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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 25, 2024

MAILING ADDRESS: The Judicial Department
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OF
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APPEAL AND ERROR

Notice of appeal—motion to suppress—underlying criminal judgment—petition for certiorari—In a criminal case in which defendant entered an Alford plea to trafficking in methamphetamine and other related charges, and where the trial court denied his motion to suppress evidence seized from a traffic stop, defendant's petition for a writ of certiorari was granted to allow review of the trial court's criminal judgment. Defendant properly notified the court and the prosecutor during plea negotiations of his intent to appeal the denial of his motion to suppress, but, when giving his oral notice of appeal after the court's judgment was entered, defendant failed to mention that he was appealing from both the denial of his motion and from the judgment. Nevertheless, defendant's intent to appeal from both orders was apparent from context, and the State did not object on appeal to defendant's petition for certiorari. **State v. San, 693.**

Right to appeal—denial of suppression motion—guilty plea—no benefit conferred—notice of intent to appeal not required—Where defendant pleaded guilty to multiple drug offenses as charged—and therefore his plea was not made as part of a plea arrangement with the State and conferred no benefit—he was not required to give notice to the State of his intent to appeal from an order denying his motion to suppress. However, the appellate court noted that, given the unsettled state of the law regarding the notice requirement under these circumstances, it had granted defendant's petition for a writ of certiorari by separate order so as to reach the merits of defendant's appeal. **State v. Moua, 678.**

Timeliness of appeal—dismissal orders—tolling—Rule 52(b) motion—In an appeal from three orders entered in a negligence action—a dismissal order (for failure to join a necessary party), a post-dismissal order, and an amended post-

dismissal order—the Court of Appeals lacked jurisdiction to consider the merits of the dismissal order because plaintiff filed his notice of appeal more than thirty days after the dismissal order was entered, thus making the appeal untimely pursuant to Appellate Rule 3(c). Plaintiff's Civil Procedure Rule 52(b) motion did not toll the time for filing a notice of appeal because a Rule 52(b) motion (which allows the court to amend its findings or make additional findings and amend the judgment accordingly) was not a proper motion in the context of dismissal for failure to join a necessary party, and the rule was not designed to provide a backdoor for making late amendments to a complaint. As for the amended post-dismissal order, which subsumed the post-dismissal order, plaintiff's notice of appeal was timely filed within 30 days of the effective date. **Reints v. WB Towing Inc., 653.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Abuse and neglect—visitation—four biological parents—findings and conclusions required for each parent—In an abuse and neglect matter involving three children, where the trial court was required to determine the visitation rights of four different biological parents (the mother and three different men who each fathered one of the children), the trial court abused its discretion in awarding supervised visitation to one of the fathers while denying all visitation to the other parents. The court not only failed to make factual findings or conclusions of law addressing why only one parent was entitled to visitation with his child, but it also failed to enter specific findings and conclusions evaluating each individual parent's entitlement to visitation with their respective children. **In re A.J.L.H., 644.**

Adjudication—dependency—ability to care for or supervise—alternative child care arrangements—sufficiency of findings—The trial court erred in adjudicating a mother's two younger children as dependent where, in determining whether a juvenile is dependent, the court was required to enter findings of fact addressing both prongs of N.C.G.S. § 7B-101(9)—the parent's ability to care for or supervise the children, and the availability of appropriate alternative child care arrangements—but the court failed to enter any findings or conclusions regarding the first prong. Regarding the second prong, although both children lived in voluntary placements with relatives for several years before the juvenile petitions were filed, the evidence did not support a finding that those placements were necessary due to an unwillingness or inability on the mother's part to parent her children. **In re A.J., 632.**

Adjudication—neglect—improper care or supervision—environment injurious to welfare—sufficiency of evidence and findings—The trial court erred in adjudicating a mother's three children as neglected on grounds that they received improper care or supervision from the mother and lived in an environment injurious to their welfare. Firstly, the court's findings describing a series of altercations between the mother and the middle child—absent any admissible evidence of physical harm to the child—were insufficient to show that the middle child was improperly disciplined. Secondly, because the middle child was residing in a voluntary kinship placement at all relevant times, the record did not support a conclusion that the middle child lived in an injurious environment under her mother's care. Thirdly, the court made no findings regarding the youngest child and only one relevant finding about the eldest child, which was insufficient to establish neglect. Finally, none of the evidence and findings established that the eldest and youngest children lived in a home where the middle child was neglected, and therefore they could not be adjudicated as neglected on that ground. **In re A.J., 632.**

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Dismissal for failure to join a necessary party—Rule 52(b) motion—improper motion—In an appeal from three orders entered in a negligence action—a dismissal order (for failure to join a necessary party), a post-dismissal order, and an amended post-dismissal order—the trial court did not abuse its discretion in denying plaintiff's Civil Procedure Rule 52(b) motion to amend the dismissal order. Because the dismissal order was based on plaintiff's failure to join a necessary party, the trial court was not required to make findings of fact; furthermore, plaintiff's motion essentially requested reconsideration and sought permission to amend the complaint to add a necessary party, which is not relief authorized under Rule 52(b). **Reints v. WB Towing Inc., 653.**

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Right to counsel—trial strategy—decision not to call out-of-state witness—no absolute impasse—The trial court did not err at the start of a drug trafficking trial by denying defendant's request to substitute counsel where the disagreement between defendant and his counsel over whether to call an out-of-state witness to testify at trial—a matter of trial tactics, which are generally within the attorney's province—did not rise to the level of an absolute impasse that would have rendered defense counsel's representation constitutionally ineffective and where there was no basis for the court to order defense counsel to call the witness. **State v. Holliday, 667.**

CRIMINAL LAW

Guilty plea—Anders review—discrepancy in Information—remand—After defendant pleaded guilty to charges of possession with intent to sell and deliver heroin, possession with intent to sell and deliver cocaine, and two counts of resisting a public officer, where defendant's appellate counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), the appellate court concluded that the trial court did not err by not instituting a competency hearing sua sponte because there was no indication that defendant lacked the capacity to enter his guilty plea; in addition, defendant's ineffective assistance of counsel claims were dismissed without prejudice to permit defendant to pursue a motion for appropriate relief in the trial court. However, the appellate court's independent review revealed a discrepancy in the Information in one of the file numbers which, although it may have been a scrivener's error, raised the potential issue of whether defendant validly waived his right to indictment by a grand jury. Therefore, the matter was remanded for the trial court to ensure and clarify that there was a valid Information, including waiver of indictment, in that file number. **State v. George, 660.**

EVIDENCE

Expert testimony—murder by torture—child victim—cause of death—In a trial for first-degree murder by torture of a child victim and related sexual offenses, there was no plain error in the admission of testimony from two expert witnesses—the deputy chief medical examiner who conducted the autopsy of the victim and a developmental and forensic pediatrician who gave testimony on fatal child maltreatment and sexual abuse—on the issue of the victim's cause of death. Although both experts made comments related to what defendant's intentions were when he committed his abusive acts against the victim, the experts' beliefs and opinions were sufficiently based on the evidence before them. Further, even if the testimony had been excluded, the jury likely would have reached the same result given the weight of the evidence of defendant's guilt. **State v. Smith, 707.**

EVIDENCE—Continued

Hearsay—child neglect and dependency proceeding—statements by child to social workers—residual exception—statement by party opponent—An order adjudicating a mother's oldest child as neglected and her two younger children as neglected and dependent was reversed and remanded where the trial court had based multiple factual findings on inadmissible hearsay statements made by the middle child to social workers (regarding altercations between the child and the mother). The statements were inadmissible under the residual hearsay exception (Evidence Rule 803(24)) because the court did not enter any findings showing that it had considered the different circumstances under which the exception would apply. Additionally, the court erred in admitting the statements under the hearsay exception for statements made by a party opponent (Rule 801(d)), since only the mother—not the child who made the statements—was a party opponent to the petitioner-complainant in the proceeding. Furthermore, the mother showed that she was prejudiced by the court's error where, absent the improperly admitted hearsay evidence, the record did not support the court's adjudications. **In re A.J., 632.**

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Murder by torture—child victim—acts constituting torture—starvation—physical and sexual abuse—The State presented substantial evidence in a prosecution for first-degree murder by torture from which a jury could conclude that defendant committed acts of torture upon his minor daughter by engaging in a pattern of the same or similar acts over a period of time that inflicted pain and suffering seemingly for the purpose of punishment, including that, after the victim had been in the sole care of defendant for nine months while the victim's mother was deployed overseas, the victim lost a significant amount of weight and had no appetite and, after her mother returned, was withdrawn and would almost never eat in defendant's presence. Further, defendant beat the victim with his hands and belt and withheld water as punishment for her failure to eat, and, when the victim was taken to a hospital the day before she died, her body showed signs of prolonged and recent physical and sexual abuse in addition to severe malnutrition. **State v. Smith, 707.**

Murder by torture—proximate cause—child victim—pattern of abuse—starvation—pneumonia—The State presented substantial evidence in a prosecution for first-degree murder by torture from which a jury could conclude that defendant proximately caused his minor daughter's death and that her death was reasonably foreseeable based on the facts where, despite defendant's argument that the victim's death from pneumonia aggravated by starvation was unrelated to his conduct and instead resulted from new and independent causes, the evidence showed a causal chain between defendant's extended pattern of physical and sexual abuse and the victim's loss of appetite, starvation, and extremely weakened condition that led to her contracting pneumonia, and ultimately dying. **State v. Smith, 707.**

SEARCH AND SEIZURE

Motion to suppress—finding of fact—traffic stop—police inquiry extending the stop—timing of dog sniff in relation to the inquiry—In a prosecution for trafficking in methamphetamine and other charges arising from a traffic stop, where an officer stopped a car in which defendant sat as a passenger, asked the driver to exit the vehicle, issued the driver a warning citation, and then asked the driver if she had any drugs or weapons inside the vehicle, competent evidence supported the trial court's finding that law enforcement conducted an open-air dog sniff around

the vehicle "simultaneously to [the officer] asking [the driver] to exit her vehicle and explaining the warning ticket to her." Importantly, when read together with other findings, this finding clearly reflected that the dog sniff occurred before the officer extended the traffic stop beyond its mission by asking the driver about items inside her car. Because the finding was both internally consistent and consistent with the court's other findings, the court properly relied on this finding when denying defendant's motion to suppress evidence seized during the stop. **State v. San, 693.**

Motion to suppress—probable cause—warrantless search following traffic stop—validity of dog sniff—In a prosecution for trafficking in methamphetamine and other charges arising from a traffic stop, where an officer stopped a car in which defendant sat as a passenger, asked the driver to exit the vehicle, issued the driver a warning citation, and then asked the driver if she had any drugs or weapons inside the vehicle, the trial court properly denied defendant's motion to suppress evidence seized from the vehicle after law enforcement conducted an open-air dog sniff around the car. Firstly, the court's legal basis for denying defendant's motion was clear enough to allow appellate review of the court's ruling. Secondly, the court properly relied on a probable cause standard when ruling on the motion because, even though the underlying issue was whether the dog sniff was valid, the ultimate question for the court was whether law enforcement had probable cause to conduct a warrantless search of the vehicle based on the dog sniff. Finally, the court's findings supported a conclusion that the dog sniff was conducted while the officer spoke with the driver and before the officer prolonged the stop beyond its mission (by asking the driver about other items inside the car), and therefore the findings established that the traffic stop was not unlawfully prolonged on account of the dog sniff. **State v. San, 693.**

Traffic stop—unlawfully extended—consent to search vehicle invalid—judgment vacated—Defendant's traffic stop for speeding was unlawfully extended and he was illegally seized for purposes of the Fourth Amendment where the investigating officer continued questioning defendant after the purpose of the stop had concluded—signified by the officer returning defendant's license and registration to him and giving him a verbal warning for speeding. There was no reasonable suspicion to extend the stop where, after determining that defendant was on active probation but had no active warrants, the officer asked to talk to defendant outside of the car and reached inside to unlock and open the door, and, once the two men were standing by the back of the car, the officer returned defendant's documents—at which point the stop's mission was over—and asked defendant about his probation status and whether he had anything on his person or in his car. Under these circumstances, a reasonable person would not have felt free to leave and, therefore, defendant's subsequent consent to search the vehicle was not freely and voluntarily given. The trial court's order denying defendant's motion to suppress evidence of drugs found in the vehicle was reversed and defendant's judgment for multiple drug offenses was vacated. **State v. Moua, 678.**

N.C. COURT OF APPEALS

2024 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	8 and 22
February	5 and 19
March	4 and 18
April	1, 15, and 29
May	13 and 27
June	10
August	12 and 26
September	9 and 23
October	7 and 21
November	4 and 18
December	2

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

IN THE MATTER OF A.J., J.C., J.C.

No. COA22-522

Filed 18 July 2023

1. Evidence—hearsay—child neglect and dependency proceeding—statements by child to social workers—residual exception—statement by party opponent

An order adjudicating a mother's oldest child as neglected and her two younger children as neglected and dependent was reversed and remanded where the trial court had based multiple factual findings on inadmissible hearsay statements made by the middle child to social workers (regarding altercations between the child and the mother). The statements were inadmissible under the residual hearsay exception (Evidence Rule 803(24)) because the court did not enter any findings showing that it had considered the different circumstances under which the exception would apply. Additionally, the court erred in admitting the statements under the hearsay exception for statements made by a party opponent (Rule 801(d)), since only the mother—not the child who made the statements—was a party opponent to the petitioner-complainant in the proceeding. Furthermore, the mother showed that she was prejudiced by the court's error where, absent the improperly admitted hearsay evidence, the record did not support the court's adjudications.

2. Child Abuse, Dependency, and Neglect—adjudication—neglect—improper care or supervision—environment injurious to welfare—sufficiency of evidence and findings

The trial court erred in adjudicating a mother's three children as neglected on grounds that they received improper care or supervision from the mother and lived in an environment injurious to their welfare. Firstly, the court's findings describing a series of altercations between the mother and the middle child—absent any admissible evidence of physical harm to the child—were insufficient to show that the middle child was improperly disciplined. Secondly, because the middle child was residing in a voluntary kinship placement at all relevant times, the record did not support a conclusion that the middle child lived in an injurious environment under her mother's care. Thirdly, the court made no findings regarding the youngest child and only one relevant finding about the eldest child, which was insufficient to establish neglect. Finally, none of the evidence and findings established that the eldest and youngest children

lived in a home where the middle child was neglected, and therefore they could not be adjudicated as neglected on that ground.

3. Child Abuse, Dependency, and Neglect—adjudication—dependency—ability to care for or supervise—alternative child care arrangements—sufficiency of findings

The trial court erred in adjudicating a mother's two younger children as dependent where, in determining whether a juvenile is dependent, the court was required to enter findings of fact addressing both prongs of N.C.G.S. § 7B-101(9)—the parent's ability to care for or supervise the children, and the availability of appropriate alternative child care arrangements—but the court failed to enter any findings or conclusions regarding the first prong. Regarding the second prong, although both children lived in voluntary placements with relatives for several years before the juvenile petitions were filed, the evidence did not support a finding that those placements were necessary due to an unwillingness or inability on the mother's part to parent her children.

Appeal by respondent-mother from order entered 22 March 2022 by Judge Lee Teague in Pitt County District Court. Heard in the Court of Appeals 13 July 2023.

The Graham Nuckolls Conner Law Firm, PLLC, by Jon G. Nuckolls, for petitioner-appellee Pitt County Department of Social Services.

North Carolina Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche and Brittany T. McKinney, for guardian ad litem.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky L. Brammer, for respondent-appellant mother.

TYSON, Judge.

Respondent is the mother of four-year-old A.J. ("Amanda"), thirteen-year-old J.C. ("Jade"), and fifteen-year-old J.C. ("Juliet"). *See* N.C. R. App. P. 42 (pseudonyms are used throughout the opinion to protect the identity of the juveniles). She appeals from an order entered 22 March 2022, adjudicating Amanda as a neglected juvenile, and Jade and Juliet as neglected and dependent juveniles, and placing the children into the custody of the Pitt County Department of Social Services ("DSS"). Respondent argues, and we agree, the inadmissible evidence and the

trial court's findings thereon are insufficient to support its conclusions and adjudications. We reverse and remand.

I. Background

In June 2021, DSS received a report alleging neglect and improper discipline based on an incident between Respondent and Jade. DSS created a safety plan with Respondent, in which she agreed to refrain from physical discipline and to begin to receive mental health services for herself and the children. Respondent also agreed to allow Jade and Juliet to continue residing with their maternal great aunt, with whom they had resided since 2018.

In November 2021, the Washington County Department of Social Services ("WCDSS") sent DSS a report of another altercation between Respondent and Jade. On 21 December 2021, WCDSS responded to a report alleging Respondent had locked Jade out of the house. WCDSS, DSS, and Respondent were unable to identify a temporary safety placement for Jade.

On 22 December 2021, DSS filed juvenile petitions alleging Amanda was a neglected juvenile and alleging Jade and Juliet were neglected and dependent juveniles, based upon these three reported incidents. DSS also obtained nonsecure custody of Jade, and she was placed into the care of her maternal great aunt. Juliet remained in the voluntary care of her maternal great aunt, and Amanda, the youngest daughter, has remained in Respondent's care.

On 8 February 2022, DSS filed a notice it intended to present hearsay statements at the adjudication hearing purportedly made by Jade and Juliet. DSS asserted their statements, made to DSS and WCDSS social workers, fell under the residual hearsay exception of N.C. Gen. Stat. § 8C-1, Rule 803(24) (2021).

The petitions were heard on 17 February 2022. During the adjudicatory phase, DSS presented testimony from a DSS social worker and a WCDSS social worker, each of whom testified to statements purportedly made to them by Jade. Respondent's counsel objected before, during, and after the social workers introduced the hearsay statements, but the court overruled the objections each time and allowed the statements to be admitted into evidence.

On 22 March 2022, the trial court entered an order adjudicating all three children as neglected juveniles and adjudicating both Jade and Juliet as dependent juveniles. The court later determined the children's best interests demanded for them to be placed into DSS' custody. Respondent timely appealed.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(3) (2021).

III. Issues

Respondent argues the trial court erred by: (1) admitting hearsay statements purportedly made by Jade, (2) adjudicating all three children as neglected, (3) adjudicating Jade and Juliet to be dependent, and (4) concluding the children's best interests demanded for all of them to be removed from their parent and family and placed into DSS custody.

IV. Standard of Review

This Court reviews an adjudication "to determine whether the trial court's findings of fact are supported by clear and convincing competent evidence and whether the court's findings, in turn, support its conclusions of law." *In re J.R.*, 243 N.C. App. 309, 312, 778 S.E.2d 441, 443 (2015) (citation and internal quotation marks omitted). "When reviewing findings of fact in a juvenile order, the reviewing court 'simply disregards information contained in findings of fact that lack sufficient evidentiary support' and examines whether the remaining findings support the trial court's determination." *In re A.J.L.H.*, 384 N.C. 45, 52, 884 S.E.2d 687, 693 (2023) (quoting *In re A.C.*, 378 N.C. 377, 394, 861 S.E.2d 858 (2021)). The trial court's conclusions of law are reviewed *de novo*. *Id.*

V. Analysis

A. Findings of Fact

[1] The trial court's order contains eighteen adjudicatory findings of fact, eight of which Respondent challenges in whole or in part:

> 5. The Department received a report relating to the Juveniles beginning on June 6, 2021, alleging neglect and improper discipline on the part of the Respondent Mother. The specific allegations were that the Juvenile, [Jade], was observed limping by another family member and later disclosed once Respondent Mother was gone that she had been in a physical altercation with the Respondent Mother. The Juvenile did not want to get out of the car and the Respondent Mother began twisting her leg trying to remove her from the car. The Juvenile locked herself in the car to get away from the Respondent Mother. The Respondent Mother then took a shovel and broke the window. Thereafter, the Respondent Mother beat the Juvenile

with a belt buckle in the head and all over her body. She also choked and threatened to kill the Juvenile. The Respondent Mother admitted to the Department Social Worker that the altercation occurred. The Respondent Mother admitted she broke (sic) the car window in today's testimony.

. . .

7. Another report was received on November 16, 2021 that the Respondent Mother had choke slammed the Juvenile, [Jade], and threw her out of the car. This incident was reportedly witnessed by a family member over a video call. During the hearing . . . Respondent Mother yelled out, "I did it." when the choke slam was testified to.

8. On December 21, 2021, the Juvenile, [Jade], had agreed to go with Respondent Mother thinking she would be able to get her Christmas gifts and return to her [great] aunt's home, where she had been living for several years. Instead, the Juvenile discovered that Respondent Mother planned to enroll her in school in Washington County, which upset the Juvenile.

9. On December 21, 2021, there was another report made that the Respondent Mother locked the Juvenile outside in the cold weather because she refused to babysit her two-year-old sister. When [the WCDSS social worker] arrived at the home, he discovered that law enforcement had to handcuff Respondent Mother just to get her to calm down. [He] observed Respondent Mother was "cussing and fussing" and demanding that the child, [Jade] come inside. [The social worker] confirmed that [Amanda], the 2-year-old child, was present and witnessed Respondent Mother's outbursts and being handcuffed. This was upsetting to the 2-year-old. Respondent Mother's behavior was unstable.

10. Neighbors, who witnessed the child's distress had let the Juvenile, [Jade], in their home to wait for assistance, as they were concerned about her.

11. The Juvenile, [Jade], is very afraid of Respondent Mother and does not want to be in her care. The Juvenile has refused to get out of the Social Worker's car, fearful

> that the Respondent Mother would kill her. The Juvenile, [Jade], confirmed there had been prior physical altercations with Respondent Mother.
>
> 12. The Respondent Mother suffers from mental and psychological illnesses as a result of traumatic experiences throughout her life, including witnessing the murder of the Juveniles' father. In 2016, Respondent Mother was the driver of a vehicle involved in an accident where two others were killed. The Respondent Mother suffered injuries that required hospitalization. The Respondent Mother has denied mental health diagnosis. The Respondent Mother has presented as extremely hostile and aggressive throughout the hearing of this matter as evidenced by numerous outbursts in the Courtroom and aggressive comments directed toward other participants in this proceeding.
>
> 13. The Respondent Mother also has a history of drug use, specifically marijuana.

Respondent argues the trial court, over multiple objections, erroneously admitted hearsay statements purportedly made by Jade. We agree.

DSS's notice of its intent to offer hearsay statements specifically indicated the proffered statements purportedly fell under the residual exception of N.C. Gen. Stat. § 8C-1, Rule 803(24) (2021). However, at the hearing, DSS changed its position from that basis asserted in the notice and appeared to argue Jade's statements were admissible because the social worker had

> direct knowledge. He had this conversation with the juvenile and he, as he testified, had a conversation with the Respondent-Mother, both of which are parties to the case, and anything that the mom said, I would argue, is an admission of the Respondent-Mother and the juvenile as well. Her statement should be allowed in, as she is a party to the case as well.

Over objections, the trial court ruled the statements were admissible because "the juvenile is a party to the action with the admission by the party as well."

