial motion to suppress hearing, defendant does not argue on appeal the trial court incorrectly denied this motion. Accordingly, we do not consider the video and limit our review to the evidence presented at trial.

"Identification evidence must be suppressed on due process grounds where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification." *State v. Wilson*, 313 N.C. 516, 528-29, 330 S.E.2d 450, 459 (1985) (citations omitted). This analysis requires a two-step determination. "First[,] we must determine whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification." *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984) (citations omitted). If not, we need not proceed with the analysis. *Id.* (citation omitted). However, "[i]f it is answered affirmatively, the second inquiry is whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification." *Id.* (citation omitted). To determine whether the procedures are impermissibly suggestive, the court must examine "the totality of the circumstances" to determine whether the procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice." *Id.* (citation omitted).

In his brief, defendant did not make any arguments as to why the procedures detectives used were unnecessarily suggestive or conducive to misidentification. Rather, defendant's argument is based on the second step of the analysis. Accordingly, we find defendant's argument, based solely on the second prong of the test without meeting the first hurdle, is without merit. Nevertheless, we address defendant's argument as to the second step of the analysis.

> The factors to be considered in evaluating the likelihood of irreparable misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

State v. Grimes, 309 N.C. 606, 609-10, 308 S.E.2d 293, 294-95 (1983) (citation omitted).

Based on the totality of the circumstances, we find no error in the admission of Ms. Pulliam's identification of defendant. She saw him during the shooting in the daytime, she testified she got "a glimpse" of the shooter's face and that she had "seen him previously in the" apartment complex and recognized him as "Bop," and she stated he did not have anything obstructing his face. Ms. Pulliam participated in the lineup less than six hours after the shooting, and in her identification packet that she signed, she was "100%" sure defendant was the perpetrator. Even if she faltered on the stand, her credibility and the weight given to her identification of defendant was for the jury. *Hannah*, 312 N.C. at 293, 322 S.E.2d at 153 (citation omitted) ("[T]he credibility of the witness and the weight to be given his identification testimony is for the jury to decide.").

"Since we find the pretrial identification procedures free of the taint of impermissible suggestiveness, we hold the trial court properly admitted the in-court identification of defendant by [Ms. Pulliam]." *Id.* at 294, 322 S.E.2d at 153. Accordingly, this argument is without merit.

E. Detectives' Statements

[5] Defendant also contends the trial court plainly erred by allowing detectives to testify Ms. Skyes and Ms. Pulliam were "forthcoming" and "unequivocal" when they identified defendant as the shooter, because such statements invaded the province of the jury as they were improper lay opinions under Rule 701. Defendant argues "credibility determinations" are for the jury to decide, and thus the detectives should not have been allowed to "bolster [the witnesses'] identifications[.]" This argument is likewise without merit.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2023). However, "[i]n criminal cases, an issue that was not preserved by objection . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4). Because defendant did not preserve any errors related to the testimony in question, this Court's review is limited to whether the trial court's actions constituted plain error.

Our Supreme Court has stated:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity[,] or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (alteration in original) (citations and quotation marks omitted). "Plain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done; or grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to appellant of a fair trial." *State v. Gregory*, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996) (citation omitted).

Under Rule 701, a lay witness's "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2022). This Court has found that law enforcement's testimony concerning a witness's "demeanor does not constitute an opinion as to the credibility of [the witness] that is subject to Rule 701." *State v. Orellana*, 260 N.C. App. 110, 116, 817 S.E.2d 480, 485 (2018) (citing *State v. Gobal*, 186 N.C. App. 308, 317, 651 S.E.2d 279, 285 (2007), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (mem.) (2008)). Therefore, detectives' testimony that the witnesses were "standoffish" or "forthcoming" was admissible.

Furthermore, we do not believe detectives' testimony that Ms. Skyes did not waver in her narrative during her interview and was unequivocal about the person they were discussing once she changed her story is a comment on her credibility. This observation is based on his perception of the interview and is helpful considering the difference between her initial statement that she did not know the shooter and her later statement during her interview. *See State v. Dickens*, 346 N.C. 26, 46, 484 S.E.2d 553, 564 (1997) (finding the detective's opinion about the witness's "demeanor was based on his personal observations" and "was

helpful to a clear understanding of his testimony concerning the differences between" the witness's first and second statement).

