290 N.C. App.—No. 6 Pages 555-680

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 3, 2024

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OF

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COURT OF APPEALS

CASES REPORTED

FILED 3 OCTOBER 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Mootness—child custody appeal—issue already resolved—public interest exception—capable of repetition yet evading review exception—In a matter involving numerous juvenile delinquency petitions, the county department of social services' (DSS) appeal of the trial court's disposition order—as to the portion of the order placing the juvenile in the temporary custody of DSS—was rendered moot by a later permanency planning order—made during the pendency of the appeal of the disposition order—which removed DSS as custodian for the juvenile and placed her in her grandmother's custody. Because the appealed issue was resolved by the permanency planning order, the appellate court dismissed the appeal as moot. The public interest exception to the general rule of dismissal for moot appeals did not apply because the interests in the case were confined to the parties and the legal standards concerning dispositional orders did not need clarification. Furthermore, the exception for cases capable of repetition yet evading review did not apply because the challenged conduct was not too fleeting to be litigated before the conduct ended, as juvenile custody cases allow ample time for litigation. **In re J.M., 565.**

ASSAULT

With a deadly weapon inflicting serious injury—jury instructions—castle doctrine—prohibition of excessive force improper—Defendant was entitled to a new trial on a charge of assault with a deadly weapon inflicting serious injury—arising from defendant having shot the victim after the victim entered defendant's front porch—where the trial court erroneously included over defendant's objection the statement that "[a] defendant does not have the right to use excessive force" in the court's jury instruction on self-defense within a home. Pursuant to the castle

doctrine defense, excessive force is presumed necessary unless the State rebuts the presumption; here, the trial court's statement was prejudicial because it was erroneous, confusing, and possibly resulted in a different verdict than if it had not been included. **State v. Phillips, 660.**

CHILD CUSTODY AND SUPPORT

Child support—gross income—work-related childcare costs—school tuition— In a divorce-related matter, the trial court did not abuse its discretion in the child support provisions of its order, to which the husband made numerous challenges on appeal. As for the calculation of the wife's gross income, the trial court's findings were supported by competent evidence of the wife's current income (additionally, the court was not required to make findings on the wife's reasonable expenses arising from her self-employment), and the court was not required to treat the wife's non-recurring, one-time early withdrawal from a retirement account as income. As for the allocation of summer camp expenses as work-related childcare costs, the trial court's finding that the wife had $386.56 in monthly work-related childcare costs was supported by competent evidence in the form of the wife's financial affidavit and her testimony. Finally, as for the child's school tuition expenses, which the trial court ordered the husband to pay, the trial court properly utilized the Child Support Guideline Worksheet and allocated all of the expenses based on the parties' respective percentage responsibility for the total support obligation (in other words, contrary to the husband's argument, he was not "solely responsible" for the tuition costs). **Klein v. Klein, 570.**

CITIES AND TOWNS

Road closure—challenged by residents—standing—"persons aggrieved"—factual basis—In an action brought against a village (defendant) by a group of residents (plaintiffs) challenging the village council's decision to close a road, the trial court properly granted defendant's Rule 12(b)(6) motion to dismiss where plaintiffs failed to provide a factual basis demonstrating that they had standing to sue under N.C.G.S. § 160A-299(b) as "persons aggrieved" by the road closure. Firstly, plaintiffs could not establish standing by relying on facts from their individual affidavits (which the trial court declined to consider after denying plaintiffs' oral motion to amend their initial petition) where they abandoned any argument in their appellate brief addressing why the affidavits should be considered for the first time on appeal. Secondly, plaintiffs did not meet the statutory definition of "persons aggrieved" where they alleged that they were "nearby property owners" concerned with how the road closure would affect "clear public interests" rather than "adjacent property owners" who suffered some unique personal injury "distinct from the rest of the community" as a result of the closure. Finally, because plaintiffs were not "persons aggrieved," they could not assert standing as "any person" under section 160A-299(a) to challenge defendant's allegedly deficient notice of the public hearing on the road closure. **Thomas v. Vill. of Bald Head Island, 670.**

