290 N.C. App.—No. 1 Pages 1-127

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 6, 2024

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

THE COURT OF APPEALS

OF

NORTH CAROLINA

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[1] Died 25 June 2022

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COURT OF APPEALS

CASES REPORTED

FILED 1 AUGUST 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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ADVERSE POSSESSION

Easement—claim by owner of dominant tenement—mistaken belief in ownership of land—In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land containing their home (Tract 1) and backyard (Tract 2)—of which Tract 2 benefited from a 30-foot-wide appurtenant easement containing a driveway and a strip of land east of the driveway—defendants presented sufficient evidence to overcome plaintiffs' motion to dismiss defendants' counterclaim for adverse possession of the strip of land between the driveway and defendants' deeded property containing defendants' garden, brick pillar, several trees, fencing, and portions of their carports. Specifically, defendants presented a survey exhibit outlining the known and visible lines and boundaries of their purported adverse possession; they listed in their counterclaim the disputed encroachments and the dates in which the encroachments were established; and they presented their deposition to the trial court with further information. The appellate court held that where the elements of adverse possession are otherwise satisfied, the owner of a dominant tenement may adversely possess the land underlying his own easement; furthermore, a party may adversely possess land even when he mistakenly believes that he is the owner during the entirety of the prescriptive period. **Hinman v. Cornett, 30.**

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Permanency planning—guardianship—guardian's understanding of legal significance of appointment—In a permanency planning order in a neglect and dependency case in which the trial court granted guardianship of three children to their great aunt, the court's determination that the great aunt understood the legal significance of being appointed the children's guardian was supported by adequate evidence, including that the children had been living with her for three years—

during which time she provided care for them, took them to medical and dental appointments, and attended meetings with their teachers—and that, in her testimony, the great aunt stated her desire and willingness to continue providing care for the children. **In re K.B., 61.**

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Effective assistance of counsel—right to conflict-free counsel—claim prematurely asserted on direct appeal—dismissal without prejudice—In defendant's prosecution for charges arising from an attempted robbery and assault with a deadly weapon, where defense counsel spoke to one of the State's witnesses in the hallway outside of the courtroom when he observed her crying and asked whether she would like to speak with an attorney (one other than defense counsel) and was subsequently accused of misconduct by the State, the Court of Appeals dismissed—without prejudice to his right to bring a motion for appropriate relief in the trial court—defendant's claim for ineffective assistance of counsel based on the allegation that defense counsel renewed his motion to withdraw yet asked the trial court not to grant the motion. **State v. Bridges, 81.**

Effective assistance of counsel—right to conflict-free counsel—Sullivan review—notice, inquiry, and waiver—In defendant's prosecution for charges arising from an attempted robbery and an assault with a deadly weapon, there was no violation of defendant's Sixth Amendment right to conflict-free counsel where defense counsel spoke to one of the State's witnesses in the hallway outside of the courtroom when he observed her crying and asked whether she would like to speak with an attorney (one other than defense counsel) and was subsequently accused of misconduct by the State. Upon defense counsel's motion to withdraw due to the alleged conflict of interest, the trial court did not err by denying the motion because the court had notice of the potential conflicts, the court conducted an adequate inquiry into the conflicts, and defendant gave a knowing, intelligent, and voluntary waiver of the conflicts. **State v. Bridges, 81.**

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Intimidating or interfering with a witness—by attempting to bribe witness—propriety of jury instruction—In a prosecution for second-degree forcible sexual offense, where defendant called the victim from prison and offered her $1,000 before his trial, in which the victim was set to testify, the trial court properly instructed the jury on the offense of intimidating or interfering with a witness under N.C.G.S. § 14-226. Firstly, because a defendant may violate section 14-226 through bribery and

without making threats, the court was not required to instruct the jury that a conviction under section 14-226 required a threat. Secondly, the court's instruction, which followed the pattern instruction for interfering with a witness, properly conveyed the requisite intent for the offense. Thirdly, although merely offering someone $1,000 is not illegal, the court did not erroneously permit the jury to convict defendant of legal conduct where it informed the jury to convict him only if his offer of $1,000 constituted an attempt to deter the victim from testifying. Finally, the court's disjunctive instruction—that a guilty verdict required finding that defendant attempted to dissuade the victim from testifying by bribery "or" by calling the victim before trial and offering her $1,000—did not violate defendant's right to a unanimous jury verdict, because bribery and offering $1,000 are undistinguished parts of a single offense under section 14-226 rather than discrete offenses. **State v. Patton, 111.**

Intimidating or interfering with a witness—through attempted bribery—specific intent to deter testimony—sufficiency of evidence—In a prosecution for second-degree forcible sexual offense, the trial court properly denied defendant's motion to dismiss a charge of intimidating or interfering with a witness under N.C.G.S. § 14-226 where sufficient circumstantial evidence supported an inference that, when defendant called the victim from prison and offered her $1,000 before his trial, defendant was attempting to bribe the victim with the specific intent of deterring her from testifying against him in court. The State's circumstantial evidence included: the context of defendant's offer (a phone call to his known accuser with an unsolicited offer of $1,000, before trial and for no other discernible reason, is inherently suspect); defendant's attempt to disguise his identity by using another inmate's telephone account to call the victim, suggesting an improper motive; defendant's prior history of threatening and intimidating the victim in order to influence her; and the victim's own understanding of the conversation based on her history with defendant. **State v. Patton, 111.**

EASEMENTS

Appurtenant—ingress and egress—benefit to specific tract of land—overburdening—In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land containing their home (Tract 1) and backyard (Tract 2)—of which Tract 2 benefited from a 30-foot-wide appurtenant easement containing a driveway and a strip of land east of the driveway—defendants' use of the easement to access Tract 1 constituted a misuse or overburdening of the easement because the easement only benefited and allowed access to Tract 2 from the main road. **Hinman v. Cornett, 30.**

Fence—location unresolved—remand—In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land containing their home (Tract 1) and backyard (Tract 2)—of which Tract 2 benefited from a 30-foot-wide appurtenant easement containing a driveway and a strip of land east of the driveway—the issue of whether a fence erected by plaintiffs was located on defendants' property or on plaintiffs' property was remanded to the trial court because it remained unresolved. **Hinman v. Cornett, 30.**

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Electronic sweepstakes—game of chance versus game of skill—predominant factor test—Plaintiffs' operation of a game called Ocean Fish King violated the prohibition against the operation of electronic sweepstakes machines and similar games

Dispositional order—no-contact provision—not authorized by statute— After finding grounds to terminate a father's parental rights in his three children, the trial court exceeded its authority when it included a provision in its dispositional order prohibiting any future contact between the father and the children, as there are no statutory provisions authorizing a trial court to issue a no-contact order in a Chapter 7B case. **In re E.Q.B., 51.**

Grounds for termination—abandonment—failure to contact or provide for children—six-month period—The trial court properly terminated a father's parental rights in his three children on the ground of abandonment where the court found—based on clear, cogent, and convincing evidence—that the father failed to provide care, affection, financial support, and a safe and loving home for the children in the six months before the termination petition was filed. The father could not communicate with the children through their mother, with whom the children lived, after the mother started blocking his phone calls and then obtained a domestic violence protective order (DVPO) barring him from contacting her. However, the DVPO did not appear to prohibit the father from contacting his children directly. Further, the record and the court's unchallenged findings showed that the father could have communicated indirectly with the children through his aunt and that he had the ability to file a custody complaint or sign a voluntary support agreement at any time, but that the father made no effort to exercise any of those options. **In re E.Q.B., 51.**

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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ANDREA CROWELL, PLAINTIFF
v.
WILLIAM CROWELL, DEFENDANT

No. COA22-737

Filed 1 August 2023

Jurisdiction—subject matter—equitable distribution—order entered during pendency of appeal—issues in new order embraced in order appealed from

In an equitable distribution action, an order granting a preliminary injunction—preventing plaintiff from disposing of certain real property categorized as separate property—was vacated because the trial court lacked subject matter jurisdiction to enter the order during the pendency of plaintiff's appeal from a prior order—which required plaintiff to pay a distributive award to defendant—since the order granting the injunction addressed issues that were embraced by the prior order being appealed from. Specifically, a key issue in the pending appeal was whether the court erred in requiring plaintiff to pay the sum it awarded defendant given the collateral effect it would have on plaintiff's separate property—the same property that the court's preliminary injunction prevented plaintiff from disposing of.

Appeal by Plaintiff from order entered 9 May 2022 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 10 May 2023.

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

No brief filed for defendant-appellee.

MURPHY, Judge.

N.C.G.S. § 1-294 strips a trial court of subject matter jurisdiction to enter further orders during the pendency of an appeal if the issues in the new order are embraced by the order previously appealed from. Here, the trial court entered an order granting a preliminary injunction on behalf of Defendant during the pendency of a previous appeal that prevented Plaintiff from disposing of property.[1] However, the appropriateness of an order based on its collateral effect on that property was the primary issue in the second appeal; thus, the current order contains issues embraced by the order previously appealed from, and the trial court lacked subject matter jurisdiction to enter it.

BACKGROUND

This is the third appeal in a protracted litigation involving the distribution of marital debt between Plaintiff Andrea Crowell and Defendant William Crowell. The bulk of the relevant facts were recounted in the previous appeal:

> Plaintiff and Defendant were married on 11 July 1998, separated on 3 September 2013, and divorced in April 2015. As of the date of separation, Plaintiff and Defendant had incurred a significant amount of marital debt. On 17 February 2014, Plaintiff filed a complaint against Defendant for equitable distribution, alimony, and postseparation support. Defendant filed an answer to the complaint and included a counterclaim for equitable distribution.
>
> From 6 July 2016 to 8 July 2016, the issues of equitable distribution and alimony were tried in Mecklenburg County District Court. The parties had stipulated in the final pretrial order that 14212 Stewarts Bend Lane, 14228 Stewarts Bend Lane, and 14512 Myers Mill Lane were all Plaintiff's separate property, and the trial court distributed the properties, along with their underlying debts, to Plaintiff. The trial court also found the following:

1. On 6 June 2023, we resolved that appeal by partially vacating the trial court's equitable distribution judgment and order because the trial court improperly reduced the distributive award to a money judgment. *Crowell v. Crowell*, COA22-111, 289 N.C. App. 112, 888 S.E.2d 227, 231. However, we rejected Plaintiff's argument that the award's collateral effect on her separate property violated the law of the case. *Id.* at 230.

> As a result of this equitable distribution Defendant[] will have more debt than property and Plaintiff[] will have to liquidate her property to pay the distributive award. . . . Neither party has any liquid marital property left. . . . There was no choice but to distribute all the debts to Defendant[] in his case which results in a heavy burden he may never be able to pay before his death and a distributive award owed by Plaintiff[] that she may never be able to pay before her death.

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

Pursuant to our Supreme Court's holding, the trial court held a hearing on 10 February 2021; and, on 16 July 2021,

the trial court issued an *Amended Equitable Distribution Judgment and Alimony Order*. The trial court concluded "Plaintiff[] has the ability to pay the distributive award as outlined herein[,]" incorporated the bulk of the 2016 order by reference, and entered the following distribution order:

> 1. Paragraph 6 (a) – (d) of the Decretal Section of the Original Order is hereby amended as follows:
>
> In order to accomplish the equitable distribution, Plaintiff[] is required to pay a distributive award of Eight Hundred Sixteen Thousand Seven Hundred Ninety-Four Dollars and no/100 ($816,794[.00]) to be paid as follows:
>
> > a. A lump [sum] payment of Ninety Thousand Dollars and no/100 ($90,000[.00]) within sixty (60) days from [10 February 2021].
> >
> > b. A second lump [sum] payment of One Hundred Thousand Dollars and no/100 ($100,000[.00]) within ninety (90) days of [20 February 2021].
> >
> > c. A third lump [sum] payment of Two Hundred Ten Thousand Dollars and no/100 ($210,000[.00]) on or before [10 February 2022].
> >
> > d. The balance of Four Hundred Twenty-Four Thousand Two Hundred Ninety-Four Dollars and no/100 ([$424,294.00]) owed is reduced to judgment and shall be taxed with post judgment interest and collected in accordance with North Carolina law.
>
> 2. Except as specifically modified herein, the parties' separate property, marital property, and divisible property shall remain as it was previously classified, valued, and distributed in the [15 August 2016 order].
>
> 3. Except as specifically modified herein, the [15 August 2016 order] shall remain in full force and effect.

(Marks omitted.) Plaintiff timely appealed.

Crowell v. Crowell, 289 N.C. App. 112, 113–15 (2023).

On 3 November 2021, during the pendency of the second appeal, Defendant filed a motion to enjoin Plaintiff from hiding or disposing of property which, if relinquished, would prevent her from complying with her obligations under the trial court's *Amended Equitable Distribution Judgment and Alimony Order*. In an order entered the same day, the trial court granted the motion, making, *inter alia*, the following findings of fact:

> 12. On June 25, 2021, Plaintiff[] sold the 14212 Stewarts Bend [Lane] property for approximately $600,000.[00.]
>
> 13. On July 16, 2021, this Court entered an [*Amended Equitable Distribution Judgment and Alimony Order*]. Said order provided, in part, for Plaintiff[] to pay [the amount specified above].
>
> 14. Despite having the cash to do so (after surreptitiously selling the real property), Plaintiff[] has not made a single payment owed to Defendant[.]
>
> 15. On August 13, 2021, Plaintiff[] filed a Notice of Appeal to the Amended Order. This appeal has no legal merit and was filed only to thwart [Defendant's] ability to collect the monies he has been rightfully owed for three (3) years.
>
> 16. Plaintiff[] is strategically avoiding paying her distributive award and is doing so in bad faith.
>
> 17. The Court has a legitimate concern that Plaintiff[] is taking purposeful actions to make herself judgment proof and that she intends to spend all of the Sales Proceeds from the recent real property sale, that she intends to transfer, sell, or otherwise dispose of CKE Properties, LLC or its only asset, the Myers Mill House, for the purpose of secreting any assets she may have available to pay the distributive award outside of the reach of the Court and/or Defendant[.]
>
> 18. To prevent irreparable harm to Defendant[] the Court has the remedy pursuant to [N.C.G.S.] § lA-1, Rule 65 to impose injunctive relief enjoining Plaintiff[] or anyone acting on her behalf from wasting these assets by enjoining

> Plaintiff[] and/or anyone acting on [her] behalf or at [her] direction from liquidating, borrowing against, cashing out, or absconding with the proceeds or ownership of received from the sale of 14212 Stewart's Bend Lane, CKE, or the Myers Mill House.
>
> 19. To prevent irreparable harm to Defendant[,] the Court has the remedy pursuant to [N.C.G.S.] § 1-440.1 to attach all of Plaintiff['s] assets pending Defendant['s] execution on the Amended Order.
>
> 20. Defendant[] has no adequate remedy at law to protect himself from Plaintiff['s] actions which will likely result in the imminent waste of assets that are necessary to satisfy Plaintiff['s] obligations to Defendant[.] If Plaintiff[] is not enjoined and/or her assets attached, she will likely be judgment proof and outside of the jurisdictional reach of the Court.

Based on these findings of fact, the trial court issued the following temporary restraining order:

> 1. The Motion in the Cause for Injunctive Relief (Temporary Restraining Order/Preliminary Injunction/Mandatory Injunction) is **GRANTED;**
>
> 2. Plaintiff[] or anyone or entity acting at her request, for her, or in concert with her from liquidating, transferring, leveraging, encumbering, selling, wasting, or otherwise dissipating a) CKE Properties, LLC; b) the Myers Mill House; and c) the Sales Proceeds from the sale of 14212 Stewart's Bend Lane.
>
> 3. This Order Re: Injunctive Relief shall expire upon the conclusion of a hearing commencing on [17 November] 2021 at 4:00 p.m. in Courtroom 8150.
>
> 4. At this day and time, Defendant['s] request for permanent injunctive relief, mandatory injunction, and attachment shall be brought on for hearing.
>
> 5. No bond shall be required.
>
> 6. The findings of fact contained herein are for purposes of this Order only and as required by Rule 65 of the North Carolina Rules of Civil Procedure and are not intended to be binding on the Court in any future proceeding.

After the 17 November 2021 hearing, the trial court orally continued the injunction until further orders, and that continuance was reduced to a written order on 6 May 2022. Plaintiff appealed.

ANALYSIS

On appeal, Plaintiff attacks the validity of the injunction on a number of bases, many of which have already been raised and resolved during prior appeals.[2] However, she also challenges the injunction on the following unique bases: first, that the trial court lacked jurisdiction to enter injunctive relief while the previous appeal was pending; second, that the preliminary injunction was improperly initiated as an independent cause of action; and, third, that the injunction was entered pursuant to improper procedure. However, as the resolution of Plaintiff's jurisdictional argument renders her other two arguments moot, we reach only that issue.

"For over a century, the Supreme Court has recognized that an appeal operates as a stay of all proceedings at the trial level as to issues that are embraced by the order appealed." *Plasman v. Decca Furniture (USA), Inc.*, 253 N.C. App. 484, 491 (2017), *disc. rev. denied*, 371 N.C. 116 (2018); *see also* N.C.G.S. § 1-294 (2022) ("When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from."). "This is [N.C.G.S. §] 1-294 in a nutshell, for the statute itself draws a distinction between trial court's inability to rule on matters that are inseparable from the pending appeal and the court's ability to proceed on matters that are not affected by the pending appeal." *Plasman*, 253 N.C. App. at 491 (marks omitted). When the trial court enters an order after an appeal is perfected, whether the trial court retains subject matter jurisdiction to enter the new order depends on whether the substantive issues in the new order "are embraced by the order [previously] appealed." *Id.*; *see also Cox v. Dine-A Mate, Inc.*, 131 N.C. App. 542, 545 (1998) (examining the substantive issues in the order at issue in a previous appeal for overlap with those in a later order allegedly entered without jurisdiction under N.C.G.S. § 1-294). "Whether a trial court has subject-matter

2. This most prominently includes her contention that the injunction violates the law of the case and arguments derivative of that position appearing throughout her brief, which was a topic in her second appeal. *Crowell*, 888 S.E.2d at 230.

jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511 (2010).

In *Romulus v. Romulus*, 216 N.C. App. 28 (2011), we resolved an issue regarding a similar operation of N.C.G.S. § 1-294. There, we held that a trial court theoretically retains jurisdiction to enter orders securing the enforcement of an equitable distribution judgment while an appeal is pending because, under N.C.G.S. § 1-289, the execution of an equitable distribution judgment is not stayed by the perfection of an appeal. *Id.* at 37 ("[A]n equitable distribution distributive award is theoretically a 'judgment directing the payment of money' which is enforceable during the pendency of an appeal unless the appealing spouse posts a bond pursuant to N.C.G.S. § 1–289[.]"); *see also* N.C.G.S. § 1-289 ("If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, as set forth in this section."). However, under the facts of that case, we nonetheless held that the trial court was without subject matter jurisdiction to enter a contempt order directing the payment of past-due amounts because the issue of which amounts, if any, were due was embraced by the pending appeal. *Romulus*, 216 N.C. App. at 37 ("[T]he trial court does not have jurisdiction after notice of appeal is given to determine the amount of periodic payments which have come due and remain unpaid during the pendency of the appeal and to reduce that sum to an enforceable judgment.").

Here, the pending appeal concerned an *Amended Equitable Distribution Judgment and Alimony Order*—reproduced in pertinent part above—specifically with respect to whether the order complied with the law of the case and whether the trial court was authorized to reduce the distributive award to a money judgment. *Crowell*, 2023 WL 3829196 at *2-4. As in *Romulus*, the fact that the *Amended Equitable Distribution Judgment and Alimony Order* is a "judgment directing the payment of money" under N.C.G.S. § 1-289 "theoretically" permits the trial court to act in a manner that ensures Plaintiff's compliance. *Romulus*, 216 N.C. App. at 37. However, one of the two issues in the previous appeal concerned whether the trial court was authorized in requiring Plaintiff to pay the sum it awarded Defendant because of the collateral effect on Plaintiff's separate real property. *Crowell*, 2023 WL 3829196 at *2-3.

That real property is, in part, the very property affected by the injunction at issue in this case. Thus, the injunction concerns issues "embraced by the order [previously] appealed[,]" and the trial court was therefore without jurisdiction to enter it during the pendency of the that

appeal. *Plasman*, 253 N.C. App. at 491. As it acted without subject matter jurisdiction, we vacate the trial court's order.[3] *Romulus*, 216 N.C. App. at 38.

CONCLUSION

Pursuant to N.C.G.S. § 1-294, the trial court lacked subject matter jurisdiction to enter an injunction on Defendant's behalf. Accordingly, we vacate the trial court's order.

VACATED.

Judges GORE and FLOOD concur.

3. We further note that, to the extent the injunction thwarted any attempt by Plaintiff to dispose of her assets to avoid her obligations to Defendant, Defendant may retain a viable remedy for any such actions under the Uniform Voidable Transactions Act. *See* N.C.G.S. § 39-23.1 *et seq.* (2022); *see also* N.C.G.S. § 50-16.7 (2022) ("A dependent spouse for whose benefit an order for the payment of alimony or postseparation support has been entered shall be a creditor within the meaning of Article 3A of Chapter 39 of the General Statutes pertaining to voidable transactions."); *Crowell v. Crowell*, 257 N.C. App. 264, 287 (2018) (Murphy, J., concurring in part and dissenting in part) ("The Majority goes to great length to illustrate that the transfers fall within the UFTA, and I agree with the analysis contained therein, but the Majority does not cite a single case where a transfer was rescinded without the transferee being a party to the litigation. By requiring non-parties to act and effectively rescind the transfers, the trial court has permanently barred CKE and Kirby from raising any defenses or protections they may have under N.C.G.S. §§ 39-23.8 (2015) or 39-23.9(3) (2015)."), *rev'd and remanded*, 372 N.C. 362 (2019).

FUN ARCADE, LLC, AND BARRACUDA VENTURES, LLC, PLAINTIFFS
v.
CITY OF HICKORY, THURMAN WHISNANT, HICKORY CHIEF OF POLICE, IN HIS OFFICIAL CAPACITY, CITY OF CONOVER, ERIC LOFTIN, CHIEF OF POLICE, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA22-557

Filed 1 August 2023

1. Gambling—electronic sweepstakes—game of chance versus game of skill—predominant factor test

Plaintiffs' operation of a game called Ocean Fish King violated the prohibition against the operation of electronic sweepstakes machines and similar games of chance (N.C.G.S. § 14-306.4) because—although some measure of dexterity was required to operate the joystick to aim and shoot at the game's sea creatures—the game was primarily one of chance, as players could not strategically optimize a favorable return on credits.

2. Civil Procedure—brief in support of motion for summary judgment—timely service

In an action involving the state's prohibition against the operation of electronic sweepstakes machines and similar games of chance (N.C.G.S. § 14-306.4), where defendants' brief in support of their motion for summary judgment was timely served on the Thursday before the summary judgment hearing that was scheduled for the following Monday—in compliance with Civil Procedure Rule 5(a1), which requires service at least two days before the scheduled hearing—the trial court did not abuse its discretion in denying plaintiffs' motion to continue the hearing.

Appeal by Plaintiffs from an order entered 15 March 2022 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 25 January 2023.

Posch Law Firm, by Gregory A. Posch, and Trapp Law PLLC, by Jonathan W. Trapp, for Plaintiffs-Appellants.

Cranfill Sumner LLP, by Steven A. Bader, Patrick H. Flanagan, Martin & Monroe Pannell, P.A., by Monroe Pannell, and Young, Morphis, Bach & Taylor, LLP, by Paul E. Culpepper, for Defendants-Appellees.

WOOD, Judge.

Section 14-306.4 of our General Statutes outlaws the operation of electronic sweepstakes machines and similar games of chance. We are tasked in this appeal with determining whether the controversial game Ocean Fish King has been caught up in the broad net of our state's sweepstakes prohibition.

I. Background

Fun Arcade, LLC, and Barracuda Adventures, LLC, (together "Plaintiffs") own several businesses that host certain gaming machines in this state. Plaintiffs' facilities allow players to buy gaming e-credits at kiosks and select to play from a host of electronic games. Players can exchange their gaming e-credits for cash value at a sales counter. The games available include titles such as Cop the Lot, Amigos Gold, Super Diamond Deluxe, Wheel of Riches, and Ocean Fish King. The game Ocean Fish King is the subject of this appeal.

In August 2018, the cities of Hickory and Conover and their respective Police Chiefs, Thurman Whisnant and Eric Loftin, (altogether "Defendants") sought to enforce against Plaintiffs this state's prohibition of slot machines and, later, electronic sweepstakes machines for their operation of Ocean Fish King and similar games.

Upon notice of Defendants' intent to enforce the prohibition, Plaintiffs filed a complaint for a declaratory judgment, a temporary restraining order, and a temporary and permanent injunction against Defendants on 20 September 2018 in Catawba County Superior Court. Defendants filed Answers to the complaint in December 2018.

On 14 March 2019, Defendants filed an expert affidavit from Andrew Baran ("Baran"), a Senior Engineering Manager for Gaming Laboratories International, LLC. Baran conducted an analysis of Ocean Fish King to determine the game's configuration settings and the effect of player interactions in relation to the game's outcome. The object of Ocean Fish King is to shoot at and destroy sea creatures that move around the screen. There are many sea creatures on the screen at any given time, so it is difficult for a player to miss hitting a sea creature with a shot. During the game, each shot taken at a sea creature equates to one wager being placed. A player is allowed to choose how many credits they wish to wager on each shot fired. Once they have selected the wager, the player uses a joystick to aim and shoot at the sea creatures. After each shot fired, the player's credit balance is debited by the amount of the selected

wager. When a shot hits a sea creature, the player is awarded a credit value based on the sea creature that was destroyed.

Baran observed no pattern for the number of shots required to destroy a sea creature. For example, a sea creature requiring thirty shots to be destroyed may require only five shots to be destroyed at a later point in the game. By analyzing the game's software, Baran determined that there was no specific strategy or advantage that a player could learn to receive a better outcome in the game. Furthermore, the game has a measurement called the return to player calculation ("RTP"). The RTP is the ratio of money paid to play the game to the amount of money returned to the player at the end of the game. Ocean Fish King has an RTP of approximately 97% to 99%, which means that, on average, 97% to 99% of the money paid to play the game is returned to the player in cash.

Plaintiffs filed an expert affidavit from Dr. Neil Mulligan ("Mulligan"), a Professor and Director of the PhD program in Cognitive Psychology at the University of North Carolina at Chapel Hill, on 20 March 2019. Mulligan described the process of playing the game, and the way the software operated, in the same manner Baran described it. Mulligan testified that the sea creatures vary in size, movement, and value and that the number of shots needed to destroy a creature is unknown to the player. However, he contended that players could develop a skill to memorize the game's patterns over time. He reasoned that a novice player could improve with experience in terms of accuracy, selection of optimal targets, and in terms of overall score if the player repeatedly played the game. In addition, Mulligan stated that success in the game was determined by the player's dexterity, because the players are required to aim at the creatures. Using Mulligan's testimony, Plaintiffs contend Ocean Fish King is not a lottery game because it is a game of skill.

On 12 March 2021, Defendants filed a joint motion for summary judgment against Plaintiffs. The matter was held in abeyance until our Supreme Court issued its decision in *Gift Surplus v. State ex rel. Cooper*. Thereafter, Defendants noticed their motion for hearing.

Plaintiffs moved to continue the hearing alleging procedural error with the timing of Defendants' service of their motion. On 14 March 2022, the trial court denied the motion to continue the summary judgment hearing and granted Defendants' motion for summary judgment on 15 March 2022. Plaintiffs appeal as of right pursuant to N.C. Gen. Stat. § 7A-27(b)(1).

II. Standard of Review

We review a trial court's summary judgment order *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669, S.E.2d 572, 576 (2008). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted). A trial court's summary judgment order "is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. at 573, 669, S.E.2d at 576 (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "[T]he trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). "If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial." *In re Will of Jones*, 362 N.C. at 573, 669, S.E.2d at 576. "Nevertheless, '[i]f there is any question as to the weight of evidence, summary judgment should be denied.' " *Id.* at 573-74, 669 S.E.2d at 576 (quoting *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999)).

A trial court's denial of a motion to continue is reviewed for abuse of discretion. *Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873 (2001). "The moving party has the burden of proof of showing sufficient grounds to justify a continuance." *Id.*

III. Discussion

On appeal, Plaintiffs first argue the trial court erred when it granted Defendant's motion for summary judgment regarding Ocean Fish King, as the court identified it as a prohibited gaming machine despite expert opinion to the contrary. Plaintiffs also argue the trial court erred when it denied Plaintiffs' motion to continue the summary judgment hearing. Plaintiffs contend that Defendants' service of briefs in support of their motion was untimely. For the reasons outlined below, we affirm the trial court's rulings.

A. Summary Judgment Order

[1] It is generally unlawful "to operate, or place into operation, an electronic machine or device to . . . [c]onduct a sweepstakes through the use of an entertaining display." N.C. Gen. Stat. § 14-306.4(b)(1) (2022). "Sweepstakes," in this sense, is defined as "any game, advertising

scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, *the determination of which is based upon chance*." *Id.* § 14-306.4(a)(5) (emphasis added).

Applying this prohibition, we are informed by our Supreme Court's recent decision in *Gift Surplus, LLC v. State ex rel. Cooper*, 380 N.C. 1, 868 S.E.2d 20 (2022). There, the court emphasized that a determination as to whether an electronic game violates the prohibition turns on whether the game is one of chance or one of skill. *Gift Surplus*, 380 N.C. at 10, 868 S.E.2d at 26. The court defined games of chance and skill consistent with a common understanding of the terms.

> A game of chance is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance . . . A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory.

Id. (quoting *Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty.*, 236 N.C. App. 340, 368, 762 S.E.2d 666, 685 (2014) (Ervin, J., dissenting)). In determining whether a game is one of chance or one of skill, the court re-affirmed the use of a predominant-factor test. *Id.* This test asks if chance or skill " 'is the dominating element that determines the result of the game, to be found from the facts of each kind of game,' or, 'to speak alternatively, whether . . . the element of chance is present in such a manner as to thwart the exercise of skill or judgment.' " *Id.* (quoting *Sandhill*, 236 N.C. App. at 368, 762 S.E.2d at 685 (Ervin, J., dissenting)). We must therefore decide if, "viewed in its entirety, the results produced by that equipment in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance or the extent of the player's skill and dexterity." *Id.*, 380 N.C. at 10, 868 S.E.2d at 27 (quoting *Crazie Overstock Promotions, LLC v. State*, 377 N.C. 391, 403, 858 S.E.2d 581, 589 (2021)).

Plaintiffs first argue the trial court erred in granting Defendants' summary judgment motion because material issues of fact remained as to whether Ocean Fish King is a game of chance or skill. Plaintiffs point to conflicting expert opinion to support this argument.

Defendants' expert testified in his affidavit that he believed Ocean Fish King operates predominantly as a game of chance, in which a game's outcome is predetermined from a formula programed into the

game. Conversely, Plaintiffs' expert testified that the game is one of skill and highlighted the hand-eye coordination, weapon selection, visual recognition, and other considerations necessary to succeed at the game.

Plaintiffs, however, do not disagree with Defendants as to how the game is played. Both acknowledge, for example, that players must use controllers to aim weapons at a screen full of fish, shoot the fish with these weapons, and receive points as a result of destroying the fish. "[W]hether chance or skill predominates in a given game is a mixed question of fact and law and is therefore reviewed de novo when there is no factual dispute about how a game is played." *Id.* at 11, 868 S.E.2d at 27. Thus, though the experts disagree as to whether the game is predominantly one of skill or chance, the trial court did not err in its determination when there is no dispute as to how the game actually is played.

Plaintiffs next argue that the trial court otherwise erred in determining that chance predominates over skill with Ocean Fish King, claiming that the trial court improperly applied the predominant-factor test. To the contrary, the court properly considered the uncontested means of play when it determined that Ocean Fish King is predominantly a game of chance.

As explained, the reviewing court must consider whether the game's outcome "varies primarily with the vagaries of chance or the extent of the player's skill and dexterity." *Id.* at 12, 868 S.E.2d at 28 (quoting *Crazie Overstock*, 377 N.C. at 403, 858 S.E.2d at 589). Using this test, or variances of it, our Supreme Court concluded that bowling is predominantly a game of skill, *State v. Gupton*, 30 N.C. (8 Ired.) 271, 275 (1848), whereas poker is predominantly a game of chance, *Collins Coin Music Co. v. N.C. Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 409, 451 S.E.2d 306, 309 (1994). Again, *Gift Surplus* instructs. There, our Supreme Court held a game resembling a slot machine, but which featured "double-nudging" and always paid out some winnings, violated the electronic sweepstakes prohibition. *Gift Surplus*, 380 N.C. at 15, 868 S.E.2d at 30. Players could only slightly influence the game's outcome. *Id.* It concluded, even if a player were to become more skilled, "chance would always predominate because, when chance determines the relative winnings for which a player is able to play, chance 'can override or thwart the exercise of skill.' " *Id.*, at 14, 868 S.E.2d at 29 (quoting *Sandhill*, 236 N.C. App. at 369, 762 S.E.2d at 685).

In the present case, Ocean Fish King players use digital weapons, controlled with a joystick, to shoot projectiles at sea creatures as they appear on the display screen. The screen is crowded with fish. Each fish

requires a set amount of hits to destroy. The player does not know how many hits are required to destroy a given fish, and similar looking fish do not necessarily require the same number of hits every game.

Applying the predominant-factor test here, we likewise hold that Ocean Fish King is predominantly a game of chance. Though players must have some measure of dexterity to use the joystick, a player cannot know beforehand how many hits are necessary to destroy fish and, thus, cannot strategically optimize a favorable return on credits. Since a player wins credits proportional to the number and type of fish destroyed, this game is predominantly one of chance, and any "skill and dexterity involved is essentially *de minimis*." *Id.* at 14, 868 S.E.2d at 29.

This is true though the game, at first glance, appears less like a Vegas-styled slot machine and more like a classic arcade game, where multiple players feverishly compete with each other for the winning score. Yet, appearance is not controlling. "The Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited." *Id.* (quoting *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 290, 749 S.E.2d 429, 431 (2012)). The trial court did not err when it granted summary judgment in favor of Defendants.

B. Continuance

[2] Plaintiffs next argue the trial court improperly denied their motion to continue the summary judgment hearing because Plaintiffs did not timely receive service of Defendants' brief in support of their motion. Plaintiffs argue that Defendants should have served their brief on Wednesday, 9 March 2022 instead of Thursday, 10 March 2022, because the hearing was scheduled for the following Monday, 14 March 2022.

Rule 5(a1) of the North Carolina Rules of Civil Procedure states that briefs must be served at least two days before the scheduled hearing on the motion. N.C. Gen. Stat. § 1A-1, Rule 5(a1) (2022). If the brief is not served on the opposing party at least two days before the hearing on the motion, the court may "continue the matter for a reasonable period" to allow the opposing party to respond to the brief. *Id.* Rule 6(a) states that the day of the hearing is included in the two-day window, as long as it is not a Saturday, Sunday, or legal holiday. § 1A-1, Rule 6(a).

This Court contemplated Plaintiffs' argument in *Harrold v. Dowd*, 149 N.C. App. 777, 786-87, 561 S.E.2d 914, 921 (2002). There, a brief was served upon opposing counsel on a Thursday when the hearing was scheduled for the following Monday. *Id.* The court determined that the service was proper under Rule 5(a1). *Id.* Likewise, we conclude Defendants' brief was timely served. Plaintiffs' argument is without merit.

IV. Conclusion

Defendants timely served their brief in support of their motion for summary judgment prior to the hearing. The trial court did not abuse its discretion in denying Plaintiffs' motion to continue the hearing. Because N.C. Gen. Stat. § 14-306.4 outlaws the operation of electronic sweepstakes machines and similar games of chance, Plaintiffs' operation of Ocean Fish King violated the prohibition against electronic sweepstakes machines. We therefore affirm the trial court's order granting Defendants' motion for summary judgment.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

GREASEOUTLET.COM, LLC, PLAINTIFF
v.
MK SOUTH II, LLC, DEFENDANT

No. COA22-648

Filed 1 August 2023

Landlord and Tenant—commercial lease—option to renew—unrecorded lease amendment—subsequent purchaser—not subject to leasehold interest

The trial court did not err by dismissing an action brought by a tenant (plaintiff) against its current landlord (defendant) to enforce a commercial lease amendment (agreed upon by the prior landlord, which gave plaintiff an option to renew its lease for another five-year term) where plaintiff's complaint failed to allege sufficient facts to show that defendant acquired its fee simple interest in the property subject to plaintiff's leasehold interest. Although a memorandum containing the option to renew was recorded, no new memorandum was recorded after the actual amendment was signed four months later; therefore, the memorandum was insufficient to bind future purchasers to the amendment's terms beyond the end of the original lease term. Further, defendant was not estopped from refusing to honor the option to renew because the deed conveying the property did not contain any language stating that defendant was taking subject to the unregistered lease amendment, and there was no basis for reformation of the deed where plaintiff did not assert that a term

had been left out by mutual mistake. Finally, neither the estoppel certificate provided to defendant during due diligence nor defendant's later acceptance of plaintiff's rent check (for a period of time beyond the end of the original lease) were sufficient bases for binding defendant to the renewal option.

Appeal by plaintiff from order entered 24 February 2022 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 22 February 2023.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Gary S. Parsons and Sarah M. Saint, for Plaintiff-Appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Scott A. Miskimon and Jang H. Jo, for Defendant-Appellee.

DILLON, Judge.

Plaintiff appeals from an order granting Defendant's motion to dismiss all claims alleged in Plaintiff's complaint pursuant to Rule 12(b)(6). We affirm.

I. Standard of Review

We review a trial court's dismissal pursuant to Rule 12(b)(6) *de novo*, deciding whether the allegations of the complaint, treated as true, state a claim upon which relief can be granted. *Sykes v. Health Network*, 372 N.C. 326, 332, 828 S.E.2d 467, 471 (2019). Dismissal under Rule 12(b)(6) is proper when the complaint on its face reveals either that no law supports the plaintiff's claim, the absence of facts sufficient to make a good claim, or some fact that necessarily defeats the plaintiff's claim. *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

II. Background

This appeal concerns a dispute between a landlord and its tenant over whether the landlord must honor the commercial lease amendment entered into by the tenant with the landlord's predecessor in title, including a provision granting the tenant options to renew. The allegations in Plaintiff's amended complaint show as follows:

Plaintiff Greaseoutlet.com, LLC, ("Tenant") operates an environmentally sensitive business, processing grease trap effluent generated by restaurants. To operate its business, Tenant must obtain certain permitting from the State.

In the Spring of 2016, Tenant entered into an agreement (the "Lease") to lease certain industrial property in Raleigh (the "Property") from the Property's then-owner ("Former Owner") for a term of five years, to expire on 30 April 2021. In August 2016, a memorandum executed by Former Owner that outlined certain Lease provisions, including that the term was for five years, was recorded in the Wake County Registry.

Four months later, in December 2016, Tenant and Former Owner entered an agreement amending certain provisions of the Lease (the "Amendment"). This Amendment contained a provision granting Tenant the option to renew the Lease term past 30 April 2021 for two successive five-year terms. However, no new memorandum regarding this Amendment was recorded in the Wake County Registry.

In December 2018, Tenant secured the necessary State permit to continue operating its business on the Property through 30 April 2021, coinciding with the original Lease term. As part of Tenant's permit application, Former Owner signed a landlord authorization form required by the State to issue the permit.

A year later, in December 2019, Former Owner sold the Property to Defendant MK South II, LLC, ("Current Owner"). Current Owner purchased the Property with plans to combine it with other properties for future redevelopment. Prior to purchasing the Property, Current Owner conducted due diligence. During the due diligence period, Current Owner received a copy of the Lease and of the Amendment. Also, during the due diligence period, Tenant signed a tenant estoppel certificate (the "Estoppel Certificate") directed to Current Owner, acknowledging, among other things, that it was currently a tenant under a lease, that neither it nor Former Owner were in default, and that it had not prepaid any rent to Former Owner.

In early 2020, Current Owner told Tenant that Tenant needed to vacate the Property at the end of the current five-year term, ending in April 2021. Tenant essentially responded that it would be too expensive to move its business.

In August 2020, Tenant notified Current Owner that it was exercising its option (as contained in the unregistered Amendment) to renew the lease for a new five-year term, to begin on 1 May 2021. In October 2020, Tenant sent a check, prepaying the rent for all of 2021, which included rent for the last four months of the initial term and the first eight months of the new term. Current Owner deposited the check. During this time, however, Current Owner was working towards gaining approvals to repurpose its assembled tracts, including the Property,

for redevelopment, gaining rezoning approval in December 2020. Also, in November 2020, when Tenant asked Current Owner to sign a new landlord authorization required as part of Tenant's application with the State to renew Tenant's permit to operate its business beyond April 2021, Current Owner refused to sign. Instead, the parties discussed an extension of Tenant's leasehold beyond April 2021. In January 2021, Current Owner notified Tenant it would sign the landlord authorization required for Tenant's permit renewal and agree to allow Tenant to extend its leasehold for five years (through April 2026) *if* Tenant agreed that Landlord could unilaterally terminate the Lease after two years into the renewal term (April 2023). Tenant refused this offer.

In March 2021, Current Owner notified Tenant that it did not consider itself bound by the Amendment and that Tenant's leasehold would terminate at the end of the next month (30 April 2021). Current Owner sent a check to reimburse Tenant for the prepaid rent for the last eight months of 2021. Tenant has not deposited or otherwise accepted this reimbursement. Rather, Tenant attempted to exercise its option to renew the Lease term as contained in the Amendment. However, Current Owner refused to honor Tenant's option as contained in the Amendment.

Tenant commenced this action against Current Owner, alleging six claims based on Current Owner's actions and inactions regarding the Lease and Amendment, including its failure to honor Tenant's right to renew the lease term.

In February 2022, after a hearing on the matter, the trial court granted Current Owner's Rule 12(b)(6) motion to dismiss Tenant's claims. Tenant appeals.

III. Analysis

Tenant's arguments on appeal turn on whether Current Owner's fee simple interest is subject to Tenant's leasehold interests beyond April 2021.

Specifically, in the Spring of 2016, Tenant acquired a leasehold interest in the Property ending in April 2021 when Former Owner executed the Lease. In December 2021, Tenant acquired a new interest in the Property, specifically the option to extend its leasehold beyond April 2021 for two five-year terms when Former Owner executed the Amendment.[1]

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1. Whether the options to renew granted to Tenant in the Memorandum was supported by consideration from Tenant is not before us. *See, e.g.*, *Barnes v. Saleeby*, 177 N.C.

Three years later, in December 2019, Current Owner acquired a fee simple interest in the Property when Former Owner executed a deed conveying the same to Current Owner. This deed did not contain any language stating that Current Owner's fee simple interest was subject to Tenant's leasehold interest. However, though Current Owner's deed was immediately registered, Current Owner concedes its fee simple interest was subject to Tenant's leasehold interest through April 2021, based on the prior recorded Memorandum. On appeal, Tenant makes several arguments as to why Current Owner's fee simple interest is also subject to its leasehold renewal interest, which we address in turn.

A. Connor Act

Tenant argues that Current Owner's interest is subject to its leasehold renewal interest contained in the Amendment because the registered Memorandum complied with the Connor Act in providing record notice of the Amendment, notwithstanding that the Memorandum was filed four months prior to the date of the Amendment. For the reasoning below, we disagree.

Prior to 1829, North Carolina was essentially a notice state, such that any "unregistered incumbrance would be upheld . . . against a subsequent registered incumbrance or conveyance with notice of the former[.]" *Robinson v. Willoughby*, 70 N.C. 358, 363 (1874). In 1829, our General Assembly passed the predecessor to Section 47-20, declaring "no deed in trust or mortgage . . . shall be valid at law to pass any property as against creditors and purchasers for a valuable consideration." *Id.* Accordingly, the interest of a subsequent purchaser for value of property is not subject to a prior, unregistered mortgage against that property, even if the subsequent purchaser had full knowledge of the prior, unregistered mortgage. *Id.* at 364 ("[N]o notice, however full or formal, will supply the want of registration."). The 1829 Act, however, only applied to unregistered mortgages and deeds of trust; North Carolina remained a notice state with respect to other prior, unregistered interests. *Id.*

In 1885, with the passage of the Connor Act, now codified as N.C. Gen. Stat. § 47-18, our General Assembly made North Carolina a "pure race" state with respect to most other real estate interests. *See DOT v. Humphries*, 347 N.C. 649, 657, 496 S.E.2d 563, 567 (1998) (describing North Carolina as a " 'pure race' state"). The Connor Act was named

256, 260, 98 S.E. 708, 710 (1919) ("An option *in the original lease* to renew would not be without consideration, but a promise *during the lease [term]* to give the tenant such option [without separate consideration] is without consideration[.]" (Emphasis added.)).

for its sponsor, Senator Henry Groves Connor[2], later a member of our Supreme Court. While serving on our Supreme Court, Justice Connor explained that the purpose of the Act was to make land titles more certain:

> The purpose of the statute was to enable purchasers to rely with safety upon the examination of the records, and act upon the assurance that, as against all persons claiming under the "donor, bargainor, or lessor," what did not appear did not exist. That hardship would come to some in applying the rigid statutory rule was well known and duly considered. . . .
>
> The change in our registration laws was demanded by the distressing uncertainty into which the title to land had fallen in this State. . . .
>
> If the [holder of an unrecorded interest] has sustained injury [because his interest with the prior owner should have been recorded], it is to be regretted, but it is not the fault of the law. Its protective provisions are clear and explicit. To permit him to disregard it at the expense of the [subsequent purchaser] who has obeyed it would be to seriously impair the value of the statute and return to many of the evils which its enactment sought to remove.

Wood v. Tinsley, 138 N.C. 507, 515, 51 S.E. 59, 62 (1905). Accordingly, as with unregistered deeds of trust and mortgages under the 1829 Act, the Connor Act affirms the principle that "[a]ctual knowledge, however full and formal, of a grantee in a registered deed of a prior unregistered deed or [long-term] lease will not defeat his title as a purchaser for value in the absence of fraud or matters creating estoppel." *Bourne v. Lay & Co.*, 264 N.C. 33, 35, 140 S.E.2d 769, 771 (1965).

The Connor Act does not require all leasehold interests to be registered in order to have priority over the interests of a subsequent purchaser for value. Rather, the Connor Act only requires a leasehold interest for more than three years to be registered. N.C. Gen. Stat. § 47-18(a) (Connor Act applies to a "lease of land for more than three years"). *See Perkins v. Langdon*, 237 N.C. 159, 165-66, 74 S.E.2d 634, 640

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2. In referring to the Connor Act, our Supreme Court and our Court have occasionally misspelled the Senator's name when referring to the Act, as "Conner". *See, e.g.*, *DOT v. Humphries*, 347 N.C. 649, 654, 496 S.E.2d 563, 566 (1998); *Hornets Nest v. Cannon*, 79 N.C. App. 187, 193, 339 S.E.2d 26, 30 (1986). The authoring judge here recently used both spellings to refer to the Act in the same paragraph of an opinion. *Benson v. Prevost*, 277 N.C. App. 405, 417, 861 S.E.2d 343, 351 (2021).

(1953) (purchaser takes subject to short-term lease when it had knowledge of the lease or if circumstances put the purchaser on inquiry notice regarding the lease's existence).

For instance, in *Bourne*, our Supreme Court held that purchasers with actual knowledge of an existing five-year lease were not bound by its terms, including the term granting the tenant an option to renew its leasehold for five years, where the lease was not registered. *Bourne*, 264 N.C. at 35, 140 S.E.2d at 771 (recognizing "[a] lease for more than three years must, to be enforceable, be in writing, and to protect it against creditors or subsequent purchasers for value, the lease must be recorded"). The Court explained in a later case that a new owner of real estate was not bound by the existing tenant's unregistered lease containing options to renew for five years:

> [Plaintiff] recorded her deed [in 1979], and the defendant recorded its options to renew the lease [in 1980]. It is well settled in this state that only actual prior recordation of an interest in land will serve to put a bona fide purchaser for value or a lien creditor on notice of an intervening interest or encumbrance on real property. Because defendant's lease was not recorded prior to the date on which plaintiff recorded her deed, plaintiff did not take the deed subject to the lease. Therefore, [she] is entitled to possession, and summary judgment on the issue of ejectment should have been entered for the plaintiff.

Simmons v. Quick-Stop, 307 N.C. 33, 42, 296 S.E.2d 275, 281 (1982).[3]

It is sufficient under the Connor Act to register a memorandum, rather than the actual lease, so long as the memorandum recites the lease's key terms sufficient to put the world on record notice the extent of tenant's leasehold interest. N.C. Gen. Stat. § 47-118(a) (2021). Tenant contends that the Memorandum recorded four months before Former Owner executed the Amendment granting Tenant options to renew its leasehold beyond April 2021, nonetheless, satisfied the Connor Act with respect to the Amendment since the Memorandum refers to any subsequent amendments to the Lease, stating in relevant part:

---

3. Our Court, likewise, has also recognized that a purchaser for value is not bound by an existing long-term lease that is not recorded. *New Bar v. Martin*, 221 N.C. App. 302, 316, 729 S.E.2d 675, 687-88 (2012) (purchaser with actual knowledge of an existing long-term unrecorded lease is not bound by its terms); *Purchase Nursery v. Edgerton*, 153 N.C. App. 156, 161, 568 S.E.2d 904, 907 (2002) (stating that a lease with a term of more than three years "must be recorded to be valid against a lien creditor or a third party purchaser value[.]").

> This Memorandum of Lease . . . is of that certain Lease Agreement dated March 12, 2016 . . . by and between [Tenant and the Former Owner].
>
> . . . [Former Owner has leased] to Tenant [the Property] for a term that began on May 1, 2016 and continues until April 30, 2021, unless sooner terminated in accordance with the terms of the Lease.
>
> The provisions set for the in the Lease and *any amendments entered into by the parties subsequent to this Memorandum* between [the Current Owner] and Tenant are hereby incorporated into this Memorandum by reference.
>
> . . . Upon the expiration of the state[d] Lease term, this Memorandum shall automatically terminate.

(Emphasis added.)

We, however, conclude this Memorandum is insufficient to bind Current Owner beyond the initial term ending in April 2021. Our General Assembly requires that a memorandum of lease *shall* state the term of the lease, *including extensions/renewals*:

> (a) A lease of land . . . may be registered by registering a memorandum thereof which shall set forth:
>
> * * *
>
> (3) The term of the lease, including extensions, renewals options to purchase, if any;
>
> * * *
>
> (b) If the provisions of the lease make it impossible or impractical to state the maximum period of the lease because of conditions, renewals and extensions, or otherwise, then the memorandum of the lease shall state in detail all provisions concerning the term of the lease as fully as set forth in the written lease agreement between the parties.

N.C. Gen. Stat. § 47-118(a)-(b).

Section 47-118 provides a form that may be used when drafting a memorandum to be recorded, *see* N.C. Gen. Stat. § 47-118(a), but also allows for other forms to be used, provided they "are sufficient in law[,]" *see* N.C. Gen. Stat. § 47-117(a) (2021).

The recorded Memorandum in this case states the term of Tenant's leasehold interest expires on "April 30, 2021, unless sooner terminated in accordance with the terms of the Lease" and that "[u]pon the expiration of the *state[d] Lease term*, this Memorandum shall automatically terminate." (Emphasis added.) To protect its leasehold rights in the Property beyond April 2021 against subsequent recorded interests, Tenant should have caused a new memorandum to be registered. But it did not. The Memorandum recorded was not in a form "sufficient in law" to subject future purchasers to its leasehold interest beyond April 2021, as contained in the Amendment.

B. Estoppel

Tenant argues that, even if the Memorandum was not sufficient under the Connor Act to protect its leasehold interests beyond April 2021, it has sufficiently alleged facts to support its contention that Current Owner is estopped from not honoring Tenant's said interests. Specifically, Tenant notes its allegation that "[o]n information and belief, the [written] purchase and sales contract . . . required [Current Owner] to assume all lease obligations owed to any tenants at the Property[.]" As explained more fully below, we conclude Tenant's estoppel fails because Tenant has not alleged that Current Owner's deed from Former Owner stated that Current Owner was taking subject to Tenant's unregistered leasehold interest beyond April 2021 or facts showing that the deed should be reformed to include such language.

Our Supreme Court has stated that "matters creating estoppel" may bind a subsequent purchaser to the terms of an existing, unrecorded [long-term] lease." *Bourne*, 264 N.C. at 35, 140 S.E.2d at 771. However, "matters of estoppel" refers to situations where a subsequent purchaser accepts a deed from the seller which contains language the purchaser is taking subject to an existing, unrecorded interest:

> When a grantee accepts the conveyance of real property subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by the grantor, he takes the estate burdened by such claim or interest. By his acceptance of the deed, he ratifies the unrecorded instrument, agrees to stand seized subject thereto, and estops himself from asserting its invalidity.

Dulin v. Williams, 239 N.C. 33, 40, 79 S.E.2d 213, 218 (1953) (quoting *State Trust Co. v. Braznell*, 227 N.C. 211, 215, 41 S.E.2d 744, 747 (1947)). It is not enough for the deed to merely refer to the lease; for estoppel to apply, the deed must clearly state that the purchaser is taking subject

to that lease. *See Bourne*, *supra* (our Supreme Court holding that a provision in a deed that "[t]here is a lease on the [property being conveyed] in favor of [name of tenant] which lease is for a period of 10 years" is not sufficient to subject the purchaser's interest to the tenant's leasehold interest).

Tenant, though, argues Current Owner is estopped if it is shown, as alleged, that Current Owner's *purchase contract* with Former Owner contained a provision that the property is being sold subject to the lease, notwithstanding such language was not in the deed, relying on *Braznell*, 227 N.C. at 215, 41 S.E.2d at 747. We conclude Tenant's reliance on *Braznell* is misplaced. As explained below, the Court in *Braznell* did not hold that "subject to" language in a purchase contract can trigger estoppel. Rather, *Braznell* held that estoppel may apply where it is shown that the deed is subject to reformation to include the appropriate "subject to" language, with evidence that the seller and purchaser expressly agreed such language was to be included in the deed and that the language was left out of the deed by mutual mistake.

Braznell involved the sale of a building. A bank held a 15-year leasehold interest in the building based on an unregistered lease. The owner entered an agreement to sell the building to a purchaser. At closing, the owner gave to the purchaser a deed with language that the purchaser's fee simple interest was "subject to the leases of the several tenants." The deed, however, did not expressly refer to the leasehold interest of the bank specifically which was, under our case law, insufficient to trigger estoppel. *See Braznell*, 227 N.C. at 213, 41 S.E.2d at 745-46.

The bank sued the purchaser seeking a reformation of the deed to include language stating the purchaser was taking subject to the bank's lease specifically. A jury found that the bank was entitled to this relief. The purchaser appealed.

In its opinion, our Supreme Court first noted that the bank, as a tenant, had standing to sue for reformation of the provision in the deed concerning its lease, notwithstanding the bank was not a party to the deed. *Id.* at 213, 41 S.E.2d at 745.

The Court then recognized the "subject to" language in the deed was not sufficient to protect the bank. *Id.* The Court held, however, that the evidence was sufficient to make out a case for reformation of the deed, noting the evidence showing "(1) the contract of purchase and sale was made subject to existing leases [including the lease to the bank]; (2) it was understood and agreed [by and between the seller and the purchaser] that the deed of conveyance should contain a provision fully

protecting the leasehold rights of the [bank]; and (3) this intent was inadequately expressed and a valid, enforceable provision was omitted by mutual mistake of the parties." *Id.*

In the present case, Tenant makes no allegation that the parties agreed that Former Owner was to incorporate "subject to" language into its deed to the Current Owner, but was omitted due to a mutual mistake. *See Wells Fargo v. Stocks*, 378 N.C. 342, 350, 861 S.E.2d 516, 523 (2021) (noting that where a "deed . . . fails to express the true intention of the parties, it may be reformed . . . whe[n] the failure is due to the mutual mistake of the parties[.]") Rather, Tenant merely alleges the purchase contract contained a provision that Current Owner would "assume all lease obligations owned to any tenants at the Property." Such language, alone, is not enough to make out a claim for reformation of the deed to express that Current Owner's fee simple interest was subject to Tenant's leasehold interests beyond April 2021.

C. Estoppel Certificate

Tenant next argues that Current Owner is estopped from avoiding its leasehold interest based on the Estoppel Certificate that Current Owner required Former Owner to procure from Tenant during Current Owner's due diligence. We disagree.

An estoppel certificate is a document routinely required by a purchaser of real estate to be signed by the existing tenants of the real estate being sold. When real estate is sold, any tenant "ceases to hold under the [seller]" and "becomes a tenant of [the purchaser]." *Pearce v. Gay*, 263 N.C. 449, 451, 139 S.E.2d 567, 569 (1965). As such, it is not uncommon for a purchaser, as part of its due diligence, to require each tenant to make representations regarding its lease by signing an estoppel certificate.

Here, Tenant attached the Estoppel Certificate prepared by Current Owner to its complaint. There is nothing in the Estoppel Certificate which stated that Current Owner would be subjecting its to-be-acquired fee simple interest to Tenant's existing, unregistered leasehold interests; it merely requested Tenant to acknowledge what it perceived its leasehold interest in the Property to be. We conclude that the Estoppel Certificate does not give rise to an estoppel.

Tenant, though, argues Current Owner is bound by the statement in the cover letter transmitting the Estoppel Certificate signed by Current Owner's real estate broker that the sale to Current Owner would not affect Tenant's leasehold interests. However, such language is not sufficient to create an estoppel, as Current Owner has failed to show how

it "omitted some act or changed [its] position in reliance upon the representations or conduct of [the Current Owner, which was] actual, substantial and justified." *Bourne*, 264 N.C. at 37, 140 S.E.2d at 772. Assuming the language in the cover letter was sufficient to evidence an offer by Current Owner to honor Tenant's leasehold interest, it would not be sufficient to constitute an offer or agreement to allow Tenant to extend the lease for five years beyond April 2021. Specifically, the draft Estoppel Certificate attached to the letter provided that *the landlord* must approve any lease extension. In any event, Tenant alleges it did not agree to this provision as outlined in the Estoppel Certificate.

D. Acceptance of 2021 Rent Check

Tenant next argues that Current Owner must honor Tenant's option to renew for five years beyond April 2021 because Current Owner accepted and deposited the rent check sent by Tenant in 2020 covering all of 2021, which included the first eight months of the renewal term. However, our Supreme Court held in *Bourne* that the mere acceptance of rent payments by a new owner during what would be the renewal term does not bind the subsequent purchaser to the longer renewal term outlined in an unregistered lease with a former owner:

> [A]re plaintiffs estopped [from avoiding the lease] by accepting the rent according to the terms of the lease for more than two years? The answer is . . . [a subsequent purchaser] is entitled to rents as long as [the tenant] remains in possession. Acceptance of rents by the landlord does not create a tenancy from year to year nor preclude the landlord from recovery. The receipt of money for the use of premises is not inconsistent with a demand for possession, for it has not misled the defendant nor put him to any disadvantage.

Bourne, 264 N.C. at 37, 140 S.E.2d at 772 (internal marks and citation omitted).

Here, in March 2021, Current Owner notified Tenant that it was demanding possession at the end of April 2021 more than a month prior to the end of the current term and attempted to refund any overages it had received. We conclude that Current Owner did not ratify Tenant's right to five-year renewal options by virtue of accepting rent for eight months beyond the expiration of the initial term but returning it before the renewal term began. In so concluding, we note Current Owner was entitled to part of the proceeds of the rent check, for the period up through April 2021, and returned the difference it was not entitled to. We

further note Tenant's allegations that Current Owner otherwise acted inconsistently with any understanding it was going to honor Tenant's renewal rights as contained in the Amendment, for instance, by refusing to sign the landlord authorization to extend Tenant's permit five years, by seeking and obtaining approvals in connection with its planned redevelopment, and by offering Tenant the option to renew its leasehold for two years beyond April 2021.

E. Other Claims

Because we conclude Tenant has failed to allege facts showing that Current Owner is obligated to honor the Lease and the Amendment, we conclude Tenant's other arguments, including those concerning Current Owner's refusal to sign a landlord authorization for Tenant's permit, its anticipatory repudiation of the Lease, and its unfair and deceptive trade practice claim must fail.

III. Conclusion

We conclude that the trial court did not err by dismissing Tenant's complaint. Tenant acquired valid interests in and incurred obligations to the Property based on the Lease and the Amendment executed by the Former Owner. Former Owner's sale of the Property to Current Owner did not void these interests and obligations. However, Tenant's complaint fails to allege facts showing that Current Owner's fee simple interest is subject to Tenant's leasehold interests beyond April 2021 as contained in the Amendment.

Accordingly, we affirm the trial court's order dismissing Tenant's complaint pursuant to Rule 12(b)(6) of our Rules of Civil Procedure.

AFFIRMED.

Judges MURPHY and ARROWOOD concur.

HINMAN v. CORNETT

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

WILLIAM HINMAN AND JOANNE W. HINMAN, PLAINTIFFS
v.
WADE R. CORNETT AND TERESA B. CORNETT, DEFENDANTS

No. COA22-481

Filed 1 August 2023

1. Easements—appurtenant—ingress and egress—benefit to specific tract of land—overburdening

In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land containing their home (Tract 1) and backyard (Tract 2)—of which Tract 2 benefited from a 30-foot-wide appurtenant easement containing a driveway and a strip of land east of the driveway—defendants' use of the easement to access Tract 1 constituted a misuse or overburdening of the easement because the easement only benefited and allowed access to Tract 2 from the main road.

2. Appeal and Error—preservation of issues—new theory advanced on appeal

In a property dispute between neighbors, defendant neighbors could not advance a new theory on appeal regarding a prescriptive easement; therefore, the Court of Appeals declined to consider the merits of the new argument.

3. Adverse Possession—easement—claim by owner of dominant tenement—mistaken belief in ownership of land

In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land containing their home (Tract 1) and backyard (Tract 2)—of which Tract 2 benefited from a 30-foot-wide appurtenant easement containing a driveway and a strip of land east of the driveway—defendants presented sufficient evidence to overcome plaintiffs' motion to dismiss defendants' counterclaim for adverse possession of the strip of land between the driveway and defendants' deeded property containing defendants' garden, brick pillar, several trees, fencing, and portions of their carports. Specifically, defendants presented a survey exhibit outlining the known and visible lines and boundaries of their purported adverse possession; they listed in their counterclaim the disputed encroachments and the dates in which the encroachments were established; and they presented their deposition to the trial court with further information. The appellate court held that where the elements of adverse possession are otherwise satisfied, the owner

of a dominant tenement may adversely possess the land underlying his own easement; furthermore, a party may adversely possess land even when he mistakenly believes that he is the owner during the entirety of the prescriptive period.

4. Adverse Possession—trespass claim—easement—dismissal of counterclaim

In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land containing their home (Tract 1) and backyard (Tract 2)—of which Tract 2 benefited from a 30-foot-wide appurtenant easement containing a driveway and a strip of land east of the driveway—and where the Court of Appeals held that the trial court erred in dismissing defendants' adverse possession counterclaim, the appellate court further held that, in light of that holding, the trial court also erred in granting plaintiffs' motion for summary judgment on their trespass claim.

5. Easements—fence—location unresolved—remand

In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land containing their home (Tract 1) and backyard (Tract 2)—of which Tract 2 benefited from a 30-foot-wide appurtenant easement containing a driveway and a strip of land east of the driveway—the issue of whether a fence erected by plaintiffs was located on defendants' property or on plaintiffs' property was remanded to the trial court because it remained unresolved.

Judge MURPHY concurring in the result only without separate opinion.

Judge TYSON concurring in the result in part and dissenting in part.

Appeal by Defendants from an order entered 22 November 2021 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 2 November 2022.

Craige Jenkins Liipfert & Walker PLLC, by Thomas J. Doughton, for Plaintiffs-appellees.

The Dawson Law Firm PC, by Kenneth Clayton Dawson, for Defendants-appellants.

WOOD, Judge.

This is an appeal from a summary judgment order settling a property dispute between disgruntled neighbors and involves questions of the parties' property interests in an old easement. The summary judgment order granted one neighbor's trespass claim and dismissed the other neighbor's counterclaims for adverse possession and nuisance. For reasons explained below, we hold that the adverse possession counterclaim was improperly dismissed, reverse the trial court's summary judgment order, and remand the matter to the trial court for further proceedings.

I. Background

In 1983, the Cornetts, husband and wife, rented a home from Ms. Tilley before purchasing the same property in 1995. The entire property comprises several tracts of land which Ms. Tilley acquired at different times prior to conveying them to the Cornetts. For instance, the home rests on what has now been labeled Tract 1. As the diagram below shows, this square, half-acre tract abuts the main road to its north, and a driveway extends from the road along the tract's western side. Tract 2, similar in size and shape to Tract 1, comprises the Cornetts' backyard and rests behind Tract 1, to its south. The same driveway runs along this tract's western border as well. Behind and adjoining Tract 2 of the Cornetts' property lies a larger property originally owned by the Churches, a family who, by all accounts, maintained a cordial relationship with the Cornetts for the duration of their ownership. In 2019, however, the Churches sold this larger, southern property to the Hinmans, and relations between the Cornetts and these newcomers quickly soured.

Armed with a recent land survey, the Hinmans insisted the Cornetts were encroaching on the Hinmans' recently acquired property and requested that the Cornetts remove such encroachments. The survey showed that the Hinmans owned the land containing the driveway running along the western sides of Tracts 1 and 2 as well as a strip of land several feet wide running along the eastern side of the driveway and into what a casual observer might mistake for the Cornetts' land. The Hinmans identified the corridor at issue, featuring the driveway and the adjacent strip of land, as an easement conveyed by their predecessor in title to Ms. Tilley. Ms. Tilley subsequently conveyed the easement to the Cornetts when she conveyed the two tracts of land to them. Allegedly oblivious to this easement and believing that they owned the disputed corridor, the Cornetts had used the driveway to access both Tracts 1 and 2 of their property, paved and maintained the driveway, and allowed guests and others to park on the driveway. On a strip of land adjacent to the driveway, the Cornetts maintained gardens, fences, a brick column, and several trees. Also, two carports extended from the home on Tract 1 to the driveway, thus extending into the adjacent strip of land in the

corridor easement. These two carports and the other structures existed on the land prior to 2000. The brick column predated the Cornetts' ownership of the property. The Cornetts began planting trees and a garden in 1983. They added another carport and a fence in 1991 and 1992 respectively. Another carport was added in 1996. Since 1999, the Cornetts further maintained another garden, crepe myrtle trees, and a fence. The Cornetts refused to remove these alleged encroachments. The Hinmans built a fence, with a gate, along the boundary between the driveway and Tract 1 and subsequently filed suit against the Cornetts.

In their complaint, filed 23 March 2021, the Hinmans alleged trespass. The Cornetts counterclaimed, alleging that they had obtained title of the disputed corridor easement by adverse possession, that the twenty-year statute of limitations for the recovery of adversely possessed land barred the Hinmans' trespass claim, and that the Hinmans' new fence constituted a nuisance.

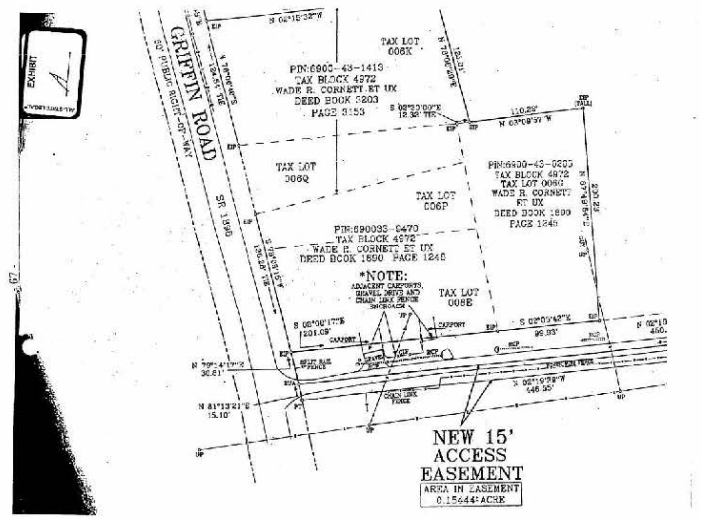
The Hinmans moved for summary judgment, filed 22 October 2021, upon their claims of trespass and requested an injunction for the removal of the alleged encroachments. The Hinmans alleged "that there is no genuine issue as to any material fact" that the Cornetts were trespassing upon their land. In support of their summary judgment motion, the Hinmans filed affidavits, including their own, and one from the land surveyor. The Cornetts responded with their own motion for summary judgment, filed 3 November 2021, requesting the trial court grant them title to the strip of land in the corridor easement between the driveway and the Cornetts' property. They also requested the trial court hold that the Hinmans' trespass claim was barred by the applicable twenty-year statute of limitations and contested the Hinmans' construction of a "nuisance fence."

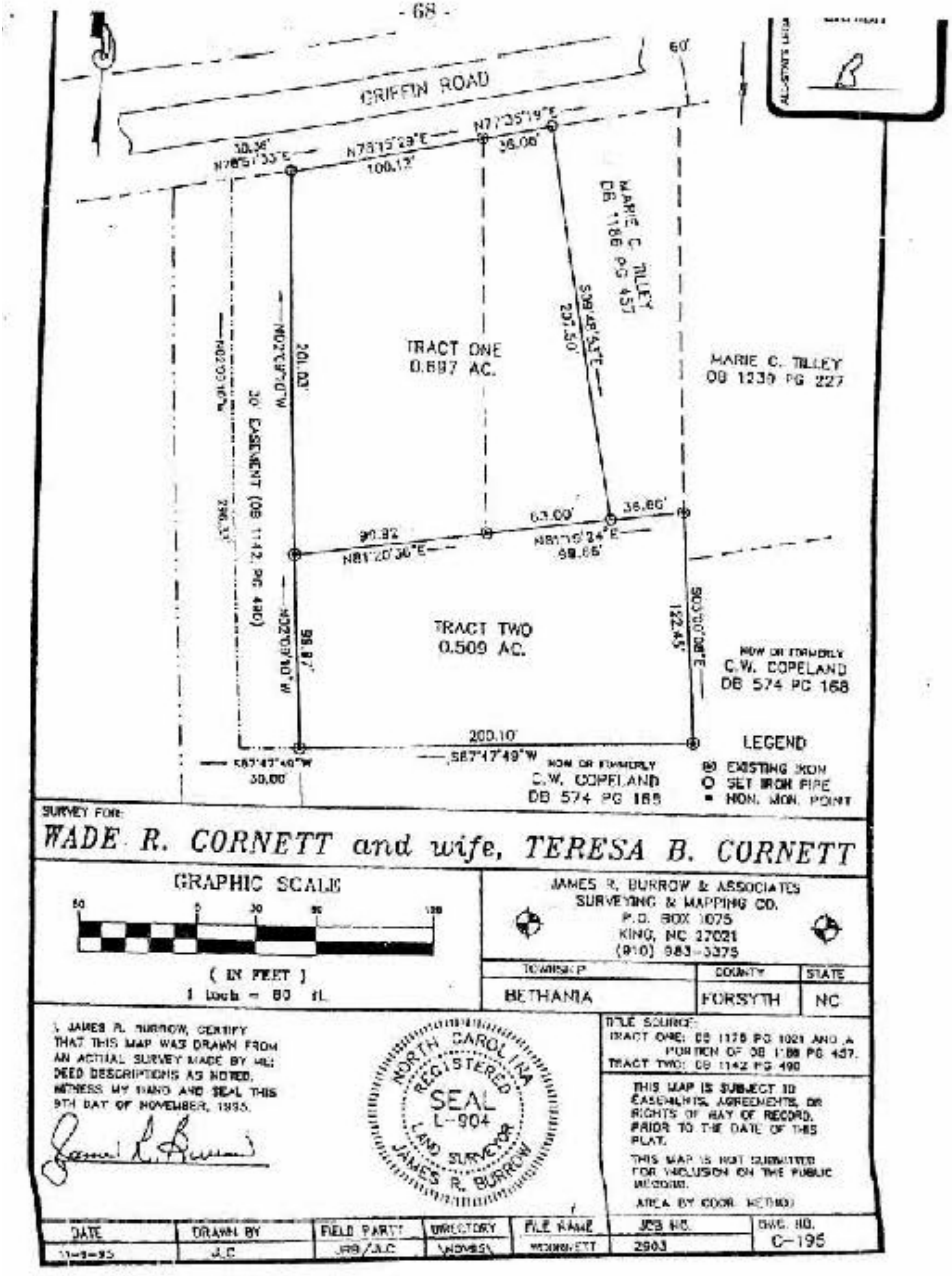
After a 9 November 2021 hearing on the matter, the trial court granted the Hinmans' motion and dismissed the Cornetts' counterclaims in a summary judgment order filed 22 November 2021. The order states:

> [S]ummary judgment is granted in favor of plaintiffs against defendants on all claims asserted by the plaintiffs and that defendants counterclaims are dismissed with prejudice and that defendants are further ordered to remove all structures, within 15 days of the date of this order, that are encroaching on Plaintiffs' property including the portion of Plaintiffs two carports that are located on Plaintiffs property, the split rail fence, the lion statue, chain link fence and post, a brick column and the concrete base to the smaller carport. Attached hereto as Exhibit A

is a survey that shows the encroachments and Exhibit B which shows tracts 1 and 2 of Defendants property. It is further ordered that the recorded easement as set out in Book 1890 Pages 1245-1247 of the Forsyth County Register of Deed [sic] is on land owned by the Plaintiffs and the easement only applies to tract 2 as set out in Book 1890 page 1247 and shown on Exhibit B. Thus, the Defendants may only use the 30-foot recorded easement to access tract 2. Defendants may not use the recorded easement to access tract 1 which includes but is not limited to accessing their current carports. In addition, Defendants cannot use the area in the recorded easement to park vehicles on or to allow third parties to park vehicles or delivery vehicles on. In addition, Defendants may not drive on or otherwise use the paved driveway to the West of their property which is outside the 30-foot recorded easement. Defendants may use the portion of the paved driveway that is contained within the 30-foot recorded easement but only to access tract 2 of their property. Finally, the fence as built by the Plaintiffs along the eastern boundary of the 30-foot easement is legal under North Carolina law and may remain and that the cost of this action be taxed against the Defendants.

Attached to the order are two survey exhibits of the same properties, which are convenient for our demonstrative purposes here:




- 68 -
GRIFFIN ROAD
60'
N78°15'29"E
100.12'
36.00'
N77°35'19"E
MARIE C. TILLEY
DB 1186 PG 457
S09°48'43"E
237.50'
TRACT ONE
0.697 AC.
MARIE C. TILLEY
DB 1339 PG 227
30' EASEMENT (DB 1142, PG 490)
N02°43'20"W
201.00'
N81°20'30"E
90.82'
63.00'
N81°15'24"E
98.65'
36.66'
TRACT TWO
0.509 AC.
S09°03'08"E
122.45'
NOW OR FORMERLY
C.W. COPELAND
DB 574 PG 168
200.10'
S87°47'49"W
30.00'
S87°47'49"W
NOW OR FORMERLY
C.W. COPELAND
DB 574 PG 168
LEGEND
EXISTING IRON
SET IRON PIPE
MON. MON. POINT
SURVEY FOR:
WADE R. CORNETT and wife, TERESA B. CORNETT
GRAPHIC SCALE
(IN FEET)
1 inch = 60 ft.
JAMES R. BURROW & ASSOCIATES
SURVEYING & MAPPING CO.
P.O. BOX 1075
KING, NC 27021
(910) 983-3375
TOWNSHIP
BETHANIA
COUNTY
FORSYTH
STATE
NC
I, JAMES R. BURROW, CERTIFY THAT THIS MAP WAS DRAWN FROM AN ACTUAL SURVEY MADE BY ME; DEED DESCRIPTIONS AS NOTED. WITNESS MY HAND AND SEAL THIS 9TH DAY OF NOVEMBER, 1995.
NORTH CAROLINA
REGISTERED
SEAL
L-904
LAND SURVEYOR
JAMES R. BURROW
TITLE SOURCE:
TRACT ONE: DB 1178 PG 1021 AND A PORTION OF DB 1188 PG 437.
TRACT TWO: DB 1142 PG 490
THIS MAP IS SUBJECT TO EASEMENTS, AGREEMENTS, OR RIGHTS OF WAY OF RECORD, PRIOR TO THE DATE OF THIS PLAT.
THIS MAP IS NOT SUBMITTED FOR INCLUSION ON THE PUBLIC RECORDS.
AREA BY COOR. METHOD
DATE
11-8-95
DRAWN BY
J.C
FIELD PARTY
RB/J.C
DIRECTORY
WDWSS\
FILE NAME
WDORNETT
JOB NO.
2903
DWG. NO.
C-195

The Cornetts appeal the order as a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b).

II. Standard of Review

A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2022). We review a trial court's summary judgment order *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)). We cannot affirm a trial court's summary judgment order if a "genuine issue as to any material fact" remains when viewed in the light most favorable to the non-moving party. *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385 (quoting N.C. R. Civ. P. 56(c)).

III. Discussion

Challenging the trial court's summary judgment order, the Cornetts argue the trial court erred when it determined that the Cornetts may not utilize the easement to access their Tract 1, failed to consider the presence of a prescriptive easement, improperly ruled on the matter of adverse possession where material facts remained contested, ordered the Cornetts to remove items alleged to have trespassed upon the Hinmans' land, and allowed the Hinmans to establish a nuisance fence. We address these issues in turn.

A. Easement to Access Tract 1

[1] We first address whether the trial court erred in granting summary judgment as to whether the Cornetts may use the driveway to access Tract 1 of their property. As explained above, the thirty-foot wide easement contains the driveway, or some part of it, and a strip of land east of the driveway. This issue concerns only the driveway and not the disputed strip of land which we discuss below.

"An easement is an interest in land" and is generally treated as a contract when deeded. *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). Easements may either be appurtenant or in gross. *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963). "An appurtenant easement is one which is attached to and passes with the dominant tenement as an appurtenance

thereof; it is owned in connection with other real estate and as an incident to such ownership." *Id.* It "is incapable of existence apart from the particular land to which it is annexed." *Id.* Because an appurtenant easement runs with the land, it "passes with the transfer of the title to the land." *Id.* at 454, 133 S.E.2d at 186. An appurtenant easement exists between the dominant tenement (the tract that benefits from the use of the easement) and the servient tenement (the tract that is burdened by the use of the easement). *Ingraham v. Hough*, 46 N.C. (1 Jones) 39, 43 (1853). An appurtenant easement is only allowed to be used "in connection with an estate to which it is appurtenant, and cannot be extended to any other property which [the easement owner] may then own or afterwards acquire." *Hales v. Atl. Coast Line R.R. Co.*, 172 N.C. 104, 107, 90 S.E. 11, 12 (1916). In contrast, an easement in gross is more like a personal license, a permit, and "is not appurtenant to any estate in land and does not belong to any person by virtue of his ownership of an estate in other land, but is a mere personal interest in or right to use the land of another." *Shingleton*, 260 N.C. at 454, 133 S.E.2d at 185. An easement in gross generally terminates "with the death of the grantee" unless abandoned or otherwise extinguished. *Id.*

The easement here was conveyed by deed with a dominant tract of land and is presumed to be appurtenant. *Id.* at 455, 133 S.E.2d at 186. Therefore, it ran with the land when Ms. Tilley deeded the dominant tenement to the Cornetts. We now look at what interests Ms. Tilley received.

Ms. Tilley gained ownership of Tracts 1 and 2 through two separate deeds. The deed to Tract 2, which does not contain road frontage, contained the easement at issue. After describing the metes and bounds of Tract 2, it reads, "The Grantor also conveys to the Grantee a road right-of-way or easement to and from the above described parcel of land for purposes of ingress, egress and regress, said right-of-way being 30.0 feet in width and described as follows . . . ." When Ms. Tilley was deeded Tract 1, no similar easement appears. In fact, the record is devoid of any evidence showing that Ms. Tilley acquired an access easement for Tract 1.

Ms. Tilley subsequently deeded both Tracts 1 and 2 as well as the access easement to the Cornetts via a single deed. That deed, after describing Tracts 1 and 2 by metes and bounds, reads, "Also conveyed herein is a thirty (30) foot right-of-way or easement for the purpose of ingress, egress and regress from Griffin Road more particularly described as follows . . . ."

Just as "no one can transfer a better title than he himself possesses," no one can transfer a greater easement than he himself enjoys.

Miller v. Tharel, 75 N.C. 148, 152 (1876). Thus, when Ms. Tilley conveyed Tract 1, Tract 2, and the access easement to the Cornetts via a single deed, the easement only benefited and allowed access to Tract 2 from the main road. Ms. Tilley could only transfer an interest in property, in the form of an access easement here, that she herself had received. Even if Ms. Tilley had desired to, she could not transfer an access easement to Tract 1 unless, perhaps, she had previously purchased the property that the Hinmans now owned and absorbed the original easement by merger. *See Patrick v. Jefferson Standard Life Ins. Co.*, 176 N.C. 660, 670, 97 S.E. 657, 661 (1918) ("A merger, technical or ideal, takes place when the owner of one of the estates, dominant or servient, acquires the other, because an owner of land cannot have an easement in his own estate in fee."). Yet, the record lacks any evidence for this possibility as well. All evidence suggested that the easement allowed for access to Tract 2 and that the Cornetts' use of the easement to access Tract 1 constituted a "misuse or overburdening" of the easement. *City of Charlotte v. BMJ of Charlotte, LLC*, 196 N.C. App. 1, 20, 675 S.E.2d 59, 71 (2009). We therefore affirm the trial court's order as to the access easement for Tract 2 but not for Tract 1, which has frontage and direct access to Griffin Road.

B. Prescriptive Easement

[2] The Cornetts next argue that the trial court erred in granting summary judgment against them by failing to consider whether the Cornetts had gained a prescriptive easement over the disputed land. However, the Cornetts did not advance this theory before the trial court. Instead, they advanced an adverse possession counterclaim. Though the elements necessary to maintain adverse possession and prescriptive easement claims are similar, they are nonetheless distinct actions requiring distinct pleadings. We therefore cannot consider this argument on appeal. *See* N.C. R. App. P. 10(a)(1); *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount" on appeal.).

C. Adverse Possession

[3] We next address the issue of adverse possession. The Cornetts clarified at the summary judgment hearing and in their reply brief that they allege adverse possession only of the strip of land consisting of their garden, brick pillar, several trees, fencing, and portions of their carports. The Cornetts do not allege adverse possession of the shared driveway, which they used with the Churches' permission and acknowledge is contained within the easement. Like the driveway, though, this disputed strip of land rests within the easement. Yet, because the Cornetts pleaded that they maintained this strip of land for over twenty years and

alleged all elements necessary to support a claim of adverse possession, the Cornetts challenge the trial court's dismissal of this claim in its summary judgment order.

Adverse possession "is not favored in the law." *Potts v. Burnette*, 301 N.C. 663, 667, 273 S.E.2d 285, 288 (1981). The possessor's use of the land, therefore, "is presumed to be permissive." *Id.* at 666, 273 S.E.2d at 288.

A successful claim of adverse possession requires that the possession be "open, continuous, exclusive, actual and notorious" ("OCEAN") for the prescribed period. *Jones v. Miles*, 189 N.C. App. 289, 299, 658 S.E.2d 23, 30 (2008). Our Supreme Court has more eloquently described these requirements as follows:

> It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner.

Locklear v. Savage, 159 N.C. 236, 237, 74 S.E. 347, 348 (1912). The prescriptive period for adverse possession, without color of title, is 20 years. N.C. Gen. Stat. § 1-40 (2022).

> No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for 20 years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability.

Id. One may assert a claim of adverse possession upon a portion of a tract of land so long as such portion is identifiable by "known and visible lines and boundaries." *Dockery v. Hocutt*, 357 N.C. 210, 218, 581 S.E.2d 431, 436 (2003). However, "his claim is limited to the area(s) actually possessed, and the burden is upon the claimant to establish his title to the land in that manner." *Id.*

We are met with an initial question: may the owner of a dominant tenement adversely possess the same land described in the easement burdening the servient tenement?

Neither party cites and we did not locate North Carolina authority definitively answering this question. One commentator who published many treatises on real property writes,

> The adverse user may be, not only by the owner of the servient tenement, but also by another person, and such other person may be one who has also an easement in the same land. That is, if there is adverse possession sufficient to divest a fee simple title to land, it will also operate to extinguish an easement in such land, without reference to whether the adverse possessor previously had himself an estate or an easement in the land.

Herbert Thorndike Tiffany, *The Law of Real Property*, Vol. 3, 397 (Basil Jones ed., 3d ed. 1939). While helpful, this commentary does not explicitly suppose that the adversely possessed land is also the possessor's easement.

Looking beyond our borders, no other state has yet to address this question, save for the state of Washington. There, its Court of Appeals concluded that the owner of an easement in common property, held in title by a homeowners association, could adversely possess that land without offending the requisite elements of adversity. *Timberlane Homeowners Ass'n v. Brame*, 901 P.2d 1074, 1078 (1995), *superseded by statute*, Wash. Rev. Code § 36.70A.165 (2022). "Although the use was originally permissive[,] . . . the construction of a fence and a concrete patio on the property far exceeded a reasonable exercise of that easement right." *Id.*

Our precedent allows the owner of a *servient* tenement to successfully claim adverse possession so as to extinguish an easement on his own property. *Skvarla v. Park*, 62 N.C. App. 482, 488, 303 S.E.2d 354, 358 (1983). Here, though, the alleged adverse possessor is the easement owner, the owner of the *dominant* tenement. A successful action for adverse possession in this case would not only extinguish the easement but would, in effect, divest the servient estate owner of title to his land.

The principal concern with adversely possessing the land of one's own easement lies in the adverseness—or hostility—of the possession. This hostility element requires "a use of such nature and exercised under such circumstances as to manifest and give notice that the use

is being made under claim of right." *Dulin v. Faire*s, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966). "[T]his does not mean that ill will or animosity must exist between the respective claimants. It only means that the one in possession of the land claims the exclusive right thereto." *Brewer v. Brewer*, 238 N.C. 607, 611, 78 S.E.2d 719, 722 (1953). Regardless of the "length of time in the enjoyment of his easement," an easement owner cannot divest the servient owner of his land merely because he made some use of the land consistent with the easement. *Everett v. Dockery*, 52 N.C. (7 Jones) 390, 392 (1860). However, where the dominant estate owner's use of the easement is so inconsistent with its permissive use as to inhibit the rights of the servient estate owner, it follows that the possession is hostile. We therefore hold that, where the elements of adverse possession are otherwise satisfied, the owner of a dominant tenement may adversely possess the land underlying his own easement.

We briefly address another dispositive question: may a party properly claim adverse possession when he is unaware of the adverse nature of his possession? In other words, may a party adversely possess land when he mistakenly believes that he was the owner during the entirety of the prescriptive period? Our Supreme Court has answered this question in the affirmative. A party may succeed in an adverse possession claim "though the claim of title is founded on a mistake." *Walls v. Grohman*, 315 N.C. 239, 249, 337 S.E.2d 556, 562 (1985). Since 1985, this state has been among a majority of states which allow a claim for adverse possession though the adverse possessor be oblivious to the adverse nature of his possession. *Id*. Therefore, though the Cornetts allege in their depositions that they were unaware of any encroachments upon their neighboring property and believed they owned the strip of land at issue, this mistake is not fatal.

Further, though the Cornetts admit their use of the driveway was permissive, this, too, is not fatal to their claim of adverse possession over the disputed strip of land. The disputed land here is not the driveway but the strip of land between the driveway and the Cornetts' recorded property line, said land containing a brick column, small garden, trees, fencing, and two carports. Nothing in the record suggests the Cornetts received permission from the Churches or their successor in title, the Hinmans, to possess and erect permanent structures on this disputed strip of land.

Next, we consider whether the Cornetts appropriately alleged an adverse possession claim sufficient to overcome a motion to dismiss. As our Supreme Court has held, "[a] party seeking to prove adverse possession of a portion of a parcel has the burden of pleading and proving

all elements of the claim." *Minor v. Minor*, 366 N.C. 526, 531, 742 S.E.2d 790, 793 (2013). Yet, "[i]n actions to recover land, wherein the plaintiff alleges title and right to the possession, it is generally sufficient for the defendant to make a simple denial and introduce evidence of his possession for twenty years . . . in support of his denial." *Whitaker v. Jenkins*, 138 N.C. 476, 478, 51 S.E. 104, 105 (1905).

Further, "[a] party against whom summary judgment is sought 'may not rest upon the mere allegations or denials of his pleading, but must, by affidavit or otherwise, set forth specific facts showing that there is a genuine issue for trial.' " *Koenig v. Town of Kure Beach*, 178 N.C. App. 500, 504, 631 S.E.2d 884, 888 (2006) (quoting *Enterprises v. Russell*, 34 N.C. App. 275, 278, 237 S.E.2d 859, 861 (1977)); *see* N.C. Gen. Stat. § 1A-1, Rule 56(e) (2022). Put another way, presuming without deciding the Cornetts' allegations relating to the adverse possession claim are true, would they be entitled to a grant of title by adverse possession? We hold that they would.

Here, the Cornetts did not merely allege adverse possession without supporting evidence. Though they did not provide the trial court with affidavits, they submitted a highlighted survey exhibit outlining the "known and visible lines and boundaries," *Dockery*, 357 N.C. at 218, 581 S.E.2d at 436, of their purported adverse possession. In their counterclaim, the Cornetts list the disputed encroachments upon this portion of the easement and the dates in which the encroachments were established or presented as evidence of their continuous possession for the prescriptive period. In the Cornetts' depositions, which were presented to the trial court, the Cornetts state that they believed the contested strip of land was theirs and had improved and maintained it since 1983. The Cornetts' counsel at the summary judgment hearing argued that the Cornetts treated the strip of land as their own and did not hide their maintenance of the structures. This evidence is sufficient to support every element of adverse possession, that the Cornetts actually possessed the land in a manner that was open, continuous, exclusive, actual, and notorious ("OCEAN") for the prescribed period and under known and visible lines and boundaries.

Presumably, the Hinmans' predecessor in title, the Churches, had the opportunity to discover and remedy the Cornetts' encroachment for over twenty years but did not do so. Indeed, this case serves as a stark reminder that "the law aids the vigilant and not those who sleep over their rights." *Butler v. Bell*, 181 N.C. 85, 90, 106 S.E. 217, 220 (1921). This is true even for the Churches' successor in title, the Hinmans, who brought the trespass action after the Cornetts had possessed the land

for over twenty years. Prior to buying the property from the Churches, the Hinmans had the opportunity to discover the encroachments by obtaining a survey.

Our statute and caselaw treats the twenty-year prescriptive period of adverse possession as a "statute of limitations" for actions to recover property, and we have never held that the prescriptive period must restart due to the sale of land adversely possessed. *Duke Energy Carolinas, LLC v. Gray*, 369 N.C. 1, 3, 789 S.E.2d 445, 446 (2016). So long as the adverse possessor continues to possess the land for the prescriptive period, the time required to adversely possess the land is not tolled or otherwise reset by the sale of the land adversely possessed. "At the expiration of the requisite period of possession, the possessor acquires fee simple title to the land; a new title is created and the title of the record owner is extinguished." *Fed. Paper Bd. Co. v. Hartsfield*, 87 N.C. App. 667, 672, 362 S.E.2d 169, 172 (1987). If the Cornetts did adversely possess the land of the Churches prior to the sale of the Churches' interest to the Hinmans, then the Hinmans would not have received fee title in the disputed land. *See, e.g.*, *Deans v. Mansfield*, 210 N.C. App. 222, 229, 707 S.E.2d 658, 664 (2011) (holding that the prescriptive period acts to divest a record owner's interest in the land even though the adverse possessor files a claim for title after a period of subsequent interruption).

These circumstances are juxtaposed to those found in *Dockery v. Hocutt*. There, our Supreme Court held that a party's evidence, even "when considered in the light most favorable to" the party, was not sufficient to bring the matter to a jury. 357 N.C. 210, 218, 581 S.E.2d 431, 437 (2003). The record was "devoid of evidence of known and visible boundaries" where the court was left to merely speculate as to where an ambiguous boundary was. *Id.* Further, the party did not evidence an encroachment "for the requisite twenty-year period." *Id.* at 219, 581 S.E.2d at 437. The Cornetts, by contrast, identified the contested strip of land where known and visible boundaries exist between it and the driveway. The Cornetts alleged that they possessed this property for over twenty years and listed the dates for the establishment of structures existing on the disputed strip of land.

These circumstances are also juxtaposed to those found in *Jones v. Miles*. This Court held that the hostility requirement of adverse possession may be extinguished with a subsequent grant of permission, unless "the possessor either rejects the grant of permission or otherwise takes some affirmative step to put the true owner on notice that the possessor's use of the land remains hostile." 189 N.C. App. 289, 294, 658 S.E.2d 23, 27 (2008). In the present case, the record demonstrates

the Churches allowed the Cornetts to use the driveway but contains no indication that the Cornetts received permission to possess the disputed strip of land as their own. Although the disputed strip of land is within an easement, the easement was for ingress and egress, not for the building of permanent structures.

The Cornetts presented evidence sufficient to overcome the Hinmans' motion to dismiss, and the trial court erred in granting summary judgment for the Hinmans when genuine issues of material fact remained.

D. Trespass

[4] Because we hold that the trial court erred in dismissing the Cornetts' adverse possession counterclaim, we hold that the trial court erred in granting the Hinmans' motion for summary judgment on their trespass claim. One party's successful adverse possession claim necessarily defeats another's trespass claim upon the same land.

Further, adverse possession is a defense to trespass. In *Williams v. South & South Rentals*, the plaintiff sought to require the removal of an apartment building which encroached approximately one square foot onto the plaintiff's property. This Court in *Williams* said, "While the action sounds in trespass because there is no dispute over title or location of the boundary line, plaintiff seeks a permanent remedy and is subject to the twenty-year statute of limitations for adverse possession." 82 N.C. App. 378, 382, 346 S.E.2d 665, 667 (1986). In the case of *Bishop v. Reinhold*, this Court held the plaintiff's action to remove structures built by the defendants which partially encroached onto the Bishops' property "would not be barred until defendants had been in continuous use thereof for a period of twenty years." 66 N.C. App. 379, 384, 311 S.E.2d 298, 301 (1984). Thus, if the Cornetts are successful in showing adverse possession of the disputed strip of land for twenty years, it would defeat the Hinmans' claim of trespass and request to remove the encroachments.

E. Nuisance Fence

[5] The Cornetts allege that the Hinmans erected a nuisance fence between the driveway and the Cornetts' property. It is not clear, presuming the Cornetts' succeed in their adverse possession counterclaim, whether the fence would be on the Cornetts' or the Hinmans' property.

If the fence is on the Hinmans' property, its mere presence on the easement is not an actionable issue so long as its presence does not interfere with the Cornetts' permissive use of the easement. "The owners of the servient estate may make any use of their property and road

not inconsistent with the reasonable use and enjoyment of the easement granted." *Shingleton v. State*, 260 N.C. 451, 457, 133 S.E.2d 183, 187 (1963); *cf. Ingraham v. Hough*, 46 N.C. (1 Jones) 39, 44 (1853) (holding that an impassable gate across a right of way is an "interruption[] to the user of the easement"). The Cornetts allege that the fence frustrates their use of the easement in that it does not allow them access to Tract 1 of their property or, rather, makes it more difficult to access Tract 1. Because we hold that the easement does not grant access to Tract 1 and because the Cornetts did not otherwise argue that the fence impedes their access to Tract 2, the Cornetts and their land are uninjured. Therefore, this argument is overruled. Yet, because the issue of whether the fence is on the Cornetts' property or the Hinmans' property is unresolved, this issue must be remanded to the trial court.

IV. Conclusion

The trial court did not err when it prohibited the Cornetts from using the driveway to access Tract 1 of their property, as the Cornetts do not have an easement to access Tract 1. However, the trial court did err in dismissing the Cornetts' counterclaim for adverse possession of the strip of land between the driveway and the Cornetts' deeded property. Because of this error, the trial court further erred in granting the Hinmans' motion for summary judgment on the issue of trespass. Consequently, we reverse the dismissal order and the summary judgment order of the trial court and remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge TYSON concurs in the result in part and dissents in part by separate opinion.

Judge MURPHY concurs in the result only without separate opinion.

TYSON, Judge, concurring in the result in part and dissenting in part.

The plurality's opinion properly affirms the trial court's prohibition of the Cornetts from using the driveway easement to access Tract 1 of their property. The plurality's opinion further holds the trial court erred in dismissing the Cornetts' counterclaim for adverse possession of the strip of land between the driveway easement and their deeded property. I vote to affirm the trial court's dismissal of the Cornetts' counterclaim and of Hinmans' motion for summary judgment on their trespass claims. I respectfully dissent.

I. Standard of Review

North Carolina Rule of Civil Procedure 56(c) allows a moving party to obtain summary judgment upon demonstrating that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" show that they are "entitled to a judgment as a matter of law" and "that there is no genuine issue as to any material fact." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021).

"The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citation omitted). "This burden may be met by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Id.* (citation and internal quotation marks omitted).

A genuine issue is one supported by evidence that would "persuade a reasonable mind to accept a conclusion." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted). "An issue is material if the facts alleged would . . . affect the result of the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

When reviewing the evidence at summary judgment, "[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citation omitted). On appeal, "[t]he standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

II. Adverse Possession for Twenty Years

"To acquire title to land by adverse possession, the claimant must show actual, open, hostile [notorious], exclusive, and continuous ["OCEAN"] possession of the land claimed for the prescriptive period [.]" *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176, *disc. review denied*, 354 N.C. 364, 556 S.E.2d 572 (2001). The law does not favor adverse possession and the presumption before the court is that a claimant's use is permissive. *See Potts v. Burnette*, 301 N.C. 663, 667, 273 S.E.2d 285, 288 (1981) (citation omitted). Adverse possession of privately-owned property without color of title must be continuously

maintained for twenty years before a claimant may successfully assert a claim to acquire title to the land. N.C. Gen. Stat. § 1-40 (2021).

A hostile use is "simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right." *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966). "[I]n order for plaintiffs to succeed in their claim, they must have shown sufficient evidence of the hostile character of their use to create an issue of fact for the jury." *Potts*, 301 N.C. at 667, 273 S.E.2d at 288. *Webster's Real Estate Law* describes hostile possession as by claimant's possession, which excludes "any recognition of the true owner's rights" to the property. James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 14.06 (Patrick K. Hetrick & James B. McLaughlin, J. eds., 6th ed. 2022) ("Hostile possession is possession that excludes any recognition of the true owner's rights in the property." citing *Marlowe v. Clark*, 112 N.C. App. 181, 435 S.E.2d 354 (1993); *State v. Brooks*, 275 N.C. 175, 166 S.E.2d 70 (1969)).

"The hostility element may be satisfied by a showing that a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto." *Jones v. Miles*, 189 N.C. App. 289, 292, 658 S.E.2d 23, 26 (2008) (citation and quotation marks omitted). "However, the hostility requirement is not met if the possessor's use of the disputed land is permissive." *Id.* (citation omitted).

The common law of North Carolina presumes the user's possession, claiming title by adverse possession, is permissive:

> Plaintiffs have vigorously urged us *to reject* our present position that a *user is presumed to be permissive* and adopt the rule, obtaining in the majority of jurisdictions, that the user is presumed to be adverse. *This we decline to do*. An easement by prescription, like adverse possession, is *not favored in the law* and we deem it the better-reasoned view to place the burden of proving every essential element, including hostility, on the party who is claiming against the interests of the true owner. Additionally we note that the modern tendency is to restrict the right of one to acquire a prescriptive right-of-way whereby another, through a mere neighborly act, may be deprived of his property by its becoming vested in one whom he favored. Thus, in order for plaintiffs to succeed in their claim, they must have shown *sufficient evidence*

> *of the hostile character* of their use to create an issue of fact for the jury.

Potts, 301 N.C. at 666-67, 273 S.E.2d at 288 (internal citations, footnote, alterations, and quotation marks omitted) (emphasis supplied).

Nearly seventy-five years ago, our Supreme Court held:

> A statute prescribing the length of time during which an adverse possession of land must be maintained in order for it to ripen into title will not begin to run until these two things concur: (1) The claimant has *actual possession* of the land under color of title, or claim of right; *and* (2) the possession of the claimant gives rise to a cause of action in favor of the true owner. *In other words, an adverse possession will never run against the owner of an interest in land unless he has legal power to stop it.*

Eason v. Spence, 232 N.C. 579, 587, 61 S.E.2d 717, 723 (1950) (internal citation omitted) (emphasis supplied).

Here, the undisputed evidence tends to show and the trial court's judgment concludes the Cornetts paid the Churches, the Hinman's predecessor-in-title, directly for the driveway easement to be paved in 1996 and shows the Cornetts also paid for the installation of drainage pipes within the easement to the Churches. The structures including: the brick driveway; the front carport; the chain link fence about the front carport; the gravel, later paved, road; the chain link fence; and, the garden were in place before the Cornetts first rented the parcel.

The burden on proving each element rests on the party claiming title by adverse possession. This party also has the burden of rebutting a presumption that its use is permissive and is not adverse. The Cornetts cannot overcome the presumption of permissive use. *See Potts*, 301 N.C. at 667, 273 S.E.2d at 288 ("Thus, in order for plaintiffs to succeed in their claim, they must have shown sufficient evidence of the hostile character of their use to create an issue of fact for the jury.").

The Cornetts installed the rear shelter during the Gulf War in 1991, the wood rail fence was constructed in 1992, the front car port in 1996, the chain link fence in 1996, and the garden and crepe myrtle trees were planted and maintained since 1999. This Court found possession not to be hostile, where the putative adverse possessor's actions acknowledge the continuing ownership rights of the landowner. *New Covenant Worship Center v. Wright*, 166 N.C. App. 96, 104, 601 S.E.2d 245, 251-52 (2004).

During his deposition, Mr. Cornett was asked "[S]o Bennie Church was fine with you using the driveway. Correct?" He replied: "Oh, yes." Mr. Cornett further stated there was no problem with the placement of drainage pipes in the easement from the Churches nor when they planted crepe myrtles in the easement. The Churches, who owned the servient estate, helped to pay for the paving of the driveway that they shared use of with the dominant estate. The Hinmans insisted for the Cornetts to move a disabled vehicle from the easement after a few weeks, and it is now on the parcel the Cornetts' son lives on.

The running of the prescribed twenty-year statutory period to assert and adversely possess real property was tolled by the Churches' granting permissive use of the easement and parcel at issue to the Cornetts. *Id.*; *Eason*, 232 N.C. at 587, 61 S.E.2d at 723. The record shows the Churches, the Hinmans' predecessors-in-title, had expressly granted permission to the Cornetts to use the now-disputed tract of land. This permissive use tolled the running of the twenty-year statute of limitations pursuant to N.C. Gen. Stat. § 1-40. The Hinmans acquired the servient parcel in 2019. The Hinmans timely filed this action to quiet title and for trespass in 2021.

The plurality's opinion states: "A party may succeed in an adverse possession claim 'though the claim of title is founded on a mistake.' " citing *Walls v. Grohman*, 315 N.C. 239, 249, 337 S.E.2d 556, 562 (1985). This is an accurate quote from *Walls*, and the Cornetts purportedly and may have mistakenly believed they owned the land contained within the easement. Even if true, their belief does not address the tolling of the statutory period by their admittedly permissive use and the Churches' ownership of the servient parcel prior to the Hinmans' acquisition. During Wade Cornett's deposition, he testified he believed he owned the land under which the easement ran.

In *Walls*, the Supreme Court of North Carolina overruled its prior holdings in *Price v. Whisnant*, 236 N.C. 381, 72 S.E.2d 851 (1952) and *Gibson v. Dudley*, 233 N.C. 255, 63 S.E.2d 630 (1951), which required an adverse possessor to have the mind of a thief in order for his possession of the property to be adverse:

> [W]e now join the overwhelming majority of states, return to the law as it existed prior to *Price* and *Gibson*, and hold that when a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse.

Walls, 315 N.C. at 249, 337 S.E.2d at 562.

However, the plurality opinion's reliance on this application of *Walls* under these facts is misplaced and erroneous. While the Cornetts' purported mistaken belief may not necessarily defeat their claim, the plurality's opinion erroneously labels it as a dispositive question, without making an analysis of the Churches' prior ownership and their express permissive allowance of the Cornetts use. The Supreme Court's analysis in *Eason* and this Court's analysis in *Jones* is dispositive. *See Eason*, 232 N.C. at 587, 61 S.E.2d at 723 ("[C]laimant has actual possession of the land. . . an adverse possession will never run against the owner of an interest of land unless he has the legal power to stop it."); *Jones*, 189 N.C. App. at 292, 658 S.E.2d at 26 (true owner must be on "notice that the [adverse] use is being made under claim of right.").

III. Conclusion

The plurality's opinion properly affirms the trial court's prohibition of the Cornetts from using the driveway to access the non-dominant Tract 1 of their property.

The Cornetts did not prove open, continuous, exclusive, actual, and notorious ("OCEAN") possession of the Hinman's property for the requisite statutory period. Viewed in the light most favorable to the Cornetts, no genuine issues of material fact exist of whether they failed to hold possession of the disputed tract for the requisite statutory twenty-year period. *Resort Realty of the Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 116, 593 S.E.2d 404, 407-08, *disc. review denied*, 358 N.C. 236, 595 S.E.2d 154 (2004). The trial court's order granting summary judgment to the Hinmans should be affirmed. I respectfully dissent.

IN RE E.Q.B.

[290 N.C. App. 51 (2023)]

IN THE MATTER OF E.Q.B., M.Q.B., S.R.R.B.

No. COA22-736

Filed 1 August 2023

1. Termination of Parental Rights—grounds for termination—abandonment—failure to contact or provide for children—six-month period

The trial court properly terminated a father's parental rights in his three children on the ground of abandonment where the court found—based on clear, cogent, and convincing evidence—that the father failed to provide care, affection, financial support, and a safe and loving home for the children in the six months before the termination petition was filed. The father could not communicate with the children through their mother, with whom the children lived, after the mother started blocking his phone calls and then obtained a domestic violence protective order (DVPO) barring him from contacting her. However, the DVPO did not appear to prohibit the father from contacting his children directly. Further, the record and the court's unchallenged findings showed that the father could have communicated indirectly with the children through his aunt and that he had the ability to file a custody complaint or sign a voluntary support agreement at any time, but that the father made no effort to exercise any of those options.

2. Termination of Parental Rights—appellate review—multiple grounds for termination—single ground sufficient to uphold termination—potential implications for mootness doctrine

In an appeal from an order terminating a father's parental rights in his children on three separate grounds, where the appellate court affirmed the order on the basis of one of those grounds, the appellate court was not required under the applicable jurisprudence to review the other two grounds for termination. The appellate court recognized a potential need to reconsider this "single ground for termination" line of jurisprudence under the mootness doctrine, noting that: in applying the "single ground" rule, it had essentially determined that issues concerning the remaining grounds for termination were moot on appeal; and a refusal to review those remaining grounds could have collateral consequences (such as affecting a parent's ability to regain his or her parental rights in the future pursuant to N.C.G.S. § 7B-1114). Nevertheless, because the father

did not challenge the "single ground" jurisprudence on appeal, the appellate court was bound to follow it.

3. Termination of Parental Rights—dispositional order—no-contact provision—not authorized by statute

After finding grounds to terminate a father's parental rights in his three children, the trial court exceeded its authority when it included a provision in its dispositional order prohibiting any future contact between the father and the children, as there are no statutory provisions authorizing a trial court to issue a no-contact order in a Chapter 7B case.

Appeal by Father from order entered 4 May 2022 by Judge William F. Brooks in Wilkes County District Court. Heard in the Court of Appeals 10 May 2023.

Samantha Belton, pro se, for petitioner-appellee mother.

Edward Eldred for respondent-appellant father.

MURPHY, Judge.

When a parent challenges the trial court's conclusion that he willfully abandoned his children, the determinative period which we consider for this alleged abandonment is the six consecutive months prior to the filing of the petition to terminate parental rights. The obstruction of a parent's ability to contact the children is relevant to the court's consideration; however, the trial court may consider the parent's other actions and inactions in determining the impact of the obstruction on the parent's lack of contact. Here, the trial court's findings of fact support its conclusion that Father willfully abandoned his children, and these findings are supported by clear, cogent, and convincing evidence. Applying our current "single ground" line of jurisprudence, we need not address the other grounds for termination disputed by Father.

While we affirm the adjudication and termination of Father's parental rights, the trial court exceeded its authority by including a no-contact provision in its dispositional order that was unsupported by statutory provisions, and we must vacate this portion of the order.

BACKGROUND

On appeal, Respondent-Father challenges the trial court's adjudicatory order terminating his parental rights of his three minor children

—E.Q.B. ("Dean"), M.Q.B. ("Barry"), and S.R.R.B. ("Allison")—and the trial court's dispositional order prohibiting Father from contacting his children.[1] In August 2007, Father married Petitioner-Mother. While the parents lived in Georgia, they had two children: Dean in 2008 and Barry in 2010. At some time after Barry's birth in 2010, Father was incarcerated, and in 2013, during his incarceration, Mother and Father divorced. After Father's release in 2015, the parents reconciled for a brief period, and Mother became pregnant with the parents' third child. During this period of reconciliation, the children would tell Mother that Father abused them when he was alone with them. After one incident, Mother took Dean to the hospital because he told her, "[D]addy kicked me in my back." Dean was treated for constipation after the kick. During another incident, Father tied up Mother's son, who was conceived with another man, with a belt. This caused that son pain and put him in fear.

When Father returned to prison in late 2016, the parents again separated. After this separation, Mother moved from Virginia to North Carolina, where she gave birth to the parents' third child, Allison. During Father's incarceration, Mother maintained contact with Father to send him pictures of their children, and in turn, Father sent drawings and cards to the children. However, Mother did not take any of the children to visit him in prison.

In 2019, some time after Father's release, Mother took the children to visit Father at his aunt's house in Virginia. She had learned from Father's aunt that he would be visiting her before he turned himself in for a probation violation. When Father first met Allison at his aunt's house, she was two years old.

After Father's visit with the children, the children expressed a desire to show their father their new toys and home in Wilkesboro. Mother allowed Father to live in her home with the children from November 2019 until December 2019, and the parents began seeing a pastor for counseling. During this time, Mother paid all of Father's expenses. On or about 1 January 2020, Mother and Father again separated.

After the parents' separation in January 2020, Father called Mother from various numbers to threaten her and the children. During this time, Mother blocked the various numbers which Father used to contact her, until she ultimately changed her phone number. In March, April, and July 2020, "[Father] gave his aunt an unspecified amount of money to send to [Mother] for the children," and in July 2020, he "provided toys to

1. We use pseudonyms to protect the juveniles' identities and for ease of reading.

his aunt to send to [Mother] for the children." Aside from these gifts, the parties dispute whether Father had any actual contact with his children after January 2020. The trial court found that since Mother and Father's separation in January 2020, Father has "made no attempt to see his children and has had no communication with them, even indirectly through his aunt" and, while he gave money and toys to his children through his aunt, he has "made no other efforts to convey messages, other gifts, or any evidence of his love and affection for the children."

From 15 September 2020 until 1 December 2020, Father was incarcerated for a probation violation. Upon his release, Father moved to Arizona "without any attempt to see the children" and was married to another woman on 6 December 2020.

In February 2021, in a separate action "[Mother] sought and obtained a temporary domestic violence protective order against [Father] due to [Father's] threatening to harm [Mother] and/or the children." On 24 March 2021, Mother filed the *Petition to Terminate Parental Rights*, alleging neglect and abandonment. On 19 April 2021, the trial court "issued a Domestic Violence Protective Order [("DVPO")] prohibiting [Father] from having contact with [Mother,]" giving "[Mother] temporary custody of the parties' children[,]" and denying Father from having visitation with the children. The DVPO "did not … prevent [Father] from having contact with the children nor providing gifts, support or other involvement in the children's lives." On 18 April 2022, Judge Robert J. Crumpton extended the DVPO until April 2024.

During the TPR hearing, Father testified that, if his parental rights were not terminated, he would file a custody complaint and sign a voluntary support agreement. On 4 May 2022, the trial court issued the *Order Terminating Parental Rights* and also ordered that "[Father] shall have no further communication or contact with any of [his] children." The trial court found that Allison was too young to express her wishes, but that Father's sons, 12 and 14 at the time, "do not want a relationship with [Father]." The trial court also found that "[Father] has had the means, opportunity, and ability to [file a custody complaint and/or sign a voluntary support agreement] at any time, but has made no effort to do so"; Father did not offer any excuse "for such lack of effort[,] nor has one been revealed by the evidence"; and "[Father] abandoned the children." The trial court concluded that "a ground exists to terminate [Father's] parental rights" pursuant to N.C.G.S. §§ 7B-1111(a)(1) and (a)(7) and N.C.G.S. § 7B-101. Father timely appealed.

ANALYSIS

Father argues that the trial court erred by finding that clear, cogent, and convincing evidence supported its findings of fact, and that these findings were sufficient to support its termination of his parental rights on three grounds: (1) abandonment, (2) neglect by abandonment, and (3) neglect by failure to provide proper care. Father also argues the trial court exceeded its authority by entering a no-contact order at the conclusion of the TPR hearing.

A. Termination of Parental Rights

We review the trial court's adjudicatory order to determine "whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law, with the trial court's conclusions of law being subject to *de novo* review." *In re N.D.A.*, 373 N.C. 71, 74 (2019), *abrogated in part on other grounds*, *In re G.C.*, 384 N.C. 62 (2023) (italics added) (citations and marks omitted). If we find the trial court's findings of fact are supported by clear, cogent, and convincing evidence and that any of the three grounds on which the trial court terminated Father's parental rights are supported by these findings of fact, we affirm the termination order:

> The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo. *See State v. Nicholson*, 371 N.C. 284, 288 (2018). However, an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. *In re B.O.A.*, 372 N.C. 372, 380 (2019); *accord In re Moore*, 306 N.C. 394, 404 (1982). Therefore, if this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds. *In re C.J.*, 373 N.C. 260, 263 (2020).

In re J.S., *C.S.*, *D.R.S.*, *D.S.*, 374 N.C. 811, 814-15 (2020) (citations omitted).

1. Abandonment

[1] A trial court may terminate a party's parental rights when it finds that the parent "has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C.G.S. § 7B-1111(a)(7) (2022). To find abandonment, the trial court must find that the parent's conduct "manifests a willful determination to forego all parental duties and relinquish all parental claims to the child[,]" but the relevant inquiry is limited to the statutory period

of six months. *In re C.B.C.*, 373 N.C. 16, 19, 22 (2019) (quoting *In re Young*, 346 N.C. 244, 251 (1997)). Thus, the dates at issue for this ground are 24 September 2020 to 24 March 2021.

On appeal, Father argues that "portions of findings 6, 22, 23, 24, and 26 are not supported by sufficient evidence." These findings read as follows:

> 6. [Mother] and [Father] were married to each other in August, 2007. They divorced in 2013. However, following the divorce, the parties reconciled in 2016 for a brief period during which [Allison] was conceived.
>
> …
>
> 22. Since the time of the parties' divorce in 2013, [Father] has made no effort to provide care for his children. Even when the parties reconciled in 2016 and spent the weeks together in 2019, [Mother] provided all of the financial support for the children.
>
> 23. Since 2013, [Father] has made no effort to provide a safe and loving home for the children.
>
> 24. Since 2013, [Father] has provided no emotional support for the children.
>
> …
>
> 26. For at least the six-month period preceding the filing of the Petition to Terminate Parental Rights, the Court finds that:
>
> (a) [Father] had no communication or contact with the children.
>
> (b) [Father] provided no financial or emotional support for the children.
>
> (c) [Father] provided no cards, gifts, letters, or tokens of affection for the children.
>
> (d) [Father] made no effort to strengthen the parent-child relationship.
>
> (e) [Father] did nothing to be a part of the respective lives of the children, other than sporadic attempts to contact

> them by some electronic means which he knew, or should have known, would be futile.
>
> (f) [Father] did nothing to demonstrate he had a genuine interest in the welfare and well-being of any of the children.
>
> (g) [Father] abandoned the children.

Father claims "[i]t is not factually accurate to say that [Father] 'made no effort' to provide care and 'provided no emotional support' for the children since 2013." Father claims his "efforts to do both" despite "[Mother] actively [taking] steps to prevent him from doing either beginning in August 2020" render these facts unsupported. Father did not explicitly challenge the trial court's finding in its *Order Terminating Parental Rights* that:

> Since January, 2020 [Father] has made no attempt to see his children and has had no communication with them, even indirectly through his aunt. Although it is apparent that his aunt was able to communicate with [Mother] and children, including being able to send money and toys supplied by [Father], [Father] made no other efforts to convey messages, other gifts, or any evidence of his love and affection for the children.

Father also does not explain with particularity which "portions" of the challenged findings were not supported by clear, cogent, and convincing evidence. Nevertheless, all components of the challenged findings of fact are supported by clear, cogent, and convincing evidence. During the TPR hearing, Mother testified that she and Father married in August of 2007, divorced in 2013, and reconciled in 2016, the period during which Allison was conceived. Mother also testified that, during the time when the parties lived together in late 2019, Father only paid for his cigarettes and "snuck … alcohol into [her] house" and that, "going back to 2016," he has not "provided any sort of financial support for the children." The trial court found, and Father does not challenge, that "[Father] has had the means, opportunity, and ability" to "file a Complaint seeking custody of the children and to sign a voluntary support agreement to provide monetary assistance" "at any time, but has made no effort to do so." According to Mother's testimony, the children have lived with her since birth, and when Mother left Father alone with their children in the past, the children would be injured, once to the point of requiring emergency medical attention. Additionally, Mother testified that the parties' children began "questioning themselves" over Father's absence from their lives, and the eldest children expressed to the Guardian *ad Litem* that

they "want [Father] to 'stay away from them.' " Consequently, we find that clear, cogent, and convincing evidence supports the trial court's findings of fact regarding the parties' relationship and Father's failure to provide care, financial support, a safe and loving home, and emotional support for the children.

Father more clearly challenges portions of the findings of fact specifically supporting the trial court's conclusion of abandonment. Father argues that for one and a half of the six consecutive months immediately preceding the filing of the petition or motion, which are reviewed for the purposes of N.C.G.S. § 7B-1111(a)(7) (2022), he was barred from contacting his children by the temporary DVPO which issued in February 2021. In contrast to the April 2021 DVPO, where the trial court explicitly noted the DVPO did not prevent Father from contacting his children through means other than through Mother; from providing financial support for them; or from having involvement in their lives, the trial court did not make a finding as to the terms of the February 2021 temporary order. Furthermore, although the trial court took judicial notice of the entire court file in that action, Father did not submit either DVPO as part of the Record for our review. When referring to the February 2021 DVPO in his brief, Father states, "for one-and-a-half … months, [Mother] had a DVPO preventing [Father] from contacting her." This language suggests that the February DVPO did not prohibit Father from contacting his children; it only prevented him from contacting Mother.

Father's brief argues that the abandonment conclusion was not supported by the facts because Father did "enough." Father notes that, despite the lack of an explicit trial court finding, both Father and Mother testified that during the six month period, Father "called [Mother] repeatedly and that they spoke once in December 2020." The trial court found "[Mother] has elected to 'block' [Father] from contacting her by telephone … out of fear for herself and the children based upon [Father's] history of abusive behavior." Although Father could not contact the children through Mother, the trial court found that "[Father] … had the means, opportunity, and ability to [file a custody complaint and/or sign a voluntary support agreement] at any time, but has made no effort to do so" and Father did not offer any excuse "for such lack of effort[,] nor has one been revealed by the evidence." Relying on Father's lack of effort to obtain custody, lack of effort to provide financial and emotional support, lack of effort to see his children before he moved to Arizona after his release from incarceration in December 2020, and knowledge that attempting to contact the children through Mother would be futile, the trial court found:

> By his actions and inactions described above, [Father] has elected to be absent from his children's lives … for more than six consecutive months preceding the filing of the Petitions in these cases. [Father] could have, and should have, made other choices to involve himself with the children as their parent. His failure to do so is, and has been, willful and without just cause or excuse.

The trial court's conclusion that Father willfully abandoned his children by demonstrating a "willful determination to forego all parental duties and relinquish all parental claims," *In re C.B.C.*, 373 N.C. at 19 (quoting *In re Young*, 346 N.C. at 251), to the children from September 2020 through March 2021 is supported by the findings of fact.

2. "Single Ground" Jurisprudence and N.C.G.S. § 7B-1114

[2] Only one ground is needed to support the termination of Father's parental rights. *In re J.S.*, 374 N.C. at 814-15 ("The issue of whether a trial court's findings of fact support its conclusions of law is reviewed *de novo*. *See State v. Nicholson*, 371 N.C. 284, 288, . . . (2018). However, an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. *In re B.O.A.*, 372 N.C. 372, 380, . . . (2019); *accord In re Moore*, 306 N.C. 394, 404, . . . (1982). Therefore, if this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds. *In re C.J.*, 373 N.C. 260, 263, . . . (2020).") As we affirm the trial court's finding of abandonment in accordance with N.C.G.S. § 1111(a)(7), we need not review either of the remaining grounds for the purposes of the termination of parental rights. Although our appellate courts have long held that our inquiry stops once we have affirmed one ground to support the termination of parental rights, *In re B.O.A.*, 372 N.C. at 372, we note that under N.C.G.S. § 7B-1114(g)(2), a discussion of these additional grounds may be a more appropriate exercise of appellate review.

A moot question is "one that would have no practical effect on the controversy." *Emerson v. Cape Fear Country Club, Inc.*, 259 N.C. App. 755, 764 (2018) (citation omitted). While the "single ground" for termination line of jurisprudence does not appear to explicitly reference our mootness doctrine, a careful reading discloses that we are essentially determining that there is no need to consider the other grounds for termination challenged on appeal, as resolving these issues would have no practical effect on the case. However, whether the trial court's conclusions in regards to each of the other grounds should be affirmed could

arguably impact a parent's ability to regain his or her parental rights in the future, pursuant to N.C.G.S. § 7B-1114, effective since 1 October 2011.

In a hearing to reinstate a party's parental rights, the trial court shall consider, *inter alia*, "[w]hether the parent whose rights the motion seeks to have reinstated has remedied the conditions that led to the juvenile's removal and termination of the parent's rights." N.C.G.S. § 7B-1114(g)(2) (2022). The validity of additional ground(s) for termination may very well be relevant to this future statutory procedure and would otherwise escape appellate review. Nevertheless, even if there is a need to reconsider this "single ground" line of jurisprudence in light of N.C.G.S. 7B-1114(g)(2) and mootness principles, a party bears the responsibility to address mootness "or present us with any collateral consequences that may stem from the disposition order in question." *In re B.B.*, 263 N.C. App. 604, 605 (2019). Father has not argued in this appeal for any renewed consideration of our "single ground" jurisprudence. As such, we need not discuss the merits of the two remaining grounds for termination, but in an exercise of intellectual honesty we acknowledge the potential for such arguments to impact future appellate litigation.

B. No-Contact Order

[3] Father argues "[t]he trial court exceeded its authority and abused its discretion by imposing [the] restriction [on Father's ability to communicate with his children.]" Father bases the majority of this argument on an assumption that the trial court issued a no-contact order pursuant to Chapter 50B, despite a lack of statutory authority to do so. N.C.G.S. § 50B-2(a) (2022). There is no indication in the Record that the trial court attempted to issue its no-contact order under Chapter 50B. However, no statutory provisions support the issuance of a no-contact order in this Chapter 7B case. Thus, we agree with Father that the trial court lacked the statutory authority to issue the no-contact order.

CONCLUSION

The trial court's conclusion that Father abandoned his children pursuant to N.C.G.S. § 7B-1111(a)(7) is supported by findings of fact which are supported by clear, cogent, and convincing evidence. Father makes no arguments related to our "single ground" jurisprudence and we need not address Father's arguments regarding neglect by abandonment or neglect by failure to provide proper care under N.C.G.S. § 7B-1111(a)(1). However, we vacate the no-contact portion of the trial court's order.

AFFIRMED IN PART; VACATED IN PART.

Judges GORE and FLOOD concur.

IN RE K.B.

[290 N.C. App. 61 (2023)]

IN THE MATTER OF K.B., A.M.H., M.S.H.

No. COA22-597

Filed 1 August 2023

1. Child Abuse, Dependency, and Neglect—permanency planning—guardianship—guardian's understanding of legal significance of appointment

In a permanency planning order in a neglect and dependency case in which the trial court granted guardianship of three children to their great aunt, the court's determination that the great aunt understood the legal significance of being appointed the children's guardian was supported by adequate evidence, including that the children had been living with her for three years—during which time she provided care for them, took them to medical and dental appointments, and attended meetings with their teachers—and that, in her testimony, the great aunt stated her desire and willingness to continue providing care for the children.

2. Child Abuse, Dependency, and Neglect—permanency planning—guardianship to in-state relative—consideration of out-of-state relative

In a permanency planning order in a neglect and dependency case, the trial court did not err by granting guardianship of three children to their great aunt—a North Carolina resident with whom the children had been living for three years in a kinship placement and with whom the children were bonded—before a home study could be completed regarding the children's grandmother, who lived in Georgia and who the trial court had previously ordered be considered for placement. There was no statutory requirement for the trial court to rule out the grandmother as a placement option, and the trial court did not abuse its discretion by determining that guardianship by the great aunt was in the children's best interests.

3. Child Abuse, Dependency, and Neglect—permanency planning—guardianship—decretal portion of order—declaration of matter being closed

In a permanency planning order in a neglect and dependency case in which the trial court granted guardianship of three children to their great aunt, the court did not err by stating in the decretal portion of the order that "[t]he matter is closed" and that the department of social services and its counsel "are released and relieved of their responsibilities regarding this matter." There was nothing

in the order that prevented respondent mother from filing future motions in the matter, where she had been granted visitation rights but had not had her parental rights terminated.

4. Child Abuse, Dependency, and Neglect—permanency planning—electronic visitation only—improper delegation of judicial authority

In a permanency planning order in a neglect and dependency case in which the trial court granted guardianship of three children to their great aunt, the court erred by limiting the mother's visitation rights to electronic-only visitation without making the necessary findings of fact that the mother had forfeited her right to in-person visitation or that in-person visitation would be inappropriate. Further, the trial court's failure to specify the length of visits and whether supervision was required amounted to an improper delegation of judicial authority.

Chief Judge STROUD concurring in part and dissenting in part.

Appeal by respondent mother from order entered 21 March 2022 by Judge S. Katherine Burnette in Vance County District Court. Heard in the Court of Appeals 23 May 2023.

Sheneshia B. Fitts for petitioner-appellee Vance County Department of Social Services.

Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford, for respondent-appellant-mother.

Robinson, Bradshaw & Hinson, P.A., by Erica M. Hicks, for appellee guardian ad litem.

DILLON, Judge.

Mother appeals from an order granting guardianship of her three children, Amy, Matt, and Kelly,[1] to the children's great aunt ("Great Aunt"), a North Carolina resident. On appeal, Mother challenges the trial court's decision to grant guardianship to Great Aunt (with whom the

1. The children's pseudonyms were designated by the parties in accord with North Carolina Rule of Appellate Procedure 42(b).

children have resided for several years), instead of to Mother's mother ("Grandmother"), who resides in Georgia. The trial court restricted Mother, who also lived in Georgia, to electronic-only visitation.

I. Background

In February 2019, the Vance County Department of Social Services ("VCDSS") filed juvenile petitions alleging that Amy, Matt, and Kelly were neglected and dependent, that domestic violence between the children's parents in their presence, as well as Mother's homelessness, "untreated mental health issues including a lack of medication management[,]" and previous alternative placements not working out. Based on the petitions, the trial court granted VCDSS non-secure custody with placement authority. About a week later, VCDSS placed all three children with Great Aunt in a kinship placement.

In April 2020, after hearings on the matter, the trial court adjudicated the children as dependent and neglected. The court entered a dispositional order setting the primary plan as reunification and the secondary plan as "custody with a court approved caretaker." The court further ordered VCDSS to retain custody and placement authority. The children's placement continued to be with Great Aunt.

Over the next three years, the trial court continued to hold dispositional hearings and enter orders. During this time, the trial court ordered that Grandmother be considered for placement and that a home study assessment by Georgia officials be completed to evaluate her fitness. Throughout this time, the children remained in the kinship placement with Great Aunt.

In May 2021, the trial court entered an order ceasing reunification efforts and shifting the primary plan to guardianship with a secondary plan of adoption.

On 21 March 2022, following a series of hearings spanning five months and prior to the completion of Grandmother's home study, the trial court entered an order granting Great Aunt guardianship of the children. In its order, the trial court also granted Mother "voluntary visitation two times per week . . . via electronic devices." The trial court noted "[t]he matter is closed" and relieved VCDSS and the GAL of further responsibilities, but noted it was "retain[ing] jurisdiction of this matter." Mother timely appealed.

II. Argument

Mother makes four arguments on appeal, which we address in turn.

A. Evidence that Guardian Understood Legal Significance

[1] In awarding Great Aunt guardianship, the trial court determined she understood the legal significance of taking on that role as required by N.C. Gen. Stat. § 7B-600. Mother argues there was no evidence to support this determination. We disagree.

Before awarding guardianship, the trial court must, in part, determine the proposed guardian understands the legal significance of the placement. *See In re K.P.*, 383 N.C. 292, 306, 881 S.E.2d 250, 259 (2022). However, the trial court need not make specific findings to support this determination. *Id.* Rather, all that is required is that the record show the trial court received and considered adequate evidence on this point. *Id.*

Here, there was evidence that the children had been living with Great Aunt for three years, she had provided care for them, she had scheduled and taken the children to medical and dental appointments, she had potty-trained the children, and she had attended meetings with their teachers. Additionally, Great Aunt testified that she wanted to continue providing care for them as their guardian and was willing do so without the assistance of VCDSS. The evidence shows that she understood her obligations to comply with court orders regarding the children. And during the last hearing, on cross-examination, she acknowledged that, as guardian, she would have more control over the children. Though Great Aunt was not expressly asked about her understanding of her legal obligations, we are satisfied that the evidence shows the trial court received adequate evidence on this point.

B. Failure to Wait for Completion of Home Study of Grandmother

[2] Mother argues the trial court erred by granting Great Aunt guardianship of the children without the benefit of considering Grandmother as a placement option following completion of the home study. She argues that the trial court was required by N.C. Gen. Stat. § 7B-903(a1) to wait for the home study of Grandmother previously ordered by the court be completed before ruling Grandmother out as a placement option for the children. For the reasoning below, we conclude the trial court did not err or otherwise abuse its discretion in granting guardianship to Great Aunt, thus ruling out Grandmother, without the benefit of a home study on Grandmother.

Section 7B-903(a1) states that the trial court should consider the children's best interests when placing them in "out-of-home care," but that "[p]lacement of a juvenile with a relative outside of this State *must* be in accordance with the Interstate Compact on the Placement of Children ["ICPC"]." N.C. Gen. Stat. § 7B-903(a1) (2021). (emphasis

added). We have held that, where the ICPC applies, "a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study." *See In re V.A.*, 221 N.C. App. 637, 640, 727 S.E.2d 901, 904 (2012).

Assuming the ICPC applies in this case, *see In re J.E.*, 182 N.C. App. 612, 643 S.E.2d 70 (2007) (holding that ICPC did not apply to an order granting guardianship to out-of-state grandparents), we conclude there is no obligation under the ICPC that a home study be completed *to rule out* an out-of-state relative as a placement option. The plain language of Section 7B-903(a1) states that the ICPC only applies where a child is actually placed with someone out-of-state, and only must be complied with with respect to the out-of-state person with whom the child is being placed. For instance, if the trial court was considering placement with ten different relatives in ten different states, the ICPC does not require the trial court to review a home study for all ten relatives but only for the out-of-state relative with whom the child is actually placed. That is, there is no requirement under the ICPC that the trial court consider home studies for the other nine relatives before ruling them out.

Mother argues, however, it was error for Judge Burnette, who entered the guardianship order we are reviewing, to grant Great Aunt guardianship without the benefit of a home study on Grandmother where a different judge in a prior hearing had ordered the home study be completed. We conclude, however, that it was not an abuse of discretion for Judge Burnette to make a placement with an in-state person without the benefit of the previously ordered home study of an out-of-state person, so long as her findings and conclusions, otherwise, support her exercise of discretion in awarding guardianship.

And, here, we conclude the order does support Judge Burnette's discretionary decision to place the children with Great Aunt. For instance, the trial court found Great Aunt's home was the only home the children had ever known, her home is near other relatives, the children were generally doing well living with Great Aunt, and Grandmother already had three minor children in her home she was taking care of. Further, we note the trial court's findings that over many years, the children bonded with Great Aunt but not with Grandmother and that it would be in the children's best interest to remain in the only home they have ever known.

It may be that VCDSS inappropriately delayed in following through on its obligation to request a home study of Grandmother as was previously ordered, as the dissent in this case suggests. Notwithstanding, the matter was properly before Judge Burnette in the latest round of hearings, and she had the discretion both to enter her guardianship order

without the benefit of the home study and to deal with VCDSS' behavior separately, as may be warranted.

In sum, it may be an abuse of discretion in some cases *to rule out* a placement option, whether in-state or out-of-state, without the benefit of a home study assessment. It may be an abuse of discretion in some cases to place a child with an in-state person without a home study assessment of that person. In such cases, when the child is placed with an in-state person, the issue is whether the trial court abused its discretion in conducting its "best interests of the child" analysis without the benefit of a home study. However, pursuant to Section 7B-903, it is only when a trial court judge *actually places a child with an out-of-state person* that the trial court lacks discretion to make that placement without the benefit of a home study *of that person*, because such study is required under the ICPC. However, since Judge Burnette ordered that the children remain with their in-state Great Aunt, we need only consider whether it was an abuse of discretion for her to do so without the benefit of a home study of Grandmother. And, for the reasons above, most notably that the children have now lived with Great Aunt for several years and have bonded well with her, we conclude that Judge Burnette did not abuse her discretion.

C. Order Stating "The Matter is Closed"

[3] In the decretal portion of her order, Judge Burnette stated that "[t]he matter is closed and [VCDSS] and its counsel are released and relieved of further responsibilities regarding this matter." Mother contends that the clause "[t]he matter is closed" constitutes error to the extent that the clause could be construed as stating the entire case has been resolved. Mother notes this clause may simply refer to the matter being closed as far as VCDSS is concerned. We do not read the clause as preventing Mother from filing motions in the future concerning her children. Her parental rights have not been terminated, and she was granted visitation rights in the trial court's order.

D. Electronic Visitation

[4] The trial court granted Mother certain visitation rights as follows:

> That there is voluntary visitation two times per week between each of the juveniles in the care of Ms. P[] and [Mother],via electronic devices. The Respondent [M]other is allowed to continue these visits.

Mother argues the trial court abused its discretion by failing to comply with Section 7B-905.1 in this visitation. As Mother asserts, this visitation

provision raises two concerns: (1) the findings are not sufficient to support the grant of electronic-only visitation; and (2) the order improperly delegates visitation decisions to the parties. *See In re J.R.*, 279 N.C. App. 352, 366, 866 S.E.2d 1, 10 (2021) (stating that our Court "reviews the trial court's dispositional orders of visitation for an abuse of discretion") (citation and quotation marks omitted).

We agree that the visitation provision does not properly support the grant of electronic-only visitation. When a juvenile is placed outside the home, North Carolina General Statute § 7B-905.1(a) requires trial courts to "provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." N.C. Gen. Stat. § 7B-905.1(a) (2021). This Court has previously held the provision of electronic-only visitation is equivalent to the trial court granting no visitation. *See In re T.R.T.*, 225 N.C. App. 567, 573, 737 S.E.2d 823, 828 (2013) (agreeing with argument on appeal that visitation exclusively over Skype "effectively denie[d]" the mother visitation "as contemplated by" North Carolina General Statute § 7B-905(c)); *see also In re K.M.*, 277 N.C. App. 592, 601 n. 2, 861 S.E.2d 10, 16 (2021) (explaining § 7B-905(c) has been "substantively recodified" as § 7B-905.1(a)).

As a result, while a trial court may grant electronic-only visitation, the court must make specific findings to justify it that are equivalent to the findings a trial court must make when it sets no visitation. *See In re T.R.T.*, 225 N.C. App. at 574, 737 S.E.2d at 829 (order failed to comply with § 7B-905(c) because "[d]espite denying visitation, the trial court did not make any specific findings that [the] respondent-mother forfeited her right to visitation or that visitation would be inappropriate under the circumstances"); *see also In re K.M.*, 227 N.C. App. at 602-04, 861 S.E.2d at 16-18 (distinguishing *In re T.R.T.* and holding the trial court did not abuse its discretion in suspending a mother's supervised in person visitation and only allowing "weekly video contact" because the trial court "ma[d]e specific findings that visitation would be inappropriate" other than supervised visitation, which could not take place because of the pandemic); *In re T.H.*, 232 N.C. App. 16, 34-35, 753 S.E.2d 207, 219 (2014) (remanding for entry of visitation order because the trial court failed to provide any visitation and had not made findings that the mother "had forfeited her right to visitation or that it was in the best interests of [the children] to deny visitation.") Specifically, to grant electronic-only visitation, the trial court must make "specific findings that" a parent "forfeited her right to visitation or that visitation would be inappropriate under the circumstances." *In re T.R.T.*, 225 N.C. App. at 574, 737 S.E.2d at 829.

Here, the trial court granted electronic only visitation without any "specific findings" that Mother "forfeited her right to visitation or that visitation would be inappropriate under the circumstances." *See id.* at 574, 737 S.E.2d at 829. The trial court's only findings regarding visitation stated:

> 12. The current visitation plan between the [M]other . . . who resides in Georgia, and the juveniles include weekly virtual visits and telephone calls. The calls are initiated by the biological [M]other of the children[.]
>
> . . . .
>
> 14. The [M]other's last in person visit with the juveniles was in December, 2020.
>
> . . . .
>
> 23. [Mother] has not been consistent on visits with the three juveniles. She has made calls to [Ms. P's] household during school hours and dinner time. She forgets what times the children are in school and when they eat dinner.

These findings do not meet the requirements for electronic-only visitation. On remand, the trial court has discretion to grant electronic-only visitation or any other visitation provision, *see In re J.R.*, 279 N.C. App. at 366, 866 S.E.2d at 10 ("[t]his Court reviews the trial court's dispositional orders of visitation for an abuse of discretion"); but if the trial court wishes to set electronic-only visitation, it must make the required findings. *In re T.R.T.*, 225 N.C. App. at 574, 737 S.E.2d at 829. We also note that if the children remain in North Carolina and Mother remains in Georgia, frequent in-person visitation may not be practical for Mother due to the cost and distance, but those factors alone may not justify the complete elimination of any possibility of in-person visitation, assuming the absence of other reasons to deny in-person visitation.

Turning to Mother's second area of concern, we agree that the visitation provision improperly delegates authority regarding her visitation. Trial courts must "provide a framework for . . . visitations." *In re N.B.*, 240 N.C. App. 353, 364, 771 S.E.2d 562, 570 (2015); *see also In re M.M.*, 230 N.C. App. 225, 240, 750 S.E.2d 50, 59 (2013) (terming the failure to provide such a framework as "leav[ing] the terms of visitation in the discretion of the custodian.").[2] Specifically, North Carolina General Statute § 7B-905.1(c) provides:

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2. *In re M.M.* used this language in reference to an old line of cases stemming from *In re E.C.* that required the court to provide for the "time, place and conditions under which

> If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1(c) (eff. 1 Oct. 2021). Thus, the trial court must include three pieces of information when ordering visitation: (1) minimum frequency; (2) length of the visits; and (3) supervision, or lack thereof, necessary for the visits. *Id.*

In the order on appeal, the visitation provision only addresses one of the three required elements. *See id.* While the minimum frequency of the visits is two times per week, the trial court's order does not address the length of the visits or whether they need to be supervised. As a result, to the extent the trial court, in its discretion, provides for visitation on remand, it must at least address the minimum frequency, length, and supervision, or lack thereof, for the visits. *See id.*; *see also In re J.R.*, 279 N.C. App. at 367, 866 S.E.2d at 10.

II. Conclusion

We vacate the portion of the order granting Mother electronic-only visitation due to both the lack of any findings that electronic-visitation would be in the children's best interest and the trial court's failure to address the frequency, length and supervision (or lack thereof) concerning the visitation. We remand the matter to the trial court to reconsider Mother's visitation and enter an order that complies with Section 7B-905.1 of our General Statutes.

We affirm the order in all other respects.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judge CARPENTER concurs.

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visitation may be exercised." *In re M.M.*, 230 N.C. App. at 239-40, 750 S.E.2d at 59 (quoting *In re E.C.*, 174 N.C. App. 517, 523, 621 S.E.2d 647, 652 (2005)). While *In re E.C.*'s requirement a trial court provide "the time, place, and conditions of visitation" was abrogated by the enactment of North Carolina General Statute § 7B-905.1, the new statute still provides a new, more limited framework. *See In re N.B.*, 240 N.C. App. at 364, 771 S.E.2d at 570 (explaining how *In re E.C.* was abrogated after stating the new statute "only require[s] the trial court to provide a framework for . . . visitations."). As such, when the trial court has not complied with the requirements of § 7B-905.1, we still refer to this as leaving the terms of visitation to the discretion of the custodians.

Chief Judge STROUD concurs in part and dissents in part by separate opinion.

STROUD, Chief Judge, concurring in part, dissenting in part.

I agree with the Majority Opinion on three of the four issues: (1) the legal significance of guardianship, (2) the trial court's statement that "matter is closed[,]" and (3) visitation. But I disagree with the Majority Opinion that the trial court could make a placement determination without waiting for the ICPC home study of Grandmother, after having thrice ordered this study be obtained. Therefore, I concur in part and dissent in part.

I first note the potential importance of this opinion. The Majority Opinion reduces a statutory mandate established to protect the best interests of abused, neglected, or dependent children to a mere discretionary question. In other words, the Majority Opinion holds that the trial court has the discretion to ignore the statute and prior court orders. The Majority Opinion also overlooks egregious and unexplained delays and multiple violations of court orders by VCDSS. This case sets a dangerous precedent for the most vulnerable members of our society—children who are abused, neglected, or dependent. Departments of Social Services and Child Protective Services agencies have an incredibly important and difficult job, and most do this job admirably. But I fear those who do not do this job properly will be able to rely on the Majority Opinion to justify their failures to act, up to and including ignoring court orders directing them to take a specific action. The Majority Opinion also gives credence to VCDSS's argument that the ultimate placement of a child is up to the Department of Social Services; the trial court just serves as a rubber stamp for the Department's decision.

As an initial matter regarding the home study issue, the Majority Opinion improperly reviews for abuse of discretion rather than *de novo*. The Majority Opinion "conclude[s] the trial court did not err or *otherwise abuse its discretion* in entering its order granting guardianship to Great Aunt without the benefit of a home study of Grandmother." (Emphasis added.) While in general this Court "review[s] a trial court's determination as to the best interest of the child for an abuse of discretion[,]" *In re C.P.*, 252 N.C. App. 118, 122, 801 S.E.2d 647, 651 (2017) (citation and quotation marks omitted), Mother argues on appeal the failure to investigate a potential placement with Grandmother, who lives in Georgia, constituted "an inexcusable breach of [the] statutory commands" of North Carolina General Statute § 7B-903(a1) to comply with

the ICPC, N.C. Gen. Stat. § 7B-3800 *et seq.* (2021), when "determin[ing] whether a child should be placed with a willing and able relative that lives outside of North Carolina." *See* N.C. Gen. Stat. § 7B-903(a1) (eff. 1 Oct. 2021). This Court "review[s] statutory compliance *de novo*[,]" *see In re N.K.*, 274 N.C. App. 5, 13, 851 S.E.2d 389, 395 (2020) (stating in a case about § 7B-903(a1)), rather than for an abuse of discretion.

In addition to the Majority Opinion's incorrect standard of review, I also note the Majority Opinion's suggestion the ICPC may not even apply here relies on caselaw this Court has determined we are not bound by. Specifically, as part of merely "[a]ssuming the ICPC applies in this case[,]" the Majority Opinion cites to *In re J.E.*, 182 N.C. App. 612, 643 S.E.2d 70 (2007) and says it holds the ICPC does not apply to a grant of guardianship to out-of-state grandparents. While the Majority Opinion accurately states *In re J.E.*'s holding, *see id.* at 615, 643 S.E.2d at 72, the Majority does not acknowledge this Court's opinion in *In re J.D.M.-J.* The *In re J.D.M.-J.* Court concluded, after an analysis under *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), this Court is not bound by *In re J.E. See In re J.D.M.-J.*, 260 N.C. App. 56, 63, 817 S.E.2d 755, 760 (2018) (determining *In re J.E.* and the other case the Majority Opinion cites, *In re V.A.*, 221 N.C. App. 637, 727 S.E.2d. 901 (2012), "are in conflict" before concluding "we are bound by" *In re V.A.* and an earlier case on which it relies, *In re L.L.*, 172 N.C. App. 689, 616 S.E.2d 392 (2005), *abrogated in part on other grounds by In re T.H.T.*, 362 N.C. 446, 450-53, 665 S.E.2d 54, 57-59 (2008)). Instead, as *In re J.D.M.-J.* states by relying on the other case cited by the Majority Opinion (*In re V.A.*), under the ICPC, "custody placement with . . . out-of-state relatives . . . trigger[s] the requirements of the ICPC." *See In re J.D.M.-J.*, 260 N.C. App. at 63, 817 S.E.2d at 760 (citing *In re V.A.*, 221 N.C. App. at 640-41, 727 S.E.2d at 904) (concluding the ICPC applies to placement with out-of-state relatives because they count as a "placement in foster care" under the ICPC (emphasis omitted)); *see also* N.C. Gen. Stat. § 7B-3800, Art. III(b) (ICPC section stating it applies to placement "in foster care or as a preliminary to a possible adoption"). So I disagree we need to *assume* the ICPC applies; under our past caselaw, the ICPC definitively applies to the situation here where there is a potential placement with an out-of-state relative, Grandmother. *See In re J.D.M.-J.*, 260 N.C. App. at 63, 817 S.E.2d at 760 (explaining, under a line of cases it later holds this Court is bound by, that "custody placement with . . . out-of-state relatives . . . trigger[s] the requirements of the ICPC"). And aside from these statements of the law in other cases, in *this* case, the trial court itself had thrice ordered VCDSS to do the ICPC home study. Those orders were not appealed. VCDSS does not contend the trial court erred by entering

those orders, nor does VCDSS give any rational explanation for its failure to comply with the trial court's three orders.

Turning to the crux of the matter, I disagree with the Majority Opinion's determination that the ICPC only applies when a child is actually placed with an out-of-state relative. This interpretation is exactly the opposite of the actual purpose of the ICPC. While North Carolina General Statute § 7B-903(a1) states, "Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children[,]" N.C. Gen. Stat. § 7B-903(a1), to hold, as the Majority Opinion does, that the ICPC only applies to placement with an out-of-state relative, and not when an ultimate placement decision settles on an in-state relative instead of an out-of-state relative also under consideration, (1) does not comport with the purpose of the abuse, neglect, dependency subchapter of the Juvenile Code and (2) does not comport with the ICPC's goal to provide information to help make the ultimate determination between an in-state and out-of-state relative.

First, the Majority Opinion's view of the ICPC study as a step to be taken *after* the trial court has made a decision to place a child in an out-of-state placement entirely contradicts the goal of attaining permanency for children as soon as possible. *See* N.C. Gen. Stat. § 7B-100(5) (2021) (listing, as a purpose of the subchapter of the Juvenile Code on abuse, neglect, dependency, "[t]o provide standards . . . for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be *placed in a safe, permanent home within a reasonable amount of time*" (emphasis added)). A trial court may order the ICPC home study to be initiated at any point in the process if the court identifies a potential out-of-state placement for the child. Here, the first order directing a home study of Grandmother was rendered *a few days* after the petition was filed. Had VCDSS complied with the first order, or the other two orders directing VCDSS to "initiate" the ICPC home study and to "expedite" the ICPC home study, the trial court would have had the home study long before the final hearing. If a trial court had to wait until it was ready to make a final determination even to order an ICPC home study, this delay would be detrimental to the children and would prolong the process in getting to permanency for the children.

Turning to the disconnect between the Majority Opinion's interpretation and the purposes of the ICPC, in relevant part, the ICPC lists these purposes:

> It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that:
>
> . . . .
>
> (b) The appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child.
>
> (c) The proper authorities of the state from which the placement is made may obtain *the most complete information on the basis of which to evaluate a projected placement before it is made*.
>
> (d) Appropriate jurisdictional arrangements for the care of children will be promoted.

N.C. Gen. Stat. § 7B-3800, Art. I (emphasis added). To support these purposes, Article III of the Compact sets forth an exchange of information between states to ensure any placement outside of the initial state, here North Carolina, "does not appear contrary to the interests of the child[:]"

> (a) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this Article and with the applicable laws of the receiving state governing the placement of children therein.
>
> (b) Prior to sending, bringing, or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:
>
> (1) The name, date, and place of birth of the child.
>
> (2) The identity and address or addresses of the parents or legal guardian.
>
> (3) The name and address of the person, agency or institution to or with which the sending agency proposes to send, bring, or place the child.

> (4) A full statement of the reasons for such proposed action and evidence of the authority pursuant to which the placement is proposed to be made.
>
> (c) Any public officer or agency in a receiving state which is in receipt of a notice pursuant to paragraph (b) of this Article may request of the sending agency, or any other appropriate officer or agency of or in the sending agency's state, and shall be entitled to receive therefrom, such supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of this Compact.
>
> (d) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

N.C. Gen. Stat. § 7B-3800, Art. III.[1]

Based on these requirements in Article III of the ICPC, this Court has held "a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study." *See In re V.A.*, 221 N.C. App. at 640, 727 S.E.2d at 904 (quoting *In re L.L.*, 172 N.C. App. at 702, 616 S.E.2d at 400) (stating this requirement directly after discussing Article III of the ICPC). Thus, a home study ultimately helps provide "the most complete information on the basis of which to evaluate a projected placement before it is made." N.C. Gen. Stat. § 7B-3800, Art. I(c); *see also In re L.L.*, 172 N.C. App. at 702, 616 S.E.2d at 400 (linking the requirement of an ICPC home study to the ICPC's goal "that states will cooperate to ensure that a state where a child is to be placed 'may have full opportunity to ascertain the circumstances of the proposed placement' and the [s]tate seeking the placement 'may obtain the most complete information on the basis of which to evaluate a projected placement before it is made' " (quoting N.C. Gen. Stat. § 7B-3800, Art. I(b), (c))).

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1. As discussed above, while the language of the ICPC states it applies to placement "in foster care or as a preliminary to a possible adoption[,]" N.C. Gen. Stat. § 7B-3800, Art. III(b), this Court has previously held "custody placement with . . . out-of-state relatives [is] a 'placement in foster care,' thereby triggering the requirements of the ICPC." *See In re J.D.M.-J.*, 260 N.C. App. at 63, 817 S.E.2d at 760 (quoting *In re V.A.*, 221 N.C. App. at 640-41, 727 S.E.2d at 904) (discussing *In re V.A.* as part of a conflict between case lines from this Court and then later holding this Court is "bound by" the *In re V.A.* line of cases).

Here, the Majority Opinion allows placement with an in-state relative, Great Aunt, without requiring the trial court to receive complete information on an out-of-state relative, Grandmother. Instead, the Majority Opinion determines (1) the trial court could make a placement determination before receiving a home study as long as the trial court's findings supported its conclusions and (2) in this case, the findings did support the conclusions. The issue with such a holding is that it assumes the placement decision would be the same—*i.e.* with an in-state relative such that compliance with the ICPC would not be required under the Majority Opinion's reading of North Carolina General Statute § 7B-903(a1)—even after the home study is complete. But that assumption cannot be sustained under the facts.

The trial court made findings about Grandmother, based on the limited information before the trial court, to support its conclusion placement with her would be contrary to the children's best interest, but the home study could have provided information that may have affected those findings. For example, the trial court found:

> 59. The three juveniles in this case have not bonded with [Grandmother] or with [Grandmother's] three older children and each juvenile in this case would be one of six children in the [Grandmother's] household as opposed to being one of three children in a household wherein the only other children in the household are their siblings in the current household of [Great Aunt].

A home study could have addressed the bond of the children with Grandmother.[2] A home study also could have addressed how Grandmother would deal with balancing the needs of her three older children and of the three children whose custody is at issue in this case. Some caretakers can care for multiple children very well; some caretakers struggle with caring for even one child. Without the ICPC home study, it is impossible to be certain what we, the parties, or the trial court would learn about Grandmother's home or her capacity to care for more children. Because of that uncertainty, I disagree with a blanket holding the ICPC does not apply when a child is placed in-state instead of with an out-of-state relative who is a placement option.

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2. We also note a three-year delay by VCDSS in requesting the ICPC home study, discussed in greater detail below, effectively eliminated any opportunity Grandmother might have had to develop or strengthen her relationship with her grandchildren during this time.

I also recognize that under different facts, the trial court's failure to wait for the ICPC home study might be harmless. So I would also not make a blanket holding the other direction and always require a trial court to wait for completion of an ICPC home study when a potential out-of-state relative placement is identified, even if the trial court had ordered the study. Circumstances can change and a trial court may have good reason—such as an out-of-state relative no longer being available to be a placement option after lengthy proceedings—to forgo the home study. Instead, I would analyze whether the trial court should have waited for the home study in this case.

Here, I would ultimately conclude the trial court was required to wait for a home study. First, the trial court repeatedly ordered the home study and even continued the hearing that led to the order on appeal because the home study had not yet been received. Second, the home study was delayed not because of any fault of Mother or Grandmother but rather because of VCDSS's repeated failures to comply with the trial court's orders to initiate the home study.

From the very start of the case, only a few days after filing of the petition, Grandmother in Georgia was identified as a potential placement for the children, and the trial court initially ordered Grandmother "be investigated as a possible placement" in February 2019, although the order was not written down and filed until April 2020. This order notes it was "entered in open court[,]" and we have no reason to believe VCDSS was not aware of the trial court's directive for this home study in February 2019, even if the written order was filed woefully late, nearly a year later.[3] While that order did not explicitly mention an *ICPC* home

3. The delays in filing written orders continued throughout the case. The record does not reveal the reason the written orders were significantly delayed in this case, especially given all of the adjudication, disposition, and permanency planning orders were required by statute to be written and entered within 30 days after the completion of the relevant hearings. *See* N.C. Gen. Stat. § 7B-807(b) (2021) (mandating adjudication orders "shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing"); N.C. Gen. Stat. § 7B-905(a) (eff. 1 Oct. 2015 to 30 Sept. 2021) (stating dispositional orders "shall be in writing, signed, and entered no later than 30 days from the completion of the hearing"); N.C. Gen. Stat. § 7B-906.1(h) (eff. 1 Oct. 2021) (requiring permanency planning orders "be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing"); N.C. Gen. Stat. § 7B-906.1(h) (eff. 1 Oct. 2019 to 30 Sept. 2021) (previous permanency planning statute including identical timing requirements as current statute); *see also* N.C. Gen. Stat. § 7B-905(a) (eff. 1 Oct. 2021) (current version of dispositional order statute also requiring written order be entered within 30 days).

Given these delays, in general, I follow the dates the orders state they were rendered in open court rather than the dates they were filed, which no parties dispute.

study, placement with Grandmother in Georgia would have required an ICPC home study. *See In re V.A.*, 221 N.C. App. at 640, 727 S.E.2d at 904 ("[A] child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study.").

Then, in an order rendered in open court on 25 February 2021 but not written and entered until 25 May 2021, the trial court explicitly ordered VCDSS to "initiate the ICPC" for Grandmother. Third, in an order rendered 7 July 2021 but not filed until 20 January 2022, the trial court specifically ordered the ICPC home study of Grandmother "be expedited." Finally, on 25 August 2021, the trial court entered an order to continue hearing of the case to 18 October 2021. The stated reason for the continuance was:

> "For the court to receive additional evidence, reports, or assessments requested by the court or one of the parties. **That the results of the ICPC have not been received by the VCDSS.**"

(Emphasis in original.) Notably, despite the Majority Opinion's discussion of how a different judge than Judge Burnette had initially ordered the ICPC home study, Judge Burnette entered the order expediting the home study *and* continued the case because the home study had not been received.

Despite these orders and the continuance by the trial court, VCDSS had not even *requested* the home study from Georgia when the hearing in October 2021 began, as it was not requested until 5 November 2021. And the home study had not been completed by the last hearing date in February 2022 that was part of the proceedings that led to the guardianship order on appeal. During the series of hearings that led to the guardianship order—contrary to the statement by VCDSS's counsel at the start of the hearing that "It has been sent to Georgia, but we do not have results"—the VCDSS social worker on the case testified she did not send the ICPC on Grandmother to Georgia until 5 November 2021. The VCDSS social worker also explicitly testified this delay with the ICPC had nothing to do with Grandmother. Instead, VCDSS waited almost three years between the time when it was clear an ICPC home study would be necessary (February 2019), *see In re V.A.*, 221 N.C. App. at 640, 727 S.E.2d at 904 (requiring an ICPC home study for an out-of-state relative placement), and the time it initiated the ICPC process by sending the ICPC to Georgia (November 2021). VCDSS failed to comply with the trial court's three orders—in February 2019, to investigate Grandmother as a potential relative placement; in February 2021, to initiate the ICPC home study; and in July 2021, to expedite the home study.

VCDSS continued to delay in *ordering* the home study even after the trial court's August 2021 order continuing hearing of the case to October expressly to obtain the home study from Georgia.

I also note that Mother did not abandon or waive her request for a home study of Grandmother but continued to assert the need for the study throughout the case and in the final hearing. Grandmother also participated in the hearing. When Mother's attorney asked at the end of the proceedings if the home study would "still be proceeding[,]" the trial court did not respond:

> [Mother's attorney]: Okay. Will the home study still be proceeding while this is going on?
>
> THE COURT: (No audible response.)
>
> [Mother's attorney]: Okay. So that – that's out of your hands. That's just . . .
>
> THE COURT: I do want to reiterate something [attorney advocate for the GAL] said. It is wonderful to see so many relatives with interest in these children.
>
> [Mother's attorney]: I agree, Your Honor.
>
> THE COURT: And I appreciate that.
>
> [Mother's attorney]: I do agree.
>
> THE COURT: All right.

As a result, by the end of the proceedings, despite three court orders and a continuance expressly to get the home study, no ICPC home study had been done to evaluate the suitability of Grandmother as a placement option.

Only VCDSS was at fault for the failure to obtain the home study; neither Grandmother nor Mother contributed to the delay. Rather, VCDSS had not initiated the home study as repeatedly ordered by the trial court. VCDSS also made misrepresentations to the trial court about the status of the request for the home study at the beginning of the hearing in October, claiming the request had been sent to Georgia, when in fact VCDSS did not send the request until November 2021.[4]

VCDSS's defense of its actions and inactions on appeal is also disconcerting. VCDSS repeatedly contends the delay in getting the ICPC home study done combined with the home study's lack of bearing on

4. The record does not reveal whether this misrepresentation was intentional or just negligent, but VCDSS's representation to the trial court that the home study had been ordered prior to November 2021 was clearly not true.

the children's placement given VCDSS's placement authority to make a determination means the trial court did not err. VCDSS argues:

> The juveniles have been in a kinship placement with [Great Aunt] since February 28, 2019, thirty-five (35) months. Reunification efforts were ceased and the primary plan changed to guardianship on February 25, 2021. In the same order, the court ordered that VCDSS initiate an ICPC but that DSS would also make the determination on the placement. *I would argue that the ICPC would not have had a bearing on the placement of the children. That still would have been up to DSS to make the determination.* (R. 162). Moreover, the request for the ICPC to be expedited did not occur until July 7, 2021.
>
> The Juvenile Code states that when the court places the child in out-of-home care with a relative outside of North Carolina, that dispositional placement "must be in accordance with the["] ICPC. N.C. Gen. Stat. § 7B-903(a)(1). *It is the Petitioner's contention that it did not intend to place the children in the home of [Grandmother]*, which would have removed them from the home that they have known for the past thirty-five (35) months with [Great Aunt] and place them in the home of a relative that they did not have a relationship with . . . . [G]randmother was not even aware that the children were in the custody of DSS until 2020 because she and the Respondent-Mother did not have a good relationship and the status of their relationship did not change until 2020. (R. 290).

(Emphasis added.) VCDSS's arguments misapprehend the situation.

First, VCDSS's reliance on the delay in the ICPC home study to justify continued placement with Great Aunt ignores the fact that *VCDSS was responsible for that delay and that it failed to comply with the trial court's three orders*. As recounted above, VCDSS failed to initiate the ICPC process for almost three years after the trial court initially rendered an order that Grandmother should be investigated. And the delay was not the fault of Grandmother but rather the fault of VCDSS. As VCDSS is entirely at fault for the delay with the ICPC home study even being initiated, it cannot now defend the trial court's decision to not wait for the home study by pointing to its own delay.

Further, VCDSS's argument about placement authority misunderstands the scope of its authority and the stage in proceedings at issue in

this appeal. To support its contention, VCDSS seems to contend it—not the trial court—would make the final placement determination by citing to the permanency planning order filed 25 May 2021. While that order granted VCDSS legal and physical custody with placement discretion, the order on appeal involved removing custody from VCDSS and instating Great Aunt as the children's guardian. When making the determination of whether Great Aunt or Grandmother would have custody, VCDSS thus did not have any sort of placement authority because it no longer would have custody.

VCDSS's placement authority only stemmed from the trial court's decision to grant it custody with placement authority. *See* N.C. Gen. Stat. § 7B-903(a) (authorizing "any *court* exercising jurisdiction" in an abuse, neglect, dependency proceeding to make a choice as to disposition where those choices include placing the juvenile with DSS (emphasis added)). In making a determination of whether to give custody or guardianship to Great Aunt or Grandmother, the trial court had the authority to decide, not VCDSS. *See id.* (again empowering the *court* to choose between placing the juvenile in the custody of a relative or appointing a guardian); *see also* N.C. Gen. Stat. § 7B-903(a1) ("In placing a juvenile in out-of-home care under this section, *the court* shall" undertake the listed actions. (Emphasis added.)). Because the trial court, not VCDSS, had authority, and the trial court was required to take into account the ICPC home study, as discussed above, VCDSS incorrectly argues the ICPC study was immaterial because VCDSS had placement authority.

In addition, VCDSS ignores the trial court's three orders directing VCDSS to obtain a home study of Grandmother. Whatever VCDSS may have "intend[ed]" as to the placement of the children, the trial court had ordered the home study, and VCDSS had an obligation to comply with the trial court's orders.

Given these facts, I agree with Mother that the trial court failed to comply with North Carolina General Statute § 7B-903(a1)'s command to comply with the ICPC. *See* N.C. Gen. Stat. § 7B-903(a1). Given the three court orders directing VCDSS to investigate Grandmother as a potential placement, the trial court was clearly considering her as a potential placement. Since the trial court was still considering placement with an out-of-state relative, it would have to comply with the ICPC. *See In re V.A.*, 221 N.C. App. at 640, 727 S.E.2d at 904 (requiring an ICPC home study before there can be placement with an out-of-state relative). But the trial court did not comply with the ICPC's requirement of a home study, *see id.*, and instead considered and rejected placement with Grandmother without having a home study. Further, the trial

court did not provide sufficient reasoning for its decision to not wait for the home study under the unusual circumstances of this case. The trial court gave "[n]o audible response" when Mother's attorney asked about the home study at the end of the relevant hearing, and the trial court's findings in its written order were not sufficient as the home study could have provided pertinent information that could have affected those findings.

I would hold the trial court failed to comply with the ICPC and failed to comply with North Carolina General Statute § 7B-903(a1). Because the trial court failed to comply with a statutory mandate, I would vacate the trial court's order entirely and remand the case to the trial court for further proceedings and entry of a new order. For that reason, I would not reach the other issues raised on appeal. However, I concur with the Majority Opinion as to the remaining issues. Therefore, I respectfully concur in part and dissent in part.

STATE OF NORTH CAROLINA
v.
SCOTT LEE BRIDGES, DEFENDANT

No. COA22-208

Filed 1 August 2023

1. Constitutional Law—effective assistance of counsel—right to conflict-free counsel—Sullivan review—notice, inquiry, and waiver

In defendant's prosecution for charges arising from an attempted robbery and an assault with a deadly weapon, there was no violation of defendant's Sixth Amendment right to conflict-free counsel where defense counsel spoke to one of the State's witnesses in the hallway outside of the courtroom when he observed her crying and asked whether she would like to speak with an attorney (one other than defense counsel) and was subsequently accused of misconduct by the State. Upon defense counsel's motion to withdraw due to the alleged conflict of interest, the trial court did not err by denying the motion because the court had notice of the potential conflicts, the court conducted an adequate inquiry into the conflicts, and defendant gave a knowing, intelligent, and voluntary waiver of the conflicts.

2. Constitutional Law—effective assistance of counsel—right to conflict-free counsel—claim prematurely asserted on direct appeal—dismissal without prejudice

In defendant's prosecution for charges arising from an attempted robbery and assault with a deadly weapon, where defense counsel spoke to one of the State's witnesses in the hallway outside of the courtroom when he observed her crying and asked whether she would like to speak with an attorney (one other than defense counsel) and was subsequently accused of misconduct by the State, the Court of Appeals dismissed—without prejudice to his right to bring a motion for appropriate relief in the trial court—defendant's claim for ineffective assistance of counsel based on the allegation that defense counsel renewed his motion to withdraw yet asked the trial court not to grant the motion.

Appeal by Defendant from judgments entered 23 July 2021 by Judge James F. Ammons, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 4 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Terence D. Friedman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

MURPHY, Judge.

When a trial court denies a defense counsel's motion to withdraw due to an alleged conflict of interest, the defendant may demonstrate reversible error by showing that either (1) defense counsel had an actual conflict of interest which implicated the defendant's Sixth Amendment right to conflict-free counsel or (2) despite the absence of an actual conflict of interest, the defense counsel provided ineffective assistance which prejudiced the defendant. However, when the trial court had notice of a potential conflict of interest and conducted an adequate inquiry into that conflict, and the defendant gave a knowing, intelligent, and voluntary waiver of that conflict, the defendant's Sixth Amendment claims fail.

Here, Defendant argues that his Sixth Amendment right to conflict-free counsel was implicated both when his defense counsel became a necessary witness and when, outside the presence of the jury,

the State accused counsel of misconduct. Defendant further argues that the denial of defense counsel's motion to withdraw, in light of these potential conflicts, violated his Sixth Amendment right to effective assistance of counsel. However, Defendant's arguments fail because the trial court had notice of defense counsel's potential conflicts; the trial court conducted an adequate inquiry into these conflicts; and Defendant gave a knowing, intelligent, and voluntary waiver of these conflicts. Defendant further raises an ineffective assistance of counsel challenge based on defense counsel's statements regarding his renewed motion to withdraw, which he argues were inconsistent with his interest in its granting. We dismiss this claim as being raised prematurely on appeal without prejudice to Defendant's ability to bring an MAR in the trial court.

BACKGROUND

On 5 October 2018, Defendant and two other individuals, Carmen Williams and Ramu Damu, traveled to a used car lot in Garner. There, Williams expressed interest in purchasing a red Cadillac and accompanied the manager to his office to discuss details of the purchase. Around this time, Defendant and Damu left the office, and Defendant and an individual with a shirt covering his face returned with a handgun. One of the men ordered the manager to "give up" his money as Williams exited the office. When the manager turned his back towards the men, one of them fired the gun. A bullet pierced the manager in the back of his neck and went through his right cheek. After the shooting, Defendant and Damu fled the scene in the car which they drove to the lot, and Williams "jumped in" the car. Afterwards, Williams called 911, provided a fake name, and told the dispatcher that someone had been shot.

After law enforcement tracked Williams from her phone call, she gave a series of inconsistent statements as to her presence at the lot. In January 2019, she denied being present and making the 911 call. However, in February 2019 and March 2019, she admitted and maintained that she was present at the scene with Defendant and Damu. In March 2019, and again at trial, Williams identified Defendant as the shooter.

Beginning 12 July 2021, Defendant was tried in Johnston County Superior Court for charges associated with the 5 October 2018 shooting. During his trial, Williams served as a witness for the State. Prior to her testimony, defense counsel observed Williams crying in the hallway outside of the courtroom, approached her, and asked if she would like to talk to an attorney. The morning after this conversation, defense counsel asked the public bar if anyone would like to talk to her, and an attorney said he would advise her. After this exchange, the trial court addressed

Williams outside of the presence of the jury in an unsworn conversation. During this conversation, Williams stated that she was never at the scene of the incident, and that she did not wish to take the witness stand and perjure herself by claiming she was present. The trial court permitted the State to speak with Williams during the lunch recess, and after this recess, Williams was again willing to tesify without an attorney. Ms. Williams ultimately testified that she was present at the scene and that she did call 911.

Outside of the jury's presence, the trial court heard defense counsel's verified motion to withdraw as counsel. Counsel argued that he was "an essential, necessary witness to [Defendant's] case" because of "what [he] witnessed [outside of the courtroom] as an officer of the court, and what [the judge] witnessed in [the courtroom]." He also moved to withdraw on the basis that a conflict of interest was created when the State alleged that he "tampered with the witness" and "chilled her testimony[,]" and that he could not defend both Defendant and himself. The Defendant further asked that the trial court declare a mistrial. However, the trial court denied the *Motion to Withdraw* and motion for a mistrial. Defense counsel cross-examined Williams in the presence of the jury, and during this cross-examination, Williams admitted that she lied to the court about not being at the scene of the crime and about not calling 911. However, despite the court's permission to do so, counsel did not question Williams about the hallway conversation. He later renewed the motion to withdraw based on his alleged conflict of interest, but this motion was again denied.

The jury found Defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by felon. Defendant timely appealed.

ANALYSIS

Defendant first argues that the trial court violated his Sixth Amendment rights to conflict-free counsel and effective assistance of counsel when it denied defense counsel's *Motion to Withdraw* and permitted him to continue representing Defendant. Specifically, Defendant argues defense counsel became a necessary witness for Defendant and defense counsel was accused by the State of misconduct related to the case. Defendant also argues that his counsel provided ineffective assistance because, after renewing his motion to withdraw, he made statements which were inconsistent with a desire for this motion to be granted.

1. Conflict-Free Counsel

[1] We "analyze ineffective assistance of counsel claims based on conflicts under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), rather than employ the standard ineffective assistance of counsel analysis under *Strickland*." *State v. Williams*, 285 N.C. App. 215, 232 (2022) (citation omitted). While a defendant must generally demonstrate prejudice under a *Strickland* framework, "a defendant who shows an actual conflict of interest 'may not be required to demonstrate prejudice.' " *Id.* (quoting *State v. Choudhry*, 365 N.C. 215, 219 (2011)). We determine whether to apply *Sullivan* or *Strickland* based on "the level of notice given to the trial court and the action taken by that court in regard to the conflict issue." *Id.* (marks omitted).

> When the court knows or reasonably should know of a particular conflict, that court must inquire into the conflict. If the trial court fails to inquire into the conflict or the trial court's inquiry is inadequate or incomplete, reversal is automatic only if the defendant objected to the conflict issue at trial. If the defendant did not object to the conflict issue and the trial court failed to adequately conduct the required inquiry, prejudice will be presumed under Sullivan only if a defendant can establish on appeal that an actual conflict of interest adversely affected his lawyer's performance. However, if a defendant is unable to establish an actual conflict causing an adverse effect, he must show that he was prejudiced in order to obtain relief.
>
> Thus, in reviewing the alleged conflict issue, we employ a multi-step test. First, we ask whether the trial court had notice of the conflict such that it was required to inquire into the conflict. Second, we determine whether the trial court conducted an adequate inquiry into the conflict. If the trial court conducted an adequate inquiry, our review ends. *See State v. Yelton*, 87 N.C. App. 554, 557–59 (1987) (linking the adequacy of the trial court's inquiry with whether a defendant has made a "knowing, intelligent and voluntary waiver" of their rights to be free from conflicted counsel such that either the record reflects a knowing, intelligent, and voluntary waiver of any conflict or "an actual conflict of interest exists" without such waiver such that "the attorney must be disqualified"). But if the trial court did not conduct an adequate inquiry, we third consider whether the defendant objected to the conflict issue at trial; if the

> defendant objected to the conflict, we must reverse. *See Choudhry*, 365 N.C. at 220, 224 (explaining "prejudice is presumed" if a defendant objected and was not given the opportunity to show the dangers of the potential conflict through a trial court inquiry). If, however, the defendant did not object to the conflict, we move to the fourth step and determine whether the defendant can establish an actual conflict of interest adversely affected his lawyer's performance. If a defendant can establish such adverse performance, we presume prejudice. If a defendant cannot establish adverse performance, we move to the fifth and final step and determine whether the defendant can show prejudice and thus obtain relief.

Williams, 285 N.C. App. at 232-234 (citations and marks omitted).

"The trial court is on notice if it knows or reasonably should know of a particular conflict." *Id.* at 234 (marks omitted); *see, e.g.*, *Choudhry*, 365 N.C. at 220-22 (holding the trial court was on notice of a potential conflict based on defense counsel's previous representation of a witness for the State because the State told the trial court of this potential conflict). Here, the trial court was put on notice when the parties addressed outside of the presence of the jury "on the record … what happened with [Williams] and [defense counsel] outside [of the court room], and also [that] she ha[d] been threatened prior to her testimony." Thus, the trial court was required to conduct an "adequate inquiry into the conflict" to "protect a defendant's right to conflict free counsel" and "avoid the appearance of impropriety." *Id.* at 235; *see Yelton*, 87 N.C. App. at 557 ("Foremost in the court's inquiry must be the preservation of the accused's constitutional rights. The hearing by the trial court must ensure that the defendants are aware of these rights and that any waiver is a knowing, intelligent and voluntary waiver."); *see also State v. Shores*, 102 N.C. App. 473, 475 (1991) (explaining that courts "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession" and such an inquiry is important to "avoid[ ] the appearance of impropriety").

The trial court's "inquiry must be adequate to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment." *Williams*, 285 N.C. App. at 235 (quoting *State v. Lynch*, 275 N.C. App. 296, 299 (2020) (citation and marks omitted). The trial court must "ensur[e] that the defendant fully understands the consequences of a potential or actual

conflict" and "has the discretion to decide whether a full-blown evidentiary proceeding is necessary or whether some other form of inquiry is sufficient." *Id.* (citation omitted). The defendant's understanding must be sufficient "to ensure a knowing, intelligent, and voluntary waiver of the potential conflict of interest." *Choudhry*, 365 N.C. at 224.

In *Choudhry*, the trial court asked the defendant whether he "had any concerns about [his attorney's] ability to appropriately represent him, if he was satisfied with [his attorney's] representation, and if he desired to have [his attorney] continue to represent him." *Id.* Nevertheless, this inquiry was not adequate for the defendant to give a knowing, intelligent, and voluntary waiver because "the trial court did not specifically explain the limitations that the conflict imposed on defense counsel's ability to question" the witness about the case in which he had previously represented her, "nor did defense counsel indicate he had given [the] defendant such an explanation." *Id.*

The trial court, State, defense counsel, and Defendant discussed the alleged conflict of interest and its potential implications at great length after the State had begun, but not finished, direct examination of Williams. Defense counsel explained he believed his "client now need[ed] [him] as a witness because of what [he] witnessed out[side of the court room] as an officer of the court, and what [the judge] witnessed in [the court room,]" and that "with [the State's] allegations [of misconduct], [he] can't defend [himself] and [Defendant]." The trial court asked counsel if he had "talked with [his] client about the results of [him] withdrawing," and counsel confirmed he had. The trial court then addressed Defendant directly:

> THE COURT: … Have you heard everything that [defense counsel] has said to me this morning?
>
> THE DEFENDANT: Yes.
>
> …
>
> THE COURT: Do you understand it?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand that there are very few options the court would have if he withdraws from representing you? One of those would be that you would be representing yourself. Is that something that you want to do?
>
> THE DEFENDANT: No.

> THE COURT: Another would be that I would declare a mistrial and we'd throw this out and start over again at another time with a different attorney. Do you want me to do that?
>
> THE DEFENDANT: Something to think about. I mean –
>
> THE COURT: Okay. Well, you need to talk to your attorney about that?
>
> THE DEFENDANT: Yes.

The trial court then addressed defense counsel:

> THE COURT: … What is it that you would testify to?
>
> [DEFENSE COUNSEL]: What she stated out there.
>
> THE COURT: You can simply ask her that on the witness stand.
>
> [DEFENSE COUNSEL]: It's not the same, because then she told you, and then everything changed.
>
> THE COURT: "Didn't you tell me outside such-and-such? Didn't I see you outside and didn't you say such-and-such?"

After this, counsel conferred with Defendant and returned to the court.

> THE DEFENDANT: I believe that I need another attorney. I don't believe that we can go further with this trial.
>
> …
>
> THE COURT: So what is it that you want me to do? Let him withdraw? Declare a mistrial? Start over?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. I've listened to you.

Subsequently, the trial court ruled:

> [T]here is nothing about the conduct of the parties that requires the court to allow [defense counsel] to withdraw. There is nothing about the conduct of the parties that require the court to declare a mistrial. It would be an injustice for the court to stop this trial at this point. So I'm going to allow [defense counsel] to cross-examine her. I will give [counsel] wide latitude in cross-examining her, although I will not allow [counsel], as I've said before,

> to badger her or to harass the witness, but [counsel] can cross-examine her….

The entirety of this inquiry demonstrates the trial court conducted an adequate inquiry to determine "whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment." *Williams*, 285 N.C. App. at 235. The transcript also reflects that the trial court ensured Defendant fully understood "the consequences of a potential or actual conflict" and properly exercised its discretion in deciding "whether a full-blown evidentiary proceeding [was] necessary or whether some other form of inquiry [was] sufficient." *Id.* Furthermore, unlike in *Choudhry*, defense counsel indicated he had also given Defendant such an explanation. The only remaining determination is whether Defendant, in light of this inquiry, made a knowing, intelligent, and voluntary waiver of the potential conflict.

"[E]ffective assistance of counsel, like any other constitutional right, [can] be waived but only so long as the waiver was voluntary, knowing, and intelligent." *Yelton*, 87 N.C. App. at 558 (citing *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975).

> As in [F.R.Crim.Pro.] 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections.

Id. (citations and marks omitted). After trial counsel had the opportunity to cross-examine Williams, he renewed his motion to withdraw based on the argument that Williams had alleged misconduct. During Williams's testimony before the jury, she stated that she "wanted to make the right choice, and the right choice is telling the truth and not allowing somebody to badger [her], belittle [her], or scare [her] into not having [her] testimony." She also claimed defense counsel was "questioning" her and

"had lawyers trying to talk to [her]" prior to her testimony. During its consideration of the renewed motion, the trial court again addressed Defendant:

> THE COURT: All right. [Defendant], you understand what [counsel] has just said? …
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right…. Do you want him to withdraw?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Okay….

Defendant's statement, made after witnessing several discussions amongst the parties and the trial court regarding both grounds upon which he now alleges violations of his Sixth Amendment right to conflict-free and effective counsel, constitutes a knowing, intelligent, and voluntary waiver. Defendant explicitly stated, after witnessing the entirety of Williams's testimony, including his counsel's cross-examination of her, that he did not wish for his counsel to withdraw. The trial court conducted an adequate inquiry, and Defendnt voluntarily, knowingly, and intelligently waived his right to conflict-free counsel. *See Williams*, 285 N.C. App. at 233.

2. Counsel's Statements During Renewed Motion to Withdraw

[2] Defendant asserts a separate claim that he was provided ineffective assistance by counsel "filing a motion to withdraw and asking the trial court not to grant it." Defendant claims this prejudiced him because when counsel asked the trial court to deny his motion, "it increased the likelihood the judge would do so." During the proceedings, counsel made a renewed motion to withdraw, expressing that he felt he had "an ethical obligation to do [so]" after Williams accused him of felony intimidation of a witness.[1] The transcript reads as follows:

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1. N.C.G.S. § 14-226 provides:

> (a) If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, the person shall be guilty of a Class G felony.
>
> (b) A defendant in a criminal proceeding who threatens a witness in the defendant's case with the assertion or denial of parental rights shall be in violation of this section.

N.C.G.S. § 14-226 (2022).

> THE COURT: Okay. So do you really want me to grant it?
>
> [DEFENSE COUNSEL]: That's not the point. It's never the point with what I do. The point is, I've got to do my job and I've got to tell you that under the rules of professional conduct, if I am alleged to commit a crime in the case I'm representing somebody, I have to file a motion to withdraw."
>
> . . .
>
> [DEFENSE COUNSEL]: . . . I think we all agree that this is unusual circumstances. This is a road I've never been on before. So I'm just trying to do my job to the best of my ability. I think – I mean, I would assume that you are the honor – you're the judge. You can determine whether or not I can withdraw or not. I'm just covering my part of the rule. That's it."
>
> . . .
>
> [DEFENSE COUNSEL]: And I don't really want you to grant it, but that's not ever the point. That point is, I've got to ask for it.
>
> THE COURT: So that's kind of the place I'm getting to, that you don't really want it because it's not in your client's best interest at this point to –
>
> [DEFENSE COUNSEL]: No, but I have to ask for it, and this is no way me wavering on my motion. So I've made the motion. I leave it in your discretion, what you want to do.

Ineffective assistance of counsel 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 (2001). When a claim for ineffective assistance of counsel is "prematurely asserted on direct appeal, [we] dismiss [it] without prejudice to the defendant's right to reassert [it] during a subsequent MAR proceeding." *Id.* at 167. Defendant's claim of ineffective assistance of counsel based on counsel's above-referenced statements is prematurely asserted on direct appeal, as there was very little inquiry into or discussion of these statements in the Record.

CONCLUSION

Defendant's claims asserting the trial court violated his Sixth Amendment rights to conflict-free and effective assistance of counsel fail, as the trial court was on notice of any potential conflict arising from his counsel's conversation with Williams, the trial court conducted an adequate inquiry into this potential conflict, and Defendant knowingly, intelligently, and voluntarily waived his right to conflict-free counsel when he told the trial court, after observing the entirety of Williams's testimony, that he did not wish for his counsel to withdraw. Accordingly, we find no error on these issues. However, Defendant's claim for ineffective assistance of counsel on the basis of counsel's statements regarding his renewed motion to withdraw is dismissed without prejudice to his right to bring an MAR in the trial court.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Chief Judge STROUD and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
KENNETH MARTIN McDONALD, DEFENDANT

No. COA22-672

Filed 1 August 2023

1. Jurisdiction—prayer for judgment continued (PJC)—no conditions attached—PJC not final

The trial court did not err by granting the State's motion to enter judgment on defendant's plea of guilty to misdemeanor death by vehicle where, although seven years had passed since the court had continued judgment on the guilty plea, the prayer for judgment continued (PJC) was not a final judgment because it did not contain conditions that amounted to punishment. Although defendant had been required, as part of his plea agreement, to acknowledge responsibility by giving an apology in open court, he was not ordered to complete any further requirements after the PJC was granted, other than to follow the law.

2. Judgments—prayer for judgment continued—entry of judgment—seven-year delay—reasonableness

The trial court's seven-year-delay in entering judgment on defendant's plea of guilty to misdemeanor death by motor vehicle after having previously entered a prayer for judgment continued (PJC) was not unreasonable where the judgment was not continued for a definite amount of time, the State had no reason to file a motion to pray for judgment until defendant was charged with another motor vehicle offense, the delay was not due to any negligence by the State, defendant's failure to request entry of judgment amounted to consent to the delay, and defendant received a benefit from having his judgment continued for nearly seven years. Further, defendant could not show prejudice due to the delay—even though the State had already destroyed all criminal discovery related to the case—where defendant had stipulated to the factual basis for the plea and had knowingly and voluntarily pled guilty.

Judge RIGGS dissenting.

Appeal by Defendant from judgment entered 3 February 2022 by Judge Tiffany Peguise-Powers in Robeson County Superior Court. Heard in the Court of Appeals 22 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh and Paul E. Smith, for Defendant.

GRIFFIN, Judge.

Defendant Kenneth Martin McDonald pled guilty to misdemeanor death by motor vehicle and the trial court continued judgment. Years later, the State prayed judgment on that conviction and the motion was allowed by the trial court. Defendant appeals from that judgment. Defendant contends the trial court erred in entering judgment because (1) the prayer for judgment continued ("PJC") was intended to be a final judgment and (2) the nearly seven-year delay in entering judgment was unreasonable. We affirm.

I. Factual and Procedural Background

This case arises from a vehicular collision between Defendant's vehicle and a motorcycle, resulting in the death of the motorcycle driver. The evidence at trial tended to show as follows:

On 6 October 2011, Defendant was preparing to make a left turn when he stopped his vehicle about three feet over the center yellow lines and into the neighboring lane. Ricky Oldfield was traveling on a motorcycle in the left, oncoming lane toward Defendant at that time. Oldfield saw Defendant stop in front of him and attempted to stop his motorcycle by engaging the brakes and sliding. Oldfield was unable to stop and collided with Defendant's vehicle. Oldfield hit his head on the front bumper of Defendant's car and died as a result of the accident.

Defendant was charged with misdemeanor death by motor vehicle. Defendant pled not guilty and his case came on for trial in April 2012 in Robeson County District Court. On 25 April 2012, Defendant was found guilty of misdemeanor death by vehicle and the District Court imposed a suspended sentence of twelve months of probation. Defendant appealed to superior court.

On 28 October 2014, Defendant pled guilty to the charge of misdemeanor death by vehicle in Robeson County Superior Court. Defendant's plea agreement stated that, as conditions for the acceptance of his plea, "Defendant shall plead guilty" and "Defendant shall acknowledge responsibility in open court." The agreement further stated that the trial court would "then enter a Prayer for Judgment in this matter."

The trial court proceeded to sentencing following Defendant's plea. During sentencing, Defendant issued an apology to the court and to Oldfield's family. After hearing from Defendant and Oldfield's family, the trial court concluded the hearing with the following remarks:

> Pursuant to the transcript of plea, judgment's continued in this matter upon payment of the costs.
>
> I hope that both sides can have some peace and resolution in this matter.
>
> . . .
>
> I wish both sides every good fortune.

The trial court then entered a written order "that prayer for judgment be continued from day to day, week to week, term to term until further motion of the state, upon payment of cost."

On 14 August 2020, nearly six years later, the State filed a motion to calendar and pray judgment after Defendant was charged with involuntary manslaughter in connection with another motor vehicle accident. On 25 September 2020, Defendant filed a motion in opposition. On 3 February 2022, the trial court filed a written judgment granting the

State's motion to pray judgment and entering judgment on Defendant's 2014 conviction, sentencing Defendant to 150 days' imprisonment, suspended for twelve months of supervised probation. Defendant appeals.

II. Analysis

Defendant contends the trial court erred in allowing the State's prayer for judgment and entering judgment on his 2014 conviction because (1) the court intended for his PJC to be a final judgment and (2) it was unreasonable to delay entry of judgment until nearly seven years after Defendant's conviction.

A. Jurisdiction

Defendant acknowledges he has no right to appeal from the entry of judgment upon his guilty plea. Accordingly, Defendant asks this Court to grant his petition for a writ of certiorari pursuant to N.C. Gen. Stat. § 15A-1444(e). *See* N.C. Gen. Stat. § 15A-1444(e) (2021) (stating a defendant who pleads guilty and thus has no right to appeal "may petition the appellate division for review by writ of certiorari"). We exercise our discretionary authority and grant review. *See State v. Posner*, 277 N.C. App. 117, 120, 857 S.E.2d 870, 872 (2021).

B. The PJC was not a Final Judgment

[1] Defendant first argues the trial court erred in entering judgment in 2022 because the "2014 [PJC] was meant to be final." This Court reviews the issue of whether a PJC constitutes a final judgment *de novo*. *See State v. Popp*, 197 N.C. App. 226, 228, 676 S.E.2d 613, 614 (2009).

"A trial court has the inherent power to designate the manner by which its judgments shall be executed." *State v. Lea*, 156 N.C. App. 178, 180, 576 S.E.2d 131, 132 (2003). "For example, a court is authorized to continue a case to a subsequent date for sentencing." *Id.* "This continuance is frequently referred to as a '[PJC]' and vests a trial judge presiding at a subsequent session of court with the jurisdiction to sentence a defendant for crimes previously adjudicated." *Id.* "When, however, the trial judge imposes conditions 'amounting to punishment' on the continuation of the entry of [the] judgment, the judgment loses its character as a PJC and becomes a final judgment." *State v. Brown*, 110 N.C. App. 658, 659, 430 S.E.2d 433, 434 (1993) (citation omitted). We have held that fines and imprisonment terms constitute conditions "amounting to punishment," and transforming a PJC into a final judgment, while conditions requiring a defendant to "obey the law" and pay court costs do not cause such a change. *Id.*; *State v. Absher*, 335 N.C. 155, 157, 436 S.E.2d 365, 366 (1993) ("In this state, we have made a distinction between cases in which

prayer for judgment is continued with conditions imposed and cases in which prayer for judgment is continued without any conditions.").

Defendant argues his PJC became a final judgment by operation of law because the trial court included a condition amounting to punishment. Specifically, Defendant's argument turns upon the fact that his PJC was allowed only after he "acknowledge[d] responsibility in open court" by an oral apology, as outlined in his plea agreement.

Defendant relies on this Court's decision in *State v. Popp* to support his contention. In *Popp*, the defendant agreed to plead guilty to certain crimes charged upon the condition that the State would dismiss other charges. The trial court then continued judgment on the defendant's conviction, but also ordered him to "abide by a curfew, complete high school, enroll in an institution of higher learning or join the armed forces, cooperate with random drug testing, complete 100 hours of community service, remain employed, and write a letter of apology." *Popp*, 197 N.C. App. at 228, 676 S.E.2d at 615. On appeal, our Court held that the defendant had been "ordered to complete a number of conditions which [were] beyond a requirement to obey the law," and his PJC therefore "lost its character as a PJC and was transformed into a final judgment." *Id.* at 228, 676 S.E.2d at 615. In the similar case of *State v. Brown*, our Court found the defendant was required to do more than obey the law when he was ordered to continue mental health treatment in the future. *Brown*, 110 N.C. App. at 659, 430 S.E.2d at 434. Notably, the defendants in *Popp* and *Brown* were ordered to take actions following the grant of their PJCs which would require further court supervision or monitoring by the State.

Defendant's case is distinguishable from both *Popp* and *Brown*. In *Popp* and *Brown*, the defendants' PJCs were predicated on additional conditions which were to be completed after entry of the PJC. In the present case, Defendant was asked to follow through on his promise to issue an oral apology, after he had formally admitted responsibility in his plea agreement. Indeed, Defendant concedes in his brief on appeal that "[r]equiring [Defendant] to make an apology was . . . part of the 'terms and conditions' of the plea agreement"—terms which included that Defendant would receive a PJC. The language of Defendant's plea agreement shows that he signed the plea upon consideration that he would receive a PJC. He cannot now claim that the State's reciprocal terms were an improper condition on that subsequent PJC.

Once the PJC was granted, Defendant was free of additional requirements; other than the general requirement to obey the law. The State prayed for judgment in this case only after Defendant was charged with

a separate, but similar, crime. Defendant was not ordered to complete any condition that amounted to punishment transforming his PJC into a final judgment.

Defendant further argues the trial court intended the judgment to be final because the trial judge stated in open court that he hoped "both sides can have some peace and resolution in the matter" following entry of Defendant's PJC. Defendant's brief cites no authority in support of this argument. Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure requires that, in an appellant's brief on appeal, "[t]he body of the argument and the statement of applicable standard(s) of review shall contain citations of authorities upon which the appellant relies." N.C. R. App. P. 28(b)(6). Defendant cites no authority and his argument is therefore abandoned. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401–02, 610 S.E.2d 360, 361 (2005). Nonetheless, assuming that this issue is properly before us, we are not persuaded that the trial court's statement caused Defendant's PJC to become a final judgment. Our criminal justice system consents to the entry of PJCs with purposeful hope that further action by the courts will not be necessary, while understanding that the need for such action may arise. *See State v. Miller*, 225 N.C. 213, 215, 34 S.E.2d 143, 145 (1945) (discussing that PJCs give a defendant the opportunity to escape punishment altogether). The trial judge's statements following heartfelt presentations from Defendant and Oldfield's family were well-wishes for the future, not statements of binding legal effect.

We hold that Defendant's PJC was not a final judgment. We now turn to whether it was reasonable for the court to enter judgment on Defendant's 2014 conviction in 2022.

C. The Trial Court's Delay was Not Unreasonable

[2] Defendant argues the trial court erred in entering judgment because "the delay in the State's prayer for judgment was unreasonable." This Court reviews the issue of whether the delay between a PJC and the entry of judgment on the continued conviction was unreasonable *de novo*. *State v. Degree*, 110 N.C. App. 638, 641, 430 S.E.2d 491, 493 (1993).

A continuance resulting from a PJC "may be for a definite or indefinite period of time, but in any event the sentence must be entered 'within a reasonable time' after the conviction." *Id.* The State is authorized, pursuant to N.C. Gen. Stat. § 15A-1416(b)(1), to motion for prayer for judgment "[a]t any time after verdict." *Id.*; N.C. Gen. Stat. § 15A-1416(b)(1) (2021). Nonetheless, "the State's failure to do so within a reasonable time divests the trial court of jurisdiction to grant the motion." *Id.* " 'Deciding whether sentence has been entered within a 'reasonable

time' requires consideration of [1] the reason for delay, [2] the length of delay, [3] whether defendant has consented to the delay, and [4] any actual prejudice to [the] defendant which results from the delay.' " *State v. Marino*, 265 N.C. App. 546, 550, 828 S.E.2d 689, 693 (2019) (citation omitted); *see Absher*, 335 N.C. at 156, 436 S.E.2d at 366 ("As long as a prayer for judgment is not continued for an unreasonable period . . . and the defendant was not prejudiced . . . , the court does not lose the jurisdiction to impose a sentence.").

In this case, Defendant's judgment was entered almost seven years after judgment on Defendant's conviction was continued. Based upon the circumstances of this particular case, we hold that this delay was not unreasonable.

The State delayed its motion to pray judgment because it had no reason to do so before Defendant was charged with another motor vehicle offense. The delay was not caused by the State's negligence or failure to otherwise timely pray for judgment, and judgment was not continued for a definite period of time shorter than seven years. *See State v. Pelley*, 221 N.C. 487, 20 S.E.2d 850, 857 (1942) (finding no error in entry of judgment after seven-year delay, while conceding that jurisdiction would have been lost if court had failed to seek custody of the defendant prior to the prescribed five-year fixed continuance term); *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493 (affirming entry of continued judgment where "[t]he record [did] not reveal any improper purpose for the delay in sentencing"). Rather, Defendant was charged with a similar crime and the State motioned to calendar and pray judgment soon thereafter, even before Defendant's trial on the new charge. The length of the delay in this case mirrors that of the longest delay this Court has previously found acceptable, *see Pelley*, 221 N.C. 487, 20 S.E.2d at 857, and, in light of Defendant's additional, similar charges, we see no reason to reach a different result.

Whatever weight we would give to the somewhat novel length of delay in this case is diminished by Defendant's consent to the delay. This Court has consistently held that, where a defendant does not initially object to PJC and does not thereafter ask for judgment to be entered, his actions are "tantamount to consent." *See Lea*, 156 N.C. App. at 182, 576 S.E.2d at 131 (holding the defendant's actions were " 'tantamount to his consent' " where "the record [did] not show that [the] defendant [] objected to the continuation of the prayer for judgment or that he ever requested that the trial court enter judgment" (citation omitted)); *Degree*, 110 N.C. App. at 641–42, 430 S.E.2d at 493 (holding the defendant's failure to request "judgment be pronounced" prior to a particular date, even where that date was definitely prescribed, was "tantamount

to his consent to a continuation of the sentencing hearing beyond that date"). Most notably, in *State v. Marino*, this Court affirmed entry of a continued judgment where the defendant "did not object to the trial court's PJC entered upon [the defendant's guilty] plea, and thereafter [the defendant] never requested the trial court enter judgment on his conviction." *Marino*, 265 N.C. App. at 554, 828 S.E.2d at 695. The defendant's "failure to do either [was] 'tantamount to his consent to a continuation of' judgment during that time period." *Id.* (citation omitted).

This factor routinely supports the reasonableness of a delayed entry of judgment, except in rare cases where the defendant does request that his judgment be entered at an earlier time and the State fails to timely comply. We note a majority of our cases, which treat a defendant's failure to request entry of judgment as consent, involve either actions by the defendant which may materially and beneficially affect the defendant's sentencing; a definite, prescribed period of continuation; or both. *See*, *e.g.*, *id.* (affirming where purpose of delay was to allow the defendant to provide "substantial assistance" to the State and receive a lower sentence as a result); *Degree*, 110 N.C. App. at 641–42, 430 S.E.2d at 493 (affirming where the defendant did not request entry of judgment on or before the prescribed date when his definite continuance period was to end). However, our Courts have never found either of these factual circumstances to be required for a defendant's failure to request entry of judgment to constitute consent. Rather, they are relevant facts to consider when weighing the reasonableness of the State's delay. Here, Defendant did not prolong the State's ability to pray judgment at an earlier time, nor was his judgment continued for a definite time. We cannot say that these circumstances negate the benefit Defendant received by allowing his judgment to remain continued for nearly seven years.

Indeed, "there is a presumption that the [PJC] was made with the defendant's consent, if not at his request . . . , as an act of mercy to him, so that he might qualify himself by his good behavior to receive further clemency from the court, and thus avoid the rigor of the law." *State v. Everitt*, 164 N.C. 399, 79 S.E. 274, 276 (1913). Defendant's actions here were substantially similar to the defendant's conduct in *Marino*, and we reach the same result.

Lastly, Defendant cannot show actual prejudice due to the delay. Defendant argues that he has been prejudiced because the State destroyed all criminal discovery associated with this case before March 2020, thus frustrating the court's ability to appropriately review the evidence during sentencing. However, Defendant pled guilty to the underlying conviction and stipulated to the factual basis supporting the guilty

plea. There is nothing in the record that indicates Defendant was denied discovery when he knowingly and voluntarily pled guilty in superior court. He had the benefit of a trial in district court and any access afforded him in the superior court prosecution. Based upon the stipulated facts and Defendant's prior record level as of 2014, Defendant received a sentence of 150 days, suspended for a term of twelve months of supervised probation. Defendant cannot show that the outcome would have differed had the State not destroyed its discovery in this case.

The Dissent presents a number of points to be considered in weighing the factors for reasonableness in this case. We disagree, though, that these considerations are both proper for this Court at this time and practically beneficial advice for the effective administration of justice through PJCs. The present case lacks factual circumstances that speak to why Defendant received a PJC or why he never chose to pray judgment on his conviction. However, the record does show that if Defendant desired to avoid punishment for his 2014 conviction altogether, he simply needed to follow the law and not commit a similar offense. If circumstances arose, whatever they may be, such that Defendant deemed it favorable for him to request entry of judgment, he was free to do so. This happens routinely with Chapter 20 motor vehicle violations. Regardless of how or for what reason Defendant would do so, the record here shows that he never did request entry of judgment. That failure to request is tantamount to consent.

The Dissent insists that the practical effects of our decision will dissuade attorneys and defendants alike from employing PJCs in future cases, because a criminal defendant would never agree to a PJC without a definite, reasonable ending point to their potential liability. The Dissent's reasoning is flawed. PJCs are beneficial to the pursuit of justice under current law. The standard the Dissent attempts to create would dissuade all parties from considering a PJC as a potential resolution. Almost certainly, the Dissent's standard would create more work for the trial courts and give people charged with Chapter 20 motor vehicle violations fewer tools to restore their privilege to drive lawfully. In their current form, interpreted as we so hold, the State and a defendant may effectively negotiate PJCs, with the consent of the court. This discretion allows criminal defendants to avoid the consequences of their convictions indefinitely and gives the State a way to remain faithful to their oath as well.

III. Conclusion

We hold that Defendant's 2014 PJC did not include conditions that converted it into a final judgment, and the nearly seven-year delay

between the PJC and the subsequent entry of judgment was not unreasonable. We affirm the trial court's judgment.

AFFIRMED.

Judge FLOOD concurs.

Judge RIGGS dissents by separate opinion.

RIGGS, Judge, dissenting.

A prayer for judgment continued ("PJC") is a longstanding procedural tool that allows a judge to refrain from entering final judgment in a case, and this tool has been developed to allow judges to encourage efficient resolutions in their courtrooms, to promote rehabilitative resolutions in, most often, lower-level crimes, and to generally promote fairness in criminal judicial proceedings. *See* Dionne R. Gonder-Stanley, *Facing A Legislative Straight Jacket in the 21st Century: N. Carolina Courts & the Prayer for Judgment Continued*, 40 N.C. Cent. L. Rev. 32, 46 (2017). A PJC can be an act of judicial discretion which allows a defendant to satisfy his obligations in criminal court in exchange for abiding by stipulated conditions for a reasonable length of time. *State v. Miller*, 225 N.C. 213, 215-16, 34 S.E.2d 143, 145 (1945). But this Court and the North Carolina Supreme Court have been clear that where a PJC has been continued for an unreasonable length of time, the trial court will lose jurisdiction to enter final judgment.[1] This Court has held that the burden is on the State to establish jurisdiction to enter judgment. *State v. Watkins*, 229 N.C. App. 628, 634, 747 S.E.2d 907, 912 (2013) (citing *State v. Batdorf*, 293 N.C. 486, 493, 238 S.E.2d 497, 502 (1977) (holding that jurisdiction is a matter which, "when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment")).

In this case, the State did not meet its burden to establish jurisdiction in the hearing; the PJC was used without stipulated conditions or

1. It seems likely in this context that the term jurisdiction refers to the court's authority to enter a judgment rather than personal jurisdiction over the defendant or subject matter jurisdiction over the issue. *See*, *e.g.*, *State v. Graham*, 225 N.C. 217, 219 34 S.E.2d 146, 147 (1945) (rejecting a defendant's argument that courts are "without *authority* to continue prayer for judgment and impose sentence at a subsequent term" on the basis that "courts of general jurisdiction . . . have the *power* to continue the case to a subsequent term for sentence" (emphasis added)).

a definite timeline; and the entry of judgment was delayed more than *seventeen times* the maximum sentence for the underlying misdemeanor. Given that, I would hold that delay in entry of final judgment is unreasonable, and the trial court was divested of jurisdiction to enter judgment. Therefore, I respectfully dissent.

I. Analysis

The majority's analysis relies on cases that I believe are distinguishable. And, in extending the time before final entry of judgment, the majority's opinion introduces unintended consequences that will impede the ability of attorneys to give sound advice to their clients and of criminal defendants to make informed decisions. By approving the lengthy delay at issue in this case without any justifiable extenuating circumstances previously accepted under our precedents, the majority creates a legal landscape marked by uncertainty; a criminal defendant will not know what they must do to end their formal interaction with the criminal justice system, nor will they know when that relationship might reasonably come to an end. In fact, this uncertainty disincentives the settlement of cases with PJCs that can help to keep judicial workloads manageable.

To be clear, this Court has held that a PJC may be for a definite or indefinite period; however, the prayer for judgment may not be continued for an unreasonable period or the court will lose jurisdiction to enter judgment. *State v. Absher*, 335 N.C. 155, 156, 436 S.E.2d 365, 366 (1993); *see also State v. Lea*, 156 N.C. App. 178, 180, 576 S.E.2d 131, 132 (2003) ("The continuance may be for a definite or indefinite period of time, but, in any event, the sentence must be entered within a reasonable time after the conviction or plea of guilty."). The trial court can include conditions with the entry of a PJC, but not conditions that constitute punishment, at least not without converting that PJC to a final judgment. *State v. Popp*, 197 N.C. App. 226, 228, 676 S.E.2d 613, 614 (2009) (internal citations omitted). "Conditions 'amounting to punishment' include fines and imprisonment. Conditions not 'amounting to punishment' include 'requirements to obey the law,' and a requirement to pay the costs of court." *Id.* (quoting *State v. Brown*, 110 N.C. App. 658, 659, 430 S.E.2d 433, 434 (1993)).

While Mr. McDonald has argued that the PJC was, in essence, converted to final judgment on the date it was entered, I do not find that argument, standing alone, persuasive. Instead, I believe the determinative question presented is whether the delay in this case was so unreasonable such that it deprived the trial court of jurisdiction to enter final judgment seven years after the PJC was entered.

The perceived finality of the judgment is relevant in the analysis of the reasonableness of the length of the delay. To determine if the delay in entering judgment is reasonable such that the trial court retains jurisdiction, this Court considers: (1) the reason for the delay; (2) the length of delay; (3) whether the defendant has consented to the delay; and (4) any actual prejudice which results from the delay. *State v. Degree*, 110 N.C. App. 638, 641, 430 S.E.2d 491, 493 (1993). These factors, when considered together, are both consistent with the public policy reasons behind the existence of PJCs and comport with due process guarantees. *See*, *e.g.*, *Betterman v. Montana*, 578 U.S. 437, 439, 194 L. Ed. 2d 723, 727 (2016) (noting that an unreasonable delay before sentencing may raise due process concerns). It is axiomatic that all parties—the State and criminal defendants—must be able to understand the contours of judicial involvement in a criminal matter and when and how that criminal matter will come to an end. *See State v. Ward*, 46 N.C. App. 200, 205, 264 S.E.2d 737, 740 (1980) (noting the State's and criminal defendants' numerous interests in the timely resolution of criminal charges); *Teague v. Lane*, 489 U.S. 288, 309, 103 L. Ed. 2d 334, 355 (1989) ("[T]he principle of finality . . . is essential to the operation of our criminal justice system.").

In this case, I would find that each of the factors utilized in analyzing the reasonableness of the delay, individually and collectively, lend themselves to a conclusion that the delay here was unreasonable and the trial court did, in fact, lose jurisdiction. First, because the trial court did not identify the purpose of the prayer for judgment and there seemed to be good faith misunderstanding of the purpose, the unascertainable reason for the continuance cannot be used to justify a long delay; second, the trial court did not provide Mr. McDonald with sufficiently definite instructions on how he might end the court's oversight such that he could make informed consent to the delay; third, the length of the delay significantly exceeds the boundaries, in analogous cases, previously approved by this Court for PJCs without predetermined timelines; and finally, the delay prejudiced Mr. McDonald.

1. The Reason for the PJC was Unclear and the Parties Were Not of Accord on that Reasoning

In this case, the reason for the delay in entry of the PJC does not support approving the delayed entry of judgment. The State argues that this was a conditional prayer for judgment that would continue *until* Mr. McDonald committed this or a similar crime. The problem with that argument is that it has no temporal bounds and inevitably runs afoul of this Court's rule that the PJC may not be used for an *unreasonable period*. *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493. Put another way,

this reason is not compelling to justify the delay because it has no reasonable bounds – this motivation can be used forever to justify delay. A person could commit a similar crime 10 years, 20 years, or 50 years down the road. Thus, the State's justification has no logical end and does not justify delay where it could also be used and extended to violate our Court's rule that trial courts lose jurisdiction where there is an unreasonable delay before entry of final judgment. *Lea*, 156 N.C. App. at 180, 576 S.E.2d at 132.

Conversely, Mr. McDonald and the attorney who represented him in 2014 believed that this prayer for judgment was the final resolution of the case. That is, it seems that Defendant and his counsel did not believe that he was in a situation where he was engaged in this long-standing relationship with the court for years long oversight under the PJC. Therein lies the problem.

There are, of course, multiple reasons why a trial court or a defendant may want (or agree to) continued interactions with and supervision of a criminal defendant (and thus delay in entry of final judgment). *See State v. Johnson*, 169 N.C. 311, 311, 84 S.E. 767, 768 (1915) (affirming an order continuing a prayer for judgment "upon condition of good behavior" for three years); *see also State v. Hilton*, 151 N.C. 687, 692 65 S.E. 1011, 1014 (1909) (explaining that prayer for judgment can be used for defendant to return to court to show good faith in some promise of reformation or continued obedience to the law). Alternatively, a PJC may be intended to serve as a final disposition in lieu of sentencing. *See*, *e.g.*, *Smith v. Gilchrist*, 749 F.3d 302, 305 n. 2, (4th Cir. 2014) (describing the use of PJC combined with driving school for efficient resolution of a moving traffic violation which benefits the court system by freeing up resources to handle other matters while allowing defendants to avoid increased insurance premiums). But where the intentions behind and intended effect of the PJC is unclear from the record, I would not hold that an unknown reason for the continuance can justify a delay this lengthy.

A recent trend in PJC statutes reaffirms the necessity for clarity in this area of the law. Our courts have used PJCs for over 100 years in all areas where sentencing is not mandated, with limited intercession by the General Assembly. *In re Greene*, 297 N.C. 305, 312, 255 S.E.2d 142, 147 (1979). In the 2011-12 session, the General Assembly passed legislation that expressly prohibited PJCs where the time before entry of judgment was continued more than a total of 12 months.[2] N.C. Gen.

2. The statute allows the trial court to continue the PJC for up to one additional 12-month period if in the interest of justice. N.C. Gen. Stat. § 15A-1331.2.

Stat. § 15A-1331.2 (2021). While this statute applies only to PJCs used in certain kinds of felony cases, it still indicates a legislative intent consistent with our courts' precedents, requiring some definition or limit to the terms for PJCs. During the discussion on this bill in the State House, Representatives discussed how the PJC was a valuable tool, but it requires clarity of scope to ensure it is used properly. House Audio Archives (28 Apr. 2011), https://www.ncleg.gov/Documents/9/1515 (remarks by Rep. Guice, Rep. Spear, Rep. Engle, and Rep. Faircloth at 3:39:00 - 4:03:00).

In sum, I believe the lack of clarity about the reason for the lengthy continuance—and the resulting confusion as to whether there even was an intended continuance rather than a final adjudication by PJC—in conjunction with the legislative trends to limit the time for entry of judgment after a PJC, counsel against holding that the delay in sentencing was reasonable.

2. The Defendant Did Not and Could Not Have Consented to a PJC Given the Indeterminate Length and Lack of Conditions Here

In the majority's acknowledgment of the "somewhat novel length of delay" in this case, the majority downplays the significance of the delay by asserting that, in their opinion, Mr. McDonald consented to this delay. The majority points to *State v. Degree* for the proposition that Defendant's failure to request sentencing is "tantamount to consent." 110 N.C. App. at 641, 430 S.E.2d at 493. However, first, consent is "[a] voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose." *Consent*, Black's Law Dictionary (11th ed. 2019). In *Degree*, the defendant agreed to a PJC for a fixed period of time of less than two weeks. 110 N.C. App. at 641, 430 S.E.2d at 493. That definite period of time provided the basis for agreement, or consent. Unlike in *Degree*, there was no end point in this case to which Mr. McDonald (or any criminal defendant) could knowingly agree. *Degree* does not mandate the outcome achieved by the majority: the rejection of any subsequent challenge to a delay in entry of judgment where a criminal defendant agrees to a PJC without a specific time period.

The majority's misreading of *Degree* and the outcome in this case would also create an unintended deterrence to the settlement of Chapter 20 or misdemeanor charges via a prayer for judgment. While our case law does not require that a prayer for judgment must have a definite time period, *id.* at 641, 430 S.E.2d at 493, it is hard to fathom a criminal

defendant agreeing to a prayer for judgment without a definite ending point if this Court is effectively issuing a rule holding that agreeing to an indefinite prayer for judgment constitutes consent to entry of judgment even after a delay of more than half a decade. This could limit the ability of courts and prosecutors to bring needed resolution to families and to lessen their workloads.

A marked characteristic of cases where this Court has affirmed longer delays in entry of judgment after a PJC on the basis of consent is that they have either had a definite time period or specific conditions of the PJC – both of which create the basis for informed consent for the PJC and an actual basis for assessing the reasonableness of the delay. For example, in *State v. Marino*, the trial court agreed to grant a PJC in exchange for the defendant providing substantial assistance in the conviction of a co-conspirator. 265 N.C. App. 546, 554 n.5, 828 S.E.2d 689, 696 n.5 (2019). The PJC required the State to pray for judgment within twelve months of the conviction. *Id.* The State moved for entry of judgment after nineteen months and this Court affirmed that the delay was not unreasonable. *Id.* It follows, then, that the defendant in *Marino* had information both on the approximate time frame and conditions that were informing his consent. The same underlying logic applied to the smaller delay incurred in *Degree*. 110 N.C. App. at 641-42, 430 S.E.2d at 493 (holding the defendant's failure to request judgment after expiration of the time set for the PJC was "tantamount to his consent to a continuation of the sentencing hearing beyond that date" (citations omitted)).

Significantly, the majority does not discuss under what circumstance Mr. McDonald, like the defendants in *Marino* and *Degree*, would know that he needed to request an entry of judgment. Nor does it address how Mr. McDonald could act affirmatively to end his interaction with the criminal justice system and bring closure to his case. During the sentencing in 2014, the court asked Mr. McDonald if he understood that he would "receive a prayer for judgment continued in this matter[.]" However, the transcript does not include any discussion about what the prayer for judgment continued actually meant in the context of this case—*i.e.*, where there was not a definite endpoint for the PJC and no conditions were detailed.

Neither the court nor the General Assembly have defined a clear process for defendants to bring final closure to an indefinite-period PJC. The General Assembly authorized the State to move for appropriate relief to enter a final judgment where a PJC had been previously entered. N.C. Gen. Stat. § 15A-1416(b)(1) (2021). This statutory enforcement mechanism is designed to address situations where a defendant who has

received a PJC has not satisfied the conditions imposed by the court in exchange for the PJC. *State v. Doss*, 268 N.C. App. 547, 551 n.4, 836 S.E.2d 856, 858 n.4 (2019). However, the General Assembly has not created any similar mechanism for a criminal defendant to end the coverage of an indefinite-period PJC. *Id.* *Doss* quite squarely highlights the problem with the majority's faulting Mr. McDonald for failure to request final judgment without a clear mechanism to do so. In *Doss*, this Court explained:

> Twenty years ago, in 1999, Defendant Jeffery Wade Doss was found guilty of assault on a female in Forsyth County District Court. The trial court entered a prayer for judgment continued (PJC) on that charge. Two years ago, in 2017, Defendant, now residing in West Virginia, was informed that he was ineligible for a concealed carry permit due to the 1999 matter. A year later, in 2018, Defendant moved the Forsyth County District Court to enter a final judgment on his 1999 matter, presumably so that he could (1) appeal the matter to superior court in hopes that the State would then be forced to dismiss the charge due to the staleness of the matter and (2) he could then regain his concealed carry permit in West Virginia.

Id. at 548, 836 S.E.2d at 856. The trial court denied that motion and the Court of Appeals held that because the PJC was not a final judgment, there was no mechanism for an appeal absent a petition for writ of certiorari. *Id.* at 550-51, 836 S.E.2d at 858. How can it be that a defendant is both without a path to force final judgment *and* deprived of his ability to complain of delayed final judgment because he did not force entry of final judgment.

Not only is Mr. McDonald similarly faced without a mechanism to force entry of a final judgment, the order itself, in this case, did not give this Defendant the option to bring final closure to the PJC; the order specifically stated that the prayer for judgment was continued "*until further motion of the State*." (Emphasis added). The situation in this case was further complicated by the fact that Mr. McDonald's attorney thought the PJC was a final judgment.

For these reasons, I do not think Mr. McDonald consented in a knowing and informed way to the delay, and indeed, had no mechanism available to him to avoid his "consent" being fatal to his appeal here. Analysis under this factor weighs in favor of concluding the delay was unreasonable.

3. The Length of the Delay Was Unreasonable

The majority here states that the length of delay in this case mirrors the longest delay this Court has found acceptable. However, in the cases relied upon by the majority, there were either multiple factors weighing in favor of the reasonableness of the delay or other extenuating circumstances. I do not think those cases mandate or even support the majority's outcome here.

Generally, where our courts have affirmed entry of judgment after a longer delay, the PJC had a predefined endpoint. *See*, *e.g.*, *State v. Thompson*, 267 N.C. 653, 655-56, 148 S.E.2d 613, 615 (1966) (affirming entry of judgment and sentencing roughly two years into a three-year PJC). Where no duration is established by the trial court, lengthy delays in sentencing have been held to be reasonable, in some cases, because of intervening appeals on related charges by the defendant or to resolve some, but not all, of the criminal charges pending. For example, in *State v. Lea*, the trial court entered a PJC on the lesser charges because the defendant was serving a longer sentence on attempted second-degree murder charges. *State v. Lea*, 156 N.C. App. at 180, 576 S.E.2d at 133. The trial court entered judgment four years after the PJC was granted when the North Carolina Supreme Court decided that the crime of attempted second-degree murder did not exist in North Carolina. *Id.* This Court held the delay was not unreasonable because the defendant was serving time on the other charges in the intervening four years. *Id.* In *State v. Van Trussel*, the trial court entered judgment four years after a jury verdict. 170 N.C. App. 33, 36, 612 S.E.2d 195, 197 (2005). In *Van Trussel*, the court *sua sponte* entered a PJC on the minor charges while the defendant appealed his convictions on the more serious charges where sentences had been entered. *Id.* at 35, 612 S.E.2d at 197. Here, Mr. McDonald's PJC had no definite term, and no intervening appeals justifying the delay here.

The majority relies heavily on an 80-year-old case, *State v. Pelley*, as precedent for a case where this Court approved a delay in judgment that approximated the seven-year delay in this case. 221 N.C. 487, 495, 20 S.E.2d 850, 855 (1942). But the facts of *Pelley* are distinguishable, and the simple reliance on the length of the delay in *Pelley*, divorced from the extenuating circumstances in that case, creates a rule that extends the permissible bounds of delayed entry of judgment without any discernible limitations. In *Pelley*, the original PJC had a fixed term of five years; the defendant was given a five-year suspended sentence with specified conditions on the first count and a five-year PJC on the second count. *Id.* at 491, 20 S.E.2d 853.

This Court based its approval of the seven-year delay in *Pelley* because the defendant violated the terms of the suspended sentence within the five-year period and then *absconded from the jurisdiction*. *Id*. at 492, 20 S.E.2d 854-55. Law enforcement found and arrested the defendant within the five-year period, but he was arrested outside of North Carolina. *Id*. at 494, 20 S.E.2d 854-55. The defendant resisted his return to North Carolina, resulting in a two-year *habeas* battle before he reentered the state. *Id*. at 494-95, 20 S.E.2d 855. Once the defendant returned to North Carolina, the court entered judgment and this Court affirmed that delay in entry of judgment as reasonable based upon the facts in that case. *Id*. at 495, 20 S.E.2d 855. Stated differently, two years of the asserted seven-year precedent in *Pelley* was because that defendant left the state, violating specific conditions of his suspended sentence, and then refused to return. That is hardly comparable to the case here. Taking, as I do, the facts of *Pelley* being quite unusual in allowing the justification of a seven-year delay, no other North Carolina case approves a delay even remotely reaching the length here. Therefore, I would hold that the length of delay in this case was unreasonable such that it divested the trial court of jurisdiction to enter the judgment.

I find persuasive cases from other jurisdictions that take into consideration the relationship between the length of the delay and the maximum penalty for the crime. These courts have considered the length of the possible sentence or probation period as a gauge of the reasonableness of the delay in entry of judgment after a PJC. *See*, *e.g.*, *People v. Kennedy*, 25 N.W. 318, 320 (Mich. 1885) (holding that the judgment could not be delayed longer than 90 days when the longest sentence that could be imposed was 90 days); *Jeffries v. Mun. Court of City of Tulsa*, 536 P.2d 1313, 1317 (Okla. Crim. App. 1975) (superseded by statute on other grounds) (holding that delaying entry of judgment beyond the maximum period which may have been accessed as a penalty for the violation divested the court of jurisdiction); *Commonwealth ex rel. Wilhelm v. Morgan*, 123 A 337, 400 (Pa. Super. 1924) (holding that sentence can only be suspended for a reasonable time not to extend beyond the maximum term of imprisonment). While our courts have not employed such a comparison, I do not read our precedent to preclude it either. And here, the maximum allowable sentence for this class A1 misdemeanor is 150 days. Entry of judgment was delayed for 7 years – over 17 times the maximum sentence for this misdemeanor.

4. The Delay Prejudiced the Defendant

Finally, in this case, the delay of seven years prejudiced Mr. McDonald. In the intervening years between when Mr. McDonald pled

guilty and the trial court entered judgment, the State destroyed all its evidence in the case. After the State made a motion for entry of judgment in 2020, Mr. McDonald made a discovery motion, and the State notified him that all evidence surrounding the 2011 incident had been destroyed.

Without discovery from the State, Mr. McDonald was unable to present mitigating factors, if any, that may have impacted the length of his sentence entered in 2022. For example, Mr. McDonald did not have access to the accident reconstruction report and a speed reconstruction compiled by an expert that were the basis of the State's proffer of guilt during the plea hearing. Additionally, Mr. McDonald did not have information on the speed the other driver was traveling, medical or vision issues of the victim that would have impacted his ability to respond to a car that was one or two feet into his lane, or the existence of any impairing substances in the victim's system at the time of the incident. Significantly, during the plea agreement in 2014, the trial court told Mr. McDonald that he would "have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case[.]" This Court has held that a defendant was prejudiced when the State failed to turn over evidence that is material to guilt *or punishment*. *State v. Williams*, 190 N.C. App. 301, 311, 660 S.E.2d 189, 195 (2008), *aff'd*, 362 N.C. 628, 669 S.E.2d 290 (2008) (emphasis added).

Ultimately, the trial court in 2022 sentenced Mr. McDonald to the maximum sentence, 150 days, suspended to 12 months of probation and loss of license. I would find that Defendant was prejudiced by the State's failure to turn over evidence that he might have used to argue for a sentence less than the maximum.

II. Conclusion

For the reasons explained above, I would hold that the State did not meet the burden of proving the trial court had jurisdiction to enter the order, the delay in entry of judgment in this case was unreasonable, and the trial court was divested of jurisdiction to enter judgment. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
RONALD EUGENE PATTON, DEFENDANT

No. COA22-994

Filed 1 August 2023

1. Indictment and Information—facial validity—intimidating or interfering with a witness—attempted bribery—encompassed by statutory definition of offense

In a prosecution for second-degree forcible sexual offense, in which the victim was set to testify at trial, an indictment charging defendant with intimidating or interfering with a witness under N.C.G.S. § 14-226 was facially valid (and, therefore, sufficient to vest the trial court with subject matter jurisdiction over the charge) where it alleged that defendant attempted to deter the victim from attending court by bribing her with $1,000. Section 14-226 prohibits intimidation of witnesses or interference with their testimony through "threats" and "menaces," but also "in any other manner." Therefore, the alleged conduct of attempting to bribe a witness fell within the statutory definition of the charged offense. Further, defendant's argument—that the statute criminalizes two types of conduct: intimidation of a witness in general, and intimidation for the specific purpose of deterring a witness from attending court (and that attempted bribery did not fall under either category)—lacked merit, as the first category of conduct necessarily encompasses the latter and would therefore render half the statute surplusage.

2. Crimes, Other—intimidating or interfering with a witness—through attempted bribery—specific intent to deter testimony—sufficiency of evidence

In a prosecution for second-degree forcible sexual offense, the trial court properly denied defendant's motion to dismiss a charge of intimidating or interfering with a witness under N.C.G.S. § 14-226 where sufficient circumstantial evidence supported an inference that, when defendant called the victim from prison and offered her $1,000 before his trial, defendant was attempting to bribe the victim with the specific intent of deterring her from testifying against him in court. The State's circumstantial evidence included: the context of defendant's offer (a phone call to his known accuser with an unsolicited offer of $1,000, before trial and for no other discernible reason, is inherently suspect); defendant's attempt to disguise his identity by using another inmate's telephone account to call the

victim, suggesting an improper motive; defendant's prior history of threatening and intimidating the victim in order to influence her; and the victim's own understanding of the conversation based on her history with defendant.

3. Crimes, Other—intimidating or interfering with a witness—by attempting to bribe witness—propriety of jury instruction

In a prosecution for second-degree forcible sexual offense, where defendant called the victim from prison and offered her $1,000 before his trial, in which the victim was set to testify, the trial court properly instructed the jury on the offense of intimidating or interfering with a witness under N.C.G.S. § 14-226. Firstly, because a defendant may violate section 14-226 through bribery and without making threats, the court was not required to instruct the jury that a conviction under section 14-226 required a threat. Secondly, the court's instruction, which followed the pattern instruction for interfering with a witness, properly conveyed the requisite intent for the offense. Thirdly, although merely offering someone $1,000 is not illegal, the court did not erroneously permit the jury to convict defendant of legal conduct where it informed the jury to convict him only if his offer of $1,000 constituted an attempt to deter the victim from testifying. Finally, the court's disjunctive instruction—that a guilty verdict required finding that defendant attempted to dissuade the victim from testifying by bribery "or" by calling the victim before trial and offering her $1,000—did not violate defendant's right to a unanimous jury verdict, because bribery and offering $1,000 are undistinguished parts of a single offense under section 14-226 rather than discrete offenses.

Appeal by Defendant from judgments entered 13 November 2021 by Judge Karen Eady-Williams in Buncombe County Superior Court. Heard in the Court of Appeals 9 May 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stephanie A. Brennan, for the State.

W. Michael Spivey for Defendant-Appellant.

RIGGS, Judge.

Defendant Ronald Eugene Patton appeals from several judgments entered after a jury found him guilty of second-degree forcible sexual offense, intimidating or interfering with a witness, and attaining habitual

felon status. On appeal, Mr. Patton contends that the trial court: (1) lacked jurisdiction over the interfering with a witness charge because the criminal conduct alleged in the indictment—bribery—is not encompassed in the relevant statute, N.C. Gen. Stat. § 14-226 (2021); (2) erred in denying his motion to dismiss that same charge for insufficient evidence of the requisite criminal intent; and (3) prejudicially or plainly erred in its jury instruction on witness interference. After careful review, we hold that: (1) bribery of a witness is criminalized by N.C. Gen. Stat. § 14-226 such that the trial court had jurisdiction over the charged offense; (2) the trial court properly denied Mr. Patton's motion to dismiss that charge; and (3) Mr. Patton's alleged jury instruction arguments are without merit.

I. FACTUAL AND PROCEDURAL HISTORY

J.L.A. ("Jane") moved to Asheville, North Carolina from Ohio in February 2017. One day when she was waiting for the bus to take her to work, Mr. Patton approached her and offered her some marijuana. Jane declined and boarded the bus without further conversation with Mr. Patton. Later, Jane again ran into Mr. Patton at the bus station as she was heading home; this time, Jane took down Mr. Patton's number in case she ever wanted to buy marijuana from him.

Jane waited to contact Mr. Patton for some time, but she did eventually text message him to ask about buying marijuana. Mr. Patton obliged Jane's request and began selling marijuana to her. The two struck up a friendship, with Jane calling Mr. Patton "grandpa" because he was twice her age. After several drug transactions, Mr. Patton told Jane that he would give her $40 worth of marijuana in exchange for sex; Jane responded by cursing at him and threatening to cut off contact.

Jane ceased talking to Mr. Patton after the above exchange. She resumed contact with him out of desperation, and Mr. Patton gave her furniture and clothing and helped her buy a car. He also continued to supply her with marijuana and make sexual comments to her, though Jane never reciprocated with any showing of romantic or sexual interest.

On the night of 10 January 2019, Mr. Patton and Jane were together at her house drinking wine, smoking marijuana, and watching movies. Mr. Patton ended up staying over at Jane's house, as he had arrived after the buses had ceased running for the evening. Jane eventually fell asleep on the floor while Mr. Patton continued to watch TV on her couch. She later awoke to Mr. Patton grinding his groin against her backside through her blanket and leggings. Jane told Mr. Patton to stop and get off her, but he instead held her down, shoved her head into a pillow, and continued

to thrust against her while groping her body. Jane fought back against Mr. Patton, punching and scratching him in the face. After getting free and heading for the front door to escape, Jane was grabbed from behind by her hair and dragged into the bedroom by Mr. Patton.

Once in the bedroom, Mr. Patton released Jane to let her go to the bathroom; as soon as she was finished, he grabbed her by the hair again. Mr. Patton then told Jane to fellate him and that he would strip her and tie her up if she refused. Jane refused and lied to him about having HIV in the hopes that he would not rape her; Mr. Patton instead continued to try and force his penis into her mouth. He then pushed her back onto the bed and tried to smother her with a pillow. When Jane continued to struggle, Mr. Patton wrapped a cell phone charger cord around her neck to choke her. Mr. Patton eventually forced his penis into Jane's mouth and ejaculated, causing her to vomit.

Mr. Patton released Jane, and she immediately went to the bathroom to continue vomiting. When she returned to the bedroom, Mr. Patton held her by her wrist and walked her through the house as he collected his belongings. He then left the house and got into a car that was waiting for him outside, whereupon Jane called the police to report the assault. Law enforcement responded to the call, interviewed Jane, photographed the scene, and collected physical evidence corroborating Jane's account. Jane went to the hospital with a police officer, where DNA evidence was collected from Jane's hair, fingernails, nose, and cheek.

On 4 February 2019, Mr. Patton was indicted for one count each of first-degree forcible sex offense, first-degree kidnapping, and assault by strangulation. After Mr. Patton's arrest and while he was in jail, Jane received a call from an inmate, purportedly named "Richie," at the Buncombe County Jail. When Jane answered the call and asked who was calling, Mr. Patton identified himself and the following conversation ensued:

> MR. PATTON: This is Gene.
>
> JANE: Why are you calling me?
>
> MR. PATTON: If you're still in Asheville I'm gonna try and send you some money.
>
> JANE: This is who?
>
> MR. PATTON: This is Gene.
>
> JANE: Why are you calling me? You're not supposed to be talking to me.

MR. PATTON: I got $1,000 for ya.

Jane immediately hung up the phone; her tone of voice during the conversation clearly conveyed a sense of distress. Mr. Patton called Jane again, but she did not answer because she had blocked the number. Jane informed law enforcement of the call and, on 1 March 2021, Mr. Patton was indicted with intimidating or interfering with a witness in violation of N.C. Gen. Stat. § 14-226.

The State obtained a superseding indictment for forcible sexual offense and an additional indictment for attaining habitual felon status ahead of trial. At trial, Jane testified consistent with the above recitation of the facts, and the jailhouse phone call was published to the jury. Jane testified that, after receiving the call, "I was shocked, because, like, you're not supposed to be contacting me. . . . I felt like he was trying to bribe me trying to get out of what he done to me, like, no."

Mr. Patton's counsel moved to dismiss the charges against him at the close of the State's case-in-chief and at the close of all evidence; the trial court denied both motions. The trial court then held the charge conference, during which the parties discussed the appropriate instruction for the charge of interfering with a witness. That conversation included the following objection from Mr. Patton's counsel concerning reference to the specific act of offering Jane $1,000 in the trial court's proposed instruction:

> [T]hat instruction . . . that Your Honor is laying out . . . is not, you know, a crime. He said he had a thousand dollars. I think that ought to read probably bribery based on the way their indictment reads.
>
> . . . .
>
> I think bribery based on their indictment is what needs to be in there, by bribing her.
>
> . . . .
>
> Because, you know, my contention is that . . . a thousand dollars is not bribery. You know, maybe he was getting close to it, but I think that would be the question they decide is him stating that he has a thousand dollars, is that in fact bribery. So it should just read bribery.

After a lengthy back-and-forth with the parties, the trial court resolved to instruct the jury disjunctively, "so if they considered calling [Jane] before his trial and stating that he had a thousand dollars for her

that would be the substitute for bribery. They could look at it as bribery or the calling her." The final instruction was given as follows:

> For you to find the defendant guilty of this offense the [S]tate must prove four things beyond a reasonable doubt.
>
> First, that a person was summoned as a witness in a court of this state.
>
> Second, that the defendant attempted to deter any person who was summoned as a witness in the defendant's case.
>
> Third, that the defendant acted intentionally.
>
> And fourth, that the defendant did so by bribery or by calling the victim before his trial and stating he had $1,000 for her.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the person was acting as a witness in the defendant's case in a court of this state, and that the defendant . . . intentionally attempted to deter by bribery or by calling the victim before his trial and stating he had $1,000 for her, it would be your duty to return a verdict of guilty.

After deliberations, the jury returned guilty verdicts on second-degree forcible sexual offense, intimidating or interfering with a witness, and attaining habitual felon status, but acquitting Mr. Patton of assault by strangulation. The trial court sentenced Mr. Patton to consecutive sentences of 146 to 188 and 146 to 236 months' imprisonment. Mr. Patton gave oral notice of appeal at the conclusion of sentencing.

II. ANALYSIS

Mr. Patton's appeal asserts the existence of several errors in connection with the interfering with a witness conviction. First, he contends that the trial court lacked jurisdiction because the conduct alleged in the indictment—attempted bribery with $1,000—does not fall within his preferred interpretation of the statute defining the offense. Second, he argues that the trial court erred in denying his motion to dismiss based on inadequate evidence of intent to deter Jane from testifying. Third, he asserts plain error in the trial court's failure to instruct on the allegedly necessary element of threatened harm, prejudicial error in failure to instruct on the intent to deter Jane *from testifying* specifically, prejudicial error in its disjunctive instruction regarding attempted bribery or payment of $1,000, and constitutional error on the basis that the

disjunctive instruction violated his right to a unanimous jury verdict. We address each argument in turn, ultimately holding that Mr. Patton received a trial free from error.

A. Bribery and N.C. Gen. Stat. § 14-226

[1] In his first argument, Mr. Patton contends that attempted bribery of a witness does not fall within the conduct criminalized by N.C. Gen. Stat. § 14-226(a). That statute provides:

> If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, the person shall be guilty of a Class G felony.

N.C. Gen. Stat. § 14-226(a).

Mr. Patton argues that a defendant can only violate the statute in two ways:

> (1) by intentionally threatening or menacing a witness to intimidate or attempt to intimidate the witness, *or*;
>
> (2) by intentionally threatening, or menacing a witness to deter, or attempt to prevent or deter the witness from attending court.

Under this reading, bribing a witness does not fall within the statute because it is not a threat designed to intimidate a witness or deter her from testifying. But, as rightly argued by the State and explained *infra*, Mr. Patton's interpretation fails because it: (1) is contrary to the plain language and intent of the statute; and (2) results in a reading that renders one of its provisions redundant.

1. Standard of Review

Whether an indictment is facially valid—and thus sufficient to confer subject matter jurisdiction on the trial court—is reviewed *de novo*. *State v. Stephenson*, 267 N.C. App. 475, 478, 833 S.E.2d 393, 397 (2019). This same *de novo* standard applies to the interpretation of criminal statutes. *Id.* at 478-79, 833 S.E.2d at 397.

2. N.C. Gen. Stat. § 12-226 Criminalizes Bribery of a Witness

The pertinent indictment alleged that Mr. Patton "unlawfully, willfully and feloniously . . . did by bribery, attempt to deter [Jane] from

attending court by offering her $1,000.00," in violation of N.C. Gen. Stat. § 14-226. Mr. Patton now argues that this conduct did not fall within the statute by putting forth an interpretation that criminalizes two types of conduct: " 'intimidation' of a witness in general . . . [and] intimidation for the specific purpose of deterring a witness from attending court." This reading is unsupported by the plain language of the statute and contravenes a key canon of statutory construction.

The relevant statutory provision prohibits intimidation of witnesses or attempts to deter or interfere with their testimony "by threats, menaces *or in any other manner*." N.C. Gen. Stat. § 14-226(a) (emphasis added). The emphasized language, given its plain and ordinary meaning, straightforwardly expands the scope of prohibited conduct beyond "threats" and "menaces" to include *any other* act that intimidates a witness or attempts to deter or interfere with their testimony. Contrary to Mr. Patton's assertion, there is no ambiguity that arises from this phrasing, and we need not rely on any canons of statutory construction to discern the legislative will. *See, e.g.*, *Swauger v. Univ. of N.C. at Charlotte*, 259 N.C. App. 727, 817 S.E.2d 434 (2018) ("Where there is no ambiguity, this Court does not employ the canons of statutory interpretation, and instead gives the words their plain and definite meaning." (cleaned up)). *See also State v. Ross*, 272 N.C. 67, 71, 157 S.E.2d 712, 714-15 (1967) (noting that the canon of *ejusdem generis* applies only where a statute is ambiguous, and holding that the legislature's use of "any guardian, administrator, executor, trustee, or any receiver, or *any other fiduciary*" in an embezzlement statute showed a "manifest purpose . . . [t]o enlarge the scope of the embezzlement statute," as "[t]he words, 'or any other fiduciary', show clearly that the General Assembly did not intend to restrict the application of the [statute] to receivers.").

This reading is fully in accord with the intent of the statute, as "[t]he gist of this offense is the obstruction of justice." *State v. Neely*, 4 N.C. App. 475, 476 166 S.E.2d 878, 879 (1969).[1] As we have since

1. To be clear, and as correctly argued by both Mr. Patton and the State in their briefs, the statute is not co-extensive with the common law offense of obstruction of justice. For example, destroying evidence is an obstruction of justice that does not fall within the scope of the statute. *See, e.g.*, *Jones v. City of Durham*, 183 N.C. App. 57, 59, 643 S.E.2d 631, 633 (2007) (holding allegations of destruction of videotape evidence from a police dashboard camera sufficed to allege the common law offense of obstruction of justice). But this statute, as with other related statutes, criminalizes a specific subset of acts that would otherwise fall within the larger common law crime. *See, e.g.*, N.C. Gen. Stat. § 14-225.2 (2021) (criminalizing harassment of a juror). Our holding that bribery constitutes an illegal act under the relevant statute does not expand the statute to entirely encompass the broader crime of obstruction of justice.

observed, "*Neely* . . . considers 'attempting to intimidate' a witness, 'attempting to threaten' a witness, and 'attempting to prevent a witness from testifying' as undistinguished parts of a single offense under N.C. Gen. Stat. § 14-226." *State v. Clagon*, 279 N.C. App. 425, 434, 865 S.E.2d 343, 349 (2021) (cleaned up) (citing *Neely*, 4 N.C. App. at 476, 166 S.E.2d at 879).

Even were the statute ambiguous, Mr. Patton's reading renders the second category of criminalized conduct redundant in violation of our statutory construction canons. *See State v. Morgan*, 372 N.C. 609, 614, 831 S.E.2d 254, 258 (2019) ("We are further guided in our decision by the canon of statutory construction that a statute may not be interpreted in a manner which would render any of its words superfluous. . . . [A] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant." (cleaned up)). Per Mr. Patton's Reply Brief, "one section of the statute addresses 'intimidation' of a witness in general while the second addresses intimidation for the specific purpose of deterring a witness from attending court." But the former crime, under Mr. Patton's own formulation, necessarily encompasses the latter, with both subject to the same felony offense classification. Mr. Patton's reading thus renders half of the statute surplusage; by way of a hypothetical, it would be entirely redundant to read a statutory provision as separately criminalizing both "striking a dog" and "striking a Dalmatian" as Class B felonies. Because Mr. Patton's preferred reading is both contrary to the statute's plain language and renders one of the statute's provisions into surplusage, we hold that the indictment alleging Mr. Patton's attempted bribery of Jane in violation of N.C. Gen. Stat. § 14-226 was sufficient to vest the trial court with subject matter jurisdiction.

B. Motion to Dismiss

[2] As an alternative to his first argument, Mr. Patton argues that the trial court erred in denying his motion to dismiss the interfering with a witness charge because the State failed to offer sufficient evidence of bribery with the specific intent to deter Jane from testifying. But, contrary to Mr. Patton's argument, the record contains sufficient circumstantial evidence from which a jury could reasonably infer that Mr. Patton intended to dissuade Jane from acting as a witness. We therefore hold that the trial court properly denied Mr. Patton's motion.

1. Standard of Review

The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied

> if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Teague, 216 N.C. App. 100, 105, 715 S.E.2d 919, 923 (2011) (cleaned up).

2. Evidence of Intent

Intent is seldom provable by direct evidence; as such, circumstantial evidence is commonly—if not necessarily—relied upon to prove state of mind. *State v. Gammons*, 260 N.C. 753, 756, 133 S.E.2d 649, 651 (1963). Thus, the State was not required to introduce evidence of Mr. Patton explicitly offering Jane $1,000 for the express purpose of dissuading her from testifying. And the circumstantial evidence that the State did introduce in this case supports a reasonable inference that Mr. Patton acted with just that intent given the context in which he made the offer. *See*, *e.g.*, *State v. Taylor*, 379 N.C. 589, 609, 866 S.E.2d 740, 756 (2021) (noting on review of a true threats conviction that, in discerning the defendant's subjective intent in the light most favorable to the State, "[d]efendant's statements should not be read in isolation and are more properly considered in context.").

The context of Mr. Patton's offer is of paramount importance—one can reasonably infer that a motorist who knowingly slips a State Trooper a $100 bill with his license and registration during a traffic stop for speeding is attempting to bribe the officer notwithstanding the lack of an express statement of such intent. Similarly, Mr. Patton's call to his known accuser with an unsolicited offer of $1,000, prior to trial and for no other discernable reason, is inherently suspect.

Other evidence solidifies the reasonable inference of intent to interfere, namely: (1) his attempt to disguise his identity in calling Jane by using another inmate's telephone account, suggesting an improper motive; (2) his offer of $1,000 immediately after Jane said "you're not supposed to be talking to me," showing that the offer was made with full awareness that he was not to be in contact with Jane and in direct contravention of those concerns; (3) Jane plainly sounds distressed on the

recoding once Mr. Patton identified himself, yet he continued to go forward with his offer despite her obvious discomfort; (4) a second attempt to contact Jane after she hung up on him, again demonstrating his disregard for prohibitions against contacting Jane and the distress under which it placed her; (5) Mr. Patton's admitted past conduct of threatening and intimidating Jane in order to influence her behavior for his benefit; and, (6) Jane's own understanding of the conversation, derived from her shared and involved history with Mr. Patton, that the offer was intended as a bribe to prevent her from testifying.[2]

All of this evidence, coupled with a lack of other evidence indicating why Mr. Patton would gratuitously, surreptitiously, and spontaneously offer his alleged victim $1,000,[3] is sufficient to support a reasonable inference that the offer was made with the intent to interfere with Jane's testimony. The State introduced sufficient competent evidence of the requisite intent and, by extension, the trial court did not err in denying Mr. Patton's motion to dismiss.

C. Jury Instructions

[3] Mr. Patton next asserts that the trial court: (1) plainly erred in failing to instruct the jury that it must find he threatened Jane to convict him of interfering with a witness; (2) prejudicially erred in failing to instruct on the requirement that his intent be to deter Jane *from testifying* specifically; (3) prejudicially erred in giving the disjunctive instruction that included offering Jane $1,000; and (4) violated his right to a unanimous jury verdict by giving said disjunctive instruction. On review of the relevant facts and law, none of these arguments is convincing.

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2. Mr. Patton argues that Jane's subjective understanding of his offer is irrelevant because, by analogy to the crime of true threats, "a speaker's subjective intent to threaten is the pivotal feature separating constitutionally protected speech from constitutionally proscribable true threats." *Taylor*, 379 N.C. at 605, 866 S.E.2d at 753. Mr. Patton overstates the relevance of that observation to his argument, as *Taylor* likewise recognized Supreme Court precedent holding that, "in order to determine whether a defendant's particular statements contain a true threat, a court must consider . . . the reaction of the listeners upon hearing the statement." *Id.* at 600-01, 866 S.E.2d at 750 (citing *Watts v. United States*, 394 U.S. 705, 708, 22 L. Ed. 2d 664, 667 (1969)).

3. On appeal, Mr. Patton points out his trial testimony that Jane falsely accused him of rape because he refused to pay her $300 in exchange for sex. From there, he argues that this evidence supports an inference that he offered Jane $1,000 to encourage her to "tell the truth" and rescind her allegations against him. But this explanation of his conduct does not arise on the face of the evidence introduced at trial; Mr. Patton never testified, either on direct or cross-examination, as to why he called Jane from jail. And, in any event, our standard of review requires us to draw all reasonable inferences in the light most favorable to the State, not the defendant.

1. Standards of Review

We review preserved challenges to the trial court's jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Omission of a necessary element from the jury instruction is reviewed under the harmless error standard. *State v. Bunch*, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010). Adequate prejudice under this standard necessitates some "reasonable probability that [the] outcome would have been different" absent the alleged error. *Id.* at 849, 689 S.E.2d at 871. In undertaking such review, the instructions are to be viewed contextually within the entire jury charge. *Id.* at 847, 689 S.E.2d at 870. A challenged instruction is sufficient "as long as [it] adequately explains each essential element of an offense." *Id.* at 846, 689 S.E.2d at 870 (citation omitted).

Unpreserved challenges to instructions given to the entire jury are reviewed for plain error when distinctly asserted in the appellant's brief. *State v. May*, 368 N.C. 112, 118, 772 S.E.2d 458, 462 (2015). "Plain error with respect to jury instructions requires the error be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. Pate*, 187 N.C. App. 442, 445, 653 S.E.2d 212, 215 (2007) (citation omitted).

2. Instructions on Threat and Intent

Mr. Patton's first asserted error in the jury instructions—that the trial court plainly erred in failing to instruct the jury that any conviction for interfering with a witness required a threat—is precluded by our earlier holding here that a defendant may violate N.C. Gen. Stat. § 14-226 through bribery and without threats. His second argument—that the trial court's instruction failed to properly convey the requisite intent to the jury—is likewise unavailing; the trial court gave the pattern instruction for the offense, which this Court has previously held to be consistent with the statute. *Clagon*, 279 N.C. App. at 434, 865 S.E.2d at 349. Further, the pattern instruction given by the trial court makes clear, through context, that the jury was being asked whether Mr. Patton acted with the intent to interfere in Jane's testimony. The meaning of jury instructions is to be derived from the instructions' totality:

> It is well established in North Carolina that courts will not find prejudicial error in jury instructions where, taken as a whole, they present the law fairly and clearly to the jury. Isolated expressions of the trial court, standing alone, will not warrant reversal when the charge as a whole is correct.

State v. Graham, 287 N.C. App. 477, 486-87, 882 S.E.2d 719, 727 (2023) (cleaned up). It is evident from the name of the charge as told to the jury, "interfering with *a witness*," and the elements of the charge as instructed—including "that the defendant attempted to deter any person who was summoned *as a witness in the defendant's case*"—that the attempt to deter referenced in the instructions related to Jane's service *as a testifying witness*. *See*, *e.g.*, *Witness*, *Black's Law Dictionary* (11th ed. 2019) ("Someone who gives testimony under oath or affirmation").

3. Instruction on $1,000

As with his first two arguments on alleged error in the jury instructions, we see no merit in Mr. Patton's assertion that the trial court's mention of offering $1,000 in the elements of the charge erroneously permitted the jury to convict him of legal conduct. To be sure, offering someone $1,000 is not, in the abstract, illegal. But such conduct *is* unlawful if made with the intent to "prevent or deter, or attempt to prevent or deter any person summoned or acting as [a] witness from attendance upon such court." N.C. Gen. Stat. § 14-226(a). When viewed in context, that is precisely what the trial court instructed the jury:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date a person was acting as a witness in the defendant's case in a court of this state, and that the defendant . . . *intentionally attempted to deter . . . by calling the victim before his trial and stating he had $1,000 for her*, it would be your duty to return a verdict of guilty.

The trial court thus informed the jury that it could convict Mr. Patton for offering Jane $1,000 only if it amounted to an "intentional[] attempt[] to deter" her from testifying, not for the mere act of offering her money itself. Mr. Patton has therefore failed to show the asserted error in the trial court's instruction.

4. Disjunctive Instruction and Unanimity

In his final argument, Mr. Patton contends that the disjunctive jury instruction given by the trial court violated his right to a unanimous jury verdict, allowing jurors to convict him for either bribery or the offer of $1,000. He presents this argument under the fatal ambiguity identified in *State v. Lyons*:

> [A] disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*,

> is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.

330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991) (emphasis in original). But not all disjunctive instructions run afoul of the constitutional requirement for unanimous verdicts. *Id.* For example, in cases involving indecent liberties:

> The risk of a nonunanimous verdict does not arise in cases such as the one at bar because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive . . . . [The statute] proscribes simply "any immoral improper, or indecent liberties." Even if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of "any immoral, improper, or indecent liberties." Such a finding would be sufficient to establish the first element of the crime charged.

State v. Hartness, 326 N.C. 561, 564-65, 391 S.E.2d 177, 179 (1990).

The statutory crime of interfering with a witness falls within the same category as the indecent liberties statute discussed in *Hartness*. This Court has previously recognized that the statute does not enumerate distinct criminal acts that disjunctively establish discrete offenses; instead, intimidating, threatening, or interfering with a witness are considered "undistinguished parts of a single offense under N.C. Gen. Stat. § 14-226." *Clagon*, 279 N.C. App. at 434, 865 S.E.2d at 349 (citing *Neely*, 4 N.C. App. at 476, 166 S.E.2d at 879). Further, there is no suggestion from the evidence or verdict that Mr. Patton violated N.C. Gen. Stat. § 14-226 in any manner other than attempting to deter Jane from testifying by offering her a $1,000 bribe over the phone. *See Lyons*, 330 N.C. at 307, 412 S.E.2d at 315 (observing that, "[i]n some cases, an examination of the verdict, the charge, the initial instructions by the trial judge to the jury, and the evidence may remove any ambiguity created by the charge" (cleaned up)). Because the disjunctive instruction did not raise the potential for a fatal ambiguity in the jury's guilty verdict, and the evidence and verdict eliminate any potential ambiguity, we hold that Mr. Patton has failed to demonstrate error in the trial court's disjunctive instruction.

III. CONCLUSION

For the foregoing reasons, we hold that the trial court had jurisdiction over the charge of interfering with a witness and that Mr. Patton received a fair trial, free from error.

NO ERROR.

Judges TYSON and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 AUGUST 2023)

CAMPBELL v. A1A ARC OF DUNN, LLC No. 23-58	Harnett (22CVS234)	Dismissed
ICENHOUR v. ICENHOUR No. 23-26	Caldwell (11CVD1624)	Vacated and Remanded
IN RE A.M.H. No. 23-89	Cabarrus (21JT64) (21JT65) (21JT66)	Affirmed
IN RE B.A.G. No. 23-184	Ashe (20JT30) (20JT31) (20JT32)	Affirmed
IN RE E.M.E. No. 22-924	Guilford (21JT469) (21JT470)	Affirmed
IN RE K.M. No. 23-32	Union (21JT36) (21JT37)	Affirmed
IN RE L.D.M. No. 22-739	Harnett (19JA103)	Affirmed
IN RE L.S. No. 22-818	Lenoir (21JA94) (21JA95) (21JA96)	Affirmed
IN RE W.H.F. No. 22-947	New Hanover (21JT213)	Affirmed
IN RE D.W. No. 22-991	New Hanover (20JT192)	Affirmed
KAPLAN v. KAPLAN No. 22-923	Union (15CVD305)	Reversed in Part, Vacated in Part and Remanded
KAPLAN v. KAPLAN No. 23-1	Union (15CVD305)	Reversed in part, vacated in part and remanded

N.C. CITIZENS FOR TRANSPARENT GOV'T, INC. v. VILL. OF PINEHURST No. 23-69	Moore (22CVS515)	Reversed and Remanded
N.C. STATE BAR v. IREK No. 22-667	N.C. State Bar (92DHC17)	Affirmed
OLSCHNER v. GOINES No. 22-944	Carteret (20CVS21)	Affirmed
STATE v. JORDAN No. 22-533	Guilford (19CRS89600)	No plain error
STATE v. LYTLE No. 22-968	McDowell (20CRS353-355) (21CRS123)	Affirmed
US ACQUISITION, LLC v. MOUSER No. 22-973	Johnston (22CVS1315)	Affirmed

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