The trial court's determination and ruling were erroneous under either of the possible hearsay exceptions noticed or presented by DSS at the hearing. In order to admit hearsay under the residual exception, the trial court must

> determine whether (1) proper notice has been given; (2) the hearsay statement is not specifically covered elsewhere; (3) the statement possesses circumstantial guarantees of trustworthiness; (4) the statement is material; (5) the statement is more probative than any other evidence which the proponent can procure through reasonable efforts; and (6) the interest of justice will be best served by admission.

In re W.H., 261 N.C. App. 24, 27, 819 S.E.2d 617, 620 (2018) (citation omitted).

Such "careful consideration" must be reflected in the trial court's findings. *In re F.S.*, 268 N.C. App. 34, 41, 835 S.E.2d 465, 470 (2019). As no such findings were made, either during the hearing or in the order, Jade's purported hearsay statements were not properly admitted under this exception and should have been excluded upon objection. *Id.* at 42, 835 S.E.2d at 470.

A statement made by a party opponent is

> admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship or (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy.

N.C. Gen. Stat. § 8C-1, Rule 801(d) (2021).

In abuse, neglect, and dependency actions, the parents are party opponents to the petitioner-complainant. *In re J.M.*, 255 N.C. App. 483, 489, 804 S.E.2d 830, 834 (2017). The trial court erred in concluding Jade, a juvenile, was a "party to the case," and, as her statements do not fall under any of the exceptions outlined in Rule 801(d), her purported statements were not admissible. Respondent's objections should have been sustained.

Neither DSS nor the guardian *ad litem* contest or argue Respondent's assertion of Jade's purported statements constituted inadmissible hearsay. Instead, they contend Respondent failed to establish the

inadmissible hearsay statements were prejudicial and argue the findings were supported by other properly admitted clear and convincing evidence. Respondent counters and contends the prejudice to her is "readily apparent," as the trial court's conclusions are unsupported by a factual basis, absent the inadmissible hearsay evidence. *In re F.S.*, 268 N.C. App. at 41, 835 S.E.2d at 470. We agree.

At the hearing, the DSS social worker acknowledged DSS was still investigating the allegations in all three reports, and the majority of the evidence to support the unsubstantiated allegations was based upon Jade's purported statements. We disregard the challenged findings, or portions thereof, which rely upon Jade's inadmissible hearsay statements or those which are otherwise unsupported. *In re A.J.L.H.*, 384 N.C. at 52, 884 S.E.2d at 693. This includes the entirety of Finding of Fact 13, as it relies solely upon inadmissible hearsay, and the entirety of Finding of Fact 7, as the only portion not solely based on Jade's inadmissible hearsay statements was apparently a misapprehension by the court.

The order identifies 16 November 2021 as the date the report "was received," by DSS, which tracks the language of the petitions. The testimony at hearing indicates WCDSS received the report 9 November 2021. Respondent asserts this discrepancy supports her assertion and argument that the trial court's findings were merely improper recitations of allegations in the petitions and do not reflect an adjudication of the evidence and findings of facts. However, it appears: (1) the report was first received by WCDSS, which then forwarded the report to DSS; and, (2) only one event allegedly occurred in November 2021.

Moreover, no properly admitted evidence supports any allegations from November 2021. When the court sought clarification on what the allegation of "choke-slammed" meant, Respondent objected and the transcript shows she stated she "didn't do it[,]" and not that she did. The properly admitted evidence, including Respondent's testimony and the social worker's testimony concerning their knowledge of the reports, supports portions of Findings of Fact 5, 8, 9, 10, 11, and 12.

Finding of Fact 5 has sufficient evidence to support an argument had occurred between Jade and Respondent on or about 6 June 2021. Jade purportedly refused to her mother's instruction to get out of the car, Respondent allegedly slapped and hit Jade with a belt, Jade locked herself in the car, and Respondent broke the vent window to unlock the car and to gain access. The remainder of Finding of Fact 5 is unsupported by properly admitted evidence.

The alleged 21 December 2021 incident, as described in Findings of Fact 8, 9, 10, and 11, finding another argument occurred between Jade and Respondent is supported by sufficient evidence. Jade was allegedly upset by Respondent's intention to enroll her in a school located in Washington County. Neighbors allegedly saw Jade standing outside and invited her to come into and wait inside their house.

Police officers allegedly told a WCDSS social worker they had handcuffed Respondent prior to his arrival. Respondent began "arguing and cussing" when the social worker called the child's maternal great aunt. The social worker allegedly believed Jade was "afraid" because, as had occurred with Respondent earlier, Jade remained inside the DSS vehicle, recalcitrant and disobeying instructions, and had refused Respondent's instructions for her to exit the DSS vehicle and go inside of Respondent's home. Amanda was two years old and was allegedly present during the incident. The remainder of these findings are unsupported by properly admitted evidence.

Sufficient evidence supports portions of Finding of Fact 12, finding Respondent had experienced several severe traumatic events in her life, had denied diagnoses of mental illness, and had outbursts during the hearing. However, no clear and convincing evidence and no expert medical testimony were presented to show or prove Respondent "suffers from mental and psychological illnesses as a result of traumatic experiences[.]"

"Without the improperly admitted hearsay evidence, [and with the lack of any other clear and convincing evidence,] the record does not support the trial court's conclusion[s]." *In re F.S.*, 268 N.C. App. at 41, 835 S.E.2d at 470. Respondent has established she was prejudiced by the trial court's erroneous admission of hearsay and other unsupported testimony. *Id.*

B. Neglect

[2] The trial court concluded all three children were neglected juveniles as defined in N.C. Gen. Stat. § 7B-101(15), as they did "not receive proper care, supervision or discipline from [their] parent, guardian, custodian or caretaker and [they] live[d] in an environment injurious to their welfare." "In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect *by an adult who regularly lives in the home*." N.C. Gen. Stat. § 7B-101(15) (2021) (emphasis supplied).

The unsupported findings of fact, as discussed above, are insufficient to support an adjudication that Jade was neglected. An argument

between a parent and child or use of corporal punishment, with no evidence of any resulting marks, bruising, or other injury, does not constitute neglect. *In re Thompson*, 64 N.C. App. 95, 98-99, 306 S.E.2d 792, 794 (1983) (concluding that a child who is repeatedly "disciplined so severely that bruises and internal abrasions [can be] a 'neglected' juvenile"); *See State v. Varner*, 252 N.C. App. 226, 228, 796 S.E.2d 834, 836 (2017) ("[O]ur Supreme Court has recognized that, as a general rule, a parent . . . is not criminally liable for inflicting physical injury on a child in the course of lawful administering corporal punishment." (citation omitted)); *In re C.B.*, 180 N.C. App. 221, 224, 636 S.E.2d 336, 338 (2006) (holding the respondent's punishment by "spanking [or] whipping that resulted in a bruise" and not "serious injury" did not constitute abuse under N.C. Gen. Stat. § 7B-101(1)).

Similarly, the supported findings regarding the June and December 2021 incidents are insufficient to establish Respondent's improper care or supervision of her children. Respondent testified that she felt it was necessary to break the car vent window after Jade had locked herself inside the vehicle and refused Respondent's instructions to open the door or exit the vehicle. Respondent testified she only used "light force" to break a vent window only to unlock the car.

Respondent's intention to enroll Jade in school located in Washington County, where Respondent lived, allegedly precipitated the December incident. The place of the family's residence and choice of their children's school is a parent's prerogative under parental care, custody, and control. Testimony at the hearing shows Respondent believed a school transfer was necessary, due to Jade's aggressive behavior at her current Greene County school. No record evidence supports a finding Respondent had locked Jade out of the home. Instead, a recalcitrant and undisciplined pattern of behavior is shown by Jade locking herself inside of and refusing to leave a car when she does not get her way, or disagrees and argues with Respondent.

Moreover, the evidence establishes that during all relevant periods and with Respondent's permission, Jade had been residing with her grandmother and later with her maternal great aunt. Where a child is residing in a voluntary kinship arrangement prior to any DSS involvement, and no evidence or adjudicatory findings support a conclusion the child has been subjected to harm in the parent's primary care, custody, and control, "the findings and evidence do not support a conclusion" of the child "living in an environment injurious to her welfare and not receiving proper care and supervision." *In re B.P.*, 257 N.C. App. 424, 434, 809 S.E.2d 914, 920 (2018). A child or DSS personnel disagreeing

with or preferring a different path to a parent's prerogatives and decisions for their child is not neglect. With no supporting evidence, the trial court erred in adjudicating Jade as a neglected juvenile. *Id.* at 434, 809 S.E.2d at 920.

The trial court's evidentiary findings center around the incidents between Jade and Respondent. The court made no evidentiary findings whatsoever concerning Juliet, who lived with her great aunt, and only one relevant finding concerning two-year-old Amanda. Though Amanda's presence while Respondent was "arguing and cussing" speaks "to the quality of [her] home environment[,]" that single finding does not support a conclusion and adjudication Amanda was neglected. *In re J.C.M.J.C.*, 268 N.C. App. 47, 58, 834 S.E.2d 670, 678 (2019).

As the evidence fails to establish Jade was a neglected juvenile, the trial court also erred in, *ipso facto*, adjudicating Juliet, who was living at her maternal great aunt's home, and two-year-old Amanda as neglected juveniles. *Cf. In re G.C.*, 384 N.C. 62, 68, 884 S.E.2d 658, 662 (2023) (evidentiary findings establishing neglect of one child *residing in the home* may support an ultimate finding another child was neglected).

The trial court also made a finding regarding Amanda's "agitation" during the hearing and Respondent's unwillingness to remove Amanda from the proceedings. The purpose of an adjudicatory hearing is to determine only "the existence or nonexistence of any of the conditions alleged in a petition." N.C. Gen. Stat. § 7B-802 (2021). The trial court failed to make findings to show this interaction was relevant or admissible in any manner as adjudicatory evidence concerning the allegations in the petition. *In re V.B.*, 239 N.C. App. 340, 344, 768 S.E.2d 867, 870 (2015) (providing that post-petition evidence may be considered where it is relevant to "a fixed and ongoing circumstance" as alleged in the petition).

C. Dependency

[3] The trial court concluded Jade and Juliet were "dependent" juveniles as their "parent, guardian or custodian is unable to provide for [their] care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2021).

"In determining whether a juvenile is dependent, 'the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.' " *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (quoting *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005)).

"Findings of fact addressing *both prongs must be made before* a juvenile may be adjudicated as dependent, and the *court's failure to make* these findings *will result in reversal* of the court." *Id.* (emphasis supplied).

The trial court failed to make any evidentiary findings or conclusions regarding Respondent's ability to care for or to supervise Jade and Juliet. The supported findings, as detailed above, address Respondent's arguments with Jade; no findings or conclusions show Respondent's behavior rendered her "wholly unable to parent" Jade or Juliet. *In re H.L.*, 256 N.C. App. 450, 458, 807 S.E.2d 685, 690 (2017).

While the trial court referenced Respondent's purported mental state, as concluded above, no evidence supports a finding that Respondent suffered from "mental and psychological illnesses," let alone "serious psychological problems" that impaired her ability to care for and supervise her children. *See In re T.B.*, 203 N.C. App. 497, 503, 692 S.E.2d 182, 186 (2010) (concluding that the mother's "suicidal ideation and tendencies," "chronic state of stimulus overload," and diagnoses of "Chronic Post Traumatic Stress Disorder, Major Personality Disorder, Major Depressive Disorder, and Dependent Personality Disorder" impaired her ability to parent her children).

We also reject DSS' and the guardian *ad litem's* assertion Respondent is unable to care for Jade and Juliet without constant assistance. The trial court failed to make any findings, other than her witnessing the murder of her older girl's father and being hospitalized from an automobile accident, regarding Respondent's reasons and permissions for Jade's and Juliet's voluntary placement with their grandmother and later their maternal great aunt for several years prior to the juvenile petitions.

The evidence also does not support a finding such a placement was necessary due to Respondent's unwillingness or inability to parent. Testimony shows Jade and Juliet originally went to live with their grandmother while Respondent recovered from injuries suffered from her car accident. After their grandmother's death and with Respondent's permissions, Jade and Juliet voluntarily went to live with their grandmother's sister: their maternal great aunt. Respondent testified she was willing and able to care for Jade and Juliet and to continue to parent Amanda. No evidence was presented to the contrary.

As the trial court failed to make sufficient findings, we conclude the trial court erred in adjudicating Jade and Juliet as dependent juveniles. *See In re J.A.G.*, 172 N.C. App. 708, 716, 617 S.E.2d 325, 332 (2005). That adjudication is reversed.

VI. Conclusion

The trial court erred in admitting the objected-to hearsay statements purportedly made by Jade to WCDSS and DSS social workers. Respondent was prejudiced by the court's error. The findings of fact, unsupported by properly admitted evidence, are insufficient to support the trial court's adjudications either that Jade, Juliet, and Amanda were neglected, or that Jade and Juliet were dependent. The 22 March 2022 order is reversed and this cause is remanded for dismissal. *See In re F.S.*, 268 N.C. App. at 47, 835 S.E.2d at 473. In light of our holding, we need not address Respondent's arguments concerning disposition. *It is so ordered.*

REVERSED AND REMANDED.

Judges FLOOD and RIGGS concur.

IN THE MATTER OF A.J.L.H., C.A.L.W., M.J.L.H.

No. COA20-267-2

Filed 18 July 2023

Child Abuse, Dependency, and Neglect—abuse and neglect—visitation—four biological parents—findings and conclusions required for each parent

In an abuse and neglect matter involving three children, where the trial court was required to determine the visitation rights of four different biological parents (the mother and three different men who each fathered one of the children), the trial court abused its discretion in awarding supervised visitation to one of the fathers while denying all visitation to the other parents. The court not only failed to make factual findings or conclusions of law addressing why only one parent was entitled to visitation with his child, but it also failed to enter specific findings and conclusions evaluating each individual parent's entitlement to visitation with their respective children.

Appeal by respondents from order entered 13 December 2019 by Judge Tonia A. Cutchin in Guilford County District Court. This case was originally heard in the Court of Appeals 17 November 2020. *See In re A.J.L.H.*, 275 N.C. App. 11, 853 S.E.2d 459 (2020). Upon remand from the Supreme Court of North Carolina.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Social Services.

Leslie C. Rawls, for the mother-appellant.

Benjamin J. Kull for respondent-father appellant.

Tin, Fulton, Walker & Owen, PLLC, by Cheyenne N. Chambers, for guardian ad litem.

TYSON, Judge.

This case was returned to this Court on remand from the Supreme Court of North Carolina to address Respondents' remaining arguments concerning the disposition order. *In re A.J.L.H.*, 384 N.C. 45, 47, 884 S.E.2d 687, 695-96 (2023), (hereinafter "*A.J.L.H. II*"), reversing and remanding *In re A.J.L.H.*, 275 N.C. App. 11, 853 S.E.2d 459 (2020) (hereinafter "*A.J.L.H. I*"). We reverse the orders of the trial court regarding visitation and remand for further findings of facts and conclusions of law.

I. Background

This matter involves the adjudication of Margaret as an abused and neglected juvenile, and the adjudication of Margaret's two younger siblings, Chris and Anna, as neglected juveniles. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identities of the juveniles). The facts and procedural history are set forth in the Supreme Court's opinion:

> Respondent-mother is the mother of Margaret, Chris, and Anna. Respondent-father lives with respondent-mother and the children but is the biological father only of the youngest child, Anna. The fathers of Margaret and Chris are not parties to this appeal.
>
> In May 2019, the Guilford County Department of Health and Human Services [("DHHS")] received a report of inappropriate discipline of Margaret. According to the report, Margaret "became extremely upset" following an incident at school and told school personnel that "she would be getting a whipping from her step-father just like she had done the previous day." The report noted that there were three marks on Margaret's back "where the skin was broken and appeared to be from a belt mark" as

well as red marks on Margaret's arms. The report further indicated that respondent-mother arrived at the school and stated that Margaret "was going to be punished again when she went home" and that Margaret "was afraid to go home."

The next day, DHHS received a second report that Margaret had a new injury on the upper part of her back or neck "that appeared to be like a silver dollar." Margaret explained that she "was hit" but would not give any details. Margaret was shaking and hiding under a desk, and she explained that she did not want to go home because "they" were "going to hurt me."

In response to this report, a social worker, Lisa Joyce, went to Margaret's school that day to speak with her. Joyce found Margaret under a desk in the school counselor's office. Margaret appeared nervous and told Joyce that she was afraid to go home. Margaret told Joyce that respondent-father hit her with a belt buckle, causing the marks on her back, and that respondents punished her by making her sleep on the floor without covers and stand in the corner for hours at a time. Joyce observed marks on Margaret's lower back and at the base of her neck, consistent with the two reports.

After speaking to Margaret, Joyce met with respondent-mother to discuss the allegations. Respondent-mother stated that Margaret "has been lying a lot lately" and that she knew about the marks on Margaret's back. She explained that the marks were "from the disciplinary action that she had asked respondent-father to perform" but that the marks were "accidental" due to Margaret moving around and causing respondent-father to hit her back instead of her buttocks area.

Respondent-mother also told Joyce "that she does take the bed privileges away for lying, that she does make Margaret stand in the corner from about 3:30 PM to around 6:00 PM," and that after stopping for dinner, "the child goes back to standing in the corner until it's bedtime." When asked about the frequency of punishment, respondent-mother stated "that recently it had been occurring about every day" due to Margaret's behavior. When Joyce expressed the view that the discipline seemed

"extreme to be using on the child," respondent-mother responded that she did not feel like what she was doing was wrong and she "felt like that this was appropriate."

Joyce also spoke with respondent-father. He reported to Joyce that he had physically disciplined Margaret in the days leading up to the DHHS reports and that he did so to "discourage the child from lying." Respondent-father also confirmed that Margaret "is made to stand in the corner for two to three hours at a time" and "made to sleep on the floor" as additional forms of discipline. When asked how often these disciplinary actions were happening, respondent-father stated that "it had been occurring a lot" in the past two months. Joyce asked whether respondent-father thought the practices were appropriate, and he responded that "he didn't see anything wrong with the disciplinary practices that they were using."

DHHS entered into a safety plan with respondents, under which Margaret was placed with her maternal grandmother. Chris and Anna remained in the home with respondents. Respondent-mother was charged with misdemeanor child abuse, and respondent-father was charged with assault on a child under the age of twelve in connection with their discipline of Margaret.

Between May and August 2019, DHHS social workers made home visits to check on Chris and Anna. They found no issues of concern. On 8 August 2019, DHHS held a meeting with respondents. The DHHS staff members explained their concerns about Margaret's discipline to respondents; however, respondents continued to defend their discipline of Margaret, with respondent-mother explaining that she was trying to "teach" Margaret that if Margaret continued misbehaving "she could end up in jail." Respondents did not commit to stop disciplining Margaret as they had in the past and did not acknowledge that these repeated, daily disciplinary measures—including whippings with a belt—were inappropriate for a nine-year-old child.

The following day, DHHS filed juvenile petitions alleging that Margaret was abused and neglected and that three-year-old Chris and three-month-old Anna were neglected. DHHS obtained custody of all three children.

> After a hearing in which the trial court received evidence concerning the facts described above, the court entered an adjudication and disposition order on 13 December 2019. In the order, the trial court adjudicated Margaret an abused and neglected juvenile and adjudicated Chris and Anna as neglected juveniles. In its disposition order, the court placed Margaret with a relative and Chris and Anna in foster care. The court determined that it was not in the children's best interests for respondents to have any visitation with the children while they worked on their case plans with DHHS. The court also scheduled a review hearing for several months after the date of the order.

In re A.J.L.H. II, 384 N.C. at 48-50, 884 S.E.2d at 690-91 (alternations in original omitted) (footnote omitted).

In the prior appeal, this Court vacated and remanded the order adjudicating Margaret as an abused and neglected juvenile. *In re A.J.L.H. I*, 275 N.C. App. at 21-23, 853 S.E.2d at 467-68. This Court explained the trial court's findings relied on inadmissible hearsay statements from Margaret, concluding it was "apparent the trial court's abuse adjudication [wa]s heavily reliant and intertwined with its findings based on inadmissible evidence." *Id.* at 23, 853 S.E.2d at 468. The matter was remanded to the trial court "for a new hearing at which the trial court should make findings on properly admitted clear and convincing evidence and make new conclusions of whether" Margaret is an abused or neglected juvenile. *Id.* If the trial court again found Margaret was an abused or neglected juvenile, this Court instructed the trial court to "order generous and increasing visitation between Margaret and her mother." *Id.* at 25, 853 S.E.2d at 469.

This Court further held the adjudications of Chris and Anna as neglected juveniles should be reversed, because those adjudications were "based solely on its conclusion Margaret was purportedly abused and neglected." *Id.* at 24, 853 S.E.2d at 468.

DHHS timely filed a petition for discretionary review to our Supreme Court pursuant to N.C. Gen. Stat. § 7A-31 (2021), and the guardian *ad litem* joined the request for review.

The Supreme Court allowed the petition, *In re A.J.L.H. II*, 384 N.C. at 51, 884 S.E.2d at 692, and reversed this Court's decision regarding Margaret's out-of-court statements, concluding: (1) Margaret's testimony was best classified as an out-of-court statement offered for a

purpose other than to prove the truth of the matter asserted and should not be considered hearsay; and, (2) this Court should have "simply disregard[ed] information contained in findings of fact that lack[ed] sufficient evidentiary support and examine[d] whether the remaining findings support[ed] the trial court's determination." *Id.* at 52, 884 S.E.2d at 692-93 (citation and internal quotation marks omitted).

Our Supreme Court also re-affirmed appellate review of a trial court's best interests assessment regarding a visitation decision made pursuant to N.C. Gen. Stat. § 7B-905.1 is for an abuse of discretion. *Id.* at 56-57, 884 S.E.2d at 695. "In the rare instances when a reviewing court finds an abuse of that discretion, the proper remedy is to vacate and remand for the trial court to exercise its discretion. The reviewing court should not substitute its own discretion for that of the trial court." *Id.* at 48, 884 S.E.2d at 690.

II. Issues

We review whether the trial court abused its discretion when it failed to provide for any visitation between Respondents and their children with their parents.

III. Dispositional Order for Visitation

Respondents argue the trial court abused its discretion when: (1) it prohibited *any* visitation between Respondent parents and their three children; and, (2) it concluded DHHS had made reasonable efforts to avoid taking custody of the children. They also assert "it was not reasonable for DHHS to seek custody of these children because of the parents' refusal to agree with the blanket accusation DHHS leveled against them." They also argue the trial court abused its discretion and erred by failing to consider and make the required factors and determinations to support any finding it was in the children's best interests to deny visitation.

A. Standard of Review

"The assessment of the juvenile's best interests concerning visitation is left to the sound discretion of the trial court and 'appellate courts review the trial court's assessment of a juvenile's best interests solely for an abuse of discretion.' " *A.J.L.H. II*, 384 N.C. at 57, 884 S.E.2d at 695 (quoting *In re K.N.L.P.*, 380 N.C. 756, 759, 869 S.E.2d 643, 646 (2022)).