CONSTITUTIONAL LAW

Effective assistance of counsel—murder trial—statements during closing argument—no concession of guilt—contradiction of defendant's testimony— In a prosecution for first-degree murder, defendant did not receive ineffective assistance of counsel where his trial counsel never conceded defendant's guilt to the charged crime, and therefore the issue of whether counsel committed a *Harbison*

error (by failing to obtain defendant's consent to concede guilt) was rendered moot. Instead, counsel's statements during his closing argument—including a statement that if the jury found defendant had used excessive force against the victim, defendant would be guilty of voluntary manslaughter—signaled an attempt to convince the jury that defendant lacked the requisite intent to be found guilty of first-degree murder, and that the most defendant could be convicted of was the lesser offense of voluntary manslaughter. Although counsel did contradict defendant's testimony regarding how defendant arrived at the scene of the crime, none of counsel's statements to that effect were so serious as to deprive defendant of a fair trial. **State v. Parker, 650.**

Right to counsel—criminal trial—waiver—forfeiture—Defendant's constitutional right to counsel was not violated in his trial for first-degree murder where defendant executed a written waiver of counsel after the trial court conducted a colloquy in accordance with N.C.G.S. § 15A-1242 informing defendant of his rights. Although the written waiver was not included in the record on appeal, its absence did not invalidate defendant's waiver. Further, presuming without deciding that defendant did not give a knowing and voluntary waiver, he engaged in misconduct sufficiently serious to forfeit the right to counsel, including having seven different attorneys during various stages of hearings and the trial (one of whom was his sister, whose *pro hac vice* admission was revoked on the trial court's own motion), warning his attorney during trial that she should withdraw for her own safety, and showing purported State Bar complaints about that same attorney to her and to the prosecutors during trial. The trial court's findings and conclusion that defendant's conduct was an attempt to delay or obstruct the proceedings and constituted egregious conduct were supported by competent evidence. **State v. Moore, 610.**

CRIMINAL LAW

Motion for continuance—time to seek other counsel—during first-degree murder trial—The trial court did not err by denying defendant's motion to continue his first-degree murder trial, which defendant made during the State's case-in-chief in order to seek other counsel, where defendant had already waived and forfeited his right to counsel three days earlier after the court allowed defendant's trial counsel to withdraw at defendant's request. **State v. Moore, 610.**

Prosecutor's closing argument—murder trial—statements regarding severity of sentences—not grossly improper—The trial court was not required to intervene ex mero motu during the prosecutor's closing argument in a first-degree murder trial, where the prosecutor made certain statements implying that defendant's minimum sentence would not be severe enough if the jury convicted him of voluntary manslaughter instead of murder. Although these statements might not have been good trial practice, they were neither "grossly improper" nor against the law, since trial attorneys have the right to inform the jury of the punishments prescribed in a case, and here, counsel for both defendant and the State commented on what defendant's minimum and maximum sentences could be. **State v. Parker, 650**.

DIVORCE

Alimony—sufficiency of findings—standard of living, reasonable needs, capacity to earn future income—marital misconduct—In a divorce-related matter, the trial court's award of alimony was proper where the court made sufficient findings regarding the parties' accustomed standard of living, the wife's reasonable needs, and

the wife's capacity to earn future income. The trial court also made sufficient findings regarding the husband's marital misconduct—illicit sexual behavior and indignities—where the wife presented circumstantial evidence showing that the husband had the opportunity and inclination to commit marital misconduct. Specifically, the husband spent nearly $100,000 on: hotel stays that corresponded with dates of large cash withdrawals, lingerie and sex store purchases for individuals other than the wife, pornography, a payment to at least one woman for sex, spyware on the wife's phone, a secret email account, numerous background checks for potential sexual partners, and online services intended for customers to contact women for the purpose of arranging sexual encounters. In addition, the trial court found that the husband lacked credibility. The alimony order was affirmed on appeal. **Klein v. Klein, 570.**