We do not believe the testimony by detectives were improper statements as to Ms. Skyes's credibility, as "[t]he cases in which this Court and [our] Supreme Court have reversed convictions based upon [a witness vouching for the credibility of another witness] generally involve testimony that directly comments on the credibility of the" witness. *State v. Dew*, 225 N.C. App. 750, 762, 738 S.E.2d 215, 223, *disc. review denied*, 366 N.C. 595, 743 S.E.2d 187 (mem.) (2013). Here, detectives did not directly comment on whether Ms. Skyes was telling the truth. *Gobal*, 186 N.C. App. at 318-19, 651 S.E.2d at 286 (finding detective's testimony that it was his "impression" the witness "told [him] the truth" was improper testimony as to the witness's credibility).

Even assuming *arguendo* that the statements were admitted in error, given the video of defendant shooting the victim in the back as he attempted to run away, and Ms. Pulliam's and Ms. Skyes's identifications of defendant as the perpetrator, such statements cannot rise to the level of plain error. Accordingly, this argument is without merit.

F. Cumulative Prejudice

Lastly, defendant argues the "cumulative effect of the preserved errors" requires this Court to grant defendant a new trial. As we have found no errors, we find no merit in this contention. *See State v. Beane*, 146 N.C. App. 220, 234, 552 S.E.2d 193, 202 (2001), *appeal dismissed*, 355 N.C. 350, 563 S.E.2d 562 (mem.) (2002).

III. Conclusion

For the foregoing reasons, we hold defendant received a fair trial free from prejudicial error.

NO ERROR.

Judge DILLON concurs.

Judge MURPHY concurs in Parts II-A through II-D and concurs in result only in Parts II-E and II-F.

STATE v. STORM

[289 N.C. App. 257 (2023)]

STATE OF NORTH CAROLINA
v.
KURT ANTHONY STORM, DEFENDANT

No. COA22-685

Filed 6 June 2023

Bailments—conversion of funds—by financial advisor—not a bailee

After a financial advisor (defendant) converted funds that plaintiff had asked him to invest on her behalf, his conviction for felony conversion of property by a bailee under N.C.G.S. § 14-168.1 was vacated because, as a matter of law, he was not a bailee when he took possession of the funds. Traditionally, a bailee is required to return the exact property to the bailor, but even where exceptions to that rule exist—such as when a bailor delivers a check to a third party on the bailee's behalf—they only exist in situations where the bailee exercises a limited degree of control over the transferred property for a specific purpose. Thus, where defendant's work involved making complex discretionary judgments about plaintiff's money as a fungible asset, and where defendant was never expected to return the "identical money" received, he did not qualify as a bailee.

Judge ARROWOOD concurring in judgment only by separate opinion.

Appeal by Defendant from judgment entered 17 February 2022 by Judge Lora Christine Cubbage in Guilford County Superior Court. Heard in the Court of Appeals 7 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Llogan R. Walters, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

MURPHY, Judge.

Traditionally, a bailor-bailee relationship exists only where an item of personal property is to be returned to the bailor by the bailee. While narrow exceptions to this rule have previously led us to include the delivery of a check on behalf of a bailor by a bailee to a third party within

the definition of "bailment," we have never deviated—and do not now deviate—so far from the traditional definition of bailment that an investment adviser, whose work entails complex discretionary judgments about a client's money as a fungible asset, would qualify as a "bailee." Here, where, in the light most favorable to the State, Defendant agreed to act as an investment adviser for the alleged victim, his conversion of funds entrusted to him in that capacity could not have formed the basis of his conviction for conversion of funds by a bailee because he was not, as a matter of law, a bailee.

BACKGROUND

On or about June of 2014, Audrey Lewis discontinued her employment at American National Insurance Company after more than fifteen years to open her own insurance agency. Shortly thereafter, Lewis began attending networking meetings for small business owners hosted by Defendant Kurt Anthony Storm. Lewis kept attending these meetings through 2017, and she developed a friendship with Defendant, with the two frequently carpooling together.

In 2017, Lewis received a letter from American National indicating that she had over $25,000.00 in a retirement fund of which she was previously unaware. Hoping to reinvest the money and recalling from earlier in their relationship that Defendant was a financial adviser, Lewis contacted Defendant and asked him to invest the money on her behalf. In order to invest the money, Defendant set up an entity called A.R. Lewis, LLC ("ARL") on 10 April 2017 and created a bank account on its behalf. Defendant accepted approximately $6,300.00 in cash as a fee for his investment services, then further accepted a check for $17,500.00 in the name of ARL, ostensibly to invest on Lewis's behalf. After Lewis gave Defendant the money, their agreement was memorialized in the following *Promissory Note*:

> Agreement between Kurt Storm and ARLEWIS LLC- Audrey Renee Lewis [r]epresenting ARLewis LLC. Principal sum of $23,836.09 will be managed by Kurt Storm.
>
> **I. Promise to Pay**
>
> Kurt Storm agrees to pay 9% annual rate fixed earnings, credited monthly in cash.
>
> **II. Repayment**
>
> The amount this Promissory Note will be returned 12 months from inception unless death or Storm's inability to perform task [sic] associated with this role and/or mutual agreement of both parties.

III. Transfer of the Promissory Note – POD applies as well as this Note as fail-safe [sic]. Entire balance will be paid to ARLewis, LLC directly at office 2216 Meadowview Drive, Greensboro, NC 27407[.]

IV. Amendment; Modification; Waiver

No amendment, modification or waiver of any provision of this Promissory Note or consent to departure therefrom shall be effective unless by written agreement signed by both Borrower and Lender.[1]

V. Successors

The terms and conditions of this Promissory Note shall inure to the benefit of and be binding jointly and severally upon the successors, assigns, heirs, survivors and personal representatives of Kurt Storm and shall inure to the benefit of any holder, its legal representatives, successors and assigns.

VI. Governing Law

The validity, construction and performance of this Promissory Note will be governed by the laws of North Carolina, excluding that body of law pertaining to conflicts of law. Borrower hereby waives presentment notice of non-payment, notice of dishonor, protest, demand and diligence.

The parties hereby indicate by their signatures below that they have read and agree with the terms and conditions of this agreement in its entirety.

After several months, in October of 2017, Lewis contacted Defendant again to inquire as to where the funds went. Lewis made several failed attempts to call and email Defendant about the funds in October and November of 2017, including one period during which Defendant blocked Lewis's email. Defendant eventually informed Lewis that he was in poor health, then once again ceased contact until January of 2018. After Defendant stopped responding for the second time, Lewis indicated to Defendant in an email dated 11 January 2018 that she would report him to law enforcement unless she heard from him. After Lewis reported Defendant to law enforcement, Defendant responded that he

1. No party contends on appeal that this language in the *Promissory Note* rendered the agreement a loan rather than an investment.

would like to "work this out so [there will] be no bad blood," and the two arranged to meet at a restaurant. Upon meeting in person, Defendant presented Lewis with information about other accounts he had worked on but provided Lewis with no concrete details regarding the money she had given to him to invest. Nonetheless, in light of Defendant's presentation, Lewis was convinced that her money had been invested.

On 16 January 2018, having received Lewis's report, the Greensboro Police Department assigned Detective Michael Montalvo to investigate what had happened to the funds. After a phone call with Lewis on 25 January 2018 detailing substantially the aforementioned facts, Detective Montalvo called Defendant on 29 January 2018 seeking an explanation as to the funds' whereabouts. The call resulted in a follow-up meeting in person at Detective Montalvo's office on 8 February 2018. During the 8 February follow-up, Defendant said of the funds that he was "not off the hook" and that "[he knew] that [he had] to pay back th[e] money[,]" suggesting that he pay Lewis back in $150.00 installments once per month. Defendant then asked Detective Montalvo what kind of criminal proceedings he could expect to see as a result of the incident, and Montalvo explained that "if you just give [Lewis] the [$17,500.00] now, this goes away. There won't be any criminal charges." Defendant responded that he didn't have the money.

Detective Montalvo's subsequent investigations revealed no account into which the funds had ever been placed.

Defendant was indicted for obtaining property by false pretenses and felony computer access on 9 July 2018, then subsequently indicted for embezzlement on 6 May 2019 and conversion of property by bailee on 19 April 2021. The indictment for conversion of property by bailee read as follows:

> The jurors for the State upon their oath present that on or about the date of offense shown above and in the county named above the defendant named above unlawfully, willfully and feloniously did being entrusted with property, seventeen thousand five hundred dollars ($17,500.00) in good and lawful United States currency owned by Audrey Renee Lewis, as a bailee, fraudulently secrete the property with the fraudulent intent to convert it to the defendant's own use and/or convert the property to the defendant's own use. The value of the property was in excess of four hundred dollars ($400.00).

Defendant was tried on 15 February 2022. During trial, the State voluntarily dismissed the felony computer access charge. At the close of the State's evidence, Defendant moved to dismiss the charges of conversion of property by bailee and embezzlement. The trial court initially denied the motion; however, after Defendant renewed the motion at the close of all evidence and made a separate motion to dismiss for fatal variance between the indictment and evidence, the trial court dismissed the embezzlement charge. The jury convicted Defendant of the single remaining charge of felony conversion of property by bailee, and the trial court sentenced him to a suspended sentence of 6 to 17 months.

ANALYSIS

On appeal, Defendant argues the trial court erred in failing to dismiss the charge of felony conversion of property by bailee under N.C.G.S. § 14-168.1 because, as a matter of law, he did not qualify as a bailee when he took possession of the funds at issue. Defendant also separately argues the charge should have been dismissed due to fatal variance between the indictment and the evidence presented at trial. However, as we agree that Defendant was not a bailee for purposes of the conversion charge, we need not reach the fatal variance issue.

Under N.C.G.S. § 14-168.1,

> [e]very person entrusted with any property as *bailee*, lessee, tenant or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with a fraudulent intent to convert it to his own use, shall be guilty of a Class 3 misdemeanor.

N.C.G.S. § 14-168.1 (2021) (emphasis added). "A bailment is created when a third person accepts the sole custody of some property given from another." *Barnes v. Erie Ins. Exch.*, 156 N.C. App. 270, 273, *disc. rev. denied*, 357 N.C. 457 (2003). Traditionally, the object of bailment is a specific item of real property.[2] *See Bailment*, Black's Law Dictionary 174 (11th Ed. 2019) (first emphasis added) ("A delivery *of personal property*

2. Older North Carolina caselaw uses the term "chattel," usually connoting specific physical items, to refer to the object of bailment. *See Cooke v. Foreman Derrickson Veneer Co.*, 169 N.C. 493, 494 (1915) ("At common law bailment contracts are largely implied from the character of the transactions. From the delivery of a chattel in bailment the law implies an undertaking upon the part of the bailee to execute the bailment purpose with due care, skill and fidelity."); *see also Chattel*, Black's Law Dictionary 295 (11th Ed. 2019) ("Movable or transferable property; personal property; esp[ecially] a physical object capable of manual delivery and not the subject matter of real property.").

by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose, usu[ally] under an express or implied-in-fact contract."); *e.g.*, *State v. Woody*, 132 N.C. App. 788, 789 (1999) (a computer); *Wilson v. Burch Farms, Inc.*, 176 N.C. App. 629, 641 (2006) (potatoes); *Martin v. Cuthbertson*, 64 N.C. 328, 328 (1870) (a horse). Moreover, historically, a bailment relationship contemplated the return of the transferred item of personal property. *Sturm v. Boker*, 150 U.S. 312, 329-30 (1893) ("The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale.").

Though not archetypally an object of bailment, money can, under certain circumstances, act as such. In *State v. Eurell*, our Supreme Court stated that "[o]ne who receives money for safe keeping . . . is a bailee if under the agreement of the parties he is to return the identical money received, and debtor if he is to use the money and return its equivalent on demand." *State v. Eurell*, 220 N.C. 519, 519 (1941). And, in *State v. Minton*, we held—without discussion—that a bailor-bailee relationship existed where checks were provided to the defendant to, in turn, pay a third party. *State v. Minton*, 223 N.C. App. 319, 322 (2012), *disc. rev. denied*, 366 N.C. 587 (2013). However, we have also reiterated the principle that whether a bailment relationship has been created with respect to money depends on whether the agreement requires the use of "exact funds" as opposed to treating the money as fungible. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 212 N.C. App. 400, 405 (2011), *rev'd on other grounds*, 365 N.C. 520, 524 (2012) ("[W]e conclude it is unnecessary to address the bailment argument."); *also cf. United States v. Eurodif S. A.*, 555 U.S. 305, 320 (2009) ("[W]here a constituent material is untracked and fungible, ownership is usually seen as transferred, and the transaction is less likely to be a sale of services, as the [U.S. Supreme] Court explained years ago in distinguishing a common law bailment from a sale[.]").

The holding in *Minton*, especially in light of *Variety Wholesalers*, appears to be an extension of—albeit a deviation from—the principle that, "where a *consignment* relationship [exists] between [two parties to an agreement], the relationship [is] also that of a bailment."[3] *Wilson*,

3. The notion of consignment as a specialized form of bailment appears to, in turn, be an extension of the traditional notion that goods transformed by a bailee may still be

176 N.C. App. at 641, 642 (emphasis added) (marks and citations omitted) ("A consignment is a type of bailment where the goods are entrusted for sale. . . . A consignment exists where a[] consignor leaves his property with a consignee who is substantially engaged in selling the goods of others, and will work to sell the goods on behalf of the consignor. After selling the goods, the consignee must account to the consignor with the proceeds from the sale."). As in a consignment relationship, the bailor in *Minton* entrusted the defendant with a specific check and asked the defendant, the bailee, to use the check in a particular transaction. *Minton*, 223 N.C. App. at 322. In that case, the transaction was a rental payment, though the transaction in a consignment relationship is the sale of the transferred property. *Id.* at 320; *Wilson*, 176 N.C. App. at 629; *see also Consignment*, Black's Law Dictionary 385 (11th Ed. 2019) ("[A] transaction in which a person delivers goods to a merchant for the purpose of sale[.]"). While the transaction in *Minton* lacked the accounting feature that otherwise conceptually tethered consignment to traditional bailment, *see Wilson*, 176 N.C. App. at 642, the limited nature of the control the bailee was meant to exercise in that case meant that the type of control exercised by the bailee generally resembled the specific, limited purposes for which bailors entrust property to bailees in more traditional bailment relationships.

In the instant case, the State argues, by analogy to *Minton*, that Defendant possessed Lewis's funds pursuant to a bailment relationship. This contention, however, deviates too far from the fundamental bailor-bailee paradigm. Bailment, by nature, involves a limited degree of control by the bailee over property transferred by the bailor "for a certain purpose[.]" *Bailment*, Black's Law Dictionary 174 (11th Ed. 2019). It usually involves a return of the exact property, *see Eurell*, 220 N.C. at 519; *Sturm*, 150 U.S. at 329-30; and, where narrow exceptions to that rule exist, they exist for arrangements in which the bailee exercises control in a specific enough manner so as to still resemble traditional bailment. *See Wilson*, 176 N.C. App. at 641; *Minton*, 223 N.C. App. at 322.

Here, to consider Defendant a "bailee" would be to allow these exceptions to swallow the rule. For purposes of this appeal, the uncontroverted status of Defendant's and Lewis's relationship was that of an investment adviser and advisee. *See* N.C.G.S. § 78C-2(1) (2021)

---

the object of a bailment relationship. *See Powder Co. v. Burkhardt*, 97 U.S. 110, 116 (1877) ("[W]here logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer.").

(" 'Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. 'Investment adviser' also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as a part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation."). Defendant was neither obligated nor expected to return the exact check given to him to Lewis. Moreover, unlike the defendant in *Minton*, Defendant was not tasked with simply acting as a courier for a check; rather, he was entrusted with a complex series of decisions concerning the investment of the funds as a fungible asset. While we express no opinion on the ongoing correctness of our opinion in *Minton* in light of its deviation from the fundamental precepts of bailment theory,[4] we decline to redouble that deviation here. Defendant was not a bailee, and we reverse the trial court's decision not to dismiss Defendant's charge on that basis.

Having so held, Defendant's remaining argument concerning fatal variance between the indictment and evidence presented at trial is moot. *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99 (1996) (citation omitted) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

CONCLUSION

Defendant's conversion of Lewis's funds could not have properly resulted in his conviction under N.C.G.S. § 14-168.1 because he was not a bailee. Accordingly, we vacate the judgment. *Woody*, 132 N.C. App. at 792.

VACATED.

Judge RIGGS concurs.

Judge ARROWOOD concurs in judgment only by separate opinion.

---

4. Nor could we overturn that decision ourselves if we were so inclined. *In re Civil Penalty*, 324 N.C. 373, 384 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

ARROWOOD, Judge, concurring in judgment only.

While I agree that our precedent compels the majority to hold that the trial court erred in failing to dismiss the felony conversion of property by a bailee charge, and their finding that defendant did not qualify as a bailee, I write separately to express my concern that a precedent, as ancient as the concepts of bailment and conversion itself, compels such a holding.

"A bailment is created upon the delivery of possession of goods and the acceptance of their delivery by the bailee." *Flexlon Fabrics, Inc. v. Wicker Pick-Up & Delivery Serv., Inc.*, 39 N.C. App. 443, 447, 250 S.E.2d 723, 726 (1979) (citation omitted). Delivery requires "the bailor [to relinquish] exclusive possession, custody, and control to the bailee . . . ." *Id.* (citations omitted). "[A]cceptance is established upon a showing directly or indirectly of a voluntary acceptance of the goods under an express or implied contract to take and redeliver them." *Id.* Although historically the law may have contemplated the return of the exact property, our case law has recognized exceptions where a bailee is not required to return the identical item to the bailor in all circumstances. *See Wilson v. Burch Farms, Inc.*, 176 N.C. App. 629, 641, 627 S.E.2d 249, 259 (2006) (citations omitted) ("While the consignee may or may not receive the specific property of the consignment back, . . . this Court has recognized that a consignment creates a bailment between the parties.").

Precedent holds that when the subject of the bailment is money, a bailment relationship is only established if the bailee is required "to return the identical money received[.]" *State v. Eurell*, 220 N.C. 519, 520, 17 S.E.2d 669, 670-71 (1941) (finding that one who is expected "to return the identical money received" is a bailee); *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 212 N.C. App. 400, 405, 712 S.E.2d 361, 365, *review allowed, writ allowed*, 717 S.E.2d 371 (N.C. 2011) (finding the plaintiff could not prove a bailment relationship existed because the agreement between the parties "was not a sufficient meeting of the minds to establish a bailment relationship[,]" as the agreement did not show defendant was expected "to redeliver the exact funds"), *rev'd on other grounds*, 365 N.C. 520, 723 S.E.2d 744 (2012). From this language, it is unclear whether "exact funds" refers to the return of an identical sum, or the exact money left in the bailee's possession. Either way, I see no reason why the rule reiterated in *Eurell* and *Variety Wholesalers* should continue to shield defendants from liability in cases such as this, where investors have been entrusted with large sums of money for the benefit of a third-party and intentionally and wrongfully convert those funds prior to investing them.

If "exact funds" refers to the return of the exact amount, I do not see why Ms. Lewis's expectation of the return of more money should extinguish the bailment relationship. Ms. Lewis delivered the funds to defendant, relinquishing possession and control, and defendant accepted the funds. Furthermore, the promissory note between the parties showed that defendant was expected to return money to Ms. Lewis. That Ms. Lewis was expecting more than the initial investment, and defendant's title as an "investor" should be of no consequence.

If "exact funds" refers to the return of the exact investment Ms. Lewis initially made, I believe that our Supreme Court has expressed movement away from this requirement and would be receptive to the adoption of the exact sum requirement adopted by other jurisdictions. *See Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 528-29, 723 S.E.2d 744, 750-51 (2012) (finding in the context of conversion that defendant's assertion that the plaintiff could not "maintain a claim for conversion of money unless the funds in question [could] be specifically traced and identified[,]" and were "not commingled" was outdated, as this requirement "has been complicated as a result of the evolution of our economic system[,]" and in response to "this reality, numerous courts around the country have adopted rules requiring the specific identification of a sum of money, rather than identification of particular bills or coins[,]" thus as long as the plaintiff could show the "specific amount" that he transferred, where the funds originated, and which account the funds were transferred to, the funds were identifiable). Indeed, the movement away from the return of the "exact funds" in conversion cases has been adopted by other jurisdictions. *Nat'l Corp. for Hous. P'ship v. Liberty State Bank*, 836 F.2d 433, 436 (8th Cir. 1988) (citations omitted) (holding the "ancient rule" "requiring [the] return of the identical item has been liberalized in the case of bailment of fungible goods"); *Repplier v. Jacobs*, 149 Pa. 167, 169, 24 A. 194, 194 (1892) (finding that "[f]or all ordinary purposes, in law as in the business of life, *the same sum of money is the same money*, whether it be represented by the identical coin or not") (emphasis added).

For either situation, I see no reason why the rule requiring the return of the exact funds should continue to shield "investment advisors" from liability in conversion cases where they have been entrusted with large sums of money for the benefit of a third-party and intentionally and wrongfully convert those funds prior to investing them. Although I agree that precedent compels the findings set forth in the majority opinion, I think precedent from 1941 should be reconsidered by our Supreme Court.

Thus, I concur in judgment only.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 JUNE 2023)

BATTEN v. WELCH No. 22-1052	Guilford (22CVS3160)	Affirmed in Part; Remanded in Part
CHAGARIS v. HARDEN No. 22-810	Iredell (20CVS2471)	Affirmed in Part, Reversed and Remanded in Part
CLARK v. GILLESPIE No. 22-535	Chatham (20CVS430)	Vacated and Remanded
E.D. v. CHARLOTTE-MECKLENBURG BD. OF EDUC. No. 23-16	Mecklenburg (22CVS1008)	Dismissed
GODLEY v. NEW HANOVER MED. GRP. No. 22-823	N.C. Industrial Commission (20-005666)	Affirmed
IN RE A.H.F. No. 22-778	Wake (19JT170) (19JT171)	Affirmed
IN RE A.N. No. 22-498	Stokes (19JA10)	Vacated and Remanded
IN RE B.S.T. No. 22-410	Guilford (17JT197) (17JT198) (17JT272)	Affirmed
IN RE C.P. No. 22-484	Robeson (21JA144)	Affirmed
IN RE D.T. No. 22-544	Craven (18JA79)	Affirmed
IN RE EST. OF SMITH No. 23-17	Union (21E1428)	Dismissed
IN RE H.K.S. No. 22-289	Mitchell (19JT42)	VACATED AND REMANDED IN PART; REVERSED IN PART.
IN RE J.C. No. 22-799	Harnett (18JT134) (18JT136-138)	Affirmed

IN RE L.I.C.M. No. 22-650	Wake (19JT140) (19JT141)	Affirmed
IN RE M.J.B. No. 22-497	Cabarrus (20JA194)	Vacated and Remanded
IN RE M.N. No. 22-472	Pitt (21JA4) (21JA5) (21JA6) (21JA7)	Affirmed
IN RE N.M. No. 22-674	Union (19JT191)	Affirmed
IN RE T.G. No. 22-504	Davie (20JA62)	Affirmed
IN RE W.J.M. No. 22-733	Durham (22SPC567)	Vacated and Remanded
IN RE Z.R.B. No. 22-686	Yadkin (18JT48) (18JT49) (18JT50) (18JT51) (18JT52)	Affirmed
N.C. DEP'T OF PUB. SAFETY v. LOCKLEAR No. 22-890	Office of Admin. Hearings (21OSP01175)	Affirmed
NATIONSTAR MORTG., LLC v. MELARAGNO No. 22-743	Mecklenburg (18CVS9595)	Affirmed
ROGERS v. WELLS FARGO BANK, N.A. No. 22-978	Caldwell (20CVS1241)	Affirmed
SKENES v. INGLE No. 22-459	Alamance (19CVD1335)	Affirmed
SRIPATHI v. RAYALA No. 22-816	Wake (20CVD718)	Affirmed
STATE v. ABEE No. 22-832	Cleveland (20CRS1261-62)	No Error

STATE v. CANTEY No. 22-693	Lenoir (17CRS51622) (17CRS51690) (17CRS52335) (19CRS50807)	Dismissed
STATE v. CRABTREE No. 22-936	Union (18CRS52801) (18CRS708510-11)	No Error
STATE v. CROTTS No. 22-697	Cleveland (20CRS52547) (21CRS466)	No Error
STATE v. CURTIS No. 22-596	Catawba (16CRS3883-84) (17CRS79) (18CRS4221)	No Error
STATE v. DeLEON No. 22-468	Sampson (19CRS51140-41)	Affirmed
STATE v. HORTON No. 22-988	Duplin (20CRS51388)	Dismissed
STATE v. JONES No. 22-454	Anson (19CRS51177-78) (20CRS398-99)	No error in part, vacated in part, and remanded for resentencing
STATE v. JOYNER No. 22-718	Iredell (16CRS51997) (17CRS53659) (17CRS53660) (20CRS50308) (21CRS803)	REMANDED FOR CORRECTION OF CLERICAL ERRORS
STATE v. MILLS No. 22-900	Henderson (18CRS53520)	No Error
STATE v. MOREFIELD No. 22-470	Cleveland (20CRS55031) (21CRS19)	No Error
STATE v. SIPES No. 22-604	Wake (19CRS222967)	No Error
STATE v. SMITH No. 22-774	Cleveland (18CRS2073) (18CRS55562) (19CRS1807)	No Error

STATE v. WIGGINS No. 22-265	Pitt (19CRS57455)	No Error
STATE v. WILLIAMS No. 22-395	Buncombe (18CRS92442) (21CRS331)	No Error

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