"Under this standard, we defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re K.N.L.P.*, 380 N.C. at 759, 869 S.E.2d at 646 (citation omitted).

"The standard of review that applies to an [assertion] of error challenging a dispositional finding is whether the finding is supported by competent evidence. A finding based upon competent evidence is binding on appeal, even if there is evidence which would support a finding to the contrary." *In re B.C.T.*, 265 N.C. App. 176, 185, 828 S.E.2d 50, 57 (2019) (citation and quotation marks omitted). Dispositional findings must be based upon properly admitted and clear cogent and convincing evidence. *Id.*

B. Analysis

After initially concluding a parent is either unfit or has acted inconsistent with his or her parental rights, "even if the trial court determines that visitation would be inappropriate in a particular case . . . 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 J.L.*, 264 N.C. App. 408, 421, 826 S.E.2d 258, 268 (2019) (citation omitted). A trial court may only "prohibit visitation or contact by a parent when it is in the juvenile's best interest consistent with the juvenile's health and safety." *Id.*

> [E]ven if the trial court determines . . . 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 [visitation] plan [is] 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).

When denying *all* visitation, this Court has required the trial court to find 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).

Here, the trial court was constitutionally and statutorily required to assess whether and to the extent visitation should be awarded to four different parents for each of their respective children. Respondent-mother's

visitation with all three children, Respondent-Father's visitation with Anna, Chris's biological father's visitation, and Margaret's biological father's visitation. The order contains and recites the history and current compliance to case plans for all four individuals.

The trial court, however, failed to find and make conclusions of law addressing the factors applicable to visitation for *each child with each parent*. The trial court also failed to conduct an individualized evaluation of the factors affecting *each parents'* visitation rights with his, her, or their children. The transcript shows the trial court only had the following brief exchange:

> THE COURT: In addition, the Court will also deny the request for visits between the juvenile [Anna], [Chris], and [Margaret] in reference to [respondent-mother]. The Court will also deny the request for visits in reference to [respondent-father] and [Anna].
>
> However, the Court will grant the request for visits between [Chris's biological father] and the juvenile [Chris] whereby he shall visit with this juvenile once per week for two hours, supervised by the Department.
>
> . . .
>
> The motion to place the juveniles [Anna] and [Chris] with [respondent-father's] relatives is denied. The request to attend medical appointments is also denied. However, the request for shared parenting is granted, via e-mail only.
>
> . . .
>
> [DHHS Attorney]: And Your Honor, a visitation order for [Margaret's biological father].
>
> THE COURT: No visits.

The trial court made no findings or conclusions regarding why only one parent, Chris's biological father, was entitled to supervised visitation with his child, but the other three biological parents were denied any and all visitation, placement with children's family or relatives, or presence and participation in their medical care. For example, the trial court found respondent-father had complied with his case plan, had maintained employment, had provided safe housing, and had significantly fewer legal infractions on his record than Chris's biological father, who was provided visitation. Neither the record nor the order provides a

finding or explanation for the objectively disparate treatment accorded to Chris's biological father and the other three parents involved in the matter, nor the denial of family or relative placement, and participation in the children's medical appointments.

The trial court failed to make specific determinations for each parent regarding unfitness or conduct inconsistent with their parental rights and, only after then, to determine whether parental visitation was in the best interests of each of their children. This absence demonstrates the trial court failed to make the required findings and conclusions and prejudicially erred in disposition. These failures: render the order manifestly unsupported by reason, demonstrate the conclusions of law were unsupported, lack legal validity, and constitutes an abuse of discretion. *In re K.N.L.P.*, 380 N.C. at 759, 869 S.E.2d at 646; *In re J.L.*, 264 N.C. App. at 421, 826 S.E.2d at 268.

IV. Conclusion

After reviewing the remaining dispositional questions remanded to this Court, we hold the trial court failed to make required and specific determinations of fact to demonstrate the trial court made supported conclusions of law. Upon remand, the trial court is to make the required findings of fact and conclusions of law concerning visitation, family placement, and parental involvement in medical treatment in the best interests of *each child for each respective parent of each child*. *In re K.N.L.P.*, 380 N.C. at 759, 869 S.E.2d at 646; *In re J.L.*, 264 N.C. App. at 421, 826 S.E.2d at 268.

We vacate those dispositional portions of the 23 October 2019 Adjudication and Disposition Order and remand for further proceedings. *It is so ordered.*

VACATED IN PART AND REMANDED.

Chief Judge STROUD and Judge HAMPSON concur.

JOHN REINTS, Plaintiff
v.
WB TOWING INC., Defendant

No. COA22-1031

Filed 18 July 2023

1. Appeal and Error—timeliness of appeal—dismissal orders—tolling—Rule 52(b) motion

In an appeal from three orders entered in a negligence action—a dismissal order (for failure to join a necessary party), a post-dismissal order, and an amended post-dismissal order—the Court of Appeals lacked jurisdiction to consider the merits of the dismissal order because plaintiff filed his notice of appeal more than thirty days after the dismissal order was entered, thus making the appeal untimely pursuant to Appellate Rule 3(c). Plaintiff's Civil Procedure Rule 52(b) motion did not toll the time for filing a notice of appeal because a Rule 52(b) motion (which allows the court to amend its findings or make additional findings and amend the judgment accordingly) was not a proper motion in the context of dismissal for failure to join a necessary party, and the rule was not designed to provide a backdoor for making late amendments to a complaint. As for the amended post-dismissal order, which subsumed the post-dismissal order, plaintiff's notice of appeal was timely filed within 30 days of the effective date.

2. Civil Procedure—dismissal for failure to join a necessary party—Rule 52(b) motion—improper motion

In an appeal from three orders entered in a negligence action—a dismissal order (for failure to join a necessary party), a post-dismissal order, and an amended post-dismissal order—the trial court did not abuse its discretion in denying plaintiff's Civil Procedure Rule 52(b) motion to amend the dismissal order. Because the dismissal order was based on plaintiff's failure to join a necessary party, the trial court was not required to make findings of fact; furthermore, plaintiff's motion essentially requested reconsideration and sought permission to amend the complaint to add a necessary party, which is not relief authorized under Rule 52(b).

Appeal by Plaintiff from order entered 7 June 2022, *nunc pro tunc* 20 May 2022, by Judge Lindsey L. McKee in New Hanover County District Court. Heard in the Court of Appeals 25 April 2023.

John Reints, Plaintiff-Appellant pro se.

Cranfill Sumner LLP, by Steven A. Bader, Jason R. Harris, and Ryan L. Bostic for Defendant-Appellee.

RIGGS, Judge.

John Reints (Plaintiff) appeals an amended order entered 7 June 2022, *nunc pro tunc* 20 May 2022, (hereinafter, "Amended Post-Dismissal Order") in New Hanover County District Court. The Amended Post-Dismissal Order denied Plaintiff's motion to amend the trial court's earlier order granting WB Towing, Inc.'s (Defendant) motion to dismiss for failure to join a necessary party (hereinafter, "Dismissal Order"), entered 28 March 2022. Plaintiff also appeals this Dismissal Order and three of Plaintiff's issues presented on appeal arise out of the Dismissal Order. However, this Court does not have jurisdiction to consider the Dismissal Order, and we dismiss issues I, II, and IV, which arise out of that order. Further, we affirm the Amended Post-Dismissal Order.

I. FACTUAL AND PROCEDURAL HISTORY

On 3 August 2020, the 30.5-foot sailboat *Neriad*, owned by the Amphitrite Celestial Navigation Society ("the Society"), ran aground in the marsh near Wrightsville Beach, North Carolina, during Hurricane Isaias. Plaintiff, a member of the Society, discovered the boat in the marsh on 8 August 2020 and contacted Defendant to request assistance ungrounding the vessel. Defendant met Plaintiff at the location where *Neriad* was grounded to assess the boat's situation.

With Plaintiff's assistance, Defendant made multiple attempts with two towboats to tilt *Neriad* upright and pull the vessel into deeper water. While attempting to pull *Neriad* into deeper water, the force from the towline broke *Neriad's* mast. Ultimately, Defendant was unable to move *Neriad* from where it was grounded.

On 23 November 2021, Plaintiff filed a claim in New Hanover County small claims court alleging Defendant negligently broke the mast of *Neriad* when it attempted to unground the vessel. Plaintiff signed the complaint indicating that he was acting on behalf of the Society. According to Plaintiff, the cost of repairing the mast exceeded the market value of *Neriad*; therefore, the damage resulted in a constructive loss. The claim was heard in small claims court on 14 December 2021 and the magistrate entered an order on 20 December 2021 in favor of Defendant.

Plaintiff appealed the order to New Hanover County District Court on 28 December 2021 and filed an amended complaint on 18 January 2022. On 25 January 2022, Defendant filed a motion to dismiss pursuant to Rule 12(b)(6) and (7). Defendant alleged that Plaintiff was not the real party-in-interest because he did not own the vessel. Plaintiff alleges he is a member of the Society, an unincorporated association that owns the vessel and, therefore, according to N.C. Gen. Stat. § 59B-7(e), he can make a claim on behalf of the Society. On 21 March 2022, the trial court heard arguments on the motion and granted the motion to dismiss without prejudice under Rule 12(b)(7) for failure to join a necessary party—the owner of the vessel. The trial court clarified that the ruling would not preclude a claim by the owner of the vessel if filed within the statute of limitations. The trial court entered the Dismissal Order in this matter on 28 March 2022.

On 1 April 2022, Plaintiff filed with the trial court an "objection to the order entered on 25 [sic] March 2022." ("Objection"). In this filing, Plaintiff argued that he had not been allowed a reasonable time for ratification of the action or joinder of the real party in interest as allowed by Rule 17 of the North Carolina Rules of Civil Procedure. N.C. R. Civ. P. 17 (2021). However, Plaintiff did not request a remedy in his filing. On the same day, Plaintiff also filed a motion to amend the order pursuant to N.C. R. Civ. P. 52(b), in which Plaintiff requested that the court set aside the order granting the motion to dismiss to allow Plaintiff additional time to file and serve ratification of the claim by the real party in interest. (hereinafter, "Rule 52(b) motion to amend Dismissal Order")

The trial court held a hearing on 16 May 2022 to consider the Rule 52(b) motion to amend Dismissal Order. In that hearing, Plaintiff argued that the trial court did not allow reasonable time after the hearing on the motion to dismiss for ratification by the real party in interest. Defendant argued that Plaintiff was put on notice when Defendant filed its motion to dismiss that Plaintiff needed to join the vessel owner as a real party in interest; the two months between the motion and the hearing provided Plaintiff reasonable time to have the Society ratify the claim. Additionally, Defendant argued that the trial court no longer had jurisdiction to allow substitution or joinder of a party once the case was dismissed. The trial court noted that because the litigation dated back to late 2021, there was "ample opportunity" to add or substitute a party.

On 20 May 2022, the trial court entered an order dismissing the Rule 52(b) motion to amend Dismissal Order and Objection. (Hereinafter, "Post-Dismissal Order"). Plaintiff made an additional motion for findings of fact and conclusions of law on 20 May 2022. On 7 June 2022,

the trial court entered the Amended Post-Dismissal Order, *nunc pro tunc*, with an effective date of 20 May 2022, adding a denial of Plaintiff's motion to reconsider the Post-Dismissal Order.

On 9 June 2022, Plaintiff entered a notice of appeal designating the Dismissal Order, the Post-Dismissal Order, and the Amended Post-Dismissal Order.

II. ANALYSIS

A. Appellate Jurisdiction

[1] As a threshold issue, we must determine whether Plaintiff's notice of appeal was timely and properly conferred jurisdiction on this Court such that we can consider the merits of the issues presented in his appeal. After careful consideration, we hold that this Court has jurisdiction as to the Amended Post-Dismissal Order, which subsumes the Post-Dismissal Order, but does not have jurisdiction as to the Dismissal Order.

In order to confer jurisdiction on this Court, litigants appealing from trial court decisions must comply with Rule 3 of the North Carolina Rules of Appellate Procedure. *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." *Id.* To comply with Rule 3, the notice of appeal must be timely, which requires that the notice is filed within thirty days of entry of the judgment. N.C. R. App. P. 3(c) (2023). However, when a party makes a proper motion for relief pursuant to Rules 50(b), 52(b), or 59 of the Rules of Civil Procedure within ten days of entry of the order or judgment, the thirty-day period for taking appeal is tolled until entry of an order disposing of the motion. N.C. R. App. P. 3(c)(2)-(3).

In Plaintiff's notice of appeal, he designates three orders entered by the trial court: (1) the Dismissal Order; (2) the Post-Dismissal Order; and (3) the Amended Post-Dismissal Order. Because the Amended Post-Dismissal Order substitutes, as a legal matter, for the Post-Dismissal Order, we need only to address the jurisdiction of the Amended Post-Dismissal Order and the Dismissal Order.

1. Jurisdiction for the Dismissal Order.

First, we address whether this Court has jurisdiction over the Dismissal Order entered 28 March 2022. The notice of appeal was entered on 7 June 2022, more than thirty days after this Dismissal Order was entered—thus, the notice of appeal was not timely under N.C. R.

App. P. 3(c). Plaintiff argues that he filed a timely motion under Rule 52(b) of the Rules of Civil Procedure, which tolled the time for filing a notice of appeal until the trial court entered the Post-Dismissal Order. Plaintiff is correct that a *proper* motion for relief under Rule 52(b) of the Rules of Civil Procedure does toll the thirty-day period for taking an appeal. N.C. R. App. P. 3(c)(3). However, to determine if the motion is proper such that it actually tolls the time for entering a timely notice of appeal, we must consider whether the motion requested relief provided by Rule 52 of the Rules of Civil Procedure.

The analysis used to determine whether the Rule 52(b) motion is properly made and thus tolls the time for appeal essentially tracks the analysis required to address the merits of one of Plaintiff's issues on appeal: whether the trial court abused its discretion in denying the Rule 52(b) motion to amend Dismissal Order. Our conclusion that the Rule 52(b) motion to amend Dismissal Order did not toll the time for entering a notice of appeal will likewise lead us to the conclusion, below, that the trial court did not abuse its discretion when it denied the motion.

To understand why Plaintiff's Rule 52(b) motion was not proper under Rule 52 and did not toll the time for entering appeal, we must first look to the purpose of Rule 52. The primary purpose of this rule is to ensure that the trial court documents factual findings and conclusions of law so that the appellate court has a correct understanding of the factual issues determined by the trial court. *Parrish v. Cole*, 38 N.C. App. 691, 694, 248 S.E.2d 878, 879 (1978). However, a trial court is only required to make findings of fact and conclusions of law on a motion "when required by statute . . . or requested by a party." *Sherwood v. Sherwood*, 29 N.C. App. 112, 113, 223 S.E.2d 509, 510 (1976); N.C. R. Civ. P. 52(a)(2) (2021). If a party wants the trial court to amend the findings prior to appeal, Rule 52(b) allows a party to make a motion, not later than ten days after entry of judgment for the court, to request that the trial court *amend its findings or make additional findings*. N.C. R. Civ. P. 52(b) (2021) (emphasis added). If the court makes or amends its findings, the court *may* amend the judgment accordingly. *Id.* (emphasis added).

When a trial court grants a dismissal for failure to join a necessary party, that dismissal is not an adjudication on the merits, and thus findings of fact are not necessary or even warranted. N.C. R. Civ. P. 41(b) (2021). In dismissing for failure to join a necessary party, the trial court is not acting as a fact finder and resolving factual disputes; the trial court is only saying that all the parties *necessary* for the litigation have not properly been brought into the litigation yet.

There are two problems with Plaintiff's motion. First, Plaintiff's motion for amended order pursuant to N.C. R. Civ. P. 52(b) did not request that the court make additional findings or amend the order based upon additional or amended findings. The Rules of Civil Procedure did not require the trial court here to make findings of fact to resolve the motion to dismiss for failure to join a necessary party. At the time the trial court was considering that motion to dismiss, neither Plaintiff nor Defendant requested that the trial court make factual findings.

Second, Plaintiff's motion requested that the trial court set aside the Dismissal Order to allow him additional time to file ratification by the necessary party in interest. A ratification at this stage would have only functioned as an amended complaint after the trial court dismissed the case and lost jurisdiction. This Court has held that amendment of the complaint after dismissal under Rule 12(b)(6) is not permitted as a matter of right. *Johnson v. Bollinger*, 86 N.C. App. 1, 7, 356 S.E.2d 378, 382 (1987). We discern no difference that would allow amendment of the complaint as a matter of right after dismissal under Rule 12(b)(7). Rule 52(b) was not designed to provide a backdoor to late amendment of a complaint. We thus hold that Plaintiff's Rule 52(b) motion was not authorized under the Rule and therefore, did not toll the time for making a notice of appeal.

For this reason, we must dismiss as untimely Plaintiff's issues on appeal I, II and IV, which arise out of the Dismissal Order.

2. Jurisdiction over the Amended Post-Dismissal Order.

Second, we address the Amended Post-Dismissal Order. In entering the Amended Post-Dismissal Order, the trial court added a denial of Plaintiff's motion to reconsider to the denial of Plaintiff's motion to amend the Dismissal Order and Objection, presumably to ensure that all motions in this matter were resolved. The court entered the order "*nunc pro tunc* 20 May 2022",[1] meaning that the Amended Post-Dismissal Order had the same effective date as the Post-Dismissal Order and took the place of the Post-Dismissal order.

In accordance with Rule 3 of the Rules of Civil Procedure, Plaintiff filed his notice of appeal on 9 June 2022, within thirty days of the effective date of the amended order. Therefore, we hold that this Court has jurisdiction over the Amended Post-Dismissal Order.

1. A *nunc pro tunc* order is an entered order with retroactive effect.

B. Denial of Rule 52(b) motion to amend the Dismissal Order.

[2] Based upon our jurisdiction over the Amended Post-Dismissal Order, we turn our consideration to the only issue on appeal arising out of this order, which is whether the trial court abused its discretion when it denied this Rule 52(b) motion to amend the Dismissal Order. Relying upon our prior analysis on the propriety of this Rule 52(b) motion *supra*, we hold that the trial court did not abuse its discretion when it denied Plaintiff's request to amend the Dismissal Order.

Because Rule 52(b) uses permissive language such that the trial court *may* amend its findings or *may* amend the judgment accordingly, the rule allows the trial court to exercise its discretion. N.C. R. Civ. P. 52(b) (emphasis added). Therefore, we consider an appeal of a Rule 52 motion for an abuse of discretion. Where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

When the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court relied upon proper evidence to support its judgment. *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987) (citations and quotations omitted). As previously discussed, the trial court here was not required to make findings of fact for an order granting a motion to dismiss, and the parties did not request findings at the time of the hearing.

Plaintiff does not provide, and we do not find, case law wherein a Rule 52(b) motion for an amended order is appropriate, without any initial findings of fact or conclusions of law, to set aside a trial court's dismissal for failure to join a necessary party. As discussed above, Plaintiff's motion for amended order essentially requested reconsideration and, effectively, sought permission for him to amend his complaint to add a necessary party. As a general rule, once a judgment is entered, amendment of the complaint is not allowed unless the judgment is set aside or vacated under Rule 59[2] or 60. *Chrisalis Props., Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 89, 398 S.E.2d 628, 634 (1990).

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2. Alternatively, Plaintiff, in his briefing, not in his motion before the trial court, invokes Rule 59 as a basis for his motion for amended judgment. *See Harrell v. Whisenant*, 53 N.C. App. 615, 617, 281 S.E.2d 453, 454 (1981) ("A motion is properly treated according to its substance rather than its label."). Plaintiff argues that the order granting the motion to dismiss was based upon an error in law, which is grounds for relief identified in Rule 59 of the North Carolina Rules of Civil Procedure. N.C. R. Civ. P. 59 (a)(8) (2021). However, this Court has held that Rule 59 does not apply to pre-trial rulings. *Doe v. City of Charlotte*, 273 N.C. App. 10, 18, 848 S.E.2d 1, 8 (2020).

Thus, in denying a motion not authorized under Rule 52(b) and one that sought relief that is generally precluded in this posture of litigation, we hold the trial court did not abuse its discretion when it denied Plaintiff's Rule 52(b) motion to amend the Dismissal Order. Accordingly, we affirm the ruling of the trial court.

III. CONCLUSION

After review of the issues, this Court does not have jurisdiction over the Dismissal Order. We, therefore, dismiss all issues on appeal associated with that order. Additionally, we affirm the trial court's order denying Plaintiff's motion to amend the Dismissal Order.

DISMISSED IN PART, AFFIRMED IN PART.

Judges TYSON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
MARCUS D. GEORGE

No. COA23-62

Filed 18 July 2023

Criminal Law—guilty plea—Anders review—discrepancy in Information—remand

After defendant pleaded guilty to charges of possession with intent to sell and deliver heroin, possession with intent to sell and deliver cocaine, and two counts of resisting a public officer, where defendant's appellate counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), the appellate court concluded that the trial court did not err by not instituting a competency hearing sua sponte because there was no indication that defendant lacked the capacity to enter his guilty plea; in addition, defendant's ineffective assistance of counsel claims were dismissed without prejudice to permit defendant to pursue a motion for appropriate relief in the trial court. However, the appellate court's independent review revealed a discrepancy in the Information in one of the file numbers which, although it may have been a scrivener's error, raised the potential issue of whether defendant validly waived his right to indictment by a grand jury. Therefore, the matter was remanded for

the trial court to ensure and clarify that there was a valid Information, including waiver of indictment, in that file number.

Appeal by Defendant from Judgments entered 3 May 2022 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Nicholas R. Sanders.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant; and Marcus D. George, pro se.

HAMPSON, Judge.

<u>Factual and Procedural Background</u>

Marcus D. George (Defendant) appeals from Judgments entered 3 May 2022 upon Defendant's guilty plea to Possession with Intent to Sell and Deliver Heroin, Possession with Intent to Sell and Deliver Cocaine, and two counts of Resisting a Public Officer. The Record before us tends to reflect the following:

On 3 May 2022, pursuant to a plea arrangement, Defendant entered guilty pleas to Possession with Intent to Sell and Deliver Heroin, Possession with Intent to Sell and Deliver Cocaine, and two counts of Resisting a Public Officer.

The State provided a factual basis, stating in relevant part: On 8 December 2018, Deputy Mitchell with the Wayne County Sheriff's Office observed a Jeep driven by Defendant make a left turn without executing a turn signal. Deputy Mitchell did not initiate his blue lights but followed the vehicle until the vehicle parked in front of a residential property. Defendant did not exit the vehicle upon parking. Deputy Mitchell approached the vehicle and asked for permission to search the vehicle; Defendant consented. In the center console, Deputy Mitchell found a clear plastic bag that contained a brown substance that he believed to be heroin based on his training and experience. Deputy Mitchell attempted to detain Defendant, but Defendant ran away. Defendant was ultimately apprehended and arrested. Defendant stipulated the brown substance was heroin.

On 12 April 2021, around 12:51 a.m., officers with the Goldsboro Police Department noticed an individual walking in the middle of the

road. One of the officers exited his patrol vehicle and approached the individual identified as Defendant. The officer asked for consent to search Defendant, and he consented. The officer located a large bulge in Defendant's pocket. Defendant began to reach for the bulge, and when the officer did not allow him to reach into his pocket, Defendant "pushed off" and ran. Defendant was apprehended and detained. Several bags containing a powdered substance were found in his pockets. Defendant stipulated the powdered substance was cocaine.

When asked by the trial court, Defendant offered nothing as to the factual basis. The trial court accepted Defendant's plea and consolidated the charges into two Judgments entered 3 May 2022. The trial court orally sentenced Defendant to two consecutive sentences of 20 to 33 months each.[1]

Acting consistently with the requirements set forth in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), Defendant's appellate counsel advised Defendant of his right to file written arguments with this Court and provided Defendant with the documents necessary for him to do so. She then filed an *Anders* brief with this Court stating she was unable to find any meritorious issues for appeal, complied with the requirements of *Anders*, and asked this Court to conduct an independent review of the record to determine if there were any identifiable meritorious issues therein. Defendant filed a *pro se* "Supplemental Brief" on 6 March 2023.

Issues

The dispositive issues on appeal are whether: (I) the trial court erred in failing to institute a competency hearing *sua sponte*; (II) the Record is sufficient to review Defendant's ineffective assistance of counsel (IAC) claims on direct review; and (III) our independent review of the Record reveals any further issues.

Analysis

I. Lack of Competency Hearing

In his *pro se* brief, Defendant contends the trial court erred in failing to order a mental examination of Defendant. We disagree.

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1. The written Judgment entered on 3 May 2022 in 18 CRS 55019 imposed a sentence of 20 to 22 months of imprisonment. On 20 June 2022, the Department of Corrections identified the discrepancy between the Written Judgment and oral sentencing. On 28 June 2022, the trial court entered an amended Judgment imposing a sentence of 20 to 33 months of imprisonment.

N.C. Gen. Stat. § 15A-1002 provides in relevant part:

> The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed. When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed.

N.C. Gen. Stat. § 15A-1002(a), (b)(1) (2021). The trial court has a "constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating the accused may be mentally incompetent." *State v. Heptinstall*, 309 N.C. 231, 236, 306 S.E.2d 109, 112 (1983) (citations and quotation marks omitted).

In the case *sub judice*, the capacity of Defendant was not questioned by any party. Further, in accepting Defendant's plea, the trial court extensively inquired as to Defendant's mental capacity and understanding of the proceedings. The trial court engaged in the following colloquy with Defendant:

> [THE COURT:] Are you able to hear and understand me?
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: Do you understand that you have the right to remain silent and that any statement you make may be used against you?
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: At what grade level can you read and write?
>
> [DEFENDANT]: Twelfth.
>
> THE COURT: Did you graduate high school?
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: Are you now consuming -- using or consuming alcohol, drugs, narcotics, medicines, including prescribed medications, pills or any other substances?
>
> [DEFENDANT]: Just medicine.
>
> THE COURT: And the medicine I see you said something about yesterday. Whatever medication you take --

[DEFENDANT]: Yes, sir.

THE COURT: Does that help you function better or does it impair your ability to think clearly in any way.

[DEFENDANT]: No, it helps me function better.

THE COURT: It's helpful. All right. So do you believe your mind is clear and do you understand the nature of the charges and do you understand every element of the charge?

[DEFENDANT]: For the most part.

THE COURT: Well, um . . . you probably need to do a little better than that, um . . . are you --

[DEFENDANT]: Well, you said we were going to talk about that, you know.

THE COURT: Well, I am, but let – let's see . . . well, what are you -- let's just touch on that real quick. You're pleading to possession with intent to sell and deliver heroin. Do you have any question about what that is?

[DEFENDANT]: No, sir (negative indication).

THE COURT: Okay. You're pleading to resisting a public officer. Any question about what that is?

[DEFENDANT]: (Negative indication).

THE COURT: You're pleading to possession with intent to sell and deliver cocaine. Do you have any question about what that mean, that charge means?

[DEFENDANT]: (Negative indication).

THE COURT: And you're charged again with resisting a public officer in that case. And of course we'll go through the factual basis on these, but as you look at that do you understand what those charges are, because that's what you're pleading to in particular, do you understand the nature of the charges and what they're about, possession with intent to sell and deliver controlled substance, and do you understand every element of these charges?

(No audible response from [Defendant])

THE COURT: Is that yes? You feel good about that?

> [DEFENDANT]: Yes, sir.
>
> THE COURT: In your review with him, [defense counsel], do you think he does?
>
> [DEFENSE COUNSEL]: Yes, your Honor.

On the Record before us, there is no indication Defendant lacked the capacity to enter his plea. Thus, there was not "substantial evidence before the court indicating the accused may be mentally incompetent." *Id.* Therefore, the trial court did not err in failing to institute a competency hearing *sua sponte*. Consequently, we affirm the trial court's Judgments.

II. Ineffective Assistance of Counsel

Defendant also raises various IAC claims. In general, claims of IAC should be considered through motions for appropriate relief and not on direct appeal. *See State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal."); *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing the defendant's appeal because issues could not be determined from the record on appeal and stating that to "properly advance these arguments defendant must move for appropriate relief pursuant to G.S. 15A-1415"). A motion for appropriate relief is preferable to direct appeal because in order to

> defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor. [O]nly when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance. Thus, superior courts should assess the allegations in light of all the circumstances known to counsel at the time of representation.

State v. Buckner, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citations and quotation marks omitted). "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). However, "should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's

right to reassert them during a subsequent MAR proceeding." *Id.* at 167, 557 S.E.2d at 525 (citation omitted).

In order to prevail on an IAC claim, Defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984); *see also State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (adopting *Strickland* standard for IAC claims under N.C. Const. art. I, §§ 19, 23). Here, we are unable to decide Defendant's IAC claim based on the "cold record" on appeal. *Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (citation omitted). We thus conclude, "further development of the facts would be required before application of the *Strickland* test[.]" *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citation omitted). Therefore, we dismiss any IAC claims, without prejudice, to permit Defendant to pursue a motion for appropriate relief in the trial court.

III. Independent Review

Our review of the Record on Appeal reveals a discrepancy in the Information in file number 18 CRS 55019 alleging Possession of Heroin with Intent to Sell and Deliver and Resist, Delay, or Obstruct a Public Officer. Specifically, in the Record before us, on the last page of the Information containing the Prosecutor's signature and Defendant's signature waiving his right to indictment the file number "18CR55019" is manually crossed out and replaced by a handwritten file number which is not entirely legible but includes "18 CRS __8079."[2] While this may be a scrivener's error, our independent review of the Record at least reveals this potential issue of whether Defendant validly waived his right to indictment by a grand jury specifically in file number 18 CRS 55019. *See State v. Willis*, 285 N.C. 195, 201, 204 S.E.2d 33, 37 (1974) (the trial court "acquires jurisdiction of the offense by valid information, warrant, or indictment."); *see also* N.C. Const. art. I, §. 22 ("Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases."); N.C. Gen. Stat. § 15A-642(c) (2021)

2. The Information itself contains a number of handwritten revisions including the file number listed on the other pages. These other pages, however, all reflect the file number 18 CRS 55019.

("Waiver of indictment must be in writing and signed by the defendant and his attorney. The waiver must be attached to or executed upon the bill of information."). Consequently, we remand this matter to the trial court to ensure and clarify there is, in fact, a valid Information, including waiver of indictment, in file number 18 CRS 55019.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Judgments and dismiss any claims for ineffective assistance of counsel without prejudice to Defendant's right to file a motion for appropriate relief in the trial court. Additionally, this matter is remanded to the trial court to ensure a valid Bill of Information was, in fact, filed in 18 CRS 55019 including Defendant's waiver of indictment.

AFFIRMED IN PART; DISMISSED WITHOUT PREJUDICE IN PART; REMANDED.

Judges FLOOD and RIGGS concur.

STATE OF NORTH CAROLINA
v.
DARVIN MAX HOLLIDAY

No. COA22-852

Filed 18 July 2023

Constitutional Law—right to counsel—trial strategy—decision not to call out-of-state witness—no absolute impasse

The trial court did not err at the start of a drug trafficking trial by denying defendant's request to substitute counsel where the disagreement between defendant and his counsel over whether to call an out-of-state witness to testify at trial—a matter of trial tactics, which are generally within the attorney's province—did not rise to the level of an absolute impasse that would have rendered defense counsel's representation constitutionally ineffective and where there was no basis for the court to order defense counsel to call the witness.

Appeal by defendant from judgment entered 6 May 2022 by Judge Jacqueline D. Grant in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Baptiste Holloway, for the State.

Ryan Legal Services, PLLC, by John E. Ryan, III, for defendant-appellant.

ZACHARY, Judge.

Defendant Darvin Max Holliday appeals from a judgment entered upon a jury's verdict finding him guilty of trafficking in fentanyl by possession. On appeal, Defendant argues that the trial court erred by failing to instruct defense counsel to call an out-of-state witness where Defendant and his attorney had reached an "absolute impasse" regarding the issue. After careful review, we conclude that Defendant received a fair trial, free from error.

Background

At approximately 4:00 a.m. on 6 December 2020, Officer Ian Casey of the Cornelius Police Department observed Defendant and Allie Meadows parked at the Microtel Hotel in Cornelius, North Carolina. As Defendant and Meadows exited the car and walked toward the hotel, Officer Casey approached and asked whether the car in the hotel parking lot belonged to them. Defendant stated that he owned the vehicle, but after determining that the vehicle's license plate did not match its registration, Officer Casey detained the couple. While talking with Defendant and checking his identification, Officer Casey observed a red tube in the driver's side door compartment, which Defendant claimed contained "nothing[.]" Officer Casey asked to search the vehicle and Defendant consented, providing Officer Casey with the keys to the locked car.

During the vehicle search, Officer Casey discovered three small packages inside of the red tube, which he suspected contained illegal drugs. Officer Casey arrested Defendant but permitted Meadows to leave in the car. The packages were later determined to contain various illicit substances, including methamphetamine and fentanyl.

On 3 May 2022, this matter came on for trial in Mecklenburg County Superior Court.[1] Just prior to jury selection, Defendant asked to address the court regarding his dissatisfaction with his appointed counsel:

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1. Defendant initially faced multiple charges arising from the events of 6 December 2020. On the morning of trial, however, the State announced its decision to dismiss three of Defendant's pending charges and to proceed solely on the superseding indictment in

> [DEFENDANT]: I think that I might have been a little bit misrepresented here because I didn't know that you could subpoena the girl that was with me[, Meadows,] that it was her heroin, and I didn't know, so she's not here today.
>
> THE COURT: Okay. All right. And is that -- are you wanting her to testify?
>
> [DEFENDANT]: Well, she should be here because it was hers. It was in my vehicle, but it was her heroin. And she was with me that night, but they let her drive off. She didn't have her drivers license or nothing, but they let her drive off in [the] vehicle, which my plates were on the vehicle, but it wasn't my vehicle.

The trial court then asked to hear from defense counsel, Michael Kolb. Mr. Kolb acknowledged that, at some point during the case's pendency, he and Defendant had discussed "[w]hether or not it would be a good idea to subpoena" Meadows, but Mr. Kolb determined that she "would not be a good witness" for Defendant. According to Mr. Kolb, the issue was not broached again until trial, when Defendant informed Mr. Kolb "that he wished for [Meadows] to be . . . subpoenaed on it, though that was not [Mr. Kolb's] understanding that he was insisting on it." Mr. Kolb further explained: "[F]or reasons of trial strategy, I have not done that, but [Defendant] does not agree with that today."

Defendant explained that Meadows told him that she was willing to testify that the drugs were hers, but that he had not spoken with her in a month and was not sure that she would answer his call. Defendant was also unsure that Meadows would voluntarily travel from her home in West Virginia to testify in court in Charlotte "because she did get in some trouble for some heroin again." In addition, Defendant conceded that the last time he was in court, at the 28 March 2022 calendar call, he had not discussed with Mr. Kolb the issue of whether Meadows would testify.

The State noted that Defendant had also neglected to raise, at any time prior to trial, Defendant's apparent dissatisfaction with counsel, or Mr. Kolb's failure to subpoena Meadows.

The trial court informed Defendant that Mr. Kolb did not have the power to subpoena a witness from outside the state. The court then attempted to clarify Defendant's desired remedy, inquiring whether he sought to replace Mr. Kolb as his attorney:

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20 CRS 100389, charging Defendant with trafficking in fentanyl by possession of more than four but less than 14 grams.

THE COURT: And understanding that you just spoke with your attorney, and if you need to speak with him further about the willingness to reach out to [Meadows] to see if she's voluntarily willing to come down, *are you then comfortable proceeding with Mr. Kolb as your attorney*? I can't tell exactly what you're asking me because it's sort of one of these, here's what I wanted him to do, but he hasn't done.

[DEFENDANT]: Right.

THE COURT: But it may be a little bit of misunderstanding of what his powers were to begin with, and so that's why *I'm trying to get -- seek clarification of exactly what you're asking me.*

. . . .

THE COURT: . . . I was trying to figure out when you were talking about -- you started off by saying this female that you wanted to be called as a witness and you were -- you had wanted her to be subpoenaed and she wasn't and that's why I just wanted to make you aware because it sounds like that's what you were upset about.

MR. KOLB: And, Your Honor, she can be voluntarily asked to be here, but again, we still have the problem of I don't really want her, but he does.

THE COURT: Correct. And that I will let y'all discuss privately, but understanding that we can't compel her to come here --

[DEFENDANT]: I do understand that. Yes, I do.

THE COURT: – is that *are you comfortable then allowing Mr. Kolb to continue representing you*? You guys can discuss whether or not it's a good idea to ask her to come down here since she has those other charges against her, and your attorney can explain to you how one's credibility if they take the witness stand can be impeached. And so *are you okay with Mr. Kolb -- are you still wanting Mr. Kolb to represent you in this matter?* And then you guys can discuss, you know, whether or not you want to reach out to her to see if she would voluntarily come or not.

> [DEFENDANT]: *No, ma'am, I would exactly maybe like to get a hold of another attorney* or, you know, I've got a friend that would probably represent me . . . I would rather, you know, get another attorney to represent me because he has misrepresented me, you know, I think that he has.

(Emphases added).

The trial court again asked whether Defendant was moving to substitute counsel, and Mr. Kolb explained the extent to which Defendant had mentioned his desire to retain new counsel:

> THE COURT: Okay. And so are you seeking to retain your own counsel?
>
> [DEFENDANT]: Yes, ma'am.
>
> . . . .
>
> MR. KOLB: Just to let you know, while he has not been -- Mr. Holliday has always been extremely polite to me and everyone he's been around, there's not any bad blood up here at all. He has told me a few times that he has spoken -- when I say a few times, this week and earlier, that he has spoken to other attorneys about his case, which I prefer he not, because that throws --
>
> THE COURT: Correct.
>
> MR. KOLB: -- off some other things. But he hasn't hired them, but I will tell you he has not shown up today with -- first time I've ever heard that he might be hiring somebody and that is only really come up since the previous calendar call, which April –
>
> [DEFENDANT]: Yes, sir.
>
> MR. KOLB: Early April, whatever the last calendar call was, that's when he first brought it up. He hasn't hired anybody. He did talk about that he might do that, he's thinking about it, so I will let the Court know while he hasn't hired anyone, I've not ever heard from anyone. It was brought up before today but only at that last time.

In opposing Defendant's motion, the State expressed concerns that Defendant had "not gone the extra step to hire his own counsel," and argued that "coming in on the day of trial to ask for new counsel and argue

about trial strategy amount[ed] to nothing more than a delay tactic[.]" The trial court requested that Defendant provide the contact information of the attorneys with whom he had communicated concerning representation. After speaking with those attorneys, the court confirmed Defendant's basis for seeking to substitute counsel:

> THE COURT: . . . [W]hat you've indicated or what I've heard from you about why you were seeking to replace Mr. Kolb and substitute in and retain counsel was really a difference -- a disagreement about trial strategy, this one particular witness that you wanted -- you wanted her to be called as a witness, and Mr. Kolb does not believe that is a good idea.
>
> [DEFENDANT]: Yes, ma'am.
>
> THE COURT: I did not hear any other reason for which you were seeking to substitute counsel for Mr. Kolb. It sounds like he's communicated with you, you've discussed your case, may not necessarily agree over complete trial strategy, but he's communicated with you, you've been here for your --
>
> [DEFENDANT]: Oh, yeah, he's been a great lawyer, but, like I said, we just -- I just disagreed with a couple things myself. It wasn't that he was a bad attorney. It was just -- I just thought I was misled, you know, because of the court –

The trial court then denied Defendant's "motion to substitute counsel":

> THE COURT: . . . [Y]ou haven't actually retained them, and so the Court is concerned that to just allow this – this case has been pending for over two years, that that would just [obstruct] and delay justice in this case for the proceedings going forward.
>
> So the Court is going to -- unless Mr. Kolb has any additional arguments he wishes to make, the Court is going to deny . . . [D]efendant's motion to substitute counsel. And the Court finds that in this case that Mr. Kolb is an experienced attorney, he appears to be competent, and the dissatisfaction in this case by [Defendant] was really over trial tactics and specifically calling a -- one witness who resides in West Virginia as a witness in this case. And that being the nature of the disagreement, the Court does

> not find that nature, a disagreement over trial tactics, renders Mr. Kolb to be incompetent or ineffective to represent . . . [D]efendant. Likewise, . . . [D]efendant has had several months since this case has first been placed on the trial calendar to retain private counsel, including and most recently, the March 28, 2022, trial calendar date where . . . [D]efendant has had an opportunity to retain private counsel and that while there may have been some phone calls to different attorneys, no attorney was specifically retained and had been paid whatever they would require as a retainer fee to represent [Defendant].
>
> So based on all of that, the Court finds that there is no legal basis or reason to replace Mr. Kolb, and for those reasons, the Court is denying [Defendant]'s motion or what will be treated as a motion to substitute counsel.

The trial proceeded as scheduled, and on 6 May 2022, the jury returned its verdict finding Defendant guilty of trafficking in fentanyl by possession. The trial court entered judgment upon the jury's verdict, sentencing Defendant to an active term of 70 to 93 months in the custody of the North Carolina Division of Adult Correction. Defendant gave oral notice of appeal in open court.

Discussion

On appeal, Defendant argues that "the trial court erred by failing to instruct [Mr.] Kolb to call Meadows as a witness when it was clear that [Mr.] Kolb and [Defendant] had reached an absolute impasse." Specifically, Defendant asserts that the trial court's failure "to either appoint substitute counsel or to instruct trial counsel on the impasse between the client and his attorney violated the constitution." We disagree.

A criminal defendant's right to counsel is enshrined in the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *State v. Ali*, 329 N.C. 394, 403, 407 S.E.2d 183, 189 (1991).

Of course, the Sixth Amendment's protections notwithstanding, "[n]o person can be *compelled* to take the advice of his attorney." *Ali*, 329 N.C. at 403, 407 S.E.2d at 189 (emphasis added) (citation and internal quotation marks omitted). Indeed, "[t]he attorney-client relationship rests on principles of agency, and not guardian and ward." *Id.* (citation omitted).

At trial, "tactical decisions—such as which witnesses to call, which motions to make, and how to conduct cross-examination—normally lie within the attorney's province." *State v. Brown*, 339 N.C. 426, 434, 451

S.E.2d 181, 187 (1994), *cert. denied*, 516 U.S. 825, 133 L. Ed. 2d 46 (1995). "However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control . . . ." *Ali*, 329 N.C. at 404, 407 S.E.2d at 189. This is the "absolute impasse" rule.

In *Ali*, our Supreme Court instructed that "[i]n such situations, . . . defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached." *Id.*

Where the trial court is aware that the defendant and counsel have reached an absolute impasse on a tactical matter, it is reversible error for the court to allow the attorney's decision to prevail over the defendant's wishes. *State v. Freeman*, 202 N.C. App. 740, 746, 690 S.E.2d 17, 22 (2010), *disc. review improvidently allowed*, 365 N.C. 4, 705 S.E.2d 734 (2011) (per curiam); *see id.* at 746–47, 690 S.E.2d at 22 ("The denial of [the] defendant's *Ali* right to make tactical decisions regarding the use of peremptory challenges is analogous to the erroneous denial of a peremptory challenge. The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused . . . . Defendant is entitled to a new trial." (citation and internal quotation marks omitted)).

Significantly, however, not all tactical disagreements between a defendant and his or her attorney rise to the level of "absolute impasse." First and foremost, a defendant cannot compel his attorney to violate the law. *See Ali*, 329 N.C. at 403, 407 S.E.2d at 189 (providing that an "attorney is bound to comply with her client's *lawful* instructions" (emphasis added)); *State v. Williams*, 191 N.C. App. 96, 105, 662 S.E.2d 397, 403 (2008) (concluding that defense counsel "could not have lawfully complied with [the d]efendant's requests" where he "essentially concede[d] racially discriminatory intent in his recommendations . . . regarding the exercise of peremptory challenges"), *appeal dismissed and disc. review denied*, 363 N.C. 589, 684 S.E.2d 158 (2009).

And "[n]othing in *Ali* or our Sixth Amendment jurisprudence requires an attorney to comply with a client's request to assert frivolous or unsupported claims. In fact, to do so would be a violation of an attorney's professional ethics[.]" *State v. Jones*, 220 N.C. App. 392, 395, 725 S.E.2d 415, 417, *disc. review denied*, 366 N.C. 389, 732 S.E.2d 474 (2012).

Furthermore, no actual impasse exists, and *Ali* does not apply, when the record fails to disclose any disagreement between the defendant and counsel with respect to *trial tactics*. *See, e.g.*, *State v. McCarver*, 341 N.C.

364, 385, 462 S.E.2d 25, 36 (1995) ("[W]e find no indication in the record of 'an absolute impasse' between the client and the defense team as it concerned trial tactics. At no time did [the] defendant voice any complaints to the trial court as to the tactics of his defense team."), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996); *Williams*, 191 N.C. App. at 104, 662 S.E.2d at 402 ("[E]ven though the foregoing evidence undoubtedly demonstrates an absolute impasse between [the d]efendant and defense counsel as concerned the necessity . . . that [the d]efendant stand trial at all, the evidence does not demonstrate an impasse *as it concerned trial tactics*." (citation and internal quotation marks omitted)).

In the instant case, Defendant asserts that the trial court erred by failing to instruct Mr. Kolb to subpoena Meadows where Defendant and Mr. Kolb had reached an "absolute impasse" regarding whether to call Meadows to testify. According to Defendant, Mr. Kolb's "unwillingness" to do so, as evinced by Mr. Kolb's decision not to "timely move[ ] the court for a certificate and order of attendance" for Meadows, together with the trial court's "failure to properly instruct" Mr. Kolb, "deprive[d Defendant] of his right to control his own defense." We disagree.

Preliminarily, we note that the parties agree that Mr. Kolb did not have the authority to subpoena Meadows, an out-of-state witness. It is also evident that while, in theory, Meadows's presence may have been secured pursuant to the Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings ("the Act"), N.C. Gen. Stat. § 15A-811 *et seq.* (2021), the trial court was not *obligated* to instruct Mr. Kolb to commence proceedings pursuant to the Act, particularly given the untimeliness of Defendant's complaint. *See State v. Cyrus*, 60 N.C. App. 774, 776, 300 S.E.2d 58, 59 (1983) (reasoning that while "the officers and the court have a duty to see that [a] defendant has an opportunity for securing material witnesses" under the Act, "[t]hey are placed under no burden to demand that [the defendant] do so").

Here, the record reflects that although Defendant and Mr. Kolb had previously discussed whether to call Meadows as a witness, Mr. Kolb did not understand that Defendant was *insisting* on Meadows's presence until the first day of trial, when Defendant raised the issue prior to voir dire. By that point, Defendant's case had been pending for over two years. We therefore conclude that Defendant failed to timely notify the trial court—as well as the State and his own attorney—that he wished to seek to compel Meadows's attendance at trial via the procedures set forth by the Act. *See id.* ("It is . . . true that the right to compulsory process is a fundamental right and that neither our statute nor the Constitution prescribes time limits within which to exercise that right. It is equally true, however, that rights can be waived.").

Moreover, contrary to Defendant's argument on appeal, Mr. Kolb's failure to "timely move[ ] the court for a certificate and order of attendance" does not demonstrate the existence of an absolute impasse between Defendant and counsel. Rather, Defendant merely presents a disagreement with his appointed attorney over trial tactics, one that counsel believed had been resolved well before trial.

As Mr. Kolb explained to the trial court, he had previously determined that Meadows "would not be a good witness for" Defendant's case, due to "reasons of trial strategy"—including the fact that Meadows "would be subject to impeachment on cross-examination." Nonetheless, upon learning of Defendant's concerns, Mr. Kolb agreed to discuss the matter further with Defendant, despite the attorney's misgivings as to whether Meadows's appearance would be in Defendant's best interest. This does not indicate a deadlock. *Cf. Williams*, 191 N.C. App. at 103, 662 S.E.2d at 402 ("[The d]efendant certainly disagreed with defense counsel's advice regarding the jury selection, but specific disagreement did not rise to the level of an absolute impasse because [he] ultimately deferred the decision to defense counsel.").

And although Defendant argues that "[d]iametric opposition like that depicted in the record between Mr. Kolb and [Defendant] cannot be construed as anything but an absolute impasse[,]" he ultimately "makes no argument rooted in law that an impasse existed, besides using conclusory terms." *State v. Curry*, 256 N.C. App. 86, 98, 805 S.E.2d 552, 559 (2017).

Consequently, Defendant has failed to demonstrate the existence of an absolute impasse. We therefore conclude that the trial court did not err by failing to instruct Mr. Kolb to call Meadows as a witness.

Finally, we briefly respond to these arguments in the context of Defendant's motion to substitute counsel. As Defendant acknowledges on appeal, in arguing before the trial court, he "was unable to clearly vocalize the true issue," which he now articulates as the "absolute impasse" issue of which we have already disposed. However, at trial, Defendant characterized the relief he sought as substitution of counsel, stating that "I would exactly maybe like to get a hold of another attorney or, you know, I've got a friend that would probably represent me . . . I would rather, you know, get another attorney to represent me because [Mr. Kolb] has misrepresented me[.]" Regardless of its characterization, Defendant's argument lacks merit.

A "trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would

amount to denial of [the] defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded [the] defendant his constitutional right to counsel." *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980). "[A] disagreement over trial tactics generally does not render the assistance of the original counsel ineffective." *Id.*; *see also State v. Gary*, 348 N.C. 510, 514, 501 S.E.2d 57, 61 (1998) (concluding that the trial court properly denied the defendant's motion to substitute counsel where the defendant's claim of ineffective assistance of counsel arose out of his attorney's decision "not to subpoena certain witnesses whom [the] defendant claimed would have provided alibi testimony").

Here, after explaining that Meadows could not be subpoenaed, the trial court repeatedly sought clarification from Defendant that substitute counsel was the remedy he desired. Defendant responded affirmatively in each instance. Defendant then provided the trial court with contact information for several attorneys from whom he had purportedly sought representation; but after the first attorney failed to immediately recognize Defendant and declined to represent him, the trial court determined that it would not "delay this trial again" and denied Defendant's motion to substitute counsel. Defendant did not revisit the issue of Meadows's attendance, but rather proceeded to trial with Mr. Kolb as his attorney.

To the extent that Defendant now challenges the trial court's denial of his motion to substitute counsel, he offers no distinct reason or supporting argument in his brief, beyond those we have already addressed and soundly rejected. Accordingly, this issue is abandoned. *See* N.C. R. App. P. 28(b)(6); *see also*, *e.g.*, *State v. Ambriz*, 286 N.C. App. 273, 292, 880 S.E.2d 449, 466 (2022) (declining to address the defendant's bald contention that certain of the trial court's findings were "incomplete, unsupported, or incorrect[,]" and concluding that because he "made no substantive argument regarding th[o]se findings, he . . . waived any challenge" on appeal).

Conclusion

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

NO ERROR.

Judges GORE and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
WANG MENG MOUA, Defendant

No. COA22-839

Filed 18 July 2023

1. Appeal and Error—right to appeal—denial of suppression motion—guilty plea—no benefit conferred—notice of intent to appeal not required

Where defendant pleaded guilty to multiple drug offenses as charged—and therefore his plea was not made as part of a plea arrangement with the State and conferred no benefit—he was not required to give notice to the State of his intent to appeal from an order denying his motion to suppress. However, the appellate court noted that, given the unsettled state of the law regarding the notice requirement under these circumstances, it had granted defendant's petition for a writ of certiorari by separate order so as to reach the merits of defendant's appeal.

2. Search and Seizure—traffic stop—unlawfully extended—consent to search vehicle invalid—judgment vacated

Defendant's traffic stop for speeding was unlawfully extended and he was illegally seized for purposes of the Fourth Amendment where the investigating officer continued questioning defendant after the purpose of the stop had concluded—signified by the officer returning defendant's license and registration to him and giving him a verbal warning for speeding. There was no reasonable suspicion to extend the stop where, after determining that defendant was on active probation but had no active warrants, the officer asked to talk to defendant outside of the car and reached inside to unlock and open the door, and, once the two men were standing by the back of the car, the officer returned defendant's documents—at which point the stop's mission was over—and asked defendant about his probation status and whether he had anything on his person or in his car. Under these circumstances, a reasonable person would not have felt free to leave and, therefore, defendant's subsequent consent to search the vehicle was not freely and voluntarily given. The trial court's order denying defendant's motion to suppress evidence of drugs found in the vehicle was reversed and defendant's judgment for multiple drug offenses was vacated.

Appeal by Defendant from Order entered 15 March 2022 by Judge Lisa Bell and Judgment entered 2 May 2022 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Tirrill Moore and Special Deputy Attorney General Kristin J. Uicker, for the State.

BJK Legal, by Benjamin J. Kull, for the Defendant.

RIGGS, Judge.

Defendant Wang Meng Moua appeals the order denying his motion to suppress evidence which was entered prior his guilty plea for trafficking in methamphetamine by transport, trafficking in methamphetamine by possession, and keeping or maintaining a vehicle for keeping or selling methamphetamine. Mr. Moua argues he has an appeal of right under N.C. Gen. Stat. § 15A-979(b) (2021), even though he did not notify the court and the prosecutor of his intent to appeal prior to his entry of a guilty plea. But on the chance that this Court concluded he did not have a statutory right of appeal, Mr. Moua also submitted a petition for writ of *certiorari* to consider the merits of his claim. We granted *certiorari* review in our discretion under separate order.

After review of the record, we hold that the search was not consensual, and accordingly, we reverse the denial of the motion to suppress and vacate the judgment.

I. FACTS & PROCEDURAL HISTORY

At 12:59 a.m. on 5 December 2019, Sgt. Garrett Tryon and Officer J. Housa, with Charlotte-Mecklenburg County Police Department, initiated a traffic stop of Mr. Moua, for speeding on North Tryon Street near the Interstate 85 connector in Mecklenburg County. Sgt. Tryon stopped Mr. Moua, who was driving with a passenger, on a side street and told Mr. Moua that he had paced him at fifty miles per hour in a thirty-five mile per hour zone on North Tryon Street. Sgt. Tryon asked Mr. Moua for his license and registration, and he also asked the passenger to provide his license. Both Mr. Moua and his passenger cooperated and provided their identification; both Sgt. Tryon and Officer Housa were calm and professional in executing the stop, which was recorded on bodycam.

Sgt. Tryon went back to his vehicle and ran the information through different law enforcement databases while Officer Housa stood by the passenger door of Mr. Moua's car, shining his flashlight into the vehicle. After about two minutes of checking, Sgt. Tryon learned that Mr. Moua was on active probation and had prior charges; however, Mr. Moua did not have any active warrants. Sgt. Tryon then returned to Mr. Moua's car and said, "Sir come out and talk to me real quick." As he was speaking to Mr. Moua, Sgt. Tryon reached through the open window, unlocked and opened the door.

As soon as Mr. Moua walked to the back of the vehicle, Sgt. Tryon handed back Mr. Moua's license and registration. Sgt. Tryon had the following conversation with Mr. Moua:

> SGT. TRYON: Come over here. Here is your stuff back, man. Um. Look. You gotta slow down. 35 is 35, right? I get it, North Tryon used to be, like 55, like three years ago. You've been living out here for a while?
>
> MR. MOUA: Yeah.
>
> SGT. TRYON: All right. Um. I see you got some charges in the past, you're on probation.
>
> MR. MOUA: Yeah.
>
> SGT. TRYON: You squared away? You straight now?
>
> MR. MOUA: Yeah.
>
> SGT. TRYON: All right. You been checking in?
>
> MR. MOUA: Oh yeah.
>
> SGT. TRYON: Are you unsupervised or –?
>
> MR. MOUA: Supervised.
>
> SGT. TRYON: Supervised. Out of Mecklenburg County or –?
>
> MR. MOUA: Ah it's Cabarrus.
>
> SGT. TRYON: Cabarrus County. Cool. Hey, man, you have anything on you or in the car –
>
> MR. MOUA: No.
>
> SGT. TRYON: –that I should be worried about?
>
> MR. MOUA: No.

> SGT. TRYON: You wouldn't mind if I check, right?
>
> MR. MOUA: Ya, go ahead.
>
> SGT. TRYON: Mind if I pat you down really quick?
>
> MR. MOUA: Ya.

Sgt. Tryon performed a pat down that did not uncover any contraband. After the pat down, Sgt. Tryon began to search the vehicle; meanwhile, Mr. Moua smoked a cigarette on the side of the road. Within fifteen seconds of initiating the search, Sgt. Tryon noticed a bag sticking out from under the driver's seat containing a white powdery substance. After discovering the bag, Sgt. Tryon walked over to Mr. Moua, placed him in handcuffs, and then continued to search the vehicle.

On 16 December 2019, Mr. Moua was indicted on one count each of trafficking methamphetamine (more than 200 but less than 400 grams) by transport, trafficking methamphetamine (more than 200 but less than 400 grams) by possession and keeping or maintaining a vehicle for keeping or selling methamphetamine. On 26 April 2021, the State filed superseding indictments on the two trafficking counts to lower the mass of methamphetamine to more than 28 but less than 200 grams.

Mr. Moua moved to suppress the evidence obtained during the search. The trial court heard this motion on 10 March 2022. During that hearing, Sgt. Tryon testified that he typically asks people to get out of the vehicle either for officer safety or privacy reasons. He testified that in this case, he asked Mr. Moua to step out of the vehicle so that he could ask him about his probation away from the passenger. Additionally, Sgt. Tryon testified that in his experience, owner-operators are more likely to consent to a search of the vehicle when they are separated from their vehicle. During his testimony, Mr. Moua's counsel asked Sgt. Tryon about his reason for questioning Mr. Moua about his probation; Sgt. Tryon testified that it was "a conversation piece." Sgt. Tryon testified that, in his opinion, the purpose of the traffic stop concluded when he returned Mr. Moua's driver's license and registration.

After the motion to suppress hearing, the trial court issued an order denying the motion to suppress. In that order, the court made twenty-one findings of facts, including:

> 8. Upon re-approaching the [D]efendant, Sgt. Tryon requested the [D]efendant step out of the vehicle to speak with him, which the [D]efendant consented to doing. Sgt. Tryon said it was common practice for him and officers to

> ask occupants out of their vehicles during traffic stops for safety and privacy purposes.
>
> 10. Almost immediately upon the [D]efendant and Sgt. Tryon getting to the back of the [D]efendant's vehicle, Sgt. Tryon returned all of the documents back to the [D]efendant and the two briefly discussed the [D]efendant speeding and Sgt. Tryon gave him a warning for the speeding.
>
> 11. *After concluding the purpose for the stop*, Sgt. Tryon engaged in a consensual conversation with the [D]efendant about his probation and asked for consent to search his car and person.
>
> 12. The [D]efendant freely and voluntarily gave consent for Sgt. Tryon to search his car and person.

The trial court also made twelve conclusions of law, including:

> 4. Almost immediately upon stepping out of the vehicle, Sgt. Tryon handed the [D]efendant his documents back and gave him a verbal warning for speeding.
>
> 5. At that point in time, this [c]ourt finds the reason for the traffic stop was concluded. The following conversation and actions after were a consensual encounter between Sgt. Tryon and the [D]efendant. A reasonable person in the [D]efendant[']s position would have felt free to leave or free to refuse to cooperate at that point and terminate the encounter.
>
> 12. In viewing the totality of the circumstances and the evidence before this [c]ourt . . .. Sgt. Tryon returned the [D]efendant[']s documents to him almost immediately and the traffic stop concluded once Sgt. Tryon handed the [D]efendant back all of his documents and gave him a verbal warning for speeding. The conversations and actions beyond that point were consensual in nature. Thereafter, the [D]efendant was no longer seized, the [D]efendant[']s Constitutional rights were not violated within the meaning of the Fourth Amendment, and the [D]efendant[']s consent to search his vehicle and person was freely and voluntarily [sic].

After the denial of his motion to suppress, Mr. Moua subsequently pleaded guilty as charged to all charges on 2 May 2022. Mr. Moua did not

seek nor secure any agreement with the prosecutor to reduce or dismiss the charges. At the plea and sentencing hearing, the State submitted, as a factual basis for the plea, the gallon-sized Ziploc bag which Sgt. Tryon found under the seat containing 194.21 grams of methamphetamine. The State indicated that after Sgt. Tryon completed the search of the car he read Mr. Moua his Miranda rights, and then Mr. Moua confessed that the methamphetamine in the vehicle was his; neither event appears on the video recording of the stop. Mr. Moua did not indicate his intent to appeal the motion to suppress prior to pleading guilty, and neither the colloquy nor the plea transcript asked Mr. Moua if he wished to reserve any rights to appeal or enter a conditional plea. However, Mr. Moua made an oral notice of appeal on the record during this sentencing hearing.

II. ANALYSIS

Mr. Moua argues that he has the right to appeal the denial of the motion to suppress upon entry of his guilty plea according to N.C. Gen. Stat. § 15A-979(b) (2021). Generally, notice of intent to appeal is required to ensure the right to appeal under the statute; however, this Court held in *State v. Jonas*, that notice of intent to appeal is not required when a defendant does not negotiate a plea agreement and simply pleads guilty as charged. *State v. Jonas*, 280 N.C. App. 511, 516, 867 S.E.2d 563, 567 (2021), *review allowed*, *writ allowed*, 876 S.E.2d 272 (2022). The ruling in *Jonas* is currently stayed; therefore, Mr. Moua also filed a petition for writ of *certiorari*. In our discretion, we granted his petition for *writ of certiorari* under separate order.

On appeal, Mr. Moua argues that at the time he gave consent to search his car, he was unlawfully seized, and therefore, his consent was invalid. We agree.

A. Appellate Jurisdiction

[1] In North Carolina, a defendant's right to pursue an appeal from a criminal conviction is a creation of statute. *State v. McBride*, 120 N.C. App. 623, 624, 463 S.E.2d 403, 404 (1995). Generally, a defendant who pleads guilty does not have a statutory right of appeal. *See* N.C. Gen. Stat. § 15A-1444(e) (2021). However, the General Assembly has, by statute, allowed a defendant to appeal an adverse ruling in a pretrial suppression hearing despite the defendant's conviction based upon a guilty plea. *State v. Reynolds*, 298 N.C. 380, 395, 259 S.E.2d 843, 852 (1979). According to N.C. Gen. Stat. § 15A-979(b), an order denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment where the defendant pleads guilty. N.C. Gen. Stat. § 15A-979(b) (2021). This statutory right to appeal is

conditional and not absolute. *State v. McBride*, 120 N.C. App. 623, 624, 463 S.E.2d 403, 404 (1995).

The North Carolina Supreme Court has held that when a defendant intends to appeal from a denial of a motion to suppress pursuant to N.C. Gen. Stat. § 15A-979(b), they must give notice of their intent to the prosecutor and the court *before plea negotiations are finalized*, or they will waive the appeal of right provisions of the statute. *State v. Reynolds*, 298 N.C. at 397, 259 S.E.2d at 853. The Court reasoned that the plea-bargaining table is not a "high stakes poker game;" it is much closer to arm's length bargaining. *Id.* Therefore, it would be inappropriate for defendants to keep their intent to appeal a secret during negotiation to get the benefit of the bargain and then surprise the prosecution with an appeal of the conviction. *Id.*

In December 2021, this Court addressed the notice requirement in the context of a unilateral guilty plea given absent any bargaining with the State. This Court held that where a defendant does not plead guilty pursuant to a plea arrangement with the State, the defendant is not required to give notice of intent to appeal prior to the plea of guilty to invoke his statutory right to appeal. *State v. Jonas*, 280 N.C. App. 511, 516, 867 S.E.2d 563, 567 (2021). The Court reasoned that the concerns the Supreme Court was addressing in *Reynolds* are not present in a scenario where a defendant is not receiving any benefit of a plea agreement; the State has not been "trapped into agreeing to a plea bargain only to later have [d]efendant contest that bargain." *Id.* We agree with this analysis.

Jonas, however, was stayed by our Supreme Court on 21 December 2021. *State v. Jonas*, 380 N.C. 301, 865 S.E.2d 886 (2021). Whether the mandate in a stayed decision is binding precedent is unclear in North Carolina jurisprudence. Mr. Moua points to *Hunnicutt v. Griffin*, which says that a case becomes binding upon filing. *Hunnicutt v. Griffin*, 76 N.C. App. 259, 263, 332 S.E.2d 525, 527 (1985). Thus, *Hunnicutt* would suggest that the rule in *Jonas* confirms Mr. Moua's right of appeal. In contrast, the State argues that according to *State v. Gonzalez* a stayed case does not have precedential authority. 263 N.C. App. 527, 530, 823 S.E.2d 886, 888 (2019). In *State v. Gonzalez*, though, this Court addressed a conflict in precedent between several Court of Appeals decisions and declined to follow the stayed case because it conflicted with prior precedent. *Id.*

Strictly speaking, *Jonas* does not conflict with the ruling in *Reynolds*; the latter did not address the type of unilateral guilty plea in the former. *Jonas* only clarifies the universe of scenarios in which the

Reynolds notice requirement applies. Further, at the time of the plea and sentencing hearing in this case, the Supreme Court had not issued an opinion in *Jonas*.

The facts in this case are similar to *Jonas*. Mr. Moua did not negotiate any plea agreement with the State, and he did not receive any benefit from the State. The State argues that even when a defendant does not negotiate a plea with the State, a defendant is still required to provide notice of intent to appeal in addition to the notice of appeal. At oral argument, the State asserted that even without a plea agreement, Mr. Moua needed to give notice of *intent to appeal* as he was pleading guilty "prior to pronouncement of sentence" *in addition* to giving notice of appeal at the conclusion of the hearing to meet the requirements under *Reynolds*. We fail to see any meaningful value to the State in requiring a defendant, who is unilaterally pleading as charged, to provide notice of intent to appeal as he enters his plea in addition to providing notice of appeal only a few minutes later in the same hearing.

However, because *Jonas* has been stayed by the Supreme Court, we considered Mr. Moua's petition for writ of *certiorari* as an alternate and appropriate basis for our review. In light of the unsettled law in this area, and our ultimate holding, we granted *certiorari* under separate order to consider the merits of his appeal.[1]

B. Motion to Suppress

[2] Mr. Moua argues that his consent to search the car was not voluntary because, at the time he gave consent, he was unlawfully seized under the Fourth Amendment. He challenges several findings of fact—which the trial court used to support the denial of the motion to suppress—as unsupported by competent evidence and argues that several findings of fact are in reality conclusions of law that this Court should review *de novo*.

After review, we agree that Mr. Moua was unlawfully seized when the police asked for consent to search his car. Based upon the totality of the circumstances, a reasonable person would not have felt free to terminate this encounter and a search of the car was not within the scope of the original stop. Therefore, his consent was not voluntary and the motion to suppress was erroneously denied. While we hold that the trial court had competent evidence upon which to base its findings of fact, the trial court comingled conclusions of law with findings of fact. Accordingly, we consider those conclusions of law *de novo*.

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1. Judge Murphy dissented from this grant of *certiorari* in the order and would have found jurisdiction existed on the grounds described *supra*.

1. Standard of Review

This Court's review of a trial court's denial of a motion to suppress is strictly limited to determining whether the trial court's underlying findings of fact are supported by competent evidence and whether those factual findings, in turn, support the ultimate conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Where the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and binding on appeal. *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735–36 (2004). The trial court's conclusions of law are reviewed *de novo*. *State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005).

When a trial court's findings comingle findings of facts with conclusions of law, we give appropriate deference to the findings of fact and review the portions of those findings that are conclusions of law *de novo*. *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009). The North Carolina Supreme Court has defined findings of fact as statements of what happened in space and time. *State v. Parisi*, 372 N.C. 639, 655, 831 S.E.2d 236, 247 (2019). A conclusion of law, however, requires the exercise of judgment or the application of legal principles to the facts found. *State v. McFarland*, 234 N.C. App. 274, 284, 758 S.E.2d 457, 465 (2014) (internal quotes and citation omitted). Therefore, when statements identified as findings of fact required the trial court to exercise its judgment or apply law to come to a determination, those statements are considered as conclusions of law.

2. Findings of Fact

Mr. Moua specifically challenges the trial court's finding of fact 10 that Sgt. Tryon had given Mr. Moua a warning for speeding as unsupported by evidence. The finding states that: "Almost immediately upon the [D]efendant and Sgt. Tryon getting to the back of the [D]efendant's vehicle, Sgt. Tryon returned all of the documents back to the [D]efendant and the two briefly discussed the [D]efendant speeding and Sgt. Tryon gave him a warning for speeding."