Appeals—order final as to some claims—trial court's jurisdiction over unresolved claims—Where the trial court's first order in a divorce-related matter fully resolved claims related to child custody, child support, and alimony but did not fully resolve claims related to equitable distribution, N.C.G.S. § 50-19.1 allowed immediate appeal of the order as to those fully resolved claims. However, because the order was not final as to the equitable distribution claims, the husband's first notice of appeal (timely filed within thirty days of entry of the first order) did not deprive the trial court of jurisdiction to enter additional orders distributing two of the husband's retirement accounts. Furthermore, the husband waived his alternative arguments regarding the retirement account orders because he failed to provide any support for his conclusory statements. **Klein v. Klein, 570.**

Equitable distribution—classification and distribution of property—numerous arguments—support of competent evidence—In an equitable distribution, alimony, and child custody and support matter, where the husband lodged numerous challenges on appeal, the Court of Appeals affirmed the trial court's first order regarding equitable distribution. The trial court did not err in its classification and distribution of the parties' property as to: a familial loan (the classification as a marital debt was supported by the findings and competent evidence; the husband ultimately admitted it was a loan to purchase the marital home; there did not have to be a written agreement memorializing the debt), loans to the husband's colleague (the characterization of the payments to the husband's colleague as loans was supported by competent evidence; there did not have to be a written agreement memorializing the debt), one of the wife's retirement accounts (the finding that the account had marital and separate components was supported by competent evidence), the proceeds of a lawsuit (the classification of the proceeds as marital instead of separate was supported by competent evidence regarding the purpose of the lawsuit—to protect the husband's income-earning ability during the marriage), and payments toward a marital debt (the husband made a payment on the parties' joint tax liability using marital funds, not his separate funds). **Klein v. Klein, 570.**

ESTATES

Claim for monies owed—out-of-state separation agreement—foreign law applied—payment obligation ended at death—Plaintiff's claim against her ex-husband's estate for monies owed under a Colorado separation agreement—pursuant to which plaintiff was entitled to receive eighty-four monthly alimony payments, only thirty-two of which she had received at the time of her ex-husband's passing—was properly dismissed for failure to state a claim for relief. Based on a plain reading of the agreement in its entirety, the parties intended for the payments to constitute future maintenance and not property division, and there was no provision in the

agreement that the payments would continue posthumously. Based on Colorado law, which governed the validity of the agreement, obligations to pay future maintenance are presumed to cease at the death of either party unless expressly contracted for and, therefore, plaintiff was not entitled to recover the remaining balance from her ex-husband's estate. **Cusick v. Est. of Longin, 555.**

EVIDENCE

Testimony of witness—first-degree murder trial—other crimes, wrongs, or acts—plain error review—The trial court did not commit plain error in defendant's trial for first-degree murder of a prostitute by admitting the testimony of a second prostitute regarding her interactions with defendant—including an allegation that defendant raped and robbed her—during an encounter that took place a day after defendant interacted with the victim and after the victim's last known contact with her family. The testimony was admissible as relevant and probative of defendant's identity as the perpetrator of the murder. Further, the acts related by the witness were close enough in proximity and place to those involving the victim to be properly included under Evidence Rule 404(b), and their probative value was not outweighed by the danger of unfair prejudice, where defendant used the same phone number to locate, message, and solicit both prostitutes; the location the witness identified as the site of her encounter with defendant was the same location where the victim's body was later discovered; and the victim's text messages also alleged she had been raped. **State v. Moore, 610.**

HOMICIDE

First-degree murder—jury instructions—aggressor doctrine—"stand your ground" laws—sufficiency of record—After defendant went to the driveway of another man's home, got into a fight with the man, and then fatally shot him, there was no plain error in defendant's prosecution for first-degree murder where the trial court instructed the jury on the aggressor doctrine but not on "stand your ground" laws. The record contained enough evidence warranting an instruction on the aggressor doctrine, including testimony indicating that defendant may have initiated the fight during a phone call with the victim just before arriving at the victim's home. On the other hand, "stand your ground" laws apply only to spaces where a person has a lawful right to be, and there was insufficient evidence supporting defendant's argument that he had a lawful right to be at the victim's residence during the fight. **State v. Parker, 650.**

JURISDICTION

Estate claim—monies owed under separation agreement—registration of foreign support order—The trial court had subject matter jurisdiction over plaintiff's claim against her ex-husband's estate for monies owed under a Colorado separation agreement, which provided that plaintiff was to receive eighty-four monthly alimony payments, only thirty-two of which plaintiff had received as of her ex-husband's passing. Plaintiff was not required to register the foreign support order in North Carolina as a prerequisite to invoking the trial court's jurisdiction, and her claim—alleging breach of contract for which she sought a sum certain as a remedy—constituted a justiciable civil matter involving an amount of money statutorily decreed to be appropriate for resolution in the superior court division. **Cusick v. Est. of Longin, 555.**

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.

CUSICK v. EST. OF LONGIN

[290 N.C. App. 555 (2023)]

KATHLEEN M. CUSICK, PLAINTIFF
v.
THE ESTATE OF KEVIN C. LONGIN, BY AND THROUGH ITS ADMINISTRATRIX, ANNE MARIE LONGIN, DEFENDANT

No. COA22-879

Filed 3 October 2023

1. Jurisdiction—estate claim—monies owed under separation agreement—registration of foreign support order

The trial court had subject matter jurisdiction over plaintiff's claim against her ex-husband's estate for monies owed under a Colorado separation agreement, which provided that plaintiff was to receive eighty-four monthly alimony payments, only thirty-two of which plaintiff had received as of her ex-husband's passing. Plaintiff was not required to register the foreign support order in North Carolina as a prerequisite to invoking the trial court's jurisdiction, and her claim—alleging breach of contract for which she sought a sum certain as a remedy—constituted a justiciable civil matter involving an amount of money statutorily decreed to be appropriate for resolution in the superior court division.

2. Estates—claim for monies owed—out-of-state separation agreement—foreign law applied—payment obligation ended at death

Plaintiff's claim against her ex-husband's estate for monies owed under a Colorado separation agreement—pursuant to which plaintiff was entitled to receive eighty-four monthly alimony payments, only thirty-two of which she had received at the time of her ex-husband's passing—was properly dismissed for failure to state a claim for relief. Based on a plain reading of the agreement in its entirety, the parties intended for the payments to constitute future maintenance and not property division, and there was no provision in the agreement that the payments would continue posthumously. Based on Colorado law, which governed the validity of the agreement, obligations to pay future maintenance are presumed to cease at the death of either party unless expressly contracted for and, therefore, plaintiff was not entitled to recover the remaining balance from her ex-husband's estate.

Appeal by plaintiff from order entered 21 July 2022 by Judge Reggie McKnight in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 February 2023.

Donna P. Savage and Matthew A. Freeze for the plaintiff-appellant.

Alexander W. Warner for the defendant-appellee.

STADING, Judge.

Plaintiff Kathleen Cusick ("plaintiff") appeals from the trial court's order granting defendant-estate's motion to dismiss. For the reasons below, we affirm.

I. Background

In 1991, plaintiff and decedent Kevin Longin ("decedent") married in the state of Washington. In 2018, they divorced in the state of Colorado. As part of their divorce, the District Court of Chafee County, Colorado, entered a Decree of Dissolution of Marriage on 7 September 2018. The decree incorporated two Memorandums of Understanding ("MOU"), documenting the terms of the Separation Agreement reached by the parties through mediation. The first MOU, signed by the parties on 5 July 2018, included a specific list of marital assets and did not refer to the income of either spouse. Under that MOU, decedent assumed an obligation to make monthly payments of $2,000 to plaintiff over a period of sixty months.

On 31 August 2018, the parties amended the MOU and the Separation Agreement. The parties noted that "[s]ubsequent to the Separation Agreement being filed, along with other necessary documents, [plaintiff] reported to the court that her attorney had not reviewed any of [decedent's] disclosure of assets or financial documents prior to mediation[.]" Plaintiff's review of decedent's disclosure of assets and financial documents led to "further negotiations" that prompted a change in paragraph 13 of the MOU and an extension of the payment obligation by twenty-four months, for a total of eighty-four months. The Separation Agreement specifically stated: "The payment of maintenance shall be deemed to be contractual in nature and shall not be modified for any reason. The Court shall be divested of all jurisdiction to modify maintenance after the entry of the permanent orders."

On 9 March 2021, decedent died intestate in Mecklenburg County, North Carolina. Decedent's sister, Anne Marie Longin, qualified as administratrix of his estate ("defendant-estate") on 9 June 2021. Before his passing, decedent made thirty-two monthly payments to plaintiff, totaling $64,000, in compliance with the Separation Agreement. At the time of decedent's passing, fifty-two monthly payments remained, with a balance of $104,000.

On 16 September 2021, plaintiff made a claim in the amount of $104,000 against decedent's estate by hand-delivering the Written Statement of Claim to defendant-estate's attorney. In response, defendant-estate rejected plaintiff's claim. Also, plaintiff filed the Written Statement of Claim with the Mecklenburg County Clerk of Superior Court. Since the claim was rejected, plaintiff timely sued in Mecklenburg County Superior Court for $104,000 on 16 March 2022, within three months as required by N.C. Gen. Stat. § 28A-19-16.

Thereafter, defendant-estate moved for a dismissal of plaintiff's suit for several reasons under North Carolina's Rules of Civil Procedure —including the two arguments preserved for consideration on appeal— lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a claim upon which relief can be granted under Rule 12(b)(6). Defendant-estate maintained that plaintiff's failure to register the Colorado support order under N.C. Gen. Stat. § 52C-6-602, resulted in the trial court lacking subject matter jurisdiction. Additionally, defendant-estate contended that, under Colorado law, the estate no longer had an obligation to pay plaintiff's claim for $104,000 after decedent's death. Plaintiff countered that defendant-estate was not entitled to judgment as a matter of law because plaintiff stated a breach-of-contract claim under Colorado law. The trial court agreed with defendant-estate and granted its 12(b)(6) motion, dismissing plaintiff's complaint without prejudice. Plaintiff filed her notice of appeal with this Court on 19 August 2022.

On appeal, plaintiff contends that since the Separation Agreement contains a non-modification clause, she is still entitled to $104,000 in maintenance payments, even after the decedent's death. Defendant-estate disagreed, asserting that, under Colorado law, plaintiff is not entitled to posthumous maintenance. Moreover, defendant-estate argues that plaintiff's claim should be dismissed for lack of subject matter jurisdiction.

II. Jurisdiction

The trial court's grant of defendant-estate's 12(b)(6) motion to dismiss is a final order, and no other claims remain pending. Therefore, this Court has jurisdiction to hear plaintiff's appeal under N.C. Gen. Stat. § 7A-27(b) (2021).

III. Analysis

A. Subject Matter Jurisdiction

[1] As a preliminary consideration, we address defendant-estate's contention that the trial court did not have subject matter jurisdiction

and this claim should be dismissed pursuant to N.C. Gen. Stat. § 1A-1, R. 12(b)(1) (2021). "Our review of a trial court's decision denying or allowing a Rule 12(b)(1) motion is *de novo* except to the extent that the trial court resolves issues of fact and those findings are binding on the appellate court if supported by competent evidence in the record." *Harper v. City of Asheville*, 160 N.C. App. 209, 215, 585 S.E.2d 240, 244 (2003) (internal quotation marks and citation omitted). However, "when considering a Rule 12(b)(1) motion—in contrast to a motion under Rule 12(b)(6)—a trial court is not confined to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Id.* (internal quotation marks and citation omitted). In this case, the trial court's order does not address defendant-estate's challenge to subject matter jurisdiction.

Defendant-estate published a notice to creditors under N.C. Gen. Stat. § 28A-14-1 (2021) on 22 June 2021, noting that "all persons . . . having claims against [the] estate to present them . . . on or before the 30th day of September, 2021, or this notice will be pleaded in bar of their recovery." On 29 September 2021, plaintiff filed the Written Statement of Claim based on the remaining alimony payments. In reply, on 23 December 2021, defendant-estate sent a denial of the claim to plaintiff. On 16 March 2022, plaintiff filed a complaint for monies owed in Mecklenburg County Superior Court, claiming that jurisdiction was proper under N.C. Gen. Stat. §§ 1-75.4, 7A-240, and 28A-19-16 (2021). Defendant-estate countered, arguing that plaintiff's failure to register the foreign support order, as permitted by N.C. Gen. Stat. § 52C-6-602(a) (2021), deprived the trial court of subject matter jurisdiction.

Defendant-estate maintains that our decision in *Halterman v. Halterman* stands for the proposition that registration of the Colorado order is a prerequisite for the trial court to have subject matter jurisdiction. 276 N.C. App. 66, 855 S.E.2d 812 (2021). In *Halterman*, the order was issued in Florida, the defendant-appellee was a resident of Virginia, and the plaintiff-appellant and children were residents of North Carolina. *Id.* at 68, 855 S.E.2d at 813. Upon consideration of the defendant-appellee motion to dismiss the plaintiff-appellant's petition to register a child support order for lack of subject matter jurisdiction, the trial court granted the defendant-appellee's motion to dismiss. *Id.* at 69, 855 S.E.2d at 814. On appeal, our Court noted the concerns implicated by registration under Chapter 52 of the North Carolina General Statutes, referred to as the Uniform Interstate Family Support Act ("UIFSA"), and the "essential differences in registration of foreign orders under" Chapter 50A of the North Carolina General Statutes, referred to as the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").

Id. at 76–77, 855 S.E.2d at 818–19. Ultimately, our Court affirmed the absence of subject matter jurisdiction "for purposes of child support modification or enforcement." *Id.* at 77, 855 S.E.2d at 819.

While *Halterman* is not squarely on point in addressing the present concern, our Court's opinion provides a level of guidance in attending to the significance of registering a foreign order that is subject to modification, which would also permit enforcement by the mechanism of contempt. *Id.* Furthermore, the considerations underlying the purpose of UIFSA are relevant to our determination:

> UIFSA introduced for the first time the principle of continuing, exclusive jurisdiction and the one-order system. The goal of this provision, like its corollary under the UCCJEA, makes only one support order effective at any one time. UIFSA also provides direct enforcement procedures that do not require assistance from a tribunal and limits modification more than it was under URESA.

3 Reynolds on North Carolina Family Law § 10.24 (2022) (internal quotation marks and citation omitted). The circumstances here provide that plaintiff is suing defendant-estate for a breach of contract, seeking a remedy of a sum certain in response to the denial of a claim as anticipated under N.C. Gen. Stat. § 28A-19-16. Thus, the complaint alleges claims for "justiciable matters of a civil nature" and original general jurisdiction is vested in the trial division. N.C. Gen. Stat. § 7A-240. Moreover, given the amount in controversy, the superior court is the proper division within the trial division to adjudicate these claims. N.C. Gen. Stat. § 7A-243 (2021). Additionally, the concerns of multiple orders, confusion regarding modification, and necessity of enforcement by contempt anticipated by UIFSA are not present. Considering the foregoing, the trial court did not want of subject matter jurisdiction.

B. Failure to State a Claim

[2] Plaintiff argues that the trial court erred in granting defendant-estate's motion to dismiss under N.C. Gen. Stat. § 1A-1, R. 12(b)(6) (2021).

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion, the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Kohn v. Firsthealth of the Carolinas, Inc., 229 N.C. App. 19, 21, 747 S.E.2d 395, 397 (2013) (citation omitted).

It is well-settled that a claim may be dismissed under Rule 12(b)(6) when one of the following is satisfied: (1) the complaint, on its face, reveals that no law supports the claim; (2) the complaint, on its face, reveals a lack of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim. *Grich v. Mantelco, LLC*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013) (citation omitted). Like the standard applied to our analysis pursuant to Rule 12(b)(1), we review a trial court's Rule 12(b)(6) order of dismissal *de novo*. *Id.*

Beginning with our *de novo* determination, "[t]he general rule is that things done in one sovereignty in pursuance of the laws of that sovereignty are regarded as valid and binding everywhere[.]" *Muchmore v. Trask*, 192 N.C. App. 635, 639, 666 S.E.2d 667, 670–71 (2008), *review allowed, writ allowed*, 363 N.C. 374, 678 S.E.2d 666 (2009) (internal quotation marks and citation omitted). "North Carolina has long adhered to the general rule that . . . the law of the place where the contract is executed governs the validity of the contract." *Id.* at 639, 666 S.E.2d at 670 (citation omitted); *see also Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980) ("[T]he interpretation of a contract is governed by the law of the place where the contract was made." (citation omitted)). Accordingly, we will apply relevant governing Colorado law. *See Muchmore*, 192 N.C. App. at 639–40, 666 S.E.2d at 670.

Plaintiff urges us to accept the position that paragraph 13 of the MOU, entitled "Agreements Regarding Maintenance," genuinely addresses "property division." In making this argument, plaintiff asserts that a reading of the entire Separation Agreement leads to such a conclusion. However, viewing the agreement in its entirely shows that the parties intended for numerous other provisions to address property apportionment, and for paragraph 13 to directly concern future maintenance. Additionally, plaintiff posits that Colorado law supports this position in requiring that a *court* "shall award maintenance only if it finds that the spouse seeking maintenance lacks sufficient property, including marital property apportioned to him or her, to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment. . . ." Colo. Rev. Stat. § 14-10-114(3)(d) (2023). To the contrary, here, the parties were free to set terms as they pleased.

Thus, it is appropriate to apply the more relevant authority—Colorado's statute for modification and termination of maintenance, support, and property disposition. Colo. Rev. Stat. § 14-10-122(2)(a)) provides:

> Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the earlier of:

I. The death of either party;

II. The end of the maintenance term, unless a motion for modification is filed prior to the expiration of the term;

III. The remarriage of or the establishment of a civil union by the party receiving maintenance; or

IV. A court order terminating maintenance.

Colo. Rev. Stat. § 14-10-122(2)(a) (2023). Here, plaintiff contends that she and decedent agreed to extend the payments posthumously. Analogous to a federal circuit court sitting in diversity, "we are obliged to interpret and apply the substantive law of [the] state." *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 512 (4th Cir. 1999). In conducting our *de novo* analysis, "we may of course consider all of the authority that the state high court[ ] would, and we should give appropriate weight to the opinions of [its] intermediate appellate courts." *Id.* (citing *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S. Ct. 1776, 1782 (1967)). We next look to available precedent in the appellate courts of Colorado.

In 2017, a division of the Colorado Court of Appeals considered facts similar to the present matter when deciding *In re Marriage of Williams*, in which a husband and wife divorced in Colorado, with the husband making "monthly [post-divorce] payments to [the] wife under the [separation] agreement until his death. . . ." 2017 COA 120M, ¶ 5, 410 P.3d 1271, 1273. After her former husband died, the wife petitioned his estate to continue the payments posthumously. *Id.* Upon declining to continue payments, the wife sued her former husband's estate. *Id.* at ¶¶ 5–6. The trial court "ruled that the premarital and separation agreements obligated the estate to continue making the monthly payments to the wife until her death or remarriage." *Id.* at ¶ 7, 410 P.3d at 1273. The estate then appealed, asserting that the trial court "erred in determining that husband's payment obligations continue after his death, as an obligation of his estate." *Id.* at ¶¶ 7–8, 410 P.3d at 1273. The appellate court sided with the estate and found that there was no longer an obligation to continue the monthly payments posthumously. *Id.* at ¶ 8, 410 P.3d at 1273. Specifically, the appellate court found that the trial court erred because

> [The] premarital agreement entitled [the] wife to receive the monthly payments specifically "from [the husband]," not also from his estate after he had died. Likewise, the separation agreement expressly provide[d] that "Husband shall pay to the Wife" the monthly payments. Neither

> agreement said anything about the estate making the payments after [the] husband's death.

Id. at ¶ 18, 410 P.3d at 1275–76 (citation omitted). Hence, the "husband's personal obligation to pay ended when he died, absent a clear indication to the contrary, which . . . neither the premarital nor separation agreement provided." *Id.* at ¶ 21, 410 P.3d at 1276 (citations omitted).

Plaintiff maintains that we should disregard the ruling in *Williams*, in favor of the reasoning employed in *In re Marriage of Parsons*, an earlier opinion from a division of the Colorado Court of Appeals. 2001 COA 116, ¶ 1, 30 P.3d 868. In that case, the separation agreement provided that the husband was to pay monthly maintenance to the wife for ninety-six months. *Id.* at ¶¶ 1–2, 30 P.3d at 868. The wife remarried in the interim and the "husband filed a motion to terminate maintenance, alleging that termination was required . . . because the separate agreement did not specifically provide that maintenance would continue if wife remarried." *Id.* at ¶ 2, 30 P.3d at 868–69. The court disagreed with the former husband, finding that "the presence of a nonmodification clause is sufficient to overcome the statutory presumption that maintenance terminates upon the recipient's remarriage." *Id.* at ¶ 4, 30 P.3d at 869.

More recently, in 2021, when deciding *In re Marriage of Cerrone*, the Colorado Court of Appeals wrestled with a similar issue of whether a maintenance obligation "ended automatically on [one party's] remarriage." 2021 COA 116, ¶ 1, 499 P.3d 1064. In that opinion, a division of the appellate court held that "the *Parsons* division diverged from the plain language of section 14-10-122(2)(a)(III) when it concluded that 'the presence of a non-modification clause'—standing alone—is sufficient to overcome the statutory presumption that the obligation to pay maintenance ends on the recipient spouse's remarriage." *Id.* at ¶ 18, 499 P.3d at 1067 (quoting *Parsons*, 2001 COA 116 at ¶ 4, 30 P.3d at 869). Further, the opinion offered that "we do not view as talismanic the terms 'contractual' and 'nonmodifiable.' " *Id.* at ¶ 19, 499 P.3d at 1067. Therefore, the court held "to avoid termination of maintenance by operation of law under section 14-10-122(2)(a)(III), a separation agreement or decree must include an 'express provision' that maintenance will continue even if the recipient spouse remarries." *Id.* at ¶ 20, 499 P.3d at 1067.

In view of the foregoing, under Colorado precedent, a split of authority exists. While panels of the North Carolina Court of Appeals are bound by decisions of predecessor panels, Colorado's Court of Appeals does not adhere to the same paradigm. *Compare In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different

case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."); *with* Colo. R. App. P. 49 ("Review in the supreme court . . . will be granted only when there are special and important reasons . . . [such as] a division of the court of appeals has rendered a decision in conflict with the decision of another division of said court. . . ."). Although rarely encountered in our setting, this quandary is hardly novel in the context of federal court. *See, e.g.*, *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938); *Food Lion*, 194 F.3d at 512; *Hatfield v. Palles*, 537 F.2d 1245 (4th Cir. 1976).

Akin to the matters addressed by the United States Court of Appeals for the Fourth Circuit in both *Food Lion* and *Hatfield*, the "process is more complicated here because [the] state's highest court has [not] applied its law to circumstances exactