290 N.C. App.—No. 5 Pages 482-554

# ADVANCE SHEETS

OF

# CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

## NORTH CAROLINA

*MARCH 26, 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 19 SEPTEMBER 2023



## CASES REPORTED WITHOUT PUBLISHED OPINIONS



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**ADMINISTRATIVE LAW**

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## CONSUMER PROTECTION

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**North Carolina Debt Collections Act—threshold elements—unfair act—landlord-tenant context—monthly fee for use of well on leased premises—** An order dismissing plaintiff-landlord's complaint for summary ejectment and granting a money judgment to defendant-tenant was reversed, where the trial court erred in concluding that plaintiff violated the North Carolina Debt Collection Act (specifically, the prohibition found in N.C.G.S. § 75-55(2) against collecting debts through "unconscionable means") by collecting a monthly fee from defendant to use a well that provided water for the leased premises. Defendant failed to establish a valid section 75-55 claim where—although he did satisfy three threshold elements, showing that he was a "consumer" who owed a "debt" to a "debt collector"—he failed to show that plaintiff committed an "unfair act" by charging him the monthly well-use fee, which was neither contrary to public policy nor prohibited by statute since it neither violated N.C.G.S. § 42-42 (which requires landlords to provide fit and habitable premises for tenants but does not require landlords to do so for free) nor violated N.C.G.S. § 42-42.1 (which provides that a lessor "may" charge lessees for water consumption based on a metered measurement, but which would not have required plaintiff to do so because of an exemption applicable to landlord-tenant relationships). **Onnipauper LLC v. Dunston, 486.**

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**JUVENILES**

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**Revocation of probation—statutory right to confront adverse witnesses—absent probation officer—other evidence sufficient—**In defendant's probation revocation hearing, the trial court did not prejudicially err when it did not make an explicit finding that good cause existed for not allowing defendant to confront (pursuant to N.C.G.S. § 15A-1345(e)) her former probation officer, who was absent due to a death in the family. The absent probation officer's testimony or cross-examination would have been superfluous because the State presented sufficient evidence—including the testimony of the new probation officer, who filed one of the probation violation reports—supporting the trial court's finding that defendant had committed new criminal offenses. **State v. Singletary, 540.**

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incredible," especially in light of prior caselaw holding that an officer's smelling of unburned marijuana can provide probable cause to conduct a warrantless search and seizure. Therefore, the officer's testimony was competent evidence to support the court's finding that the officer had reasonable suspicion to initiate the *Terry* stop, since the reasonable suspicion standard is less demanding than that for probable cause. **State v. Jacobs, 519.**

## N.C. COURT OF APPEALS
## 2024 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

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

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

**IN RE N.M.**

[290 N.C. App. 482 (2023)]

IN THE MATTER OF N.M.

No. COA23-100

Filed 19 September 2023

**Juveniles—disposition—statutory factors—no findings**

In a juvenile action arising from a physical altercation on a school bus, the trial court erred by failing to make findings addressing the statutory factors in N.C.G.S. § 7B-2501(c) prior to determining the juvenile's disposition. Checking the boxes on the preprinted Juvenile Level 1 Disposition Order form indicating that it had received, considered, and incorporated by reference the predisposition report, risk assessment, and needs assessment—while leaving the Other Findings section blank—was insufficient to comply with the statute's requirements.

Appeal by Defendant from an order entered 23 August 2022 by Judge William F. Southern, III in Surry County District Court. Heard in the Court of Appeals 23 August 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Melissa K. Walker, for the State.*

*Appellant Defender Glenn Gerding, by Assistant Appellate Defender David S. Hallen, for the juvenile appellant.*

WOOD, Judge.

John Bailey[1] (the "juvenile") appeals the trial court's disposition order placing him on probation for twelve months following the trial court adjudicating him delinquent for simple assault. We vacate the disposition order and remand for a new disposition hearing in accordance with N.C. Gen. Stat. § 7B-2501(c).

## I. Factual and Procedural History

On 3 May 2022, the juvenile and Michael Anderson ("Anderson") engaged in a physical altercation over seating on a school bus. The parties have a history of conflict over who sits where on the bus. Approximately

1. Pseudonyms are used to protect the identity of the juveniles pursuant to N.C. R. App. P. 42(b).

one week prior to the incident in this case, Anderson warned the juvenile "if [you] pull me out of the seat again, I will do something about it." At the adjudication hearing, testimony conflicted as to whether seats were assigned by the school or were considered "assigned" by the students who customarily sat in a particular seat. The juvenile testified he asked Anderson to leave his seat, but Anderson did not move. Anderson testified the juvenile just walked up to him, and Anderson assumed he was there to take his seat again. Anderson kicked the juvenile in his lower stomach or groin area. The juvenile then punched Anderson on or around his head approximately ten times.

The school resource officer reviewed the video and called Anderson into his office to have him explain what happened. Subsequently, a juvenile petition charging the juvenile with misdemeanor assault was filed on 6 May 2022. The adjudication and disposition hearings were held in immediate succession on 23 August 2022. A video of the incident recorded by the bus cameras was presented at the adjudication hearing. The trial court adjudicated the juvenile delinquent for the offense of simple assault. The trial court then proceeded to the disposition hearing wherein it entered a Level 1 Disposition placing the juvenile on probation for twelve months and ordering him to participate in and complete various programs and conditions.

The juvenile appealed pursuant to N.C. Gen. Stat. § 7B-2602.

## II. Standard of Review

The juvenile argues the trial court erred in entering the disposition order and that it must be vacated because the trial court failed to comply with the requirements of N.C. Gen. Stat. § 7B-2501(c). "Whether the trial court properly complied with its statutory duty to make findings is a question of law to be reviewed *de novo*." *In re J.D.*, 267 N.C. App. 11, 19, 832 S.E.2d 484, 490 (2019). "Under the *de novo* standard, the Court considers the matter anew and freely substitutes its own judgment for that of the lower court." *In re A.M.*, 220 N.C. App. 136, 137, 724 S.E.2d 651, 653 (2012).

## III. Discussion

Pursuant to N.C. Gen. Stat. § 7B-2501(c), the court is required to select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile based upon:

(1) The seriousness of the offense;

(2) The need to hold the juvenile accountable;

> (3) The importance of protecting the public safety;
>
> (4) The degree of culpability indicated by the circumstances of the particular case; and
>
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2023).

This Court has held "the trial court is required to make findings demonstrating that it considered the [N.C. Gen. Stat.] § 7B-2501(c) factors in a dispositional order entered in a juvenile delinquency matter." *In re V.M.*, 211 N.C. App. 389, 391–92, 712 S.E.2d 213, 215 (2011). "The plain language of Section 7B-2501(c) compels us to find that a trial court must consider each of the five factors in crafting an appropriate disposition." *In re I.W.P.*, 259 N.C. App. 254, 261, 815 S.E.2d 696, 702 (2018).

The juvenile alleges the trial court failed to properly consider and apply the five factors identified in the statute prior to determining his disposition and failed to issue a written order indicating the consideration of these factors. The juvenile argues this constitutes reversible error. We agree.

Here, the trial court received into evidence a predisposition report, risk assessment, and needs assessment from the juvenile court counselor as well as a Youth Assessment and Screening Instrument (YASI) full narrative assessment which contained much information from which the trial court could have made the necessary findings required by N.C. Gen. Stat. § 7B-2501(c). However, the trial court did not make any written finding regarding the five factors as required. The court used the preprinted Juvenile Level 1 Disposition Order form and checked the boxes finding that it received, considered, and incorporated by reference the predisposition report, risk assessment, and needs assessment; however, the trial court made no independent findings. The section titled "Other Findings" was left blank. The State agrees with the juvenile—and concedes—that checking the boxes indicating the trial court received, considered, and incorporated by reference the predisposition report, risk assessment, and needs assessment was insufficient under N.C. Gen. Stat. § 7B-2501(c).

This case is similar to *In re V.M.* wherein "the trial court checked boxes [on the disposition order,] indicating that it had received, considered, and incorporated by reference the predisposition report, risk assessment, and needs assessment." 211 N.C. App. at 392, 712 S.E.2d at 215. However, the disposition order did not contain any "additional

findings of fact, including in the area designated as 'Other Findings,' " which lists the same factors contained in N.C. Gen. Stat. § 7B-2501(c). *Id.* at 392, 712 S.E.2d at 215–16. This Court "reverse[d] the trial court's dispositional order and remand[ed] th[e] matter for a new dispositional hearing." *Id.* at 392, 712 S.E.2d at 216; *see also In re J.A.D.*, 283 N.C. App. 8, 24–25, 872 S.E.2d 374, 387–88 (2022) (remanding for further findings because the trial court did not make findings addressing the N.C. Gen. Stat. § 7B-2501(c) factors).

Although the information regarding the statutory factors may be included in the reports given to the court by the juvenile court counselor and may have been considered by the trial court, the trial court is vested with the responsibility of making oral and written findings showing its consideration of the five factors contained in N.C. Gen. Stat. § 7B-2501(c). The Level 1 Juvenile Disposition Form includes a note to the trial court under "Other Findings" to remind the trial court of the findings that must be made:

> NOTE: State any findings regarding the seriousness of the offense(s); the need to hold the juvenile accountable: the importance of protecting the public, the degree of the juvenile's culpability; the juvenile's rehabilitative and treatment needs; and available and appropriate resources. Also use this space for any findings that are required to support a particular disposition, such as a finding of the juvenile's ability to pay if the Court is ordering restitution.

This section must be filled with findings made by the trial court regarding the five factors required by the statute, otherwise it is reversible error.

## IV. Conclusion

Because the trial court must make findings addressing the statutory factors in N.C. Gen. Stat. § 7B-2501(c), we vacate the disposition order and remand for a new dispositional hearing and entry of an order that includes written findings showing its consideration of the five factors contained in N.C. Gen. Stat. § 7B-2501(c). *In re V.M.*, 211 N.C. App. at 392, 712 S.E.2d at 216; *In re J.A.D.*, 183 N.C. App. at 24–25, 872 S.E.2d at 387–88.

VACATED AND REMANDED.

Judge DILLON and ZACHARY concur.

ONNIPAUPER LLC, PLAINTIFF
v.
EUGENE DUNSTON, DEFENDANT

No. COA23-151

Filed 19 September 2023

**1. Consumer Protection—North Carolina Debt Collections Act—threshold elements—unfair act—landlord-tenant context—monthly fee for use of well on leased premises**

An order dismissing plaintiff-landlord's complaint for summary ejectment and granting a money judgment to defendant-tenant was reversed, where the trial court erred in concluding that plaintiff violated the North Carolina Debt Collection Act (specifically, the prohibition found in N.C.G.S. § 75-55(2) against collecting debts through "unconscionable means") by collecting a monthly fee from defendant to use a well that provided water for the leased premises. Defendant failed to establish a valid section 75-55 claim where—although he did satisfy three threshold elements, showing that he was a "consumer" who owed a "debt" to a "debt collector"—he failed to show that plaintiff committed an "unfair act" by charging him the monthly well-use fee, which was neither contrary to public policy nor prohibited by statute since it neither violated N.C.G.S. § 42-42 (which requires landlords to provide fit and habitable premises for tenants but does not require landlords to do so for free) nor violated N.C.G.S. § 42-42.1 (which provides that a lessor "may" charge lessees for water consumption based on a metered measurement, but which would not have required plaintiff to do so because of an exemption applicable to landlord-tenant relationships).

**2. Consumer Protection—North Carolina Debt Collections Act—threshold elements—proximate injury—summary ejectment action—wrong amount of rent listed in complaint**

An order dismissing plaintiff-landlord's complaint for summary ejectment and granting a money judgment to defendant-tenant was reversed, where the trial court erred in concluding that plaintiff violated the North Carolina Debt Collection Act (specifically, the provision found in N.C.G.S. § 75-54(4) prohibiting debt collectors from falsely representing "in any legal proceeding" the amount of debt a consumer owes them) by incorrectly listing in its complaint the amount of rent defendant paid under the parties' lease agreement. In listing the rate of rent, plaintiff mistakenly included a washer-dryer

fee that plaintiff had waived after the parties amended the lease agreement; however, defendant was not proximately injured by plaintiff's error—a threshold element for a section 75-54(4) claim—since plaintiff did in fact waive the washer-dryer fee and defendant never argued that he paid or was misled about the fee.

Appeal by Plaintiff from order entered 13 October 2022 by Judge David Baker in Wake County District Court. Heard in the Court of Appeals 9 August 2023.

*City of Oaks Law, by Hunter Blake Winstead & Jonathan W. Anderson, for Plaintiff-Appellant.*

*Legal Aid of North Carolina, Inc., by BreAnna VanHook, Christopher Stella, Pamela Thombs, Celia Pistolis, & Isaac W. Sturgill, for Defendant-Appellee.*

CARPENTER, Judge.

Onnipauper LLC ("Plaintiff") appeals from the trial court's order dismissing its complaint in summary ejectment and granting a money judgment to Eugene Dunston ("Defendant"). On appeal, Plaintiff asserts the trial court erred by concluding Plaintiff violated the North Carolina Debt Collection Act (the "NCDCA"). After careful review, we agree with Plaintiff. Therefore, we reverse the trial court's order.

## I. Factual & Procedural Background

Starting in August 2019, Plaintiff rented a Raleigh property (the "Property") to Defendant. The Property is a single-family home with a well that supplies water solely to the home. On 15 August 2019, the parties executed a rental contract (the "Lease"). Under the terms of the Lease, Plaintiff agreed to rent the Property to Defendant, and Defendant agreed to pay monthly rent of $1,175. Four days after executing the Lease, the parties signed an amendment, modifying the "[t]otal rent" to a monthly amount of $1,350. The amended Lease itemized the rent, detailing a "[b]ase rent" of $1,175, a "[w]ater utility" amount of $125, and a "[w]asher[–d]ryer" amount of $50. The water-utility amount refers to Defendant's use of the well.

Plaintiff and Defendant later excluded the $50 washer–dryer amount from Defendant's total rent because Defendant did not use the washer or dryer. Therefore, after the amendment, Defendant's total rent was

$1,300. Throughout Defendant's tenancy, a third party subsidized part of Defendant's base rent, and Defendant paid the difference plus the "[w]ater utility" amount. On 31 January 2022, Plaintiff gave Defendant a written notice to vacate the Property by 11 March 2022.

Defendant refused to leave the Property, so on 1 April 2022, Plaintiff filed a complaint for summary ejectment against Defendant in Wake County Small Claims Court. The complaint listed the "rate of rent" as $1,350. On 18 April 2022, the small-claims magistrate ordered Defendant to vacate the Property. On 22 April 2022, Defendant appealed to Wake County District Court. On 2 June 2022, Defendant answered Plaintiff's complaint, raised affirmative defenses, and asserted counterclaims for violations of the NCDCA.

After a bench trial conducted on 23 August 2022, the trial court found Plaintiff violated two provisions of the NCDCA. Specifically, the trial court found "Plaintiff violated N.C. Gen. Stat. § 75-55(2) twenty-nine (29) times by attempting to collect and collecting a fee for the provision of water that [it was] not legally entitled to collect." The trial court also found Plaintiff violated N.C. Gen. Stat. § 75-54(4) by stating in its complaint that Defendant's "rate of rent" was $1,350, rather than $1,175. In support of these violations, the trial court found:

> 56. Pursuant to North Carolina General Statute § 42-42(2) the landlord has a standing obligation to do whatever is necessary to put and keep the premises in a fit and habitable condition. Additionally, the landlord must comply with the provision of North Carolina General Statute § 42-42(4) by maintaining in good and safe working order, plumbing and other facilities provided by the landlord.
>
> 57. Access to running water is essential to the habitability of the leased premises. Thus, Landlord is not entitled to charge an additional fee to the tenant for upholding this basic statutory obligation to provide fit premises.
>
> . . . .
>
> 61. Plaintiff was not entitled to collect fees from Defendant for the provision of unmetered well water. These charges are not lawful, and tenant is entitled to a reimbursement of all payments for water and sewer.

Thus, the trial court dismissed Plaintiff's complaint with prejudice and awarded $25,876 to Defendant. Plaintiff timely appealed on 2 November 2022.

## II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(2) (2021).

## III. Issues

The issues on appeal are whether the trial court erred by concluding Plaintiff violated N.C. Gen. Stat. § 75-54(4) (2021) and N.C. Gen. Stat. § 75-55(2) (2021).

## IV. Standard of Review

When we review decisions from a bench trial, "findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). But "[c]onclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004). " 'Under a de novo review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"The label of fact put upon a conclusion of law will not defeat appellate review." *City of Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946). Thus, findings of fact that are actually conclusions of law will be reviewed as conclusions of law. *Harris v. Harris*, 51 N.C. App. 103, 107, 275 S.E.2d 273, 276 (1981). And determinations reached by "application of legal principles" are conclusion of law. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997).

Here, the trial court made findings of fact asserting Plaintiff violated sections 75-54 and 75-55. These assertions, however, required an application of legal principles; specifically, these assertions required application of statutory elements. *See* N.C. Gen. Stat. §§ 75-54(4), -55(2). Because we are not bound by the trial court's labels, we will review these "findings of facts" as conclusions of law, as they were reached by an application of legal principles. *See Heath*, 226 N.C. at 755, 40 S.E.2d at 604; *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675. Accordingly, we will review these conclusions of law de novo. *See Carolina Power & Light*, 358 N.C. at 517, 597 S.E.2d at 721.

## V. Analysis

On appeal, Plaintiff argues the trial court erred in holding that it violated N.C. Gen. Stat. §§ 75-54, -55. After careful review, we agree with Plaintiff on both arguments. Because it is more involved, we will address section 75-55 first.

### A. N.C. Gen. Stat. § 75-55(2)

**[1]** Chapter 75 of our General Statutes contains the NCDCA, which prohibits certain debt-collection activity. *See* N.C. Gen. Stat. §§ 75-51 to -55 (2021). Section 75-55 prohibits debt collectors from collecting debts "by unconscionable means," which includes "[c]ollecting or attempting to collect from the consumer all or any part of the debt collector's fee or charge for services rendered, collecting or attempting to collect any interest or other charge, fee or expense incidental to the principal debt unless legally entitled to such fee or charge." *Id.* § 75-55(2).

But before diving into the specific requirements of section 75-55, we must first analyze the six threshold elements applicable to all NCDCA claims. *Reid v. Ayers*, 138 N.C. App. 261, 263–66, 531 S.E.2d 231, 233–35 (2000). All NCDCA claims require: (1) a consumer; (2) that owes a debt; (3) to a debt collector. *Id.* at 263, 531 S.E.2d at 233. Further, all NCDCA claims require: (4) the debt collector to commit an unfair act; (5) that affects commerce; and (6) that proximately injures the consumer. *Id.* at 266, 531 S.E.2d at 235. Because a section 75-55 claim is conjunctive, including the threshold elements, we will walk through each element until we reach a dead end or valid claim.

#### 1. Consumer

A "consumer" is "any natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes." N.C. Gen. Stat. § 75-50(1) (2021). Here, Defendant is a natural person who incurred this alleged debt for well-water use at his home. Well-water use at one's home is a personal, household purpose. Defendant is therefore a consumer under the NCDCA. *See id.*

#### 2. Debt

A "debt" is "any obligation owed or due or alleged to be owed or due from a consumer." *Id.* § 75-50(2). In *Friday v. United Dominion Realty Trust*, this Court said that "past due" rent is debt under section 75-50. 155 N.C. App. 671, 678, 575 S.E.2d 532, 537 (2003). Plaintiff points to *Friday* and federal-court interpretations of the NCDCA for the proposition that "debt" requires the consumer to be in default, meaning the payment must be past due. We think this is a misreading of "debt."

When examining statutes, words undefined by the General Assembly "must be given their common and ordinary meaning." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202–03 (1974). "Debt" is statutorily defined, but "owed" and "due" are not. *See* N.C. Gen. Stat. § 75-50. Therefore, we look to the common meaning of "owed" and "due." *See In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 202–03. "Owe" is defined as "to be under obligation to pay or repay in return for something received." *Owe*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020). "Due" is defined as "owed or owing as a debt." *Due*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra*. And contrary to Plaintiff's position, the *Reid* Court implied that payment timing is irrelevant to defining debt; the *Reid* Court focused on whether there was an obligation to pay, not when the payment was due. *See Reid*, 138 N.C. App. at 264, 531 S.E.2d at 234.

Here, Defendant was obliged to pay Plaintiff $125 each month to use a well. Defendant's obligation to pay accrued at the beginning of each month that Defendant occupied the Property. Regardless of the timing of his payments, Defendant was indebted to Plaintiff because Defendant was obliged to pay "in return for something received," well access. *See* N.C. Gen. Stat. § 75-50(2); MERRIAM-WEBSTER'S, *supra*. Therefore, given the "common and ordinary meaning" of "debt," Defendant owed Plaintiff a debt under the NCDCA. *See In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 202–03.

**3. Debt Collector**

A "debt collector" is "any person engaging, directly or indirectly, in debt collection from a consumer." N.C. Gen. Stat. § 75-50(3). "Debt collector" is defined broadly: "there is no regularity or primary purpose limitation." *Reid*, 138 N.C. App. at 265, 531 S.E.2d at 234. Here, the parties do not dispute that Plaintiff collected money from Defendant, a consumer. Because we have established that the money collected was a debt, Plaintiff is therefore a debt collector under the NCDCA. *See* N.C. Gen. Stat. § 75-50(3); *Reid*, 138 N.C. App. at 265, 531 S.E.2d at 234.

**4. Unfair Act**

We must now determine whether Plaintiff committed an "unfair act." *Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Whether an act is unfair depends on the facts of the case. *Id.* at 548, 276 S.E.2d at 403. Concerning contractual obligations, "our state's

legal landscape recognizes that, unless contrary to public policy or prohibited by statute, freedom of contract is a fundamental constitutional right." *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 243, 539 S.E.2d 274, 276 (2000).

"In the absence of statutory proscription or public policy violation, it is beyond question that parties are free to contract as they deem appropriate . . . ." *Id.* at 244, 539 S.E.2d at 277. Because parties are free to contract as they please, *see id.* at 244, 539 S.E.2d at 277, and because we are not moral arbiters—we do not deem a practice "immoral, unethical, oppressive, unscrupulous, or substantially injurious" unless the contract is prohibited by the General Assembly or other controlling authority, *see Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. Therefore, we must determine whether the well-use provision is "contrary to public policy or prohibited by statute" to determine whether Plaintiff committed an unfair act under the NCDCA. *See Hlasnick*, 353 N.C. at 243, 539 S.E.2d at 276; *Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235.

Here, in addition to the "base rent," the parties mutually agreed that Defendant would pay Plaintiff $125 each month to use the well. And for twenty-nine months, Defendant paid Plaintiff to use the well. Yet the trial court found the well-use provision "unlawful" under N.C. Gen. Stat. § 42-42 (2021). If the provision was indeed unlawful under section 42-42, it would be against public policy and therefore unfair under the NCDCA. *See Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. Accordingly, we must analyze the legality of the well-use provision to determine if it was "unfair" under the NCDCA.

**i. N.C. Gen. Stat. § 42-42**

Under section 42-42, landlords must "provide fit premises" for tenants. *See* N.C. Gen. Stat. § 42-42. Specifically, landlords must "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition," *id.* § 42-42(2), and landlords must "[m]aintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord," *id.* § 42-42(4).

Here, the trial court found the well-use provision unlawful under subsections 42-42(2) and (4) because Plaintiff was "not entitled to charge an additional fee to the tenant for upholding this basic statutory obligation to provide fit premises." In other words, the trial court found Plaintiff violated subsections 42-42(2) and (4) because Plaintiff was not entitled to separately charge Defendant for providing a fit premises.

Nothing in our statutes or caselaw supports this proposition. Plaintiff is required to provide a fit premises; it is not required to do so for free. *See id.* § 42-42(2), (4).

As mentioned above, Defendant and Plaintiff contracted for Defendant to pay $125 per month for well access. Defendant paid, and Plaintiff provided. No evidence suggests the Property was unfit for Defendant, and no evidence suggests that a separate well-use fee is prohibited by section 42-42. Therefore, Plaintiff did not violate section 42-42 by charging Defendant a well-use fee. *See id.* § 42-42(2), (4).

**ii. N.C. Gen. Stat. § 42-42.1**

Defendant also asserts Plaintiff's well-use provision is unlawful under N.C. Gen. Stat. § 42-42.1 (2021) because Plaintiff is required to charge for water based on a metered measurement. So according to Defendant, the well-use provision is prohibited and therefore unfair under the NCDCA. We disagree.

Under section 42-42.1, "[f]or the purpose of encouraging water, electricity, and natural gas conservation, pursuant to a written rental agreement, a lessor *may* charge for the cost of providing water or sewer service to lessees pursuant to [N.C. Gen. Stat.] 62-110(g) . . . ." *id.* § 42-42.1(a) (emphasis added). Generally, "may" does not mandate; "may" merely permits. *Campbell v. First Baptist Church*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979). Nonetheless, we will analyze section 62-110 to confirm the general understanding of "may" is applicable here.

Subsection 110(g)(1) of Chapter 62, titled "Public Utilities," provides that "all charges for water or sewer service shall be based on the user's metered consumption of water, which shall be determined by metered measurement of all water consumed." N.C. Gen. Stat. § 62-110(g)(1) (2021). In a preceding section, however, Chapter 62 provides:

> authority shall be vested in the North Carolina Utilities Commission to regulate *public utilities* . . . . Nothing in this Chapter shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission.

*Id.* § 62-2(b) (2021) (emphasis added).

The General Assembly was clear: Chapter 62 governs only public utilities. *Id.* And this Court has confirmed the clarity: "Chapter 62 of the North Carolina General Statutes defines and prescribes the way public

utilities are regulated within the state." *State ex rel. Utils. Comm'n v. Cube Yadkin Generation LLC*, 279 N.C. App. 217, 220, 865 S.E.2d 323, 325 (2021); *see also*, *e.g.*, *State ex rel. Utils. Comm'n v. N.C. Waste Awareness & Reduction Network*, 255 N.C. App. 613, 616, 805 S.E.2d 712, 714 (2017) ("The Public Utilities Act, found in Chapter 62 of our General Statutes, gives the Commission the power to supervise and control the 'public utilities' in our State."); *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 163 N.C. App. 46, 48, 592 S.E.2d 221, 223 (2004) ("Chapter 62 of our statutes governs public utilities . . . .").

Concerning water use, a "public utility" is a person "owning or operating in this State equipment or facilities for . . . [d]iverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation." N.C. Gen. Stat. § 62-3(23)(a)(2) (2021). A "public utility" is not, however, a person who "furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others." *Id.* § 62-3(23)(d)(4). In other words, subsection 62-3(23)(d)(4) exempts those who solely provide water in a landlord–tenant relationship from public-utility regulation. *Cube*, 279 N.C. App. at 220, 865 S.E.2d at 326 (citing N.C. Gen. Stat. § 62-3(23)(d)(4)) (stating that "[subs]ection 62-3(23)(d) exempts from the definition of a 'public utility' an entity acting in a landlord/tenant relationship").

Here, Plaintiff is a landlord, Defendant was Plaintiff's tenant, and the Property is a single-family dwelling with a well as its water source. Plaintiff rented Defendant access to the well, and that "service or commodity [was] not resold to or used by others." *See* N.C. Gen. Stat. § 62-3(23)(d)(4). Thus, Plaintiff falls squarely within the landlord–tenant exemption and is not regulated as a public utility under Chapter 62. *See id.*; *Cube*, 279 N.C. App. at 220, 865 S.E.2d at 326. Therefore, Plaintiff is not required to charge for water consumption based on a metered measurement. *See* N.C. Gen. Stat. § 62-3(23)(d)(4); *Cube*, 279 N.C. App. at 220, 865 S.E.2d at 326.

Returning to the use of "may" in section 42-42.1: The landlord–tenant exemption supports the generally understood meaning of "may." It is permissive. *See Campbell*, 298 N.C. at 483, 259 S.E.2d at 563; N.C. Gen. Stat. § 42-42.1(a). Section 42-42.1 states lessors may comply with section 62-110, and Chapter 62 has a landlord–tenant exemption. *See* N.C. Gen. Stat. §§ 42-42.1(a), 62-3(23)(d)(4). With the exemption, Chapter 62 does not govern landlords who provide water to "tenants when such service or commodity is not resold to or used by others." *See id.* § 62-3(23)(d)(4). In other words, lessors who qualify for the landlord–tenant exemption are not regulated as public utilities under Chapter 62. *See id.*

So when section 42-42.1 states "a lessor may" choose to comply with section 62-110, the statute merely permits compliance with section 62-110. *See Campbell*, 298 N.C. at 483, 259 S.E.2d at 563; N.C. Gen. Stat. § 42-42.1(a). It does not require compliance. Otherwise, "may" would mandate metered measurement as a public utility and would clash with the landlord–tenant exemption. *See* N.C. Gen. Stat. § 62-3(23)(d)(4). Because "may" is generally understood to permit, and that general understanding supports the landlord–tenant exemption, the permissive meaning applies to section 42-42.1. *See Campbell*, 298 N.C. at 483, 259 S.E.2d at 563; N.C. Gen. Stat. § 42-42.1(a). Thus, section 42-42.1 does not require lessors to follow section 62-110, and Plaintiff's well-use provision is lawful. *See* N.C. Gen. Stat. § 42-42.1(a). But as discussed above: Even if section 42-42.1 required lessors to comply with section 62-110, Plaintiff would be exempt from compliance because of the landlord–tenant exemption, and the well-use provision would still be lawful. *See id.* § 62-3(23)(d)(4).

We conclude Plaintiff's well-water provision does not violate sections 42-42 or 42-42.1. Therefore, the well-water provision does not violate public policy and is not unfair under the NCDCA. *See Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. Hence, Defendant failed to satisfy a threshold NCDCA element, and Defendant therefore failed to establish a section 75-55 claim. *See Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235; N.C. Gen. Stat. § 75-55(2). Because the elements of such a claim are conjunctive, we need not address its remaining elements.

### B. N.C. Gen. Stat. § 75-54(4)

**[2]** Section 75-54 prohibits debt collectors from "[f]alsely representing the character, extent, or amount of a debt against a consumer or of its status in any legal proceeding." N.C. Gen. Stat. § 75-54(4). "To prevail on a claim for violation of [section 75-54], one need not show deliberate acts of deceit or bad faith, but must nevertheless demonstrate that the act complained of 'possessed the tendency or capacity to mislead, or created the likelihood of deception.' " *Forsyth Mem'l Hosp., Inc. v. Contreras*, 107 N.C. App. 611, 614, 421 S.E.2d 167, 169–70 (1992) (quoting *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 453, 279 S.E.2d 1, 7 (1981)). But like any other NCDCA claim, section 75-54 requires the threshold NCDCA elements. *See Reid*, 138 N.C. App. at 263–66, 531 S.E.2d at 233–35. For efficiency's sake, we will start with the proximate-injury element. *See id.* at 266, 531 S.E.2d at 235 (listing the final NCDCA element as an act "proximately causing injury").

Here, the Lease itemized the rent, detailing a "[b]ase rent" of $1,175, a "[w]ater utility" amount of $125, and a "[w]asher[–d]ryer" amount

of $50. Defendant suggests Plaintiff violated section 75-54 because Plaintiff's complaint listed Defendant's "rate of rent" as $1,350, which Defendant contends is inaccurate because he did not owe a washer–dryer fee, and because the well-use fee was unlawful.

We have already established the well-use provision was lawful. But as Defendant points out, Plaintiff waived the washer–dryer fee, lowering the rent to $1,300. Thus, the actual rent was $1,300, and Plaintiff's complaint listed the rent as $1,350. Defendant, however, was not proximately injured by Plaintiff's "false representation." Defendant never overpaid because of Plaintiff's error. Indeed, Defendant failed to pay any rent after Plaintiff filed its complaint. Nor did Plaintiff's error deceive Defendant. Defendant only alleged Plaintiff deceived him due to the unlawfulness of the well-use provision, but as detailed above, we conclude the provision was lawful. Further, Plaintiff agreed to waive the washer–dryer fee, and Defendant never argued that he paid, or was misled, about the fee.

Therefore, Plaintiff did not violate section 75-54 because Defendant was not proximately injured by Plaintiff's error. *See Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235. Accordingly, we conclude the trial court erred when it found Plaintiff violated section 75-54. *See id.* at 266, 531 S.E.2d at 235; N.C. Gen. Stat. § 75-54(4).

## VI. Conclusion

In sum, we hold the trial court erred in concluding Plaintiff violated sections 75-54 and 75-55. Thus, we reverse the trial court's order.

REVERSED.

Judge TYSON and Judge FLOOD concur.

PINNACLE HEALTH SERVICES OF NORTH CAROLINA LLC, D/B/A CARDINAL POINTS IMAGING OF THE CAROLINAS WAKE FOREST AND OUTPATIENT IMAGING AFFILIATES LLC, PETITIONER

v.

NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICES REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED SECTION, RESPONDENT, AND DUKE UNIVERSITY HEALTH SYSTEM INC., RESPONDENT-INTERVENOR

No. COA22-1042

Filed 19 September 2023

**1. Administrative Law—standard of appellate review—administrative law judge's final decision—reversing government agency decision—whole record test—deference to administrative law judge**

In a contested case where an administrative law judge (ALJ) reversed a decision by the Department of Health and Human Services (respondent-agency) to award a certificate of need for an MRI scanner to a university healthcare system (respondent-intervenor) rather than to a medical imaging company (petitioner), and where respondents subsequently appealed from the ALJ's final decision, the appellate court reviewed the case by applying the whole record test and by giving deference to the ALJ's final decision rather than to respondent-agency's initial decision, in large part because of a 2011 amendment to the Administrative Procedure Act that gave ALJs the authority to render final decisions in challenges to agency actions (whereas, previously, ALJs would issue recommendations that the agency was then free to accept or reject in full or in part).

**2. Administrative Law—appeal from administrative law judge's final decision—reversing government agency decision—appellants' failure to challenge specific findings**

In a contested case where an administrative law judge (ALJ) reversed a decision by the Department of Health and Human Services (respondent-agency) to award a certificate of need for an MRI scanner to a university healthcare system (respondent-intervenor) rather than to a medical imaging company (petitioner), the appellate court declined to review the merits of respondents' appeal from the ALJ's final decision where, in advancing their arguments, respondents failed to challenge specific findings of fact made by the ALJ, and therefore all of the ALJ's findings were deemed to be supported by the evidence under the whole record test and binding on the parties.

Judge TYSON dissenting.

Appeal by North Carolina Department of Health and Human Services, Division of Health Services Regulation, Health Care Planning and Certificate of Need Section, and Duke University Health System Inc. from the final decision entered 19 July 2022 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 9 August 2023.

*Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Matthew A. Fisher, for respondent-intervenor-appellant.*

*Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly Randolph, for respondent-appellant.*

*Fox Rothschild LLP, by Marcus C. Hewitt, for petitioner-appellee.*

FLOOD, Judge.

North Carolina Department of Health and Human Services and Duke University Healthcare Systems Inc. (collectively "Respondents") appeal from the Final Decision of the Administrative Law Judge ("ALJ"). After careful review, we affirm.

## I. Factual and Procedural Background

Petitioners Pinnacle Health Services of North Carolina and Outpatient Imaging Affiliates (collectively "Pinnacle") are limited liability companies authorized to conduct business in the state of North Carolina. Pinnacle operates medical imaging practices in Wake County, North Carolina. Respondent-Intervenor, Duke University Healthcare Systems ("Duke"), provides medical care, hospital care, medical education, and medical research in North Carolina. Respondent North Carolina Department of Health and Human Services (the "Agency") is the administrative body responsible for the administration of North Carolina Certificate of Need ("CON") law. A CON is required for certain "institutional health services," such as the procurement of a magnetic resonance imaging ("MRI") scanner.

On 15 April 2021, Pinnacle filed a CON application with the Agency, proposing to place one fixed MRI scanner in a diagnostic center in Wake Forest, North Carolina. On the same day, Duke filed a CON application with the Agency, proposing to place an MRI scanner in its diagnostic center in Raleigh, North Carolina. The Agency could approve only one

application. Thus, the Agency conducted a competitive review of the applications to determine which was more effective for the purposes of awarding the CON. On 24 September 2021, the Agency approved Duke's application and denied Pinnacle's application. The Agency determined Duke's application was more effective as to geographic accessibility and access to service areas for residents—two of the factors required in a competitive review.

On 22 October 2021, Pinnacle filed a Petition for Contested Case Hearing in the Office of Administrative Hearings, appealing the Agency's decision. The appeal was heard by ALJ Lassiter in a week-and-a-half-long hearing. On 19 July 2022, ALJ Lassiter entered the Final Decision awarding the CON to Pinnacle and reversing the Agency's decision to award the CON to Duke. ALJ Lassiter concluded the Agency's decision was based on material errors in the geographic accessibility analysis that led to the erroneous decision that Duke's application would be more effective. ALJ Lassiter further concluded the Agency erroneously failed to follow principles used to determine historical utilization, which would have revealed Pinnacle's as the more effective application. Finally, ALJ Lassiter concluded Pinnacle met its burden of demonstrating the Agency's decision substantially prejudiced its rights.

On 18 August 2022, Respondents filed timely notices of appeal.

## II. Jurisdiction

The Final Decision issued by ALJ Lassiter is a final decision pursuant to N.C. Gen. Stat. § 131E-188 (2021). This Court, therefore, has jurisdiction to review this appeal from a final judgment entered by an ALJ pursuant to N.C. Gen. Stat. § 7A-29(a) (2021).

## III. Analysis

Duke presents two arguments on appeal: (1) the ALJ erred in analyzing and changing the Agency's comparative analysis review; and (2) the Agency correctly concluded Duke's application was comparatively superior and the most effective alternative under its comparative review analysis. The Agency argues the ALJ's final decision should be reversed due to Pinnacle's failure to demonstrate substantial prejudice. Because Duke and the Agency failed to make any specific arguments challenging any specific findings of fact, we will not reach the merits of their respective arguments.

### A. Standard of Review

**[1]** Even though Duke and the Agency adopt each other's respective arguments by reference pursuant to North Carolina Rule of Appellate

Procedure 28(f), for clarity, we will attribute the arguments made in each brief to the respective party. First, we begin with Duke's arguments regarding the appropriate standard of review.

Duke implores this Court to review this case by giving deference to the Agency's decision, and not to the Final Decision of the ALJ. To support this argument, Duke cites several of this Court's precedents that did, in fact, analyze agency decisions by giving deference to the agency's expertise and experience in the particular field. While this review would have been correct in the cases preceding the 2011 legislative session, it is not a correct application of current law. What Duke failed to note, either fortuitously or conveniently, is that our legislature amended the Administrative Procedure Act (the "APA") in 2011, "conferring upon [ALJs] the authority to render final decisions in challenges to agency actions, a power that had previously been held by the agencies themselves." *AH N.C. Owner LLC v. N.C. Dep't of Health and Hum. Servs.*, 240 N.C. App. 92, 98, 771 S.E.2d 537, 541 (2015); *see also* 2011 N.C. Sess. Laws 1678, 1685–97, ch. 398, §§ 15–55. Before the legislature amended the APA, an ALJ would issue a recommended decision to the respective agency, which the agency was then free to adopt in full or in part, or reject in full. *See id.* at 98, 771 S.E.2d at 541. Since the 2011 amendment, however, the ALJ decision is no longer a recommendation but rather is the final decision binding on parties. *See* N.C. Gen. Stat. § 150B-34(a) (2021). In reviewing an agency decision, the ALJ "shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." *Id.*

As for our review of the ALJ's final decision:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;

> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat.] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2021). When reviewing a final decision under subsection five or subsection six of N.C. Gen. Stat. § 150B-51, this Court applies the whole record test. *See* N.C. Gen. Stat. § 150B-51(c) (2021). While Duke does not specify which subsections under which it challenges the Final Decision, it correctly posits that the appropriate standard of review is the whole record test.

When applying the whole record test,

> [the reviewing court] may not substitute its judgment for the [ALJ's] as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the [ALJ's] findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the [ALJ's] decision.

*Brewington v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 1, 13, 802 S.E.2d 115, 124 (2017) (first alteration in original). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Surgical Care Affiliates, LLC v. N.C. Dep't of Health and Hum. Servs.*, 235 N.C. App. 620, 623, 762 S.E.2d 468, 470 (2014).

Duke correctly argues we are required to give a high degree of deference, but incorrectly asserts to whom this deference is given.

> [I]n an administrative proceeding, it is the prerogative and duty of [the ALJ], once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or in part the testimony of any witnesses. Our review, therefore, must be undertaken with a high degree of deference as to the credibility of witnesses and the probative value of particular testimony.

*Brewington*, 254 N.C. App. at 13, 802 S.E.2d at 124–25 (first alteration added) (internal quotation marks and citation omitted).

### B. Failure to Challenge Specific Findings

**[2]** Pinnacle argues Respondents' respective failures to challenge specific findings of fact in the Final Decision render those challenges abandoned. We agree.

On appeal, the burden is on the appellant to show an error by the lower court. *See Rittelmeyer v. Univ. of N.C. at Chapel Hill*, 252 N.C. App. 340, 351, 799 S.E.2d 378, 385 (2017) (concluding the petitioner had abandoned her argument challenging the findings of fact because the petitioner "failed to specifically raise an argument on appeal to *any* particular finding of fact, [] failed to address any particular finding of fact as not supported by the evidence, and [] failed to raise any issues with the findings of fact . . . ."). All unchallenged findings are deemed to be supported by substantial evidence and "therefore are conclusively established on appeal." *Brewington*, 254 N.C. App. at 17, 802 S.E.2d at 126 (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.")).

Our Supreme Court made this principle of judicial review crystal clear in *Brackett v. Thomas*, 371 N.C. 121, 814 S.E.2d 86 (2018) (unchallenged findings of fact in an appeal from an agency decision are binding on appeal). The dissent posits *Brackett* is inapplicable because the holding does not apply to the whole record test. The statute under review in *Brackett*, however, limited the reviewing court to determining whether there is sufficient evidence "in the record" to support the agency's decision. *Id.* at 125, 814 S.E.2d 86; *see also* N.C. Gen. Stat. § 20-15.2(e) (2021). As we have stated, the whole record test requires the reviewing court to determine whether there is substantial evidence in the record to support the ALJ's Final Decision. *See Brewington*, 254 N.C. App. at 13, 802 S.E.2d at 124.

Under *Brackett*, a reviewing court must not consider "whether the evidence in the record" supports the conclusion of the lower court, but "whether the uncontested findings of fact" support the conclusion. *Brackett*, 371 N.C. at 126, 814 S.E.2d at 89. *Brackett* is clear: "[i]t is the role of the agency, rather than a reviewing court, 'to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts and to appraise conflicting and circumstantial evidence.' " *Id.* at 126–27, 814 S.E.2d at 89 (citation omitted).

1. Duke's Arguments

Duke asserts that "[t]hroughout its brief and in its proposed issues on appeal Duke makes it clear that it is appealing the ALJ's decision to reverse the Agency's decision to award Duke a CON." This may be true; Duke, however, failed to make any specific arguments challenging any particular findings of fact. *See Rittelmeyer*, 252 N.C. App. at 349, 799 S.E.2d at 384. Most of Duke's brief is dedicated to showing why the Agency decision was correct, while failing to specifically show this Court where the ALJ's Final Decision was incorrect. Duke makes various conclusory statements including that the ALJ failed to apply the appropriate standard of review, the ALJ erred in changing the Agency's comparative analysis review, and the Agency's decision was correctly decided. Instead of challenging specific findings of fact, however, Duke cites to a range of pages within the Record. We decline Duke's apparent invitation to sift through the entire Record to find substantial evidence, or lack thereof, for all 155 findings of fact enumerated in the Final Decision. That is the job of the appellant. *See Rittelmeyer*, 252 N.C. App. at 351, 799 S.E.2d at 385.

2. The Agency's Argument

The Agency argues this Court's role is to review whether Pinnacle met its burden of showing substantial prejudice. The question before this Court, however, is "whether the whole record contains relevant evidence that a reasonable mind might accept as adequate *to support the [ALJ's] decision*" that Pinnacle showed it suffered substantial prejudice from the Agency's granting of the CON to Duke. *CaroMont Health, Inc. v. N.C. Dep't of Health and Hum. Servs.*, 231 N.C. App. 1, 5, 751 S.E.2d 244, 248 (2013) (emphasis added). Our review is not conducted with an eye towards whether Pinnacle met its burden of proof to the ALJ; instead, our review is focused on whether the ALJ's Final Decision concluding Pinnacle did meet its burden is supported by substantial evidence. As previously stated, without challenging specific findings of fact in the Final Decision, which the Agency failed to do, those findings are binding on appeal. *See Brewington*, 254 N.C. App. at 17, 802 S.E.2d at 126. We further decline to give the same deferential reading of the Agency's brief as the dissent does, and to interpret the Agency's arguments as challenging specific findings of fact, when no such findings are explicitly challenged.

As both Duke and the Agency failed to challenge specific findings of fact in their respective briefs, the findings of fact in the Final Decision are deemed to be supported by substantial evidence and survive the whole record test. *See Brewington*, 254 N.C. App. at 17, 802 S.E.2d at

126. Were we to review the appeal at hand without Respondents challenging specific findings of fact, as the dissent concludes we should, we would be impermissibly determining the weight and sufficiency of the evidence and drawing our own inferences from the facts. *Brackett* makes clear that this type of review is "prohibited." *Brackett*, 371 N.C. at 127, 814 S.E.2d at 89.

## IV. Conclusion

For the reasons stated above, we hold the ALJ's Final Decision was supported by substantial evidence. We therefore affirm the ALJ's Final Decision awarding the CON to Pinnacle.

AFFIRMED.

Judge CARPENTER concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion erroneously affirms the Administrative Law Judge's ("ALJ") decision to reverse the agency's decision and award the Certificate of Need ("CON") to Pinnacle. I disagree with the standard of review the majority applies to review Duke's and North Carolina Department of Health and Human Services' ("NC DHHS") arguments and the ALJ's decision on appeal. I respectfully dissent.

## I. The Office of Administrative Hearings' Standard of Review

Contrary to the majority's assertion that Duke did not raise or properly challenge the ALJ's decision, the first sentence of Duke's argument on appeal states: "The ALJ failed to exercise the appropriate *scope of review* in reviewing the Agency's selection of factors it used for the Comparative Analysis Review of the Duke and Pinnacle applications and how it applied those factors in this review." (emphasis supplied). Duke argues the ALJ applied the wrong statutory standard of review when examining and reversing the agency's decision to grant the CON to Duke instead of Pinnacle.

Duke further advances this argument later in its brief: "In essence, Pinnacle encouraged the ALJ to conduct a *de novo* review of the Agency's decision and the ALJ improperly did exactly that. Duke now anticipates that Pinnacle will contend that this Court also should affirm

the ALJ's erroneous application of a *de novo* standard[.]" Duke further asks this Court to apply "the legally applicable standard," i.e., the correct statutory standard of review the ALJ should have applied to the agency's decision, and hold as a matter of law "the Agency committed no error" by awarding the CON to Duke.

The ALJ's mandated standard of review of NC DHHS' decision is defined in the North Carolina Administrative Procedure Act ("NCAPA"). N.C. Gen. Stat. §§ 150B-1 to 52 (2021). The NCAPA limits the ALJ's review of an agency's decision to whether the agency: "substantially prejudiced the petitioner's rights *and* that the agency did any of the following: (1) Exceeded its authority or jurisdiction. (2) Acted erroneously. (3) Failed to use proper procedure. (4) Acted arbitrarily or capriciously. (5) Failed to act as required by law or rule." N.C. Gen. Stat. § 150B-23(a)(1)-(5) (2021) (emphasis supplied).

The standard of review this Court applies on appeal differs from the standard of review the ALJ applies to an agency's decision. Our standard of review provides two separate standards of appellate review, depending upon the appealing party's alleged errors and arguments before this Court. N.C. Gen. Stat. § 150B-51 (2021).

A *de novo* standard of review is applied if a party argues the ALJ's "findings, inferences, conclusions, or decisions are: (1) In violation of constitutional provisions; (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge; (3) Made upon unlawful procedure; [or] (4) Affected by other error of law[.]" N.C. Gen. Stat. § 150B-51(b)(1)-(4) and 51(c).

If the appealing party argues the ALJ's decision was "(5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or (6) Arbitrary, capricious, or an abuse of discretion[,]" this Court must apply the "whole record" test. N.C. Gen. Stat. § 150B-51(b)(5)-(6) and 51(c).

The majority's opinion concludes Duke's argument asserting the ALJ applied the wrong standard of review falls under either subsections (5) and (6) of § 150B-51(b), and this Court should review Duke's argument using a "whole record" standard of review.

Duke's argument asserting the ALJ used the wrong standard of review when examining the agency's decision is properly reviewed under subsections (2), (3), or (4) of § 150B-51. Whether the ALJ applied the correct standard of review is a question of law, and any failure by the ALJ to apply the correct standard of review is best categorized as

the ALJ's decision being: "(2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge; (3) Made upon unlawful procedure; [or] (4) Affected by other error of law[.]" N.C. Gen. Stat. § 150B-51(b)(2)-(4). On appeal, this Court should conduct a *de novo* review of whether the ALJ applied the correct standard of review. N.C. Gen. Stat. § 150B-51(c).

This Court is required, and the majority's opinion should have determined, whether the ALJ applied the appropriate standard of review set out in N.C. Gen. Stat. § 150B-23(a). While this Court lacks the authority to examine the agency's findings using the statutory standard of review *prescribed to the ALJ* in N.C. Gen. Stat. § 150B-23(a), this Court maintains the authority to remand the matter to the ALJ to comply with statute and to correctly apply the statutorily-mandated standard of review.

The ALJ's order recites the correct conjunctive standard of review from the NCAPA:

> 17. According to N.C. Gen. Stat. § 150B-23(a), an agency decision is subject to reversal if the agency substantially prejudiced Petitioner's rights *and*:
>
> (1) Exceeded its authority or jurisdiction.
>
> (2) Acted erroneously.
>
> (3) Failed to use proper procedure.
>
> (4) Acted arbitrarily or capriciously; or
>
> (5) Failed to act as required by law or rule.

Pinnacle's argument asserts the ALJ's decision and the record before us indicate the ALJ applied the appropriate standard of review pursuant to N.C. Gen. Stat. § 150B-23(a). In reviewing an agency decision, the ALJ is mandated and "shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a).

When the ALJ reviewed NC DHHS' comparative analysis of Duke's and Pinnacle's CON applications, the ALJ focused its findings of fact on whether the agency had "acted erroneously," which is a prong of N.C. Gen. Stat. § 150B-23(a)(2). The ALJ found: (1) "[T]he Agency acted erroneously by concluding that Duke was superior on the Geographic Accessibility comparative factor" because certain ratios had a denominator of zero, which is mathematically impossible; (2) "Pinnacle's Operating Expenses were the lowest of all three applicants, and therefore Pinnacle was more effective. By finding this factor inconclusive

and failing to find Pinnacle more effective, the Agency acted erroneously[;]" (3) "The Agency's own calculations demonstrated that Pinnacle had the highest historical utilization per existing scanner and would be more effective with respect to this factor[;]" and, (4) "Pinnacle projected the highest historical utilization per scanner and should have been found 'more effective' with respect to the historical utilization factor. The Agency's determination that this factor was inconclusive was erroneous[.]"

While the ALJ is statutorily required to give "due regard to the demonstrated knowledge and expertise of the agency" as required by N.C. Gen. Stat. § 150B-34(a), the NCAPA also permits the ALJ to examine whether the agency "acted erroneously" or "failed to use proper procedure" using the standard of review outlined in N.C. Gen. Stat. § 150B-23(a)(2)-(3). This Court should examine Duke's argument using a *de novo* standard of review and determine whether the agency followed the statutory standard of review in N.C. Gen. Stat. § 150B-23(a).

## II. Challenged Findings of Fact

NC DHHS argues Pinnacle failed to demonstrate and meet its statutory burden of showing "substantial prejudice" as a result of the CON being awarded to Duke. N.C. Gen. Stat. § 150B-23(a). The agency asserts Pinnacle failed to meet its burden before the OAH, and the ALJ was prohibited from reversing the agency's decision and awarding the CON to Pinnacle.

The majority's opinion correctly notes this Court applies the whole record test to arguments challenging whether findings of fact are supported by substantial evidence. N.C. Gen. Stat. § 150B-51(b)(5)-(6) and 51(c).

The majority's opinion erroneously concludes NC DHHS was required and failed to challenge specific findings of fact in the ALJ's decision. Their opinion holds the whole record test requires all of the 155 findings of facts contained in the thirty-six pages of the 19 July 2022 decision to be individually objected to, and, if not, it becomes binding upon appeal, citing *Brewington v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 1, 17, 802 S.E.2d 115, 126 (2017) and *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Under the whole record test, whether before the ALJ or this Court, the reviewing officer or court is required to look at the entirety of the evidence, the "whole record", and not individual findings to determine whether the agency's findings of fact are supported by substantial evidence. N.C. Gen. Stat. § 150B-51(b)(5)-(6) and 51(c). The issue is

"whether the Agency's decision that [petitioner] failed to prove substantial prejudice is supported by substantial evidence when considering the *record as a whole*[.]" *CaroMont Health, Inc. v. N.C. Dep't of Health & Human Servs.*, 231 N.C. App. 1, 5, 751 S.E.2d 244, 248 (2013) (emphasis supplied) (citation omitted). As such, individual evidence or even findings to the contrary are immaterial, so long as "the whole record contains relevant evidence that a reasonable mind might accept as adequate to support the Agency's conclusion[.]" *Id.*

The notion that each individual finding in the whole record must be excepted to preserve review is not supported in the NCAPA or in our CON precedents. That individual exception to each finding of fact requirement may arise in domestic relations, child custody, or other cases, but not under the whole record review of a CON before the OAH or this Court. *See Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." (citations omitted)).

While our Supreme Court cited *Koufman* in *Brackett v. Thomas*, the superior court's standard of review in those cases differs from the case presently before us on appeal. *Brackett v. Thomas*, 371 N.C. 121, 122, 814 S.E.2d 86, 87 (2018). In *Brackett*, the superior court's standard of review for examining an agency decision by the Department of Motor Vehicles was governed by N.C. Gen. Stat. § 20-16.2(e), which provides the "superior court review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license." *Id.* at 125, 814 S.E.2d at 89 (quoting N.C. Gen. Stat. § 20-16.2(e)). *Brackett* does not apply in OAH administrative appeals, where this Court applies the whole record test.

Even if the majority's assertion that NC DHHS was required to object to specific findings of fact on appeal were correct, NC DHHS's brief specifically challenges several findings of fact, with specific references to the record:

> In the Final Decision, the ALJ determined that Pinnacle was substantially prejudiced for three reasons:
>
> • The Agency denied Pinnacle's otherwise approvable application; (R p. 265)
>
> • Pinnacle's denial infringes on its freedom to buy additional equipment using its own funds and the ability to compete with Duke; *Id.* and,

> • Pinnacle's denial will impact its operations, limit its capacity and its ability to meet patient's needs, prevent it from realizing approximately $400,00.00 annually in savings and prevent it from earning approximately $97,000 in additional net income annually. *Id.*

The ALJ's decision makes the following findings of fact, which mirror the contested facts in NC DHHS' brief on appeal:

> 61. The denial of its CON application infringes on Pinnacle's freedom to invest in additional equipment using its own funds, and the ability to compete with Duke on the same footing.
>
> 62. Pinnacle demonstrated it will suffer an injury in fact as a result of the Agency's decision. The denial of its application will have a significant impact on its operations, limiting its capacity and its ability to meet patients' needs, preventing it from realizing approximately $400,000.00 annually in savings, and preventing it from earning approximately $97,000 in additional net income annually.

This Court is required to " 'examine all competent evidence' " and apply the whole record test to determine whether Findings of Fact 61 and 62 were supported by sufficient evidence in the whole record before the ALJ. *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Hum. Servs.*, 235 N.C. App. 620, 622-23, 762 S.E.2d 468, 470 (2014) (quoting *Parkway Urology, P.A. v. N.C. Dep't of Health & Human Servs.*, 205 N.C. App. 529, 535, 696 S.E.2d 187, 192 (2010)).

The CON application and review process originates before NC DHHS and not the OAH. The OAH's review jurisdiction under the NCAPA is not original or co-existent. The ALJ is not writing on a clean slate and is statutorily constrained and mandated to "giv[e] due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a).

While the OAH and the ALJ, since the 2011 amendments to the statute, can issue a Final instead of a Recommended Decision, those amendments and the standards and constraints in the NCAPA do not allow an ALJ to merely disagree with and substitute its judgment for that of "the specialized knowledge of the agency." *Id. See* 2011 N.C. Sess. Laws 1678, 1685–97, ch. 398, §§ 15–55.

Here, both applicants, Pinnacle and Duke, submitted conforming applications. NC DHHS could approve only one application, as only one CON was authorized. There was necessarily going to be a winner and a loser, as in all competitive environments and contests. The Agency conducted an extensive and competitive review of the applications within its expertise to determine which was more effective for the purposes of awarding the CON. On 24 September 2021, the Agency approved Duke's application and denied Pinnacle's application.

The CON statute vests the decision with NC DHHS, of whether to award a CON to Duke or Pinnacle subject to *review* in the OAH under the standards, constraints, and procedures of the NCAPA. N.C. Gen. Stat. §§ 150B-23(a)(1)-(5) and 131E-177(6) (2021). This review, allowed pursuant to the NCAPA, is not a hearing *de novo* before the ALJ, and she was not free to substitute her personal preferences for the record, expertise, and knowledge of the agency merely to reach a contrary result. N.C. Gen. Stat. § 150B-34(a).

The burden of establishing "substantial prejudice" fell on Pinnacle as the petitioner before the OAH. *Parkway Urology*, 205 N.C. App. at 535-39, 696 S.E.2d at 192-95; N.C. Gen. Stat. § 150B-23(a). *See also* N.C. Gen. Stat. § 131E-188. Pinnacle was required to demonstrate it was "substantially prejudiced" by the Agency's decision to approve a competing application. N.C. Gen. Stat. § 150B-23(a).

"[H]arm from normal competition does not amount to substantial prejudice[.]" *CaroMont Health*, 231 N.C. App. at 8, 751 S.E.2d at 250 (citing *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195). *See also Blue Ridge Healthcare Hosps. Inc. v. N.C. Dep't of Health & Human Servs.*, 255 N.C. App. 451, 464, 808 S.E.2d 271, 279-80 (2017); *Surgical Care Affiliates*, 235 N.C. App. at 632, 762 S.E.2d at 476 (finding the petitioner failed to demonstrate "substantial prejudice" because "the only purported harm to Petitioners is the possibility that the Agency's decision will make it more difficult for them to expand their business").

Also, " 'economic losses [a petitioner] will suffer as a result of the Agency's decision' " generally does not amount to substantial prejudice, as it amounts to harm from normal competition. *Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Human Servs.*, 237 N.C. App. 113, 123, 764 S.E.2d 491, 498 (2014) (citing *CaroMont Health*, 231 N.C. App. at 8, 751 S.E.2d at 250).

This Court is required to apply the whole record test to determine whether Findings of Fact 61 and 62 were supported by sufficient evidence in the "whole record" before the ALJ. *Surgical Care Affiliates*, 235 N.C. App. at 622-23, 762 S.E.2d at 470 (citation omitted); *CaroMont*

*Health*, 231 N.C. App. at 5, 751 S.E.2d at 248. If a petitioner cannot demonstrate the threshold substantial prejudice requirement, the ALJ need not address allegations of Agency error. *Surgical Care Affiliates*, 235 N.C. App. at 629-30, 762 S.E.2d at 475 (explaining "the petitioner must establish that the Agency has deprived it of property, has ordered it to pay a fine or penalty, or has otherwise substantially prejudiced the petitioner's rights, *and*, *in addition*, the petitioner must establish that the agency's decision was erroneous in a certain, enumerated way, such as failure to follow proper procedure or act" (citation omitted)).

Pinnacle's failure to show "substantial prejudice" merely from losing the competition and its consequent economic loss condemns their case. *Id.*; N.C. Gen. Stat. § 150B-23(a)(1)-(5). The ALJ's decision is properly vacated.

## III. Conclusion

The CON statute vests the award with NC DHHS, subject to *review* in the OAH by the ALJ under the standards, constraints, and procedures of the NCAPA. This review allowed in the NCAPA is not a hearing *de novo* before the ALJ, and she was not free to substitute her personal preferences for the record, expertise, and knowledge of the agency merely to reach a contrary result. N.C. Gen. Stat. § 150B-34(a).

The ALJ found "[t]he denial of its CON application infringes on Pinnacle's freedom to invest in additional equipment using its own funds, and the ability to compete with Duke on the same footing." She also found:

> Pinnacle demonstrated it will suffer an injury in fact as a result of the Agency's decision. The denial of its application will have a significant impact on its operations, limiting its capacity and its ability to meet patients' needs, preventing it from realizing approximately $400,000.00 annually in savings, and preventing it from earning approximately $97,000 in additional net income annually.

While both may be true, as between two admittedly qualified applicants and only one CON available, those findings will be equally true no matter which party is not awarded the CON. It is not up to the ALJ under the statute to make that determination, but only to review "whether the whole record contains relevant evidence that a reasonable mind might accept as adequate to support the Agency's conclusion[.]" *CaroMont Health*, 231 N.C. App. at 5, 751 S.E.2d at 248 (citation omitted). The ALJ's decision is affected with error and is properly vacated and remanded. I respectfully dissent.

**ROOK v. ROOK**

[290 N.C. App. 512 (2023)]

ALEXANDER N. ROOK, PLAINTIFF
v.
DEBRA ANN ROOK, DEFENDANT

No. COA22-902

Filed 19 September 2023

**Child Custody and Support—jurisdiction—Uniform Child Custody and Jurisdiction Enforcement Act—lack of findings from out-of-state court**

In a custody dispute in which the child's mother filed for custody in Utah six months after she and the child moved to that state, the trial court lacked subject matter jurisdiction to adjudicate the father's subsequently filed custody claim in this state where, as required by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), there was no evidence in the record of any findings by the Utah court that North Carolina was the more appropriate forum and that it was therefore declining to exercise jurisdiction in the matter.

Appeal by defendant from judgment entered 31 March 2022 by Judge Meader W. Harriss III in Perquimans County District Court. Heard in the Court of Appeals 6 September 2023.

*Melissa L. Skinner, for the plaintiff-appellee.*

*Woodruff Family Law Group, by Jessica S. Bullock, for the defendant-appellant.*

*Rose & Johnson PC, by K. Brooke Johnson, for the defendant-appellant.*

TYSON, Judge.

Debra Rook ("Mother") appeals from a custody order granting joint custody to Mother and Alexander Rook ("Father") on 31 March 2022. The trial court lacked subject matter jurisdiction. We vacate the order and remand.

## I. Background

Mother and Father married on 22 February 2002. Thirteen years later, Mother and Father procreated one minor child ("the Child") born

18 April 2015. Mother and Father resided in Perquimans County while they were married.

The Perquimans County Department of Social Services ("DSS") investigated Father in 2018 because the Child had allegedly been left in a locked vehicle, while Father exercised at the gym and shopped at an Ollie's Bargain Outlet. DSS determined Father had a lapse in judgment and closed the investigation.

In early 2019, Mother became concerned because Father continuously insisted upon showering with the Child. Mother purportedly observed the Child touching Father's erect penis on 7 March 2019. Four days later, Mother removed the Child and herself from the marital home and moved to Wake County.

Mother and Father entered into a Separation and Property Settlement Agreement on 28 March 2019. Mother and Father agreed for Mother to have legal and physical custody of the Child, and Father agreed to "accompanied visitation" with the Child "at times and locations agreed upon by the parties at minimum of twice a month for six (6) to ten (10) hour periods." The agreement specified neither Mother nor Father were permitted to leave North Carolina with the Child without first providing written notice to the other parent, exempting certain enumerated family members who reside in Virginia and Kentucky.

Mother filed a complaint for child custody and attorney's fees in Wake County on 11 December 2019.

Mother also filed a complaint and motion for a domestic violence protective order on 29 January 2020 in Wake County. An *ex parte* order of protection was granted that day. A domestic violence protection order was granted on 10 June 2020.

Mother filed an amended complaint for absolute divorce, breach of contract, specific performance, and attorney's fees in Wake County on 29 May 2020. Father filed his answer on 4 August 2020, counterclaiming for an absolute divorce and asking the court to incorporate the separation agreement entered into on 28 March 2019.

On the day Mother filed her amended complaint for divorce, Mother also filed a notice of voluntary dismissal of her custody claim. Without alerting Father in writing, Mother moved with the Child to Utah in May of 2020. Mother filed a petition for custody in Salt Lake County, Utah, on 30 October 2020.

Father filed a motion to change venue from Wake County to Perquimans County for the pending divorce claims on 16 November

2020. In his motion, Father stated he believed Mother had moved with the Child to Utah. The motion also acknowledged Mother had denied living in Wake County in her reply to Father's counterclaims.

Father initiated this action by filing a complaint and motion for *ex parte* temporary custody in Perquimans County on 23 November 2020. The trial court entered an order denying Father's request for an ex parte temporary custody order on 24 November 2020, but the court scheduled the matter for a 30 December 2020 hearing on the issue of temporary custody.

A summons for Mother's Utah custody action was issued on 8 December 2020. Mother was served on 21 January 2021 with Father's Perquimans County custody action, which is the subject of this appeal. On 22 January 2021, Mother filed a *pro se* motion to continue the temporary custody hearing and a "12(b)(1) Motion to Dismiss and Request for Judicial Conference" requesting that Father's Complaint be dismissed for lack of subject matter jurisdiction.

An Order was entered that directed judicial communication between the Perquimans County District Court and the Utah court on 27 January 2021. On 18 February 2021, Mother filed a notice of voluntary dismissal of her Rule 12(b)(1) motion to dismiss and request for judicial conference.

A "Consent Order on Subject Matter Jurisdiction" was entered on 25 February 2021, asserting "[t]he State of North Carolina has subject matter jurisdiction to determine custody of the minor child[.]"

A judgment of divorce was entered in Wake County on 15 March 2021, which incorporated the contents of Mother's and Father's Separation Agreement, granted primary custody of the Child to Mother, and which retained the provisions constricting interstate travel.

The trial court entered an order on 29 April 2021 requiring Mother to return the Child to North Carolina for the duration of the custody trial in Perquimans County. On 12 May 2021, Mother filed an answer, motion to consolidate, motion to modify prior custody order, and counterclaim in Perquimans County, asking for the two Perquimans County files to be consolidated regarding current custody of the Child and the custody order originally entered in Wake County on 15 March 2021.

The custody trial in Perquimans County began 18 May 2021. On 17 June 2021, the trial court entered an order granting Father supervised visitations with the Child and ordered Mother to bring the Child back to North Carolina in August when the trial was scheduled to resume.

The trial court entered another Temporary Custody Order granting the parties joint legal and physical custody on an alternating weekly basis on 2 September 2021. The order required the minor child "be enrolled immediately in either Grace Montessori School in Elizabeth City, North Carolina or the Perquimans County Public School System."

The trial court entered a custody order granting joint custody to Mother and Father on 31 March 2022. Father was given the authority to make any final decisions regarding Child's "education, health, medical and dental care, religious, athletic and extra-curricular activities" if Mother and Father disagreed. Mother was prohibited from taking the Child outside North Carolina except to visit her family in Virginia. Father was instructed to enroll the Child in Grace Montessori Academy in Elizabeth City or the Perquimans County Public School System.

Mother timely appeals.

## II. Jurisdiction

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

## III. Subject Matter Jurisdiction

Mother argues the trial court lacked subject matter jurisdiction over the Child's custody determination.

### A. Standard of Review

The issue of whether a trial court possessed subject matter jurisdiction is a matter of law, and we review questions of law *de novo*. *In re N.P.*, 376 N.C. 729, 731, 855 S.E.2d 203, 205-06 (2021) (citing *In re K.J.L.*, 363 N.C. 343, 345-46, 677 S.E.2d 835 (2009) and *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 556, 809 S.E.2d 558, 560 (2018)).

If a trial court's basis for whether subject matter jurisdiction exists is erroneous, this Court may review the record to determine if subject matter jurisdiction exists. *Foley v. Foley*, 156 N.C. App. 409, 412, 576 S.E.2d 383, 385 (2003) (citing *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882 (2000)).

### B. Analysis

"Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel." *Id.* at 411-12, 576 S.E.2d at 385 (citing *In re Davis*, 114 N.C. App. 253, 256, 441 S.E.2d 696, 698 (1994)).

North Carolina has adopted the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). The UCCJEA includes

four bases for a trial court to obtain subject matter jurisdiction over a custody determination:

> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
>
> (3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or
>
> (4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

N.C. Gen. Stat. § 50A-201(a) (2021). *See also* N.C. Gen. Stat. § 50A-202(a) (2021) (explaining "a court of this State which has made a child-custody determination consistent with G.S. 50A-201 or G.S. 50A-203 has exclusive, continuing jurisdiction" unless certain determinations are made).

A child's "home state" is "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7) (2021).