However, the competent evidence presented at the motion to suppress hearing supports this finding. The video footage of the incident, which was introduced as evidence during the motion to suppress hearing, shows that Sgt. Tryon said to Mr. Moua "You gotta slow down. 35 is 35, right? I get it, North Tryon used to be, like 55, like three years ago." The bodycam footage provided the trial court with competent evidence as to what Sgt. Tryon said and the statement plainly put Mr. Moua on notice to slow down and desist from going faster than the current

speed limit on North Tryon Street. Accordingly, we hold that the trial court had competent evidence upon which to make the finding of fact that Sgt. Tryon gave Mr. Moua a warning. However, the key issue, which we discuss later, is whether this warning is sufficient, under the totality of the circumstances, to communicate to a reasonable person that the purpose of the stop had ended, and the person was free to terminate the encounter.

Additionally, Mr. Moua challenges finding of fact 13 that Mr. Moua "freely and voluntarily" consented to the search by arguing that the finding is actually a conclusion of law. The "question of whether consent to a search was in fact voluntary or was the product of duress or coercion, expressed or implied, is a question of fact to be determined based upon the totality of the circumstances." *State v. Hall*, 268 N.C. App. 425, 429, 836 S.E.2d 670, 674 (2019) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 863 (1973)). Here, the competent evidence does not support the finding of fact that Mr. Moua "freely and voluntarily" consented to the search. Mr. Moua had just been separated from his vehicle through a show of force by Sgt. Tryon, where Sgt. Tryon had reached through the car window, unlocked and opened the car door. Sgt. Tryon was questioning Mr. Moua behind the car about his probation status with the State while his partner was shining his flashlight in the car. Sgt. Tryon presented the questions in a rapid-fire manner which quickly transitioned into a request to search the car. Based upon the totality of the circumstances, this finding of fact is not supported by competent evidence.

3. Conclusions of Law

Additionally, Mr. Moua argues that the trial court comingled findings of facts with conclusions of law. Specifically, Mr. Moua asserts that findings of fact 11 and 12—that the stop concluded prior to Sgt. Tryon's request to search and the request came during a "consensual" conversation—are actually conclusions of law. These items appear in the order as both findings of fact and conclusions of law. The ultimate conclusion of the trial court was that the purpose of the traffic stop ended when Sgt. Tryon returned Mr. Moua's documents, and the ensuing conversation was consensual; therefore, when Mr. Moua gave consent to search the car it was voluntary and consensual because a reasonable person would feel free to leave or refuse to cooperate. We review these conclusions *de novo*. *See State v. Reed*, 257 N.C. App. 524, 530, 810 S.E.2d 245, 249, *aff'd*, 373 N.C. 498, 838 S.E.2d 414 (2020) (explaining that while a traffic stop only concludes and becomes consensual after an officer returns the detainee's paperwork, the governing inquiry is whether under the

totality of the circumstances, a reasonable person in the detainee's position would believe they are free to leave). *See also State v. Icard*, 363 N.C. at 308, 677 S.E.2d at 826 (stating that whether an officer's actions amount to a show of authority is a conclusion of law).

4. Consent to search was not valid

On appeal, Mr. Moua argues that when he gave consent to search his car, he was still "seized" within the meaning of the Fourth Amendment because the traffic stop was unlawfully extended. Therefore, his consent was invalid. We agree.

The Fourth Amendment to the U.S. Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." *United States v. Mendenhall*, 446 U.S. 544, 550, 64 L. Ed. 2d 497, 507 (1980). Similarly, the North Carolina Constitution, Article 1, Section 20 guarantees the right of people to be secure in their person and property and free from unreasonable search. *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984).

When a party gives consent to a search while they are seized *or* when the bounds of an investigative stop have been exceeded, the consent is invalid. *Florida v. Royer*, 460 U.S. 491, 501, 75 L. Ed. 2d 229, 239 (1983) (emphasis added). Stopping an automobile and detaining its occupants constitutes a "seizure" within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979). A traffic stop is permitted when an officer sees a motorist committing a violation or when the officer has a reasonably articulable suspicion that there is criminal activity afoot. *State v. Heien*, 226 N.C. App. 280, 286, 741 S.E.2d 1, 5 (2013). Generally, the allowable duration of police inquiry in the traffic-stop context is determined by the seizure's "mission"—e.g., to address the traffic violation that warranted the stop or to attend to related safety concerns.[2] *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 673 (2017).

The return of documents would render further interaction voluntary and consensual only if a reasonable person under the circumstances

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2. The State submitted a Memorandum of Authority presenting cases that justify the request for a motorist to exit the car during a traffic stop for safety concerns. The State did not advance that argument at the trial court level or in its appellate brief. The Rules of Appellate Procedure do not allow parties to add additional arguments through a Memorandum of Additional Authorities. N.C. R. App. P. 28(g) (2022). The scope of appeal is limited to issues presented in the briefs. N.C. R. App. P. 28(a).

would believe that they are free to leave or disregard the officer's request for information. *Heien*, 226 N.C. App. at 287 (citing *State v. Kincaid*, 147 N.C. App. 94, 99, 555 S.E.2d 294, 299 (2001)). Once the purpose of the traffic stop has concluded, there is nothing that precludes a police officer from asking questions of a citizen; however, the interaction must be consensual and devoid of a show of authority or force on the part of law enforcement in order to avoid becoming a seizure within the scope of the Fourth Amendment. *United States v. Mendenhall*, 446 U.S. at 552, 64 L. Ed. 2d at 508.

Here, it is undisputed that the initial traffic stop was lawful. However, the scope of detention for this traffic stop, "must be carefully tailored to its underlying justification." *State v. Morocco*, 99 N.C. App. 421, 427–28, 393 S.E.2d 545, 549 (1990) (quoting *Florida v. Royer*, 460 U.S. at 500, 75 L. Ed. 2d at 238). Sgt. Tryon had the authority to stop Mr. Moua for speeding when he paced Mr. Moua driving fifty-five miles per hour in a thirty-five mile per hour zone. Beyond determining whether to issue a traffic ticket for the infraction, the reasonable duration of a traffic stop may include ordinary inquiries incident to the traffic stop including checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. *State v. Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (2017) (citing *Rodriguez v. United States*, 575 U.S. 348, 355, 191 L. Ed. 2d 492, 499 (2015)). Sgt. Tryon completed all these tasks. He ran the driver's information through different law enforcement databases. After about two minutes of checking, Sgt. Tryon learned that Mr. Moua did not have any active warrants.

When Sgt. Tryon returned the documentation to Mr. Moua and gave him a verbal warning about speeding, the authority for the seizure ended. Sgt. Tryon needed reasonable articulable suspicion of a crime to extend the stop beyond that point and the State has not argued that reasonable articulable suspicion existed to extend the traffic stop. *See Rodriguez v. United States*, 575 U.S. at 354, 191 L. Ed. 2d at 498; *See also State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 754 (holding that when the original purpose of the stop has been addressed, there must be grounds that provide a reasonable and articulable suspicion to justify further delay), *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008).

Therefore, to determine whether the encounter was unlawfully extended, as Mr. Moua argues, or a voluntary encounter, as the State argues, we consider whether, based upon the totality of the circumstances, a reasonable person would have felt free to leave prior to the request to search. In a scenario where a reasonable person would feel free to

leave, the encounter after the documents were returned would be a voluntary encounter, and the consent may be valid. *State v. Heien*, 226 N.C. App. 280, 287, 741 S.E.2d 1, 6 (2013). However, if the seizure was unlawfully prolonged, then consent was invalid. *Rodriguez v. United States*, 575 U.S. at 351, 191 L. Ed. 2d at 496. Neither the subjective beliefs of law enforcement nor those of the defendant is dispositive of the question of whether a defendant is seized within the meaning of the Fourth Amendment; instead, the appropriate inquiry is whether a reasonable person would believe they are free to terminate the encounter. *State v. Freeman*, 307 N.C. 357, 360, 298 S.E.2d 331, 333 (1983).

The return of the documents is not a bright line that automatically and inarguably turns a seizure into a consensual encounter. We must consider the return of the document in the context of the entire encounter. Moments before the return of the documents, Sgt. Tryon had made a show of authority to remove Mr. Moua from his vehicle and instructed him to stand behind the vehicle. The video shows that Sgt. Tryon did not phrase his direction as a question, instead directing, albeit politely: "Sir come out and talk to me real quick." Further, Sgt. Tryon reached into the car, unlocked, and opened the door, further suggesting that whether to exit the vehicle was not up to Mr. Moua. The second uniformed police officer was still standing by the passenger side of the car, shining his flashlight into the car. Sgt. Tryon did not tell Mr. Moua that the purpose for the traffic stop had concluded or even ask if he could question him about other topics. During the motion to suppress hearing, Sgt. Tryon testified that he removed Mr. Moua from his car, not for safety reasons but for privacy reasons and because people are more likely to consent to a search when they are separated from their vehicle.[3] No written citation or warning was issued, nor was there any indication from Sgt. Tryon that the traffic stop had ended. Sgt. Tryon immediately began questioning Mr. Moua about his probation status and whether he was compliant with the terms of his probation—questions directly implicating Mr. Moua's continued supervisory relationship with the State.

In the United States, the social contract that underpins our system of government is one premised on the fact that we cede the absolute nature of some of our individual rights in order to secure group safety and order. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 45

3. Although this fact may be viewed as one reflective of the subjective intent of Sgt. Tryon, which we have identified as not part of the Fourth Amendment analysis, we think it provides context for how certain patterns and practices are employed in attempts obtain consent that may impact how reasonable people perceive their ability to withhold consent.

L. Ed. 2d 607, 615 (1975). That agreement creates an inherent power differential between law enforcement and citizens. Even if Sgt. Tryon intended to have a consensual conversation with Mr. Moua, we must objectively consider whether a reasonable person who is being questioned about their probation status on the side of a dark road in the middle of the night after being pulled out of their vehicle by a uniformed police officer would feel free to turn his back on the officer, walk back to their car, and drive away. After a review of the totality of this four-minute and forty-second encounter, we hold that a reasonable person in this situation would not have felt free to terminate the encounter even after the police officer returned his driver's license and registration four minutes and twelve seconds into the encounter. Therefore, the seizure was not rendered consensual by the return of the documents, the request to search was during an unlawful extension of the traffic stop, and Mr. Moua's consent to search was invalid.

In its brief, the State argues that the encounter between Sgt. Tryon and Mr. Moua was consensual based upon *United States v. Mendenhall*, 446 U.S. 544, 64 L. Ed. 2d 497 (1980). However, the facts in *Mendenhall* are distinguishable from the facts in this case. In *Mendenhall*, two plainclothes officers, who did not have any visible weapons, approached the defendant in the Detroit Metropolitan airport concourse during the morning. *Id.* at 555, 64 L. Ed. 2d at 510. The officers requested, not demanded, to see the defendant's identification. *Id.* The Court held that the officer's conduct *without more* was insufficient to find a constitutional infringement. *Id.* By contrast, the instant case presents those facts that would convert *Mendenhall* into a constitutional infringement. Here, the uniformed police officers displayed, although they did not draw, weapons. The encounter occurred on a dark street, largely deserted, in the middle of the night. Further, in a show of authority, Sgt. Tryon reached into the window, unlocked and opened the car door, and told Defendant to get out of the car—essentially taking away any option for Mr. Moua to decline to follow Sgt. Tryon's instructions. Sgt. Tryon's conduct was sufficient to establish that a reasonable person would not feel free to terminate the encounter.

The State also points to *State v. Kincaid* and *State v. Heien* to support their contention that a reasonable person would have felt free to terminate this type of encounter. The State's argument is not persuasive. In *State v. Kincaid*, the police officer specifically told the defendant the reason for the stop had concluded, and the officer asked if he could question the defendant on another topic. *State v. Kincaid*, 147 N.C. App. at 100, 555 S.E.2d at 299. Here, Mr. Moua was not told that

the reason for the stop had concluded, and Sgt. Tryon did not ask to question him on other topics. In *State v. Heien*, this Court held that a short encounter after the return of the license was consensual. 226 N.C. App. 280, 289, 741 S.E.2d 1, 6 (2013). However, the defendant in *Heien* was not the driver of the automobile, and the police officer told the driver that he was free to leave before asking the defendant, who was the passenger and owner of the vehicle, for consent to search the vehicle. *State v. Heien*, 214 N.C. App. 515, 516, 714 S.E.2d 827, 828 (2011) *rev'd*, 366 N.C. 271, 737 S.E.2d 351 (2012). Here, Sgt. Tryon never told Mr. Moua that he was free to leave. Thus, we find the facts here render *Heien* largely inapplicable.

As to the appropriate remedy, the State, for the first time at oral argument,[4] argued that even if this Court reversed the order denying the motion to dismiss, we should not vacate the judgment because it is based upon a guilty plea. However, the Legislature specifically created the right to appeal a denial of the motion to suppress from a guilty plea or a conviction, and the right does not exist until there is a guilty plea or conviction. N.C. Gen. Stat. § 15A-979(b). This Court only gains jurisdiction to consider the denial of the motion to suppress when the trial court entered a final judgment. *State v. Horton*, 264 N.C. App. 711, 714, 826 S.E.2d 770, 773 (2019). The plain language of the statute controls, and it explicitly provides relief after a guilty plea. Therefore, the appropriate remedy is to vacate the judgment and remand.

Based upon the totality of the circumstances, we hold that the seizure was unlawfully extended, and Mr. Moua was not engaged in a consensual conversation with law enforcement. A reasonable person would not have felt free to terminate this encounter, rendering Mr. Moua's consent invalid. Therefore, we hold that he was unlawfully seized under the Fourth Amendment, and the consent to search the vehicle was not freely and voluntarily given.

III. CONCLUSION

Upon careful consideration of the issues presented, we hold that at the time the police officer asked for consent to search his car, Mr. Moua was unlawfully seized under the Fourth Amendment and did not, as a matter of law, freely and voluntarily give consent to the requested search. Therefore, the search violated his Fourth Amendment rights.

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4. As previously noted, the addition of new arguments not contained in the brief is a violation of the North Carolina Rules of Appellate Procedure. It was improper for the State to raise this new argument at oral argument because it was not included in their brief.

Accordingly, we reverse the order denying the motion to suppress, vacate the judgment, and remand for further proceedings before the trial court.

REVERSED AND VACATED.

Judges MURPHY and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
OEUN SAN

No. COA22-664

Filed 18 July 2023

1. Appeal and Error—notice of appeal—motion to suppress—underlying criminal judgment—petition for certiorari

In a criminal case in which defendant entered an Alford plea to trafficking in methamphetamine and other related charges, and where the trial court denied his motion to suppress evidence seized from a traffic stop, defendant's petition for a writ of certiorari was granted to allow review of the trial court's criminal judgment. Defendant properly notified the court and the prosecutor during plea negotiations of his intent to appeal the denial of his motion to suppress, but, when giving his oral notice of appeal after the court's judgment was entered, defendant failed to mention that he was appealing from both the denial of his motion and from the judgment. Nevertheless, defendant's intent to appeal from both orders was apparent from context, and the State did not object on appeal to defendant's petition for certiorari.

2. Search and Seizure—motion to suppress—finding of fact—traffic stop—police inquiry extending the stop—timing of dog sniff in relation to the inquiry

In a prosecution for trafficking in methamphetamine and other charges arising from a traffic stop, where an officer stopped a car in which defendant sat as a passenger, asked the driver to exit the vehicle, issued the driver a warning citation, and then asked the driver if she had any drugs or weapons inside the vehicle, competent evidence supported the trial court's finding that law enforcement conducted an open-air dog sniff around the vehicle "simultaneously to

[the officer] asking [the driver] to exit her vehicle and explaining the warning ticket to her." Importantly, when read together with other findings, this finding clearly reflected that the dog sniff occurred before the officer extended the traffic stop beyond its mission by asking the driver about items inside her car. Because the finding was both internally consistent and consistent with the court's other findings, the court properly relied on this finding when denying defendant's motion to suppress evidence seized during the stop.

3. Search and Seizure—motion to suppress—probable cause—warrantless search following traffic stop—validity of dog sniff

In a prosecution for trafficking in methamphetamine and other charges arising from a traffic stop, where an officer stopped a car in which defendant sat as a passenger, asked the driver to exit the vehicle, issued the driver a warning citation, and then asked the driver if she had any drugs or weapons inside the vehicle, the trial court properly denied defendant's motion to suppress evidence seized from the vehicle after law enforcement conducted an open-air dog sniff around the car. Firstly, the court's legal basis for denying defendant's motion was clear enough to allow appellate review of the court's ruling. Secondly, the court properly relied on a probable cause standard when ruling on the motion because, even though the underlying issue was whether the dog sniff was valid, the ultimate question for the court was whether law enforcement had probable cause to conduct a warrantless search of the vehicle based on the dog sniff. Finally, the court's findings supported a conclusion that the dog sniff was conducted while the officer spoke with the driver and before the officer prolonged the stop beyond its mission (by asking the driver about other items inside the car), and therefore the findings established that the traffic stop was not unlawfully prolonged on account of the dog sniff.

Appeal by Defendant from Judgment entered 11 January 2022 by Judge James M. Webb in Randolph County Superior Court. Heard in the Court of Appeals 24 January 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Kelly A. Moore and Special Deputy Attorney General Martin T. McCracken, for the State.

Benjamin J. Kull for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Oeun San (Defendant) appeals from the denial of a Motion to Suppress and a subsequent Judgment entered upon Defendant's *Alford*[1] plea to Trafficking in Methamphetamine, Selling or Delivering a Schedule II Controlled Substance, and two counts of Possession of a Firearm by a Felon. As part of the plea agreement, the State agreed to dismiss a number of other charges. Relevant to this appeal, the Record before us tends to reflect the following:

Defendant was charged with thirteen separate counts arising from four separate alleged offense dates. The first offense date was 15 May 2018, stemming from a traffic stop. As a result of this stop, Defendant was charged with Trafficking Methamphetamine by Possession, Trafficking Methamphetamine by Transportation, Conspiracy to Trafficking Methamphetamine by Possession, Conspiracy to Trafficking Methamphetamine by Transportation, Possession of a Firearm by a Felon, and Possession with Intent to Sell or Deliver Methamphetamine. The second offense date was the following day, 16 May 2018, as a result of a search warrant-based search of Defendant's home. This search resulted in Defendant being charged with Trafficking Methamphetamine by Possession, Conspiracy to Trafficking Methamphetamine by Possession, Keeping/Maintaining a Dwelling for Keeping/Selling a Controlled Substance, and Possession with Intent to Sell or Deliver Methamphetamine. The final two offense dates were 22 October 2019, when Defendant was charged with Selling/Delivering Methamphetamine and Conspiracy to Sell Methamphetamine, and 23 October 2019, when Defendant was charged with an additional count of Possession of a Firearm by a Felon. The State subsequently dismissed the charge of Keeping/Maintaining a Dwelling for Keeping/Selling a Controlled Substance.

On 30 April 2019, Defendant filed a Motion to Suppress alleging the search of the vehicle during the 15 May 2018 traffic stop and the 16 May 2018 search of his residence were in violation of both the United States and North Carolina Constitutions. Defendant's Motion to Suppress was heard on 26 July 2021. At the outset of the hearing, the State announced it consented to the suppression of evidence of drugs seized from Defendant's home resulting from the 16 May 2018 search warrant. As a result, the parties proceeded only on the issue of whether evidence seized as a result of the 15 May 2018 traffic stop should be suppressed. Defendant contended the traffic stop was impermissibly prolonged

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1. *See North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L. Ed. 2d 162 (1970).

beyond the mission of the traffic stop without reasonable suspicion or consent. At the conclusion of the hearing, the trial court took the matter under advisement. Defendant provided notice that in the event the Motion to Suppress was denied, he intended to appeal the denial.

On 24 September 2021, the trial court entered its written Order denying the Motion to Suppress the evidence seized at the 15 May 2018 traffic stop. The trial court made the following—largely unchallenged—Findings of Fact:

> 1. That on May 15, 2018 Detective Richard Linthicum with the vice narcotics unit of the Randolph County Sheriff's Department ("Linthicum") received information that the [D]efendant was in possession of a large amount of methamphetamine. Linthicum described the provider of the information as a confidential and reliable informant; however, the Court heard no evidence as to this person's reliability, and no evidence corroborating the information.
>
> 2. That after receiving the information, Linthicum and other officers attempted to locate [D]efendant and conduct surveillance. Linthicum located [D]efendant and a female, later identified as Jamie Little, driving a Ford Edge at the Dixie Suds Laundry . . . .
>
> 3. Linthicum and Detective Hammer were in an unmarked Ford 150 [sic] truck parked at the Midtown Dixie gas station, and Linthicum noticed the Ford Edge parked next to a wall at the laundry. He noticed [D]efendant and Ms. Little going back and forth from the vehicle to the laundry.
>
> 4. The Ford Edge left the laundry and parked beside Linthicum's truck at the gas station, Ms. Little attempted to go in the gas station but it was closed.
>
> 5. The Ford Edge left the gas station and Linthicum followed them . . . .
>
> 6. That Linthicum noticed the Ford Edge cross the double center line when the vehicle turned left off of Highway 311 onto Stout Road, and he radioed this information to [Deputy] Kyle Cox ("Cox"), also with the Randolph County Sheriff's Department, who was driving a marked patrol vehicle, to conduct a traffic stop on the vehicle. Linthicum pulled over on the side of the road to allow Cox to pass him to make the traffic stop. Linthicum saw Cox initiate

the stop and the Ford Edge stopped, and then Linthicum continued traveling on Stout Road and waited for further instructions.

7. That Cox initiated the traffic stop on the Ford Edge, the vehicle stopped[,] and Cox went to the driver's side of the vehicle, and told Ms. Little the reason he stopped her and asked for her driver's license and registration. Ms. Little gave her driver's license and registration to Cox.

8. That Cox went to his patrol vehicle, and ran a records check on Ms. Little and the vehicle, which took three to four minutes. Cox recognized [D]efendant as the passenger in the vehicle.

9. That Cox then requested Ms. Little exit the vehicle so he could explain the warning citation to her, which is Cox's routine procedure. Cox and Ms. Little walked behind the Ford Edge and in front of Cox's patrol vehicle. Cox explained to Ms. Little the warning citation while standing in front of the patrol vehicle, and asked Ms. Little if she had any questions. After Cox returned Ms. Little's documents, he then asked Ms. Little if there was anything in the vehicle that he needed to know about including guns, drugs, bombs, large amounts of U.S. currency or any other weapons. That Ms. Little said she had a gun on the seat. However, based on testimony from the other officers involved, they were not aware of this information until after the search of the vehicle.

10. That Detective Joshua Santiago and Detective John Lamb[e] with the Randolph County Sheriff's Department, Vice Narcotics Unit ("Santiago" and "Lamb[e]"), also arrived on scene. Santiago and Lamb[e] had previously been informed of the information that [D]efendant had a large amount of methamphetamine. Santiago is a certified K-9 handler of K-9, Lizzy. Lizzy was certified on cocaine, methamphetamine, heroin and marijuana.

11. That Santiago noticed Ms. Little sitting in the driver's seat of the Ford Edge when he and Lamb[e] arrived on scene. He then spoke to Cox, and Cox informed Santiago he was writing Ms. Little a warning ticket and he was going to get Ms. Little out of the vehicle to explain the warning ticket to her.

> 12. When Cox got Ms. Little out of the vehicle, Santiago asked Lamb[e] to get [D]efendant out of the vehicle due to Santiago readying to deploy Lizzy. While Cox and Ms. Little were in front of Cox's patrol vehicle, Santiago deployed Lizzy to complete an open air sniff around the vehicle.
>
> 13. That although Cox asked Ms. Little a question about whether she had anything in the vehicle he needed to know about after he returned her driver's license and registration and gave her the warning ticket, this open air sniff around the vehicle started simultaneously to Cox asking Ms. Little to exit her vehicle and explaining the warning ticket to her.
>
> 14. Lizzy sat, which is a passive alert, at the area of the front passenger door.
>
> 15. Based on Lizzy's alert, the vehicle and containers within the vehicle were searched.

The trial court then concluded: "Based upon a totality of the circumstances the [c]ourt concludes that the Defendant's [M]otion to [S]uppress for lack of probable cause should be denied."

On 11 January 2022, Defendant and the State entered a plea arrangement. Defendant entered an *Alford* plea to: Trafficking Methamphetamine by Possession and Possession of a Firearm by a Felon both arising from the 15 May 2018 offense date; Selling/Delivering Methamphetamine from the 22 October 2019 offense date; and Possession of a Firearm by a Felon from the 23 October 2019 offense date. The State agreed to dismiss all other pending charges. The trial court consolidated the four charges into a single judgment and sentenced Defendant to an active prison term of 70 to 93 months and imposed a $50,000 fine. Defendant's trial counsel announced in open court: "We had a motion to suppress. I gave notice in advance that if the motion was denied, we intend to give notice of appeal to the Court of Appeals. It was denied on September 24th of 2021, therefore we're giving notice of appeal for denial of that motion to the Court of Appeals."

Appellate Jurisdiction

[1] As an initial matter, Defendant filed a Petition for Writ of Certiorari in this Court in the event we deem his oral Notice of Appeal insufficient to preserve his appeal from the trial court's Judgment. "An order . . . denying a motion to suppress evidence may be reviewed upon an appeal from . . . a judgment entered upon a plea of guilty." N.C. Gen. Stat.

§ 15A-979(b) (2021). However, a defendant must (1) notify the prosecutor and the trial court of his intention to appeal during plea negotiations and (2) provide notice of appeal from the final judgment. *State v. McBride*, 120 N.C. App. 623, 625-26, 463 S.E.2d 403, 404-05 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996).

Here, Defendant, through trial counsel, complied with only one of the two required steps to preserve his appeal from his guilty plea. Defendant complied with step 1 by notifying the prosecutor and trial court of his intent to appeal the denial of the Motion to Suppress prior to his plea being accepted. However, after Judgment was entered, trial counsel gave oral Notice of Appeal but specified the appeal was from the denial of the Motion to Suppress and failed to state the appeal was from the Judgment rendered by the trial court. As such, Defendant has lost his right to appeal from the Judgment entered by the trial court. *See State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 542 (2010) (dismissing appeal where defendant gave written notice of appeal "from the denial of Defendant's motion to suppress," but did not specify the judgment itself).

Nevertheless, in the context of this case, we discern Defendant's intent to appeal from both the Motion to Suppress and the Judgment. Indeed, for its part, the State contends Certiorari is unnecessary as the State does not seek dismissal of the appeal. In our discretion, and in aid of our jurisdiction, we allow Defendant's Petition and issue our Writ of Certiorari. *See* N.C. Gen. Stat. § 7A-32(c) (2021).

Issues

The issues on appeal are whether: (I) Finding of Fact 13, that "the open air sniff around the vehicle started simultaneously to Cox asking Ms. Little to exit her vehicle and explaining the warning ticket to her," is supported by competent evidence in the Record; and (II) the trial court's Findings of Fact support its Conclusion: "Based upon a totality of the circumstances . . . Defendant's [M]otion to [S]uppress for lack of probable cause should be denied."

Analysis

"Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether [the trial court's] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Reynolds*, 161 N.C. App. 144, 146-47, 587 S.E.2d 456, 458 (2003) (citation and quotation marks omitted). The trial court's conclusions of law, however, are reviewed de novo. *See State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997)

(citation omitted). "In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State[.]" *State v. Moore*, 152 N.C. App. 156, 159, 566 S.E.2d 713, 715 (2002) (citations omitted).

I. Finding of Fact 13

[2] Defendant challenges only one of the trial court's Findings of Fact: Finding 13. In Finding of Fact 13, the trial court found:

> That although Cox asked Ms. Little a question about whether she had anything in the vehicle he needed to know about after he returned her driver's license and registration and gave her the warning ticket, this open air sniff around the vehicle started simultaneously to Cox asking Ms. Little to exit her vehicle and explaining the warning ticket to her.

In particular, Defendant contends the portion of the Finding that "this open air sniff around the vehicle started simultaneously to Cox asking Ms. Little to exit her vehicle and explaining the warning ticket to her" is unsupported by the evidence, self-contradictory and illogical, and further contradicted by Finding of Fact 12. We disagree.

First, there is competent evidence in the Record to support the trial court's Finding. Defendant focuses exclusively on Deputy Cox's written report. This report on its face indicates Deputy Cox had concluded the stop by issuing a warning ticket and asked Ms. Little if there was anything in the car Deputy Cox should know about like weapons, contraband, or large sums of currency. The Report further states "Detective Santiago *then* deployed his canine Lizzy . . . [.]" However, Defendant's reliance on Deputy Cox's report ignores other testimony and evidence, including Detective Santiago's testimony. Detective Santiago testified when he arrived on the scene to handle Lizzy while she conducted the open-air sniff, Deputy Cox was in the process of issuing the warning ticket and told Detective Santiago he was going to ask Ms. Little to step out of the car so he could explain the warning ticket to her. Once Deputy Cox asked Ms. Little to step out of the car to explain the warning ticket, Detective Santiago asked Detective Lambe to remove Defendant from the car, so Lizzy could be deployed. Detective Santiago also testified that as he went to retrieve and deploy Lizzy, he briefly overheard the conversation between Deputy Cox and Ms. Little when Deputy Cox was still explaining the warning ticket. Lizzy conducted her open-air sniff while Deputy Cox and Ms. Little were still having their conversation. Detective Santiago's testimony was also consistent with his written

report. Further, Detective Lambe testified when Deputy Cox asked Ms. Little to step out of the car, Detective Santiago asked Detective Lambe to remove Defendant from the car also, so Lizzy could be deployed. Detective Lambe's written report reflects "Deputy Cox had [Ms.] Little whom was driving the vehicle step out to explain the warning citation while Detective Santiago deployed K9. Before doing so I asked the male passenger to step out of the vehicle . . . ." This evidence, taken in the light most favorable to the State on appellate review, supports the finding "this open air sniff around the vehicle started simultaneously to Cox asking Ms. Little to exit her vehicle and explaining the warning ticket to her." *See State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) ("The trial court's findings of fact on a motion to suppress are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." (citations and quotation marks omitted)).

Second, Finding of Fact 13 is not illogical or internally inconsistent. Defendant argues it is logically impossible for the open-air sniff to have started precisely simultaneously to both Ms. Little being asked to exit the vehicle and the warning ticket being explained to her—as those were two separate occurrences. Defendant reads the Finding too narrowly. Rather, when read in context, it is apparent that the trial court, in this Finding, is acknowledging the evidence that after Deputy Cox finished his explanation, handed over the warning citation, and returned Little's license and registration, he *then* asked about items in the car—which could be seen as extending the traffic stop after its mission was completed. The trial court, however, goes on to clarify that the open-air sniff was initiated prior to Deputy Cox's inquiry. In other words, the open-air sniff was occurring prior to the stop arguably being extended beyond its mission.

Third, Defendant contends Finding of Fact 13 is contradicted by Finding of Fact 12. To the contrary, Finding of Fact 13 is perfectly consistent with Finding of Fact 12. Finding of Fact 12 states: "When Cox got Ms. Little out of the vehicle, Santiago asked Lamb[e] to get [D]efendant out of the vehicle due to Santiago readying to deploy Lizzy. While Cox and Ms. Little were in front of Cox's patrol vehicle, Santiago deployed Lizzy to complete an open air sniff around the vehicle." Defendant's argument, again, rests on an overly narrow focus on the trial court's use of the term "simultaneously" in Finding of Fact 13. However, Finding 12 reflects that Santiago began the process of deploying Lizzy when Ms. Little got out of the vehicle and Detective Lambe removed Defendant; Lizzy *then* performed the sniff while Deputy Cox and Ms. Little were in front of the patrol vehicle.

Thus, the trial court's Findings, read together, reflect that the sniff was, in fact, undertaken during the same time frame as Ms. Little getting out of the car and Deputy Cox explaining the warning citation to her. Therefore, Finding of Fact 13 is supported by evidence in the Record and is consistent with itself and the trial court's other Findings. Consequently, Finding of Fact 13 may, in turn, also be relied on to support the trial court's Conclusions.

II. The Trial Court's Conclusion of Law

[3] Defendant further challenges the trial court's Conclusion of Law: "Based upon a totality of the circumstances, the [c]ourt concludes that the Defendant's [M]otion to [S]uppress for lack of probable cause should be denied." Defendant contends the trial court's Conclusion fails to articulate any rationale for its decision to deny the Motion to Suppress. Defendant further argues the trial court misapprehended the law applicable to traffic stops and warrantless dog-sniffs by relying on "a probable cause" standard. Finally, Defendant—relying on *Rodriguez v. United States*, 575 U.S. 348, 135 S.Ct. 1609, 191 L. Ed. 2d 492 (2015)—contends, even applying the correct standard, the trial court's Findings of Fact do not support its Conclusion of Law.

First, Defendant contends the trial court's Conclusion of Law is insufficient for appellate review because it fails "to provide the trial court's rationale regarding why" it denied the Motion to Suppress.[2] When ruling on a motion to suppress following a hearing, a judge "must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2021). As Defendant notes, our Court has observed:

> When a trial court fails to make all the necessary determinations, *i.e.*, findings of fact resolving disputed issues of fact and conclusions of law applying the legal principles to the facts found, "[r]emand is necessary because it is the trial court that is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, *and*, *then based upon those findings*, *render a legal decision*, *in the first instance*, as to whether or not a constitutional violation of some kind has occurred."

State v. Faulk, 256 N.C. App. 255, 263, 807 S.E.2d 623, 629 (2017) (emphasis added) (quoting *State v. Baskins*, 247 N.C. App. 603, 610, 786

2. Defendant actually raises this argument as an argument in the alternative should we reject his other arguments. For our purposes, however, we first review whether the trial court made a conclusion of law adequate for appellate review before reaching Defendant's more substantive arguments.

S.E.2d 94, 99 (2016) (citations and quotation marks omitted)). Here, however, the trial court made generally unchallenged Findings of Fact and "based on those findings" did "render a legal decision." *Id.* Indeed, in *State v. Aguilar*, we recently concluded a substantively identical conclusion of law was reviewable, particularly when taken in context of the findings of fact and prior trial court proceedings, "because the trial court here explained that probable cause supported the search based upon the totality of the circumstances in the findings." *State v. Aguilar*, 2022-NCCOA-903, ¶ 28, 882 S.E.2d 411, 423. Here, the trial court was tasked with ultimately determining whether law enforcement officers had probable cause to search the vehicle as a result of a valid dog-sniff. This is clear from the trial court's Findings of Fact as well as the proceedings reflected in the hearing transcript. While additional conclusions outlining the analytical steps undertaken by the trial court would certainly be more helpful in our review, here, we are able to discern the basis of the trial court's ruling and conduct our review.

Relatedly, Defendant further argues the trial court's Conclusion of Law constitutes a misapprehension or misapplication of the law, because—Defendant asserts—the real issue is not whether the dog-sniff provided probable cause to search the vehicle without a warrant but rather whether the dog-sniff itself was permissible as part of the traffic stop. As such, Defendant contends the trial court erred in applying a "probable cause" legal standard in its Conclusion rather than analyzing whether the dog-sniff occurred during the original mission of the traffic stop or was otherwise supported by reasonable suspicion of other criminal activity under *U.S. v. Rodriguez*.[3] While we agree with Defendant that the underlying issue is whether the dog-sniff—which led to the warrantless search—was validly conducted in the course of the traffic stop, we disagree the trial court's Conclusion of Law reflects a misapprehension of law.

To the contrary, the ultimate question for the trial court was whether there was probable cause to conduct the warrantless search of the vehicle primarily based on the positive alert from the dog-sniff, which necessarily required the trial court to first consider the validity of

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3. For its part, the State contends there was probable cause to initiate the search based on the totality of the circumstances including a tip from a confidential, reliable informant, knowledge of the firearm in the vehicle, and knowledge of Defendant's prior criminal history. None of these circumstances, however, are supported by the trial court's Findings. To the contrary, the trial court expressly made no findings about the reliability of the informant; the officers conducting the search were not aware of the firearm until after the search; and there is no finding regarding Defendant's prior history.

the dog-sniff.[4] Nevertheless, "[a]ssuming arguendo that the trial court's reasoning for denying defendant's motion to suppress was incorrect, we are not required on this basis alone to determine that the ruling was erroneous." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (citing *State v. Gardner*, 316 N.C. 605, 342 S.E.2d 872 (1986)). "A correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." *Id.* (citing *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957)). "The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence." *Id.*

Ultimately, Defendant argues the trial court's Findings cannot support a determination the dog-sniff was validly conducted during the traffic stop consistent with Fourth Amendment jurisprudence. Specifically, pointing to *Rodriguez*, Defendant contends the Findings—and in the absence of any finding of reasonable suspicion of other criminal activity—do not support a conclusion the dog-sniff was conducted prior to the completion of the original mission of the stop. As such, Defendant asserts the trial court's denial of the Motion to Suppress should be reversed and the trial court's Judgment vacated.

The Fourth Amendment of the Constitution provides the right of the people to be secure in their persons and protects citizens from unreasonable searches and seizures. U.S. Const. amend. IV.; *see also* N.C. Const. art. I, § 20; *State v. Garner*, 331 N.C. 491, 506-07, 417 S.E.2d 502, 510 (1992). These protections apply to "seizures of the person, including brief investigatory detentions such as those involved in the stopping of a vehicle." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994) (citation omitted). "Thus, a traffic stop is subject to the reasonableness requirement of the Fourth Amendment." *State v. Reed*, 373 N.C. 498, 507, 838 S.E.2d 414, 421-22 (2020). "A traffic stop may become 'unlawful if it is prolonged beyond the time reasonably required to complete [its] mission.' " *Id.* at 508, 838 S.E.2d at 422 (alteration in original) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 837, 160 L. Ed. 2d 842, 846 (2005)).

In *Rodriguez*, the Supreme Court of the United States clarified:

> [a] seizure for a traffic violation justifies a police investigation of that violation. . . . [T]he tolerable duration of police

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4. In the absence of a valid dog-sniff, the trial court may well have determined there was no probable cause to perform a warrantless search of the vehicle on the facts before it.

> inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop, and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.

575 U.S. 348, 354, 135 S.Ct. 1609, 1614, 191 L. Ed. 2d 492, 498 (2015) (citations and quotation marks omitted).

However, the *Rodriguez* Court also acknowledged: "the Fourth Amendment tolerated certain unrelated investigations that did not lengthen the roadside detention." *Id.* Nevertheless, a traffic stop " 'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a warning ticket." *Id.* (quoting *Caballes*, 543 U.S. at 407, 125 S.Ct. at 837). "The seizure remains lawful only 'so long as [unrelated] inquiries do not measurably extend the duration of the stop.' " *Id.* at 355, 135 S.Ct. at 1615 (quoting *Arizona v. Johnson*, 555 U.S. 323, 333, 129 S.Ct. 781, 788, 172 L. Ed. 2d 694, 704 (2009)). "An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.*

Applying *Rodriguez*, the North Carolina Supreme Court recognizes: "Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to [the traffic] stop." *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017) (citation and quotation marks omitted) (alteration in original). "These inquiries include checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* (citation and quotation marks omitted). "In addition, 'an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely[,]' " including conducting criminal history checks. *Id.* at 258, 805 S.E.2d at 673-74 (citations omitted). Officer safety "stems from the mission of the traffic stop"; thus, "time devoted to officer safety is time that is reasonably required to complete that mission." *Id.* at 262, 805 S.E.2d at 676. "On-scene investigation into other crimes, however, detours from that mission." *Rodriguez*, 575 U.S. at 356, 135 S.Ct. at 1616. Moreover, "traffic stops remain[ ] lawful only so long as [unrelated] inquiries do not *measurably* extend the duration of the stop." *Bullock*, 370 N.C. at 262,

805 S.E.2d at 676 (alterations and emphasis in original) (citation and quotation marks omitted).

Relevant to this case, this Court, applying *Rodriguez*, has recognized: "The [*Rodriguez*] Court specifically held that the performance of a dog sniff is not a type of check which is related to an officer's traffic mission." *State v. Warren*, 242 N.C. App. 496, 499, 775 S.E.2d 362, 365 (2015), *aff'd per curiam*, 368 N.C. 756, 782 S.E.2d 509 (2016). "Therefore, under *Rodriguez*, an officer who lawfully stops a vehicle for a traffic violation but who otherwise does not have reasonable suspicion that any crime is afoot beyond a traffic violation may execute a dog sniff only if the check does not prolong the traffic stop." *Id.* Indeed, the United States Supreme Court had previously concluded "conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not." *Caballes*, 543 U.S. at 408, 125 S.Ct. at 837.

In this case, the trial court's Findings demonstrate the dog-sniff was undertaken prior to the completion of the mission of the traffic stop. In particular, the trial court found:

> 11. That Santiago noticed Ms. Little sitting in the driver's seat of the Ford Edge when he and Lamb[e] arrived on scene. He then spoke to Cox, and Cox informed Santiago he was writing Ms. Little a warning ticket and he was going to get Ms. Little out of the vehicle to explain the warning ticket to her.
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> 12. When Cox got Ms. Little out of the vehicle, Santiago asked Lamb[e] to get [D]efendant out of the vehicle due to Santiago readying to deploy Lizzy. While Cox and Ms. Little were in front of Cox's patrol vehicle, Santiago deployed Lizzy to complete an open air sniff around the vehicle.
>
> 13. That although Cox asked Ms. Little a question about whether she had anything in the vehicle he needed to know about after he returned her driver's license and registration and gave her the warning ticket, this open air sniff around the vehicle started simultaneously to Cox asking Ms. Little to exit her vehicle and explaining the warning ticket to her.

Crucially, these Findings tend to establish the dog-sniff was undertaken during the process of Cox explaining the warning ticket to Ms. Little and

prior to Cox asking the question potentially unrelated to the mission of the stop. As such, the trial court's Findings support a determination the traffic stop was not prolonged by, or for, the dog-sniff.

Thus, the trial court's Findings support a determination the dog-sniff which led to the search of the vehicle was validly conducted during the time reasonably required to complete the mission of the traffic stop. *See Rodriguez*, 575 U.S. at 354, 135 S.Ct. at 1609. Therefore, the trial court properly concluded "Based upon a totality of the circumstances"—including the validly conducted dog-sniff—"the Defendant's [M]otion to [S]uppress should be denied." Consequently, the trial court did not err in denying Defendant's Motion to Suppress.

Conclusion

Accordingly, for the foregoing reasons, we affirm both the trial court's Order denying the Motion to Suppress and the Judgment entered upon Defendant's *Alford* plea.

AFFIRMED.

Judges ZACHARY and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
JAMARKUS MESHAWN SMITH, DEFENDANT

No. COA22-880

Filed 18 July 2023

1. Homicide—murder by torture—child victim—acts constituting torture—starvation—physical and sexual abuse

The State presented substantial evidence in a prosecution for first-degree murder by torture from which a jury could conclude that defendant committed acts of torture upon his minor daughter by engaging in a pattern of the same or similar acts over a period of time that inflicted pain and suffering seemingly for the purpose of punishment, including that, after the victim had been in the sole care of defendant for nine months while the victim's mother was deployed overseas, the victim lost a significant amount of weight and had no appetite and, after her mother returned, was withdrawn and would almost never eat in defendant's presence. Further,

defendant beat the victim with his hands and belt and withheld water as punishment for her failure to eat, and, when the victim was taken to a hospital the day before she died, her body showed signs of prolonged and recent physical and sexual abuse in addition to severe malnutrition.

2. Homicide—murder by torture—proximate cause—child victim—pattern of abuse—starvation—pneumonia

The State presented substantial evidence in a prosecution for first-degree murder by torture from which a jury could conclude that defendant proximately caused his minor daughter's death and that her death was reasonably foreseeable based on the facts where, despite defendant's argument that the victim's death from pneumonia aggravated by starvation was unrelated to his conduct and instead resulted from new and independent causes, the evidence showed a causal chain between defendant's extended pattern of physical and sexual abuse and the victim's loss of appetite, starvation, and extremely weakened condition that led to her contracting pneumonia, and ultimately dying.

3. Evidence—expert testimony—murder by torture—child victim—cause of death

In a trial for first-degree murder by torture of a child victim and related sexual offenses, there was no plain error in the admission of testimony from two expert witnesses—the deputy chief medical examiner who conducted the autopsy of the victim and a developmental and forensic pediatrician who gave testimony on fatal child maltreatment and sexual abuse—on the issue of the victim's cause of death. Although both experts made comments related to what defendant's intentions were when he committed his abusive acts against the victim, the experts' beliefs and opinions were sufficiently based on the evidence before them. Further, even if the testimony had been excluded, the jury likely would have reached the same result given the weight of the evidence of defendant's guilt.

Appeal by defendant from judgment entered 2 August 2021 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 23 May 2023.

Marilyn G. Ozer, for defendant-appellant.

Attorney General Joshua H. Stein, by Sherri Horner Lawrence, Special Deputy Attorney General, for the State.

FLOOD, Judge.

Defendant appeals from a jury verdict finding him guilty of, *inter alia*, first-degree murder on the basis of torture. Defendant contends the trial court erred when it (1) denied his motion to dismiss on the basis that proximate cause could not be proven by the State's evidence and (2) admitted testimony from two of the State's experts. We disagree and hold the trial court did not err.

I. Factual and Procedural Background

The Record tends to show the following facts: On 19 April 2012, J.S.[1] was born to Octavia Bennet-Smith ("Ms. Smith") and Jamarkus Smith ("Defendant"). In May 2014, Ms. Smith, a then-active-duty member of the military, was deployed overseas for nine months, leaving J.S. in the exclusive care of Defendant. Prior to Ms. Smith's deployment, J.S. was a perfectly healthy, chubby baby who would eat any food put in front of her, but upon Ms. Smith's return from deployment on 15 February 2015, she discovered that J.S. was "really tiny, skinny, skinny." Ms. Smith also found J.S. would only eat when encouraged, but she would do so in a very "slow" manner and almost never when she was around Defendant. Neither Defendant nor Ms. Smith took J.S. to the doctor, despite her diminishing physical state.

In the months following Ms. Smith's return from deployment, J.S.'s physical state continued to diminish, and she showed little sign of an appetite except when encouraged to eat by her mother; even then, she ate slowly. Ms. Smith bought several weight-gain supplements for J.S. in an effort to help her reach a healthy weight. While Ms. Smith was at work, Defendant would tell her that he sat with J.S. while she ate, but J.S. still showed no sign of gaining any weight.

In the summer of 2015, J.S. went on a family vacation for a week with Ms. Smith's sister. Ms. Smith and Defendant did not attend the family vacation. When J.S. returned from the trip, Ms. Smith observed that she was "happier" and "had more of an appetite" after her time away from Defendant. Upon return home, however, J.S.'s health began to decline once again. Despite encouragement from Ms. Smith, J.S. rarely ate. When J.S. refused to eat, Defendant regularly resorted to violent disciplinary measures, such as beating J.S. with his belt or hands. In some instances, Defendant would force J.S. to perform pushups, run

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1. A pseudonym is used in accordance with N.C. R. App. P. 42(b)(3).

sprints, and climb up and down a high chair as punishment for her lack of appetite.

By September 2015, J.S. had lost what weight and energy she had gained on vacation, and was "smaller . . . more withdrawn[,] and . . . just not the same." J.S. was "playful," "chatty," and "talkative" when around Ms. Smith, but would become closed off when Defendant was nearby. Defendant told Ms. Smith he believed this was because J.S. saw him as the "disciplinarian," while Ms. Smith was the "playful" parent. By November 2015, J.S. was even smaller, and, while she was playful with Ms. Smith, J.S. would not "interact" with Defendant. Defendant would also only willingly engage with J.S. when asked to by Ms. Smith such as when she was "sleepy" after work and would ask Defendant to "take" J.S. By this time, J.S. was also observed as having less control over her bladder and bowels; Ms. Smith noted that J.S. would no longer tell anyone she had to "go potty" and would soil herself wherever she was sitting. Defendant would spank J.S. as punishment for these accidents.

30 November 2015

On 30 November 2015, Ms. Smith returned home from work to find J.S. in a chair watching television with Defendant. When Ms. Smith greeted J.S., J.S. got up and slowly moved towards Ms. Smith. Defendant, seeking to discipline J.S. for her slow movement, "grabbed [J.S.] by her arm . . . and . . . popped [J.S.] on the behind" with his belt. The force of Defendant's blow caused J.S. to pitch and fall forwards, but since Defendant was holding her wrist, J.S. could not extend her arm to prevent her fall. She fell and hit her face into the floor, prompting a nosebleed.

Later that night, while the family was eating dinner together, J.S. hardly ate and complained of being thirsty. Ms. Smith proceeded to fill a "coke bottle" with water for J.S. Defendant, however, objected, claiming that he and Ms. Smith should not reward J.S. for being disobedient by not eating. Defendant proceeded to beat J.S. with his belt to discipline her.

The next morning, Ms. Smith went to work where she received texts from Defendant asking her why J.S. was "walking funny." Defendant later called Ms. Smith, exclaiming that "something's wrong with [J.S.][;] I think she's dying." Ms. Smith immediately left work and arrived home to find J.S. unconscious and naked from the waist down while Defendant frantically splashed water onto her face in an effort to revive her. As the two attempted to resuscitate J.S., Ms. Smith also noticed a bruise on J.S.'s inner thigh. Ms. Smith questioned Defendant about it who, when pressed, yelled "I got to get to South Carolina, my mama going to protect

me." Upon entering the ambulance, Ms. Smith asked the emergency technician to "perform a kit . . . a sexual assault kit on [J.S.]."

Admittance to the Hospital and Death

J.S. was admitted to the hospital with a body temperature of merely 88 degrees; generally, a healthy body temperature for a child of J.S.'s age is 97.4 degrees. J.S.'s emergency care team observed that since J.S.'s body had "no muscle mass [and] no subcutaneous fat," it was virtually impossible for her to retain body heat. J.S.'s body mass index "was around 12" meaning she was "so profoundly underweight that it was not surprising that she might not survive." As J.S.'s care team struggled to save her life and bring her core temperature up, they noticed a series of injuries that seemed indicative of a pattern of "physical and sexual" abuse. This included "large chronic and acute tearing of [J.S.'s] anus," with visualization of the intestines and active bleeding, and "extensive bruising" on her "labia and . . . inner thighs." Further, J.S.'s hips appeared to be "chronically forced outward" such that the emergency personnel "could not get them to go straight." J.S. had contusions across her entire body and hemorrhaging under the skin on her limbs and torso, as well as a periosteal hemorrhage in the skull.

Ultimately, J.S. was pronounced dead at 11:11 a.m. on 1 December 2015. Her cause of death was reported as "acute and organizing bilateral bronchopneumonia in the setting of malnutrition, neglect and sexual abuse." J.S.'s autopsy did not reveal any bacteria or pathogen that could have caused pneumonia. Instead, the attending physician identified atelectasis—the inability to properly breathe deeply—as the cause of the pneumonia. Atelectasis may develop in malnourished children because their bodies become "so weak" that they cannot properly draw breath.

Trial and Expert Testimony

The Fayetteville Police Department arrested Defendant on 1 December 2015 based on their belief that he had committed assault resulting in serious physical injury on a minor; committed a "lewd and lascivious act" upon J.S., a minor; and "killed J.S. with malice aforethought." A Cumberland County Grand Jury indicted Defendant on 13 March 2017 for first-degree murder, felony child abuse inflicting serious physical injury, felonious child abuse-sexual act upon a child, taking indecent liberties with a child, and two counts of sexual offenses against a child by an adult.

At trial, Dr. Timothy Hartzog ("Dr. Hartzog"), the emergency physician who led J.S.'s care team, provided testimony regarding his observations of J.S.'s injuries and condition while she was in the hospital. He first

noted that, upon her admission to the hospital, J.S. looked "extremely ill, had the markings of a child that was extremely malnourished, [and] ha[d] been subjected to abuse, physical[] and sexual." Dr. Hartzog considered J.S.'s lack of muscle mass and subcutaneous fat as indicative of a pattern of "malnutrition," and explained that her body lacked the ability to retain heat as a result. Dr. Hartzog stated that, in his expert opinion, the active bleeding on J.S.'s anus at the time of her admission evidenced some sort of traumatic event that happened mere "hours before [the] visit." He further testified that J.S.'s inability to lie with her legs straight was most likely the result of something that "chronically forced [J.S.'s] hips apart and wide to get access to her perineum."

The State elicited testimony from two more experts: Dr. Kimberly Janssen ("Dr. Janssen"), the deputy chief medical examiner who performed J.S.'s autopsy, and Dr. Sharon Cooper ("Dr. Cooper"), a developmental and forensic pediatrician who offered expert testimony on fatal child maltreatment and sexual abuse. Though both witnesses testified regarding the nature of J.S.'s death, neither of them had pretrial access to the investigative reports; they had access only to the autopsy report. Defendant did not object to the testimony of either of these expert witnesses at trial.

During her testimony, Dr. Janssen testified extensively about the autopsy she performed, before summarizing her findings and concluding that J.S.'s cause of death was "acute and organizing bronchopneumonia," and that "malnutrition contribute[d] to the death" because a healthy child could have fought off a pneumonia infection. She further stated that "the abuse [and] neglect in this case raises [] the manner to the level of homicide."

Dr. Cooper testified that when a child is "emaciated and malnourished" in the way that J.S. appeared, their mistreatment must be the product of "more than neglect," and that the mistreatment must have been a "willful" act. Dr. Cooper testified at length about the nature of the injuries indicated in the evidence: J.S.'s head and hands were disproportionate to the rest of her body; J.S.'s contusions and cuts did not seem consistent injuries typical of a fall; J.S.'s body was covered in contusions consistent with chronic and severe blunt force trauma; and J.S. had bruising all over her genitalia. Dr. Cooper stated that, in some of the worst situations, children may begin to starve in response to psychological trauma from abuse. Finally, Dr. Cooper echoed Dr. Janssen's findings and, based on her examination of the medical evidence, identified starvation and malnutrition as J.S.'s cause of death. On cross-examination, Dr. Cooper admitted she had access only to the medical records and

autopsy report, and she had not been provided information about Defendant and Ms. Smith's efforts to get J.S. to gain weight.

At the close of the State's evidence, Defendant moved to dismiss the charge of first-degree murder by torture, alleging that the State's evidence did not adequately show "Defendant had . . . intentionally withheld food or hydration sufficient to cause death," meaning that Defendant could not have proximately caused J.S.'s death. The trial court denied Defendant's motion, and a jury subsequently found Defendant guilty of felonious child abuse inflicting a physical injury, felonious child abuse by committing a sexual act, indecent liberties with a child, two counts of statutory rape, and first-degree murder on the basis of torture. Defendant was sentenced to life in prison without parole for the conviction of first-degree murder and to an additional prison sentence of 300 to 420 months at the expiration of his life-sentence for the sexual offenses.

Defendant timely appealed from the trial court's rejection of his motion to dismiss the first-degree murder charge.

II. Jurisdiction

An appeal lies of right directly to this court from any final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Analysis

On appeal, Defendant argues the trial court erred by (1) denying his motion to dismiss, alleging the State's evidence did not sufficiently indicate that Defendant's conduct was the proximate cause of J.S.'s death, and (2) impermissibly allowing testimony from the State's expert witnesses. For the reasons stated below, we disagree and conclude there was no error.

A. Defendant's Motion to Dismiss

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citations and internal quotation marks omitted).

2. Substantial evidence regarding Defendant's torture of J.S.

[1] In reviewing Defendant's motion to dismiss the charge of first-degree murder by torture, we begin by examining whether Defendant's conduct was torture. We hold that it was.

"Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence of (1) each essential element of the offense charged . . . and (2) of [the] defendant's being the perpetrator of such an offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

"First-degree murder by torture requires the State to prove that the accused intentionally tortured the victim and that such torture was a proximate cause of the victim's death." *State v. Pierce*, 346 N.C. 471, 492, 488 S.E.2d 576, 588 (1997) (citation and internal quotation marks omitted). Our Supreme Court defines torture as "the course of conduct by one or more persons which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure." *State v. Anderson*, 346 N.C. 158, 161, 484 S.E.2d 543, 545 (1997) (citation omitted). Said course of conduct is "the pattern of the same or similar acts, repeated over a period of time, however short, which establish[es] that there existed in the mind of the defendant a plan, scheme, system, or design to inflict cruel suffering upon another." *Id.* at 161, 484 S.E.2d at 545. "The presence or absence of premeditation, deliberation, and specific intent to kill is irrelevant in determining whether the evidence is sufficient for first-degree murder by torture." *State v. Lee*, 348 N.C. 474, 489, 501 S.E.2d 334, 344 (1998) (citation and internal quotation marks omitted).

Here, several facts were presented that "a reasonable mind might accept as adequate to support" the conclusion that Defendant tortured J.S. *See Smith*, 300 N.C. at 78, 265 S.E.2d at 169. For example, the Record demonstrates that, at some point after Ms. Smith deployed, J.S., while in the sole care of Defendant, lost her appetite and a significant amount of weight. Upon Ms. Smith's return, J.S. would eat slowly, but only if Ms. Smith was feeding her and hardly ever in the presence of Defendant. By this time, Defendant had begun to beat J.S. with his hands and belt, seemingly under the pretense of disciplining her for various infractions, including her lack of appetite. As punishment, Defendant forced her to exercise and would withhold water if she didn't eat. The Record further indicates that, beyond a violent and physical approach to discipline, Defendant was sexually assaulting J.S. It is probable that, combined, such psychological trauma resulting from the abuse contributed to J.S.'s malnutrition. By the time J.S. was admitted to the hospital, she had no

subcutaneous fat and was profoundly underweight. Her hips had been so chronically forced outwards that they would not lie straight, she had bruising around her genitalia, and a build-up of scar tissue and acute tearing in and around her anus. At the time she was admitted to the hospital, J.S. was also actively bleeding from her anus, which medical experts believed was indicative of penetrative trauma that had happened at most, hours before.

There is no doubt Defendant's cruel and depraved conduct constituted torture. Beating J.S. with a belt, forcing her to exercise, withholding water, and sexually assaulting her is clearly "a course of conduct . . . which intentionally inflict[ed] grievous pain and suffering upon [J.S.]," and it was seemingly done "for the purpose of punishment." *See Anderson*, 346 N.C. at 161, 484 S.E.2d at 545. Far from isolated incidents, Defendant's acts can accurately be described as a "course of conduct." *Id.* at 161, 484 S.E.2d at 545. There is clearly a "pattern of the same or similar acts, repeated over a period of time," as the evidence tends to show that Defendant regularly and commonly resorted to beating J.S., forcing her to exercise, and withholding water, and expert medical testimony at trial tends to show that the sexual abuse was chronically occurring. *See id.* at 161, 484 S.E.2d at 545. Accordingly, we hold that the State satisfied its evidentiary burden to show that Defendant's actions constituted torture. *See Lee*, 348 N.C. at 489, 501 S.E.2d at 343–44.

3. Proximate Cause

[2] Defendant contends that, even if his violent physical and sexual abuse of J.S. constituted torture, it was not the proximate cause of J.S.'s death. To support this, Defendant argues J.S. actually died of pneumonia aggravated by her state of starvation. According to Defendant, the pneumonia and starvation were "new and independent cause[s]" that were not the "result of any of [Defendant's] acts." We disagree.

The doctrine of proximate causation exists across the law as a limiting factor, designed to prevent liability from reaching too far back along a causal chain and applying to parties who cannot truly be said to be responsible for a harm done. *See, e.g., Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 1318, 117 L. Ed. 2d 532 (1992) ("Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."); *see also* W. Page Keeton et al., *Prosser and Keeton on Torts* § 41, at 264 (5th ed. 1984) ("Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.").

A proximate cause is one in,

> (1) which, in a natural and continuous sequence and unbroken by any new and independent cause, produces an injury; (2) without which the injury would not have occurred; and (3) from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed.

State v. Hall, 60 N.C. App. 450, 454–55, 299 S.E.2d 680, 683 (1983). For the purposes of proximate causation, "the act of the accused need not be the immediate cause of the death[;] [the accused] is legally accountable if the direct cause is the natural result of his criminal act." *State v. Minton*, 243 N.C. 716, 722, 68 S.E.2d 844, 848 (1952).

First, Defendant's contention that there is no causal chain connecting his torturing J.S. to her starvation and pneumonia is unsupported by the evidence. The Record indicates J.S. did not lose her appetite or struggle with eating until she was left in Defendant's sole custody for nine months. The Record further shows that when she was only around Ms. Smith, J.S. would eat, albeit slowly and with plenty of encouragement. The facts in the Record reveal that in the summer of 2015, J.S. went on a family trip without Defendant and returned happier, more energetic, and with more of an appetite. To that end, J.S. also behaved differently when away from Defendant: she was more energetic and talkative. Finally, J.S.'s pneumonia infection was not an independent cause; expert testimony indicated that atelectasis—the inability to properly breathe deeply—both caused and limited J.S.'s ability to fight off her pneumonia.

Contrary to Defendant's assertion, J.S.'s starvation was not an independent cause sufficient to break the causal chain between Defendant's torturous abuse of J.S. and her heartbreaking death. Instead, the evidence demonstrates that J.S.'s loss of appetite and subsequent starvation were the product of Defendant violently physically and sexually abusing her. The Record evidence and trial testimony illustrate a toddler who lost her appetite as a result of the psychological trauma she suffered from Defendant's abuse.

Medical evidence indicates that Defendant sexually abused J.S. for an extended period of time and that J.S. did not lose her appetite until she was left in the exclusive care of Defendant. The evidence also tends to show that J.S.'s starvation caused her pneumonia. J.S. did not develop

pneumonia from some chance encounter with a pathogen. Instead, J.S. contracted pneumonia because her body was too weak to properly draw breath as a result of her state of deathly malnourishment.

Far from being unfortunate and independent causes, J.S.'s starvation and pneumonia are the "natural result" of Defendant's "criminal act[s]" of violently and sexually abusing J.S. *See Minton*, 243 N.C. at 722, 68 S.E.2d at 848. Accordingly, there was no break in the causal chain.

Second, Defendant characterizes his treatment of J.S. as little more than "non-fatal assaults," which he could not have "reasonably foreseen" would result in J.S.'s death. Defendant's argument that J.S.'s death was not reasonably foreseeable is unsupported by the evidence or law.

We begin by noting that our inquiry is not whether Defendant could have reasonably foreseen the death, but whether a "person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed." *Hall*, 60 N.C. App. at 455, 299 S.E.2d at 683.

Here, there was a relationship between Defendant's abusive acts and J.S.'s starvation and exceedingly diminished physical state. Defendant chronically physically and sexually abused J.S., his daughter, to the point that she lost her appetite and would not eat. Her loss of appetite led to J.S. becoming dangerously malnourished and starved, a condition that subsequently led to J.S. contracting pneumonia, and ultimately dying.

A "person of ordinary prudence" would have reasonably foreseen that continuing to perpetuate a cycle of physical and sexual abuse that already seemed to be causing the victim to starve would produce an injurious result, if not death. *See id.* at 455, 299 S.E.2d at 683. J.S.'s death was the "probable" result of Defendant's abuse. *See id.* at 455, 299 S.E.2d at 683. Accordingly, we hold that J.S.'s death was foreseeable "under the facts as they existed." *See id.* at 455, 299 S.E.2d at 683.

Because J.S.'s death was the "natural result" of Defendant's "criminal act[s]" (*see Minton*, 243 N.C. at 722, 68 S.E.2d at 848), and a "person of ordinary prudence" would conclude that J.S.'s death was the "probable" result of her abuse (*see Hall*, 60 N.C. App. at 455, 299 S.E.2d at 683), J.S.'s death completed the causal chain that began with her abuse and torture at the hands of Defendant. Defendant is, therefore, properly responsible for the harm done, and, thus, we hold there was no error in the trial court's denial of Defendant's motion to dismiss. *See Williams*, 362 N.C. at 632–33, 669 S.E.2d at 319.

B. The State's Expert Testimony

[3] "[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). Normally, "the trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005). "In criminal cases, an issue that was not preserved by objection noted at trial . . . 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); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007). Plain error arises when an error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and internal quotation marks omitted).

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Under the North Carolina Rules of Evidence, an expert witness may testify if: "(1) [t]he testimony is based upon sufficient facts or data[,] (2) [t]he testimony is the product of reliable principles and methods[, and] (3) [t]he witness has applied the principles and methods reliably to the facts of the case." N.C. R. Evid. 702. "Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. R. Evid. 704.

Defendant challenges Dr. Janssen's testimony that the level of "neglect" in J.S.'s death "raises [] the manner to the level of homicide." Defendant, however, did not object or file a motion *In Limine* following Dr. Janssen's testimony. Defendant likewise challenges Dr. Cooper's testimony that the mistreatment of J.S. must have been a "willful" act, but similarly failed to object at the time of the testimony. Accordingly, Defendant did not preserve the admission of the expert testimony under Rule 702 as an issue for appellate review. *See* N.C. R. App. P. 10(a)(1). We, therefore, review the admission of the testimony for plain error and, for the reasons explored below, do not find any.

Under the plain error rule, there must first have been error committed. *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. We see no evidence in the Record that this testimony was not "based upon sufficient facts or data," or that it was not "the product of reliable principles and methods." *See* N.C. R. Evid. 702. Dr. Janssen and Dr. Cooper each testified as to their beliefs and opinions about J.S.'s death. Though they both made comments that related to Defendant's state of mind, their comments were sufficiently based on the facts and evidence before them.

If error was committed, however, then under the plain error rule this Court considers whether "absent the error, the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. In this case, the jury probably would have reached the same verdict even without the challenged testimony. Dr. Janssen and Dr. Cooper merely testified that, based on the evidence before them, J.S.'s starvation and death did not appear consistent with a death solely caused by neglect. There is no evidence that the jury misunderstood the testimony and instead thought that the two experts were testifying as to Defendant's actual mental state. As we have previously explained, it does not matter whether Defendant intentionally starved J.S., as the starvation was clearly the product of Defendant's intentional abuse and was obviously made worse by Defendant's continued actions.

Accordingly, even if the trial court had excluded Dr. Janssen and Dr. Cooper's testimony, the jury probably would have reached the same result given the sheer weight of the evidence. As such, we affirm the trial court's order. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

V. Conclusion

After careful review, we conclude: the trial court did not err when it denied Defendant's motion to dismiss, as the State's evidence amply supported proximate causation of the child's death, and the trial court properly admitted the testimony of expert witnesses. For the foregoing reasons, we affirm the trial court's rulings and the jury verdict.

NO ERROR.

Judges HAMPSON and RIGGS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 18 July 2023)

BLIZZARD v. JOYNER No. 23-43	Pasquotank (20CVD370)	Affirmed
IN RE A.G.L. No. 22-891	Watauga (20JT41)	Affirmed
IN RE A.L.C.H. No. 22-1061	Iredell (20JT141)	Affirmed
IN RE D.P. No. 22-809	Rutherford (21JA119)	Affirmed
IN RE D.W. No. 22-849	Watauga (19JT53)	Affirmed
IN RE E.J-K. No. 22-861	Guilford (21JA402) (21JA403) (21JA404)	Affirmed
MANZOEILLO v. PULTEGROUP, INC. No. 21-722	Durham (21CVS2278)	Reversed in Part; Affirmed in Part
MENDEZ v. MENDEZ No. 22-647	Catawba (20CVD1054)	Affirmed in Part, Vacated in Part, and Remanded
ROMAN CATH. DIOCESE OF BROOKLYN, N.Y. v. TIGHE No. 22-905	Mecklenburg (21CVS13272)	Affirmed
STATE v. BANKS No. 22-317	Yancey (18CRS50127) (19CRS409)	Dismissed
STATE v. BELFIELD No. 22-769	Nash (19CRS50811)	Vacated and Remanded
STATE v. BONDS No. 22-920	Pasquotank (18CRS50893)	No Error
STATE v. DOVER No. 20-362-2	Rowan (16CRS52274-75) (19CRS1637)	No Error
STATE v. HINES No. 22-824	Lenoir (14CRS51201)	Dismissed.

STATE v. MITCHELL No. 22-749	McDowell (18CRS51290)	No Error
STATE v. RASAY No. 22-908	Anson (17CRS51639) (17CRS51642) (17CRS923)	No error in part; vacated and remanded in part

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