The UCCJEA also requires the court who possesses subject matter jurisdiction over a child custody determination to make certain findings that another state is the more appropriate forum before declining to

exercise its jurisdiction. *See* N.C. Gen. Stat. §§ 50A-207 and 208 (2021). Mother argues the Utah court failed to make such findings.

A consent order does not waive challenges to subject matter jurisdiction, "and the jurisdictional requirements of the UCCJEA must be met for a court to have power to adjudicate child custody disputes." *Foley*, 156 N.C. App. at 411, 576 S.E.2d at 385 (citation omitted).

The comments contained in the UCCJEA's jurisdictional statute section also provide: "It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective." N.C. Gen. Stat. § 50A-201, cmt. 2.

In *Foley*, this Court determined insufficient evidence in the record existed for the trial court to establish subject matter jurisdiction pursuant to the UCCJEA. *Foley*, 156 N.C. App. at 413-14, 576 S.E.2d at 386. The trial court had failed to include evidence concerning "whether the minor resided in North Carolina during the six months prior to the commencement of this proceeding" to determine if North Carolina was the child's home state. *Id.* The record also contained "no evidence the West Virginia court was a court having subject matter jurisdiction but declining to exercise it on the grounds North Carolina was the more appropriate forum." *Id.* This Court vacated the trial court's custody order and remanded the matter to the trial court to determine whether it possessed subject matter jurisdiction under one of the four bases in the UCCJEA. *Id.*

Here, as in *Foley*, the record does not indicate whether North Carolina possessed subject matter jurisdiction over the custody determination of the Child. *Id.* The trial court found Mother had resided in Utah since May 2020, which is more than six months prior to the commencement of this Perquimans County child custody matter by Father in November 2020. According to the terms of the Separation Agreement, the Child was residing with Mother during that period. Further, the following colloquy occurred before the trial court regarding whether it possessed subject matter jurisdiction:

> THE COURT: So we have declared subject matter jurisdiction pursuant to a consent order in the –
>
> [FATHER'S COUNSEL]: In –
>
> THE COURT: – state of North Carolina, so that case is now –
>
> [FATHER'S COUNSEL]: That case –

[MOTHER'S COUNSEL]: That's correct.

The record is devoid of any findings from the court in Utah determining whether North Carolina is the more appropriate forum and Utah's decision to decline to exercise its jurisdiction. *See* N.C. Gen. Stat. §§ 50A-207 and 208. Without this evidence, the trial court's custody order must be vacated for lack of subject matter jurisdiction and remanded. N.C. Gen. Stat. § 50A-201(a), cmt. 2; *Foley*, 156 N.C. App. at 413-14, 576 S.E.2d at 386.

## IV. Conclusion

The trial court's custody determination of the Child on 31 March 2022 is vacated for lack of subject matter jurisdiction. *Foley*, 156 N.C. App. at 413-14, 576 S.E.2d at 386. The trial court must find and resolve evidence concerning the Child's home state in the six months prior to Father filing his motion for child custody in North Carolina. N.C. Gen. Stat. §§ 50A-201(a) and 102(7). In the alternative, the trial court must include findings from the court in Utah indicating its decision to decline to exercise its jurisdiction and its determination concluding North Carolina is the more appropriate forum. *See* N.C. Gen. Stat. §§ 50A-207 and 208.

The custody order is vacated, and the matter is remanded to the trial court for hearing to determine whether it possesses subject matter jurisdiction over this custody determination. *Foley*, 156 N.C. App. at 413-14, 576 S.E.2d at 386; N.C. Gen. Stat. §§ 50A-102(7) and 201(a). Mother's remaining arguments concerning the vacated order are dismissed as moot. *It is so ordered.*

VACATED AND REMANDED.

Judges CARPENTER and GORE concur.

STATE OF NORTH CAROLINA
v.
GERALD TELPHIA JACOBS, II, DEFENDANT

No. COA22-997

Filed 19 September 2023

**Search and Seizure—Terry stop—reasonable suspicion—strong marijuana odor—credibility of officer's testimony**

In a prosecution for multiple drug possession and trafficking offenses, the trial court properly denied defendant's motion to suppress evidence seized during a *Terry* stop, which the officer initiated on the basis that he smelled a strong odor of marijuana emanating from defendant's car. Even though the marijuana at issue was unburned, wrapped in plastic, and stored inside the center console of the car, the officer's claim about smelling the marijuana was not "inherently incredible," especially in light of prior caselaw holding that an officer's smelling of unburned marijuana can provide probable cause to conduct a warrantless search and seizure. Therefore, the officer's testimony was competent evidence to support the court's finding that the officer had reasonable suspicion to initiate the *Terry* stop, since the reasonable suspicion standard is less demanding than that for probable cause.

Appeal by defendant from judgments entered 30 June 2022 by Judge R. Kent Harrell in the New Hanover County Superior Court. Heard in the Court of Appeals 22 August 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Lewis Lamar, Jr., for the State.*

*Richard Croutharmel, for defendant-appellant.*

FLOOD, Judge.

Gerald Telphia Jacobs, II ("Defendant") appeals pursuant to N.C. Gen. Stat. § 15A-979(b) (2021) from an order denying his motion to suppress evidence. Defendant argues the trial court improperly denied his motion because the arresting officer lacked reasonable suspicion to stop his vehicle, in violation of his right to be free from unreasonable searches and seizures. Defendant specifically contends the officer did not witness a traffic violation, and his claims of smelling unburnt

marijuana emanating from Defendant's vehicle were "inherently incredible." Because the trial court's findings were supported by competent evidence, we hold the trial court did not err in denying Defendant's motion to suppress.

## I. Factual & Procedural Background

The evidence tends to show the following: On 29 March 2019, Officer Benjamin Galluppi ("Officer Galluppi") of the Wilmington Police Department was traveling in his patrol car on Market Street between 29th Street and Covil Avenue. Officer Galluppi turned onto Covil Avenue and noticed Defendant's car traveling in front of him. There were no other cars on Covil Avenue, and Officer Galluppi, while following Defendant, remained roughly two and a half car lengths behind him. The two cars traveled roughly fifty feet down Covil Avenue when, according to Officer Galluppi, he could "very strongly" smell the odor of marijuana emanating from Defendant's vehicle.

Officer Galluppi continued to follow Defendant for about five or six blocks down Covil Avenue and eventually pulled Defendant over after he turned left onto Broad Street. According to Officer Galluppi, he stopped Defendant solely because of the unburned marijuana smell. Officer Galluppi walked up to the driver's side of Defendant's car and noticed the driver's side window was cracked open about three inches. Defendant was holding his driver's license and a piece of paper up against the window. Upon getting closer to Defendant's car, Officer Galluppi continued to detect the odor of marijuana and testified that, at that point, the odor was "even stronger." After a discussion of the ownership of the car, Officer Galluppi asked Defendant to step out of the car.

Once Defendant was out of the car, Officer Galluppi noticed a small plastic bag of white powder "at [Defendant's] feet" and an open bottle of alcohol in the backseat. Officer Galluppi then patted Defendant down and handcuffed him for safety while Officer Galluppi waited for backup to arrive. Detective Javier Tapia ("Detective Tapia") of the Wilmington Police Department arrived at the scene roughly two minutes after Officer Galluppi stopped Defendant. Upon arrival, Detective Tapia saw Defendant sitting handcuffed on the tailgate of his car and could also smell a "very strong" odor of unburned marijuana. By this time, Officer Galluppi had opened all of Defendant's car's doors, and the driver's side window was cracked open.

Officer Galluppi and Detective Tapia conducted a frisk of Defendant and a full search of Defendant's car. In the car they found heroin, a MDMA tablet, powder cocaine, crack cocaine, and approximately sixteen grams

of marijuana. The search of Defendant's person and car were captured on Officer Galluppi's bodycam. Officer Galluppi arrested Defendant for trafficking in cocaine; possession with intent to sell or deliver cocaine; felony possession of cocaine; possession with intent to sell or deliver heroin; possession with intent to sell or deliver MDMA; possession of MDMA; and misdemeanor possession of more than one-half ounce, but less than one and one-half ounces of marijuana. The marijuana Officer Galluppi found in the car was in the center console, wrapped in twelve separate plastic bags.

On 9 September 2019, the New Hanover County grand jury returned true bills of indictment against Defendant on the following charges: trafficking in cocaine by possession of 28 grams or more but less than 200 grams of cocaine; trafficking in cocaine by transportation of 28 grams or more, but less than 200 grams of cocaine; felony possession of a Schedule II controlled substance; possession with intent to sell or deliver cocaine; possession with intent to sell or deliver heroin; possession with intent to sell or deliver MDMA; felony possession of MDMA; and misdemeanor possession of greater than one-half ounce, but less than one and one-half ounces of marijuana.

On 24 October 2019, Defendant filed a motion to suppress the evidence obtained from the search. He argued law enforcement violated his Constitutional right to be protected from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and the North Carolina Constitution. On 27 May 2021, the trial court held a suppression hearing. At the hearing, Defendant testified he was not smoking marijuana while driving, and all the windows of the vehicle were closed before he was pulled over. He testified that, about an hour before the traffic stop, he was smoking marijuana at a house on 10th Street and put the narcotics in his car when he left the house. He also testified he had put marijuana in the center console of the car.

Officer Galluppi testified he did not notice whether Defendant's driver's side window was open until he pulled Defendant over, and the back rear-view window of Defendant's car was halfway open. He admitted, however, that he did not indicate in his written police report that Defendant's back rear-view window was halfway open. Counsel for Defendant played the bodycam footage at the thirty-five-minute mark, and Officer Galluppi admitted, after watching it, that it showed the rear-view window of Defendant's car was closed.

At the close of the hearing, the trial court denied Defendant's motion to suppress, and an order reflecting the same was filed on 27 May 2021.

On 30 June 2022, Defendant's guilty plea to trafficking in cocaine, possessing with intent to sell or deliver heroin, and possessing with intent to sell or deliver MDMA was accepted. Defendant was determined to be a prior record level IV for felony sentencing purposes. For his guilty plea to trafficking cocaine, Defendant received an active sentence of thirty-five to fifty-one months. At the expiration of that sentence, Defendant was ordered to serve another active sentence of nine to twenty months for his guilty plea to possession with intent to sell or deliver heroin. And, at the expiration of that sentence, Defendant was ordered to serve another active sentence of eight to nineteen months for his guilty plea to possession with intent to sell or deliver MDMA. Additionally, he was ordered to pay a $50,000 fine and attorney's fees. Defendant gave oral notice of appeal from the judgments following their announcements in open court.

## II. Jurisdiction

This Court has jurisdiction to address Defendant's appeal pursuant to N.C. Gen. Stat. §§ 15A-144(a1)-(a2) (2022) and 15A-979(b) (2021).

## III. Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress the evidence obtained from the traffic stop. Defendant specifically contends the arresting officer lacked reasonable suspicion to initiate the stop, as his claim of smelling unburned marijuana emanating from Defendant's vehicle was "inherently incredible." We disagree.

Our standard of review of a trial court's denial of a motion to suppress is "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). "Conclusions of law are reviewed de novo and are subject to full review." *Id.* at 168, 712 S.E.2d at 878. This Court, "under a *de novo* review, [ ] considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 168, 712 S.E.2d at 878.

As an initial matter, we address the framework for evaluating the constitutionality of an ordinary traffic stop. The Fourth Amendment of the United States Constitution, applicable to the states through the Due Process Clause of the Fourteenth Amendment, "protects private citizens against unreasonable searches and seizures." *State v. Johnson*, 378 N.C. 236, 244, 861 S.E.2d 474, 483 (2021); *see* N.C. Const. art. I, § 20; *see* U.S. Const. amend. IV. "Traffic stops are considered seizures subject to the strictures of these provisions and are historically reviewed under the

investigatory detention framework first articulated in *Terry v. Ohio*." *Id.* at 244, 861 S.E.2d at 483 (citation omitted). When a law enforcement officer has a "reasonable, articulable suspicion that criminal activity is afoot" he is justified in initiating a traffic stop. *Id.* at 244, 861 S.E.2d at 483 (citation omitted). Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *State v. Maready*, 362 N.C. 614, 618, 669 S.E.2d 564, 567 (2008) (citation and internal quotation marks omitted). To satisfy the reasonable suspicion standard, only "some minimal level of objective justification is required." *Id.* at 618, 669 S.E.2d at 567 (citation omitted); *see State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (providing that a justified traffic stop requires "something more than an unparticularized suspicion or hunch").

Officer testimony can establish reasonable suspicion, and "[w]e defer to the trial court's assessment of the officer's credibility . . . . Accordingly, we are bound by the trial court's finding based upon that credibility determination." *State v. Salinas*, 214 N.C. App. 408, 411, 715 S.E.2d 262, 264 (2011) (cleaned up) (citation and internal quotation marks omitted) ("[A]n appellate court affords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based on those findings, render a legal decision . . . as to whether or not a constitutional violation of some kind has occurred.") (citation omitted). This Court, as opposed to the trial court, "is much less favored [to make such decisions] because it sees only a cold, written record . . . [and as such] the findings of the trial judge are, and properly should be, conclusive on appeal if they are supported by the evidence." *Id.* at 411, 715 S.E.2d at 265 (citation omitted).

Our Supreme Court, however, has provided that there are circumstances where this Court does not defer to the trial court's assessment of witness credibility. In *State v. Miller*, for example, our Supreme Court held, "[t]his rule [of deference] does not apply . . . where the only evidence identifying the defendant as the perpetrator of the offense [was] *inherently incredible* because of undisputed facts, clearly established by the State's evidence, as to the physical conditions under which the alleged observation occurred." *State v. Miller*, 270 N.C. 726, 731, 154 S.E.2d 902, 905 (1967) (emphasis added) (holding that it was inherently incredible for one to observe, from a great distance, details "which would enable him, six hours later, to identify a complete stranger with the degree of certainty which would justify the submission of guilty of such person to the jury").

This Court has recognized that an officer's smelling of unburned marijuana can provide probable cause to conduct a warrantless search and seizure, and that an officer's smelling of such is not inherently incredible. Most notably, in *State v. Stover*, officers testified they smelled a "strong odor of marijuana" when they arrived at the defendant's home to conduct a "knock and talk" after receiving a tip that the defendant's residence was a place where marijuana could be purchased. 200 N.C. App. 506, 507, 685 S.E.2d 127, 129 (2009). When the officers arrived at the residence, they stepped out of their vehicles and immediately "perceived a 'strong odor of marijuana,' which grew stronger as they approached the house." *Id.* at 507, 685 S.E.2d at 129. The officers did not have a warrant to search the home, and their smelling of the unburned marijuana provided probable cause to conduct a warrantless entry into the defendant's home. *See id.* at 513, 685 S.E.2d at 132.

The defendant's argument on appeal in *Stover* "center[ed] on the trial court's denial of his motion to suppress the evidence seized." *Id.* at 510, 685 S.E.2d at 131. He contended "the trial court's finding of fact that the officers 'detected a strong odor of marijuana in the air' was inherently incredible, and therefore, cannot constitute competent evidence[.]" *Id.* at 510, 685 S.E.2d at 131. He specifically reasoned this finding of fact was inherently incredible because the marijuana at issue was not burning, most of it was kept in sealed containers, and what was loose was too small a quantity to be observable; therefore, the officers could not have been able to smell the marijuana from outside his residence. *Id.* at 512, 685 S.E.2d at 132. This Court held, "the simple fact that the majority of marijuana was in closed containers when the officers found it does not make the officers' smelling of the drug 'inherently incredible.' " *Id.* at 512, 685 S.E.2d at 132. Thus, "the officers' testimony that they smelled marijuana outside defendant's residence was competent evidence upon which the trial court could base its finding of fact that the officers 'detected a strong odor of marijuana in the air.' " *Id.* at 513, 685 S.E.2d at 132.

Defendant, here, makes a similar argument to that of the defendant in *Stover*: that Officer Galluppi's smelling of the unburned marijuana in Defendant's car was "inherently incredible[,]" and therefore could not have supported the trial court's finding that Officer Galluppi had reasonable suspicion to stop Defendant's car. We do not find Defendant's argument persuasive, and conclude Officer Galluppi's smelling of the unburned marijuana was not inherently incredible. In *Stover*, the marijuana was unburned, wrapped in plastic, and located within a residence, which the *Stover* officers testified they could smell from outside. *See id.* at 508, 685 S.E.2d at 130. We held the officers' smelling of the

unburned marijuana not inherently incredible, and that it provided probable cause for the officers to search the defendant's domicile. *See id*. at 508, 685 S.E.2d at130. Here, Officer Galluppi, like the officers in *Stover*, testified he smelled the odor of marijuana emanating from Defendant's vehicle "very strongly[,]" and the marijuana at issue here was unburned, wrapped in plastic, and located in the center console of Defendant's car. Thus, Officer Galluppi's claim that he smelled unburned marijuana, for the purpose of satisfying the reasonable suspicion standard—a "less demanding standard" than that for probable cause—was not inherently incredible, and his testimony was competent evidence to support the trial court's findings of fact. *See Maready*, 362 N.C. at 618, 669 S.E.2d at 567; *see Watkins*, 337 N.C. at 442, 446 S.E.2d at 70; *see Stover*, 200 N.C. App. at 508, 685 S.E.2d at 130.

As Officer Galluppi's smelling of unburned marijuana was not inherently incredible, we defer to the trial court's assessment of Officer Galluppi's testimonial credibility, which supported the factual finding that he smelled the marijuana "very strongly." *See Salinas*, 214 N.C. App. at 411, 715 S.E.2d at 265. This finding, in turn, supported the trial court's conclusion that Officer Galluppi had proper reasonable suspicion—a "minimal level of justification"—to justify the traffic stop. *See Watkins*, 337 N.C. at 442, 446 S.E.2d at 70. We therefore conclude the trial court did not err in denying Defendant's motion to suppress.

## IV. Conclusion

Defendant has failed to demonstrate Officer Galluppi lacked reasonable suspicion to initiate the stop of his vehicle. Accordingly, the trial court did not commit reversible error in denying Defendant's motion to suppress evidence obtained from the stop.

NO ERROR.

Chief Judge STROUD and Judge STADING concur.

STATE OF NORTH CAROLINA
v.
ANTONIO DAYMONTE LIVINGSTON, DEFENDANT

No. COA22-678

Filed 19 September 2023

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

In a prosecution for possession of a firearm by a felon, the State presented substantial evidence from which a jury could conclude that defendant, a convicted felon, constructively possessed a gun while riding as a passenger in a car. Defendant was in close proximity to the gun, which was found in a black bag behind the passenger seat where he was sitting, and there was indicia of defendant's control over the black bag, since the gun was touching another bag inside that held a wallet with three identification cards and a credit card, all of which had defendant's name and picture on them.

Appeal by defendant from judgment entered on or about 1 July 2021 by Judge Jason C. Disbrow in Superior Court, Brunswick County. Heard in the Court of Appeals 9 May 2023.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Eric R. Hunt, for the State.*

*Sean P. Vitrano for defendant-appellant.*

STROUD, Chief Judge.

Defendant Antonio Daymonte Livingston appeals from a judgment, entered following a jury trial, for one count of possession of a firearm by a felon ("felon-in-possession"). Because the State presented sufficient evidence Defendant constructively possessed the firearm, we find no error.

## I. Background

The State's evidence at trial tended to show, on 25 June 2020, deputies with the Brunswick County Sheriff's Office were conducting surveillance in a neighborhood they characterized as "a known drug area[.]" During this surveillance operation, the deputies noticed a car go into the "known drug area" for "[a]pproximately two minutes[,]" which gave them a "hunch" it was involved in "[i]llegal activities." Based on this

"hunch" the car was involved in illegal activities, the deputies continued to observe it. After seeing the car fail to stop at a stop sign and drive 70 miles per hour in a zone where the speed limit was 55 miles per hour, the deputies stopped the vehicle.

When deputies stopped the vehicle, the only two occupants were Defendant, who was in the passenger seat, and another man, who was driving. As deputies approached the vehicle, they smelled marijuana and saw marijuana "shake"[1] on both Defendant and the driver. Based on the marijuana smell and presence of marijuana shake, the deputies searched the car.

The search revealed a black bag behind the passenger seat where Defendant was sitting. Inside the black bag, one of the deputies discovered a gun, which was touching a Crown Royal bag. Inside the Crown Royal bag was a wallet that had three identification cards and one credit card, each with Defendant's name and picture on it.

After one of the deputies made this discovery of the gun and the wallet with Defendant's identification and credit cards, he informed the other two deputies on scene. After the deputy speaking with Defendant was informed the search revealed a gun, he asked Defendant about the bag with the gun and his identification and credit cards. Defendant denied the bag was his and stated he did not know how any of the identification or credit cards could be his, but Defendant admitted he was a convicted felon. Because Defendant admitted he was a convicted felon and a gun was found touching the Crown Royal bag with his cards, the deputies arrested Defendant on a felon-in-possession charge.

On or about 7 December 2020, Defendant was indicted on the felon-in-possession charge.[2] The trial began on 28 June 2021. At trial, the State had three deputies testify consistent with the facts recounted above. At the close of the State's evidence, Defendant moved to dismiss the felon-in-possession charge on the grounds the State had failed to prove Defendant possessed the gun recovered from the black bag. The trial court denied the motion to dismiss. Defendant did not present any evidence at trial. At the close of all the evidence, Defendant renewed his motion to dismiss, and the trial court again denied it.

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1. Marijuana "shake" is "small pieces of marijuana" that fall "[a]s people are rolling marijuana cigarettes[.]"

2. Defendant was also indicted as a habitual felon on or about 7 December 2020. We do not discuss habitual felon status further because it is not challenged on appeal.

The jury found Defendant guilty on the felon-in-possession charge. On or about 1 July 2021, the trial court entered judgment on the felon-in-possession charge and sentenced Defendant to 108 to 142 months in prison, as enhanced by Defendant's status as a habitual felon. Defendant gave oral notice of appeal in open court and also gave written notice of appeal on 2 July 2021.

## II. Analysis

In his only argument on appeal, Defendant contends the "trial court erred in denying the motion to dismiss" the felon-in-possession charge because there was insufficient evidence to submit the charge to the jury. After discussing the standard of review, we turn to the question of whether the State presented sufficient evidence.

### A. Standard of Review

Our Supreme Court has explained the standard of review in sufficiency of the evidence cases as follows:

> The standard of review for a motion to dismiss for insufficient evidence is well settled. The trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. All evidence, competent or incompetent, must be considered. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. In its analysis, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence. The test for sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both.

*State v. Bradshaw*, 366 N.C. 90, 92-93, 728 S.E.2d 345, 347 (2012) (citations, quotation marks, and brackets omitted). Then, "[a]n appellate court reviews the denial of a motion to dismiss for insufficient evidence

*de novo*." *State v. Taylor*, 203 N.C. App. 448, 458, 691 S.E.2d 755, 763 (2010) (citation and quotation marks omitted).

**B. Sufficiency of the Evidence**

North Carolina General Statute § 14-415.1 bars convicted felons from possessing firearms: "It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c)." N.C. Gen. Stat. § 14-415.1(a) (2019). The elements of the felon-in-possession offense are: "(1) [the] defendant was previously convicted of a felony and (2) subsequently possessed a firearm." *Bradshaw*, 366 N.C. at 93, 728 S.E.2d at 347-48. Defendant concedes the previous felony conviction element "is not in dispute[;]" the State introduced a certified copy of Defendant's prior felony conviction. As a result, the only issue is whether the State presented sufficient evidence Defendant possessed the gun. *See id.*

"It is well established that possession may be actual or constructive." *Id.* at 93, 728 S.E.2d at 348. "Actual possession requires that the defendant have physical or personal custody of the firearm." *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764. Alternately, "[a] defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it." *Bradshaw*, 366 N.C. at 94, 728 S.E.2d at 348 (citations and quotation marks omitted). Here, law enforcement found the gun in a black bag in the car, so Defendant did not have actual possession. *See Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764 (requiring "physical or personal custody" for actual possession). So the State had to present sufficient evidence of constructive possession to defeat the motion to dismiss. *See Bradshaw*, 366 N.C. at 93, 728 S.E.2d at 348 (indicating possession can be actual or constructive).

As to constructive possession, our Supreme Court has explained:

> A defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it. The defendant may have the power to control either alone or jointly with others. Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession.

*Id.* at 94, 728 S.E.2d at 348 (citations and quotation marks omitted). In the context of a car, a defendant does not have exclusive possession of a car if the car has other occupants. *See State v. Bailey*, 233 N.C. App. 688,

691, 757 S.E.2d 491, 493 (2014) ("[I]t is undisputed that [the] defendant did not actually possess the rifle, nor was he the only occupant in the car where it was found. Therefore, he did not have 'exclusive possession' of the car[.]" (quoting *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001))). Here, Defendant was not the only person in the car when the gun was found, so he did not have exclusive possession of the place the gun was found. *See Bailey*, 233 N.C. App. at 691, 757 S.E.2d at 493. As a result, the State "must show other incriminating circumstances sufficient for the jury to find" Defendant "had constructive possession." *Bradshaw*, 366 N.C. at 94, 728 S.E.2d at 348.

The other incriminating circumstances "inquiry is necessarily fact specific; each case will turn on the specific facts presented, and no two cases will be exactly alike." *Id.* (citation and quotation marks omitted). Our Courts "consider[] a broad range of other incriminating circumstances to determine whether an inference of constructive possession [is] appropriate[.]" *Id.* (citation and quotation marks omitted). "Two of the most common factors [of incriminating circumstances] are the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found." *Id.* (citation and quotation marks omitted). This Court has also termed the indicia of control factor as "evidence that the defendant had a specific or unique connection to the place where the contraband was found." *State v. Kennedy*, 276 N.C. App. 381, 384-85, 856 S.E.2d 893, 896 (2021) (citation and quotation marks omitted).

Focusing on proximity first, mere proximity alone is not sufficient. *See Bailey*, 233 N.C. App. at 692, 757 S.E.2d at 493 ("[T]his Court has found the evidence insufficient to go to the jury when there is no link between the defendant and the firearm besides mere presence."). But proximity can be sufficient when combined with other factors. *See State v. Best*, 214 N.C. App. 39, 47, 713 S.E.2d 556, 562 (2011) (finding "the location in which the firearm was discovered" combined with other testimony was sufficient to support a felon-in-possession conviction). For example, in *Best*, this Court found the "close proximity" between the defendant, who was driving the vehicle, and the gun, which was "found on the floor next to the driver's seat," sufficiently supported a felon-in-possession conviction when combined with the defendant's admitted ownership of the gun and corroborative testimony by other witnesses. *See id.*

Turning to indicia of control, in *Kennedy*, this Court concluded the defendant had a "specific or unique connection to the place where the contraband was found" when the gun was discovered inside a backpack

the defendant owned and that also contained "drugs and drug paraphernalia belonging to" the defendant. *Kennedy*, 276 N.C. App. at 385, 856 S.E.2d at 897 (citation and quotation marks omitted). Further, in *Bradshaw*, our Supreme Court concluded the defendant "exercised dominion and control" over contraband found in a bedroom because police also found in the bedroom: bills with his name on them, a paystub with his name on it, a holiday card with a "known alias" of the defendant, and two recent photographs of the defendant. *Bradshaw*, 366 N.C. at 96-97, 728 S.E.2d at 349-50.

Here, the "[t]wo most common factors" indicating other incriminating circumstances—(1) Defendant's "proximity to the contraband and [(2)] indicia of" Defendant's "control over the place where the contraband is found"—are both present. *Bradshaw*, 366 N.C. at 94, 728 S.E.2d at 348. First, as to proximity, the black bag containing the gun was placed "behind the passenger seat" where Defendant was sitting. As a result, Defendant was sitting "[l]ess than" two feet in front of the bag. This proximity resembles the situation in *Best* where the defendant was in the driver's seat and the gun was found "on the floor next to the driver's seat[.]" *Best*, 214 N.C. App. at 47, 713 S.E.2d at 562.

Second, as to indicia of Defendant's control, the gun was found touching a Crown Royal bag that contained a wallet with three different identification cards and a credit card, which all had Defendant's name and picture on them. Similar to *Bradshaw*, these identification cards and credit card make it reasonable to infer Defendant controlled, in this case owned, the Crown Royal bag. *See Bradshaw*, 366 N.C. at 96-97, 728 S.E.2d at 349-50 (finding recent photos of the defendant and financial documents with his name on them were sufficient indicia of control for constructive possession); *see also Bradshaw*, 366 N.C. at 92-93, 728 S.E.2d at 347 (indicating we draw "all reasonable inferences" in favor of the State when reviewing a motion to dismiss for insufficient evidence). Working with the inference Defendant owned the Crown Royal bag, this case resembles *Kennedy*. *See Kennedy*, 276 N.C. App. at 385, 856 S.E.2d at 897. Like in *Kennedy*, we can reasonably infer Defendant had control over the firearm inside the black bag because he had stored it with his other possessions, *i.e.* the Crown Royal bag with his identification and credit cards. *See id.*; *see also Bradshaw*, 366 N.C. at 92-93, 728 S.E.2d at 347 (requiring drawing reasonable inferences in favor of the State for motions to dismiss). Therefore, the State presented significant evidence Defendant controlled the black bag that contained the gun.

Combined with Defendant's proximity to the firearm, the State's evidence Defendant controlled the black bag with the gun in it is sufficient

to conclude Defendant constructively possessed the gun. *See Bradshaw*, 366 N.C. at 94, 728 S.E.2d at 348 (indicating "[t]wo of the most common factors" allowing "an inference of constructive possession . . . when a defendant exercised nonexclusive control of contraband" are proximity and "indicia of the defendant's control over the place where the contraband is found"). Thus, after our *de novo* review, the State presented sufficient evidence for each of the elements of the felon-in-possession charge, and the trial court did not err in denying the motion to dismiss.

## III. Conclusion

Drawing all reasonable inferences in favor of the State, the State presented sufficient evidence Defendant constructively possessed the gun. As a result, we conclude the trial court did not err in denying Defendant's motion to dismiss.

NO ERROR.

Judges WOOD and GRIFFIN concur.

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STATE OF NORTH CAROLINA
v.
DE'QUAN LAMONT LYNN, DEFENDANT

No. COA22-990

Filed 19 September 2023

**1. Criminal Law—jury selection—prosecutor's voir dire statements—probation as possible sentence**

During jury selection for defendant's trial for assault with a deadly weapon with intent to kill and discharging a weapon into occupied property, the trial court did not abuse its discretion by allowing the prosecutor to forecast to potential jury members that probation was within the range of sentencing possibilities that defendant could receive. Even though probation would be allowed pursuant to statute only under narrow circumstances, the prosecutor's statements were technically accurate and therefore not manifestly unsupported by reason.

**2. Appeal and Error—preservation of issues—substitution of alternate juror after deliberations began—failure to object**

In defendant's trial for assault with a deadly weapon with intent to kill and related charges, where defendant did not object when the trial court substituted an alternate juror after jury deliberations began, defendant failed to preserve for appellate review the issue of whether the substitution was proper.

**3. Constitutional Law—effective assistance of counsel—self-defense instruction—additional language unnecessary**

In defendant's trial for assault with a deadly weapon with intent to kill and discharging a weapon into occupied property—charges which arose from defendant having fired several gunshots during an altercation at a fast food restaurant—defendant's counsel was not ineffective for failing to ask the trial court to include in the self-defense jury instruction a requirement to consider whether other restaurant patrons had weapons. The jury was unlikely to have reached a different result where the given instruction followed the statutory language on self-defense, including the reasonable belief standard, and where there was no evidence that anyone else had brandished a gun.

**4. Constitutional Law—effective assistance of counsel—failure to request jury poll—group affirmation of unanimous verdict**

In defendant's trial for assault with a deadly weapon with intent to kill and discharging a weapon into occupied property, defendant's counsel was not ineffective for failing to ask the trial court to conduct a jury poll. There was not a reasonable probability of a different result if the jurors had been polled individually because the jury foreman and the other jurors, as a group, affirmed in open court that their verdicts were unanimous and there was no evidence that a juror was coerced into a verdict.

Appeal by Defendant from judgment entered 14 March 2022 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals on 9 August 2023.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan Richard Marx, for the State.*

*Office of the Public Defender, by Assistant Public Defender Julie Ramseur Lewis, for Defendant-Appellant.*

CARPENTER, Judge.

De'quan Lamont Lynn ("Defendant") appeals from judgment after a jury convicted him of assault with a deadly weapon with intent to kill, discharging a weapon into an occupied building, and four counts of discharging a weapon into a vehicle in operation. On appeal, Defendant argues: (1) the trial court erred by permitting the prosecutor to inform potential jurors that probation was within Defendant's potential sentencing range; (2) the trial court erred by substituting an alternate juror after deliberations began; and (3) he received ineffective assistance of counsel. After careful review, we disagree. We discern no prejudicial error.

## I. Factual & Procedural Background

On 9 December 2019, a Mecklenburg County grand jury indicted Defendant for assault with a deadly weapon with intent to kill, discharging a firearm into occupied property, and four counts of discharging a firearm into an occupied vehicle in operation. The State tried the case before a jury in Mecklenburg County Superior Court in March 2022.

During voir dire, the prosecutor informed the potential jurors that a person convicted of four counts of discharging a weapon into an occupied vehicle "could be sentenced up to 17 years in prison," but a person "convicted of all these crimes could also be sentenced to probation." Defense counsel objected on the basis that this was an incorrect statement of the law. After a bench conference, the trial court allowed the prosecutor to proceed with his sentencing-range description.

At trial, evidence tended to show the following: On 2 December 2019 at a Cook Out restaurant located in Charlotte, Defendant had an altercation with other Cook Out patrons. During the altercation, Defendant fired several gunshots, four of which hit a car, and one of which hit the exterior wall of the Cook Out building. Defendant asserted that one of the other Cook Out patrons brandished a gun, but the police failed to find another gun during their investigation, and other witnesses denied the presence of another gun.

Before jury deliberations, the trial court instructed the jury that "if the defendant reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm to himself or another, such assault would be justified by self-defense." The trial court did not expressly instruct the jury to consider whether other Cook Out patrons possessed weapons. The jury began deliberating on 11 March 2022. On the second day of deliberations, one juror reported that he was ill and would not report for jury duty. The following exchange occurred between the trial court and counsel:

> **Judge:** Essentially, what the Court will do is, I will inform the jury that Juror Number 4 is unable to continue to deliberate with them. And that Juror [N]umber 4 will be replaced with Juror Number–Alternate Number 1. And I will read the instruction from 100.4, which basically indicates that there's an alternate being replaced. They must restart the deliberations from the beginning. They are to disregard entirely any deliberations that have taken place before the alternate was substituted. They are not to be discouraged by the replacement. Then they will resume with deliberations . . . . Any concerns about that before I bring the jury panel in from the State?
>
> **Prosecutor:** No, your Honor.
>
> **Judge:** From the defendant?
>
> **Defense Counsel:** No, your Honor.

The trial court then substituted the alternate juror and instructed the jury to restart deliberations in accordance with N.C. Gen. Stat. § 15A-1215(a) (2021).

On 14 March 2022, the jury found Defendant guilty of assault with a deadly weapon with intent to kill, discharging a weapon into an occupied building, and four counts of discharging a weapon into an occupied vehicle in operation. In open court, both the jury foreman and the other jurors affirmed that the verdicts were unanimous. The trial court sentenced Defendant to serve between fifty-one and seventy-four months in prison. Defendant orally appealed in open court.

## II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2021).

## III. Issues

The issues on appeal are whether: (1) the trial court erred by permitting the prosecutor to inform potential jurors that probation was within Defendant's potential sentencing range; (2) the trial court erred by substituting an alternate juror after deliberations began; and (3) Defendant received ineffective assistance of counsel.

## IV. Analysis

### A. Voir Dire Statements

**[1]** In his first argument, Defendant asserts the trial court erred by permitting the prosecutor to inform potential jurors that probation was

within Defendant's potential sentencing range, as doing so was improper and misleading. After careful review, we disagree.

We review a trial court's management of jury selection for abuse of discretion. *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559 (1994). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). " 'The goal of jury selection is to ensure that a fair and impartial jury is empaneled.' " *State v. Ward*, 354 N.C. 231, 253, 555 S.E.2d 251, 266 (2001) (quoting *State v. Gell*, 351 N.C. 192, 200, 524 S.E.2d 332, 338 (2000)). "To that end, the trial court is vested with broad discretion to regulate the extent and manner of questioning by counsel during [voir dire]." *Id.* at 253, 555 S.E.2d at 266.

Under N.C. Gen. Stat. § 15A-1340.13(g), a probationary sentence is permitted in lieu of active punishment if the court finds: (1) "extraordinary mitigating factors of a kind significantly greater than in the normal case are present"; (2) "[t]hose factors substantially outweigh any factors in aggravation"; and (3) active punishment would be "a manifest injustice." N.C. Gen. Stat. § 15A-1340.13(g) (2021).

The wisdom of discussing probation as a possible sentence is questionable, as a probationary sentence under these facts requires the trial judge to find extraordinary mitigation. Nonetheless, the prosecutor's voir dire statements were technically accurate statements of the law because probation was a possibility under narrow circumstances. *See id.* (allowing probation instead of active punishment if the trial court makes certain findings). Thus, regardless of the likelihood of a probationary sentence, the trial court did not abuse its discretion in allowing the prosecutor to discuss the possibility of probation because doing so was not "manifestly unsupported by reason." *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527; *Lee*, 335 N.C. at 268, 439 S.E.2d at 559.

### B. Alternate Jurors

**[2]** In his second argument, Defendant asserts the trial court erred by substituting an alternate juror after deliberations began. Specifically, Defendant argues the "jury verdict was reached by more than twelve persons," and thus the verdict violates the North Carolina Constitution. Defendant also argues N.C. Gen. Stat. § 15A-1215(a), itself, violates the North Carolina Constitution. After careful consideration, we conclude that Defendant failed to preserve these arguments for appellate review.

A party must timely object to the trial court in order to preserve an issue for appellate review. N.C. R. App. P. 10(a)(1). Generally, constitutional

issues not raised in the trial court are abandoned on appeal. *See State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982).

Here, Defendant did not object to the alternate-juror substitution or to the constitutionality of N.C. Gen. Stat. § 15A-1215(a), the statute authorizing the substitution. In fact, when the trial court asked whether there were "[a]ny concerns" regarding the trial court's plan to substitute the alternate juror, Defendant's counsel said "[n]o."

Therefore, Defendant failed to preserve this issue for appellate review under Rule 10. *See* N.C. R. App. P. 10(a)(1); *Hunter*, 305 N.C. at 112, 286 S.E.2d at 539. Accordingly, we dismiss Defendant's arguments because the asserted alternate-juror issues are not properly before this Court.

### C. Ineffective Assistance of Counsel

In his final argument, Defendant claims he received ineffective assistance of counsel for two reasons. First, Defendant asserts his trial counsel should have objected to the trial court's self-defense instruction. Second, Defendant asserts his trial counsel should have requested a jury poll. After careful review, we disagree with Defendant.

To establish ineffective assistance of counsel, a defendant must satisfy a two-part test. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)) (analyzing ineffective assistance of counsel under the North Carolina Constitution and adopting the federal test).

First, a defendant must show his counsel's performance was below an objective standard of reasonableness. *Id.* at 562, 324 S.E.2d at 248. Second, the defendant must show he was prejudiced by counsel's error, and there was a reasonable probability of a different result but for counsel's error. *Id.* at 562, 324 S.E.2d at 248. The probability of a different result at trial is "reasonable" if the error undercuts confidence in the result. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). There is a strong presumption that an attorney has "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695.

#### 1. Jury Instructions

**[3]** To establish ineffective assistance of counsel concerning jury instructions, "the defendant [must] prove that without the requested

jury instruction there was plain error in the charge." *State v. Pratt*, 161 N.C. App. 161, 165, 587 S.E.2d 437, 440 (2003). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

A person may use deadly force in self-defense when "[h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." N.C. Gen. Stat. § 14-51.3(a) (2021).

Here, the trial court instructed the jury that "if the defendant reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm to himself or another, such assault would be justified by self-defense." The trial court did not explicitly direct the jury to consider whether another Cook Out patron possessed a weapon. Defendant has failed to show, however, that the "jury probably would have reached a different result" if the trial court specifically instructed the jury to consider whether other patrons had weapons. *See Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. First, the given instruction tracks closely with the exact language of N.C. Gen. Stat. § 14-51.3(a), which details the statutory requirements of self-defense. *See* N.C. Gen. Stat. § 14-51.3(a)(1). Second, although Defendant contended that another Cook Out patron brandished a gun, the police failed to find another gun during investigation, and other witnesses denied seeing another gun.

Under these circumstances, it is unlikely that the jury would have reached a different verdict had the trial court specifically instructed the jury to consider whether another patron had a weapon. *See Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. Indeed, the trial court instructed the jury to determine "if the defendant reasonably believed that deadly force was necessary." In determining what Defendant reasonably believed, the jury needed to consider competing evidence concerning whether another patron had a weapon. Because the instructed reasonable-belief standard encompassed whether another patron had a weapon, adding a separate, specific instruction to consider whether another patron had a weapon is unlikely to have caused a different result. *See id.* at 440, 426 S.E.2d at 697. Thus, counsel's failure to object to the trial court's instruction was not ineffective assistance of counsel. *See Pratt*, 161 N.C. App. at 165, 587 S.E.2d at 440; *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248.

**2. Jury Polling**

**[4]** Jury polling is a procedure in which the trial court asks each individual juror to state the jury's verdict. *Davis v. State*, 273 N.C. 533, 541,

160 S.E.2d 697, 703 (1968). The purpose of polling the jury is to "enable the court and the parties to ascertain with certainty that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented." *State v. Holadia*, 149 N.C. App. 248, 259–60, 561 S.E.2d 514, 522 (2002). Unless requested, a trial court is not required to poll the jury. *State v. Sturdivant*, 304 N.C. 293, 305, 283 S.E.2d 719, 728 (1981).

Here, Defendant did not request that the jury be polled, so the trial court was not required to do so. *See id.* at 305, 283 S.E.2d at 728. Even if Defendant requested a jury poll, both the jury foreman and the other jurors, as a group, affirmed—in open court—that their verdicts were unanimous. And the record lacks evidence that a juror was "coerced or induced to agree to a verdict to which he [did] not fully assent[]." *See Holadia*, 149 N.C. App. at 259–60, 561 S.E.2d at 522. Thus, because the jury affirmed "with certainty that a unanimous verdict ha[d] been in fact reached," polling each individual juror was unnecessary here. *See id.* at 259–60, 561 S.E.2d at 522. Therefore, failing to request a jury poll was not ineffective assistance of counsel because it did not create a reasonable probability of a different result. *See Braswell*, 312 N.C. at 562, 324 S.E.2d at 248; *Allen*, 360 N.C. at 316, 626 S.E.2d at 286.

## V. Conclusion

In sum, the trial court did not err by permitting the prosecutor to inform potential jurors that probation was within Defendant's sentencing range, and Defendant failed to preserve his arguments concerning the substitution of an alternate juror. Lastly, Defendant did not receive ineffective assistance of counsel. Accordingly, we discern no prejudicial error.

NO PREJUDICIAL ERROR.

Judge TYSON and Judge FLOOD concur.

STATE OF NORTH CAROLINA
v.
JASMIN R. SINGLETARY

No. COA22-1068

Filed 19 September 2023

**1. Probation and Parole—revocation of probation—new criminal offense—sufficiency of evidence—check fraud crimes**

In defendant's probation revocation hearing, there was sufficient evidence to support the trial court's finding that it was more probable than not that defendant had committed a new criminal offense—check fraud crimes—while on probation where the State presented violation reports, the testimony of a probation officer concerning defendant's admission that she had "cashed the check to help her friends out," the arrest warrants, and still images from bank security footage showing defendant committing the new crimes.

**2. Probation and Parole—revocation of probation—statutory right to confront adverse witnesses—absent probation officer—other evidence sufficient**

In defendant's probation revocation hearing, the trial court did not prejudicially err when it did not make an explicit finding that good cause existed for not allowing defendant to confront (pursuant to N.C.G.S. § 15A-1345(e)) her former probation officer, who was absent due to a death in the family. The absent probation officer's testimony or cross-examination would have been superfluous because the State presented sufficient evidence—including the testimony of the new probation officer, who filed one of the probation violation reports—supporting the trial court's finding that defendant had committed new criminal offenses.

Appeal by Defendant from a judgment entered 23 May 2022 by Judge L. Lamont Wiggins in Wilson County Superior Court. Heard in the Court of Appeals 9 August 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kyle Peterson, for the State.*

*Phoebe W. Dee, for the Defendant.*

WOOD, Judge.

Jasmin Singletary ("Defendant") appeals from the trial court's revocation of her probation and activation of a sentence of ten to twenty-one months imprisonment. Defendant was placed on thirty-six months of probation for five counts of obtaining property by false pretenses. Three violation reports were subsequently filed against her for, among other things, committing criminal offenses while on probation. Probation Officer Heather Horne ("Horne"), who testified for the State at Defendant's probation revocation hearing, had replaced Probation Officer Williams ("Williams"), Defendant's prior probation officer, shortly before the revocation hearing.

First, Defendant argues there was not sufficient evidence before the trial court for it to find Defendant committed a crime while on probation where the State called no witnesses except the new probation officer to testify as to the alleged crimes. Second, Defendant argues the trial court violated her statutory confrontation rights when it proceeded with the probation revocation hearing without Williams and without making an explicit finding of good cause not to allow Defendant to confront her.

After careful review, we conclude there was sufficient evidence before the trial court to find Defendant committed a crime while on probation. We further conclude the trial court did not prejudicially err when it proceeded with the probation revocation hearing without Williams because other competent evidence established Defendant violated probation by committing a new criminal offense.

## I. Background

On 7 November 2019, Jasmin Singletary pleaded guilty to five counts of obtaining property by false pretenses. The trial court entered three judgments. Defendant was sentenced to an active sentence of imprisonment for a minimum of ten months and a maximum of twenty-one months, suspended for thirty-six months of probation. Defendant also was sentenced to a minimum of ten and maximum twenty-one months imprisonment, suspended for thirty-six months of supervised probation. The probationary sentence included a condition of paying $26,563.00 restitution to the victims of the false pretenses crimes as well as the costs of court, bringing the total cost to $27,415.50. Finally, Defendant was sentenced to another ten to twenty-one months imprisonment, also suspended for thirty-six months and subject to the same terms and conditions applying to the second judgment. The trial court ordered all sentences to run consecutively.

The regular conditions of Defendant's probation, as relevant to this case, also included:

> [D]efendant shall: (1) Commit no criminal offense in any jurisdiction. . . . (6) Not abscond, by willfully avoiding supervision or by willfully making [D]efendant's whereabouts unknown to the supervising probation officer. . . . (8) Report as directed by the Court or the probation officer to the officer at reasonable times and places and in a reasonable manner[.]

After Defendant's release from jail, Defendant was on supervised probation in Wilson County.

On 21 January 2021, a probation officer filed a probation violation report alleging Defendant willfully failed to repay the amount ordered in restitution and court fees and failed to pay supervision fees. At a probation violation hearing held 26 July 2021, Defendant admitted to not having paid any money toward the restitution, court costs, and supervision fees, but she denied the willfulness of her failure to pay. The trial court found Defendant violated probation by her failure to pay restitution, court costs, and supervision fees. The court converted all restitution due except $5,000.00 to a civil judgment and ordered monthly payments of $50.00, with Defendant returning to court if she missed two or more payments.

Subsequently, three violation reports leading to Defendant's probation revocation hearing and the probation revocation at issue in this case were filed against Defendant: (1) a 1 November 2021 violation report alleging Defendant failed to make two $50.00 payments and committed a criminal offense as Defendant was charged on 1 September 2021 with obtaining property by false pretense and uttering a forged instrument in Johnston County; (2) a 22 December 2021 violation report alleging Defendant absconded by leaving her last known address and failing to make herself available for supervision; and (3) a 28 February 2022 violation report alleging that on 29 February 2022 Defendant was arrested and charged with uttering a forged instrument at the State Employee's Credit Union (SECU) in Wake County and violated her probation by being on the premises of a SECU on 31 August 2021, when the alleged offense was committed.

The probation violation hearing was held 23 May 2022. At the beginning of the probation revocation hearing, Defendant objected to Williams's absence, arguing Defendant had a right to cross-examine adverse witnesses unless the court found good cause for not allowing confrontation. Defendant's counsel relayed her understanding that Williams was "on leave and they did not know when she was coming back." Defendant's counsel explained there was conversation and text

messages between Defendant and Williams about which Defendant wished to cross-examine Williams. The trial court asked for the State's position on the matter, and the State explained Williams was absent due to a death in her family. The trial court then asked if Defendant acknowledged she had been served with a copy of the violation report and was on notice of the allegations contained in the reports. Defendant's counsel acknowledged both points. The court stated, "the objection is noted for the record."

The State called Officer Horne as a witness. Horne had taken over as Defendant's probation officer. Williams was "not technically with the Department" at the time because of a death in her family at the hands of someone who was "criminally charged in a homicide." Horne testified Williams made her aware of Defendant's pending probation violations and asked for her assistance with Defendant's case. Horne further testified that she was familiar with Defendant, her case, and her violations.

Regarding the first violation report, Defendant admitted she had not made the $50.00 payments for two months but denied her willfulness. Through counsel, Defendant stated she since had paid some of it. Defendant admitted to the pending charges of obtaining property by false pretense and uttering a forged instrument but not to any "independent finding behind the charge." Horne testified Defendant cashed a check in the amount of $600.00 drawn on a closed bank account and admitted during a phone conversation with both Horne and Williams that she had cashed the check "to help her friends out." The state submitted two exhibits pertaining to the Johnston County charges of obtaining property by false pretense and uttering a forged instrument. The State submitted two still images, dated 1 September 2021, from security footage captured inside the SECU showing a woman standing in front of a bank teller's counter. Horne testified the Johnston County Sheriff's Office sent her a copy of the images. The State also submitted a warrant for Defendant's arrest for obtaining property by false pretense and uttering a forged instrument. The warrant accurately stated Defendant's date of birth. It further stated Defendant tried to deposit the check, which was "from a known closed BB&T checking account belonging to the Defendant[,] into a [SECU] account belonging to Dinesha Brice[.]" Horne testified she spoke with a Johnston County detective who stated the photographic evidence confirmed Defendant was at SECU, wrote a check, cashed it, and took funds.

Regarding the second violation report, Horne testified Defendant's last known address was a 406 Englewood Drive, at the time her case was accepted for courtesy supervision in Johnson County. Horne testified

Williams went to this address on 3 October 2021, but Defendant was not there. On cross-examination, Defendant's counsel asked Horne if she was aware of a message sent by Defendant to inform Williams that Defendant had obtained a restraining order against her husband with whom she had been living at the Englewood address. Horne stated that while she could not testify as to a text message because she did not have access to Williams's cell phone, she was aware Defendant was scheduled to appear in court for a domestic violence case in December.

Horne testified Williams did not hear from Defendant until 26 October 2021, when Defendant called Williams and Horne (who were on the phone together) to explain her son had a mental health issue and she was taking him for treatment. Williams and Horne requested medical proof which Defendant did not provide. On 8 November 2021, Williams again went to the Englewood address, but family stated Defendant lived in Clayton. Defendant did not provide notice of her change of address to her probation officer, as required, nor did she make any visits to the probation office. Some time later, Defendant reported an address in Johnston County stating she lived there with her friend. However, when a Johnston County officer visited this address, the resident stated Defendant did not live there but "only came through every once in a while." After further extensive efforts by probation officers to locate Defendant, she turned herself in after absconding probation for a little over a month.

Horne replaced Williams as Defendant's probation officer in February 2022. On 28 February 2022, Horne filed the third probation violation report alleging Defendant committed a new criminal offense. The State submitted two images, provided to Horne by the Garner Police Department, purportedly of Defendant at a SECU drive-through ATM in Garner. The State also submitted a Garner Police Department arrest warrant naming Defendant and stating probable cause to believe she uttered a forged instrument. The warrant stated there was probable cause to believe Defendant delivered to SECU a forged check in the amount of $300.00 payable to Dinesha Brice by Defendant. The warrant contained Defendant's demographic information, which Horne confirmed.

The State requested the trial court to have Defendant remove the mask she wore at the probation revocation hearing for the trial court to compare Defendant's appearance to the images of the woman in the photos submitted by the State. In response, the trial court stated:

> For the record, when the State asked the Defendant to remove her mask earlier at the beginning of the proceeding for purposes of identification by the witness, the Court

> actually reviewed the court file. There was a picture of the Defendant in the court file and the Court has reviewed all the documentation and exhibits that have been presented by the State and finds that the individual in the photographs is indeed the Defendant seated in the courtroom.

After finding it more probable than not Defendant had committed a new criminal offense while on probation, the trial court found Defendant in willful violation of its terms and conditions. The trial court revoked probation and activated the prison sentences. Defendant appealed to this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2022).

## II. Analysis

The issues before us are: (1) whether there was sufficient evidence before the trial court to find it more probable than not Defendant committed a new criminal offense, and (2) whether the trial court erred by not making a specific finding of good cause to proceed with the probation revocation hearing in Williams's absence.

Defendant argues Horne's testimony, the images captured at SECU locations, and the arrest warrant for alleged new crimes were insufficient evidence for the court to find it more probable than not Defendant committed a new criminal offense during probation. Defendant further argues the trial court violated her statutory right to confront Williams at the probation revocation hearing by proceeding in Williams's absence. We disagree.

### A. Standard of Review

"We review a trial court's decision to revoke probation only for manifest abuse of discretion." *State v. Stephenson*, 213 N.C. App. 621, 624, 713 S.E.2d 170, 173 (2011) (quotation marks omitted). A probation revocation hearing requires evidence "to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (quotation marks omitted).

> [O]nce the State has presented competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms. If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior

> sentence was suspended, it may within its sound discretion revoke the probation.

*Stephenson*, 213 N.C. App. at 624, 713 S.E.2d at 173 (citation and quotation marks omitted).

### B. Sufficiency of the Evidence

**[1]** Defendant argues Horne's testimony, the still images from SECU security footage purporting to show Defendant committing the check fraud crimes, and the arrest warrants for the alleged crimes were insufficient for the court to find it more probable than not she committed those crimes. Specifically, Defendant argues the State needed to call law enforcement witnesses to present evidence about the investigations relating to the crimes, civilian victim witnesses, or SECU employees who could identify Defendant. Because the trial court specifically based its finding of a probation violation on the commitment of a new crime, we limit our review to that basis.

A trial court may revoke probation for committing a criminal offense while on probation. N.C. Gen Stat. §§ 15A-1343(b)(1), 1344(a) (2022).

> [T]he "mere fact that [a probationer is] charged with certain criminal offenses is insufficient to support a finding that he committed them. However, a defendant need not be convicted of a criminal offense in order for the trial court to find that a defendant violated N.C. Gen. Stat. § 15A-1343(b)(1) by committing a criminal offense."

*State v. Hancock*, 248 N.C. App. 744, 749, 789 S.E.2d 522, 526 (2016) (citation omitted). It is sufficient that the "State . . . introduce evidence from which the trial court can independently find that the defendant committed a new offense." *Id.* at 749–50, 789 S.E.2d at 526. "The sworn violation report constitutes competent evidence sufficient to support the trial court's finding that [the] defendant committed this violation." *Id.* at 750, 789 S.E.2d at 526; *see also State v. High*, 183 N.C. App. 443, 449, 645 S.E.2d 394, 397 ("Defendant's probation officer filed a violation report that specifically stated that defendant absconded—a statement that in itself is competent evidence that he violated his probation by absconding. Defendant's suggestion that a statement in a probation violation report is nothing more than an allegation, like the notation on the arrest warrant, is contrary to established law.").

In *Hancock*, it was sufficient for the trial court to make "an independent determination that defendant committed the three offenses charged . . . by finding that defendant committed the violation alleged in

the" violation report. *Hancock*, 248 N.C. App. at 750, 789 S.E.2d at 526. The violation report itself was based on evidence of illegal drug possession found after a warrantless search of the defendant's residence. *Id.* at 750, 789 S.E.2d at 526. "Given the informal nature of a probation revocation proceeding, the trial court was entitled to infer that the discovery of" drugs in the defendant's residence "gave rise to the criminal charges" for illegal drug possession. *Id.* at 750, 789 S.E.2d at 526 (citation omitted).

In the present case, we are satisfied the trial court did not manifestly abuse its discretion in finding it was more probable than not Defendant committed a new criminal offense. The violation reports at issue were based on details provided in the arrest warrants, but not only on the arrest warrants. Horne testified she was on a phone call with Defendant and Williams in which Defendant herself stated she cashed the check to help her friends out. The trial court made detailed oral findings regarding the identity of the person in the images, finding that the person in the images was Defendant. The trial court was entitled to infer from two arrest warrants issued by two different law enforcement offices in two alleged incidences involving fraudulent checks, two sworn violation reports, and Horne's sworn testimony, that the images of Defendant depicted her committing the crimes alleged. *See Hancock*, 248 N.C. App. at 750, 789 S.E.2d at 526. Thus, the court made an independent finding based on the evidence provided at the probation revocation hearing and did not reach its determination based solely on Defendant's being charged with the crimes. *See id.* at 749–50, 789 S.E.2d at 526. A probation revocation hearing is not a trial, and the State need not present evidence sufficient to convict Defendant nor call as witnesses the investigating officers of the crimes alleged. *See id.* at 749, 789 S.E.2d at 526.

Accordingly, we conclude there was sufficient evidence before the trial court for it to find it more probable than not Defendant committed the new criminal offenses alleged in the probation violation reports.

### C. Confrontation Challenge

**[2]** Defendant argues the trial court's decision to proceed with the probation revocation hearing in Williams's absence violated Defendant's right to confront adverse witnesses in such hearings provided in N.C. Gen. Stat. § 15A-1345(e). Specifically, Defendant argues there was no evidence Williams was actually unavailable where, although undeniably grieving, she was not ill or otherwise incapacitated, and had not moved or transferred from Wilson County. Most importantly, Defendant argues the trial court erred in failing to make a specific good cause finding when it merely noted the objection but did not address good cause.

"A proceeding to revoke probation is not a criminal prosecution[.]" *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). Therefore, "a Sixth Amendment right to confrontation in a probation revocation hearing does not exist." *State v. Hemingway*, 278 N.C. App. 538, 548, 863 S.E.2d 279, 286 (2021). Instead, N.C. Gen. Stat. § 15A-1345(e) "is a codification of the probationer's right to due process under the Fourteenth Amendment" and controls the probationer's right to confrontation in a probation revocation hearing. *Jones*, 269 N.C. App. at 444, 838 S.E.2d at 689. Thus, any "constitutional argument, to the extent it sounds in due process, collapses into [a] statutory argument." *Hemingway*, 278 N.C. App. at 548, 863 S.E.2d at 286. N.C. Gen. Stat. § 15A-1345(e) provides, "At the [probation revocation] hearing, evidence against the probationer must be disclosed to him, and the probationer may appear and speak in his own behalf, may present relevant information, and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C. Gen. Stat. § 15A-1345(e) (2022). Accordingly, "while N.C. Gen. Stat. § 15A-1345(e) confers upon a probationer a right to confrontation, it commits to the discretion of the trial court whether 'good cause exists for not allowing confrontation.' " *Jones*, 269 N.C. App. at 444, 838 S.E.2d at 689 (brackets omitted); N.C. Gen. Stat. § 15A-1345(e) (2022).

"The denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case[.]" *State v. Terry*, 149 N.C. App. 434, 438, 562 S.E.2d 537, 540 (2002) (quotation marks omitted); *see also State v. Lewis*, 361 N.C. 541, 544, 648 S.E.2d 824, 827 (2007) (violation even of Confrontation Clause rights may be harmless error in light of other evidence of defendant's guilt). The issue here, then, is whether the trial court committed prejudicial error by not making an explicit finding that good cause existed for not allowing Defendant to confront Williams.

In *Terry*, this Court held the trial court did not err in failing to require an adverse witness to testify where (1) the adverse witness's testimony would have been merely extraneous evidence in light of other competent evidence presented through the probation officer's testimony and (2) defendant failed to request the professor be subpoenaed. *Id.* at 438, 562 S.E.2d at 539 (evidence that the defendant failed to report to a detention center on its own "was sufficient to satisfy the State's burden of showing that defendant had violated an important condition of her probation" without calling the adverse witness, and "Defendant did not at any stage in the proceedings request that her professor be subpoenaed").

There are limitations on a court's decision not to allow a defendant to confront a witness at a probation revocation hearing as demonstrated in two cases where this court determined the trial court erred by failing to allow the defendant to confront a witness. In *State v. Coltrane*, the defendant appeared before the trial court upon allegations she violated a condition of her probation requiring her to obtain a job. 307 N.C. 511, 512–13, 299 S.E.2d 199, 200–01 (1983). In this extremely brief hearing, the prosecuting attorney explained to the court that she heard from the probation officer the defendant had not found a job. *Id.* at 515, 299 S.E.2d at 202. The trial court asked the defendant if she had a job, and when the defendant started to explain that she did not, the trial court immediately interrupted her and activated her sentence. *Id.* at 515, 299 S.E.2d at 202. On appeal, the *Coltrane* court held the defendant's rights to "present relevant information" and "confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation" were violated when the defendant was not allowed to confront the prosecuting attorney or the probation officer and where the defendant was not allowed to speak on her own behalf due to the hearing's extreme brevity. *Id.* at 515–16, 299 S.E.2d at 202; N.C. Gen Stat. § 15A-1345(e). Because the trial court "interrupted [the] defendant and did not permit her to offer any explanation of her failure to obtain" a job, there was "no competent evidence in the record to support the conclusion that [the] defendant violated the condition of probation willfully or without lawful excuse," and therefore, the trial court erred in revoking defendant's probation. *Id.* at 516, 299 S.E.2d at 202.

We recognize the statutory mandate under N.C. Gen. Stat. § 15A-1345(e) for a trial court to find good cause before denying a defendant's request to cross-examine an absent witness. In the present case, we also must recognize the controlling authority of *Terry* which held testimony from an absent witness may be merely extraneous in light of other sufficient evidence supporting the trial court's finding that a defendant violated her probation.

Here, the evidence supporting the trial court's finding that Defendant committed new criminal offenses was such that Williams's testimony merely would have been extraneous in light of the testimony provided by Horne. The trial court had before it arrest warrants, SECU security footage images which the court examined and found were of Defendant, and Horne's independent testimony of Defendant's admission that she cashed a check for her friends. Horne initiated and filed the third probation violation report alleging that on 29 February 2022, Defendant committed a new criminal offense, was arrested and charged

with uttering a forged instrument at the SECU in Wake County, and violated the terms of her probation by being on the premises of a SECU on 31 August 2021, when the alleged offense occurred. Furthermore, she provided testimony regarding the new offense and was available for cross-examination during the revocation hearing. The State provided evidence sufficient to support the trial court's finding that Defendant had committed new crimes even without any testimony from Williams. *Terry*, 149 N.C. App. at 438, 562 S.E.2d at 539.

Defendant specifically wished to cross-examine Williams regarding a text or texts sent by Defendant to Williams stating she obtained a restraining order against her husband. First, and most significantly, such testimony would have been relevant to the issue of absconding. The trial court, however, based its revocation of Defendant's probation on Defendant's having committed new criminal offenses, so even if Defendant had cross-examined Williams regarding the restraining order, it would not have impacted the revocation of her probation. Second, Horne conceded she was aware Defendant was scheduled to appear in court for a domestic violence case in December, allowing Defendant to develop testimony in her favor on the issue of absconding.

Defense counsel even demonstrated an awareness that Williams would be absent, stating her understanding that Williams was on leave for an unknown period of time. Yet Defendant had not subpoenaed Williams. The trial court heard from both Defendant and the State regarding Defendant's objection to Williams's absence, and the trial court noted the objection for the record. The death in Williams's family clearly would have shown good cause to proceed in her absence. The trial court was aware of the reason for Williams's absence and decided to proceed. Because the record demonstrates the trial court's awareness of the circumstances surrounding Williams's absence, we cannot say the trial court abused its discretion by allowing the hearing to proceed in her absence. *See Terry*, 149 N.C. App. at 438, 562 S.E.2d at 539.

Finally, if there were any error, Defendant was not prejudiced where the trial court had before it competent evidence without testimony from or cross-examination of Williams, and Horne, who filed the third probation violation report, testified at the probation revocation hearing. *Terry*, 149 N.C. App. at 438, 562 S.E.2d at 540; *see also Lewis*, 361 N.C. at 544, 648 S.E.2d at 827.

## III. Conclusion

We hold there was sufficient evidence to support the trial court's finding Defendant committed a new criminal offense based on the arrest

warrants, still images of Defendant at two different SECU locations, the sworn violation reports, and Horne's testimony. We further hold the trial court did not prejudicially err by not making an explicit finding of good cause where sufficient evidence and testimony provided through Horne supported the trial court's finding that Defendant violated her probation, even with Williams absent from the hearing.

NO ERROR.

Judges MURPHY and HAMPSON concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 SEPTEMBER 2023)

| | | |
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| COURTNEY CARTER HOMES, LLC v. WYNN CONSTR., INC.<br>No. 22-792 | Onslow<br>(19CVS3578) | Affirmed |
| ELWIR v. BOUNDARY, LLC<br>No. 22-961 | Wake<br>(20CVS7911) | Affirmed |
| IN RE D.S.R.<br>No. 23-344 | Surry<br>(22JT94)<br>(22JT95)<br>(22JT96)<br>(22JT97) | Affirmed |
| IN RE H.G.<br>No. 22-807 | Guilford<br>(19JA280) | Vacated and Remanded |
| IN RE J.L.<br>No. 23-59 | Jackson<br>(20JT27) | Affirmed |
| IN RE K.R.<br>No. 22-753 | Cumberland<br>(18JA128)<br>(18JA129)<br>(20JA205) | Affirmed |
| IN RE M.D.G.<br>No. 22-875 | Wayne<br>(21SPC1195) | Dismissed |
| IN RE S.A.B.S.<br>No. 22-830 | Wilkes<br>(20JA145) | Vacated and Remanded |
| MARECIC v. BAKER<br>No. 23-38 | Iredell<br>(18CVD3017) | Affirmed |
| MESSICK v. WALMART STORES, INC.<br>No. 22-1069 | N.C. Industrial Commission<br>(X45404)<br>(X82412) | Affirmed |
| ODINDO v. KANYI<br>No. 23-437 | Wake<br>(22CVD1497) | Dismissed |
| SLOAN v. TOWN OF MOCKSVILLE<br>No. 23-121 | Davie<br>(21CVS381) | Affirmed |
| STATE v. BEST<br>No. 22-1050 | Pitt<br>(20CRS50522)<br>(20CRS85) | No Error |

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| STATE v. BLACK<br>No. 23-102 | Haywood<br>(21CRS488) | Dismissed |
| STATE v. COX<br>No. 23-31 | Forsyth<br>(17CRS190)<br>(18CRS111) | No Error |
| STATE v. COX<br>No. 23-405 | Cleveland<br>(19CRS55692-93)<br>(20CRS53868) | Affirmed |
| STATE v. DALEY<br>No. 23-7 | New Hanover<br>(19CRS2698)<br>(19CRS51951-54) | No Error |
| STATE v. FENNER<br>No. 23-6 | Wake<br>(21CRS200683-86) | No Error |
| STATE v. FORE<br>No. 23-231 | Henderson<br>(20CRS53541-45)<br>(20CRS53549)<br>(21CRS247-48) | Dismissed |
| STATE v. GIBBS<br>No. 20-591-2 | New Hanover<br>(18CRS56870) | No Error |
| STATE v. HOPKINS<br>No. 22-1010 | Transylvania<br>(19CRS214)<br>(19CRS216)<br>(19CRS217)<br>(19CRS51397) | No Error |
| STATE v. IVEY<br>No. 22-1033 | Iredell<br>(19CRS51309-15) | No Error. |
| STATE v. JOHNSON<br>No. 22-1051 | Guilford<br>(20CRS66568)<br>(20CRS78879)<br>(21CRS79567-68) | Dismissed |
| STATE v. LINK<br>No. 23-468 | Randolph<br>(17CRS51759) | No Error |
| STATE v. McSPADDEN<br>No. 23-247 | Forsyth<br>(21CRS53428) | Vacated |
| STATE v. MOORE<br>No. 23-259 | Craven<br>(19CRS53491-493)<br>(20CRS794-797)<br>(21CRS519) | No Error |

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| STATE v. O'HANLAN<br>No. 23-279 | Swain<br>(00CRS194-97)<br>(99CRS2025-28) | Affirmed. |
| STATE v. PITTS<br>No. 23-70 | New Hanover<br>(17CRS50730) | Dismissed |
| STATE v. REGISTER<br>No. 22-437 | Duplin<br>(20CRS50271-72)<br>(20CRS50908-09) | No Error |
| STATE v. STEPHENS<br>No. 23-280 | Wake<br>(18CRS218993-94) | No Error |
| STATE v. STREATER<br>No. 23-302 | Davidson<br>(20CRS51464)<br>(20CRS51466)<br>(20CRS948) | No Error |
| STATE v. THOMAS<br>No. 23-158 | Wayne<br>(18CRS1396)<br>(18CRS52883-84) | No Error |
| VENABLE v. GREP SE. LLC<br>No. 23-218 | Mecklenburg<br>(21CVS9629) | Affirmed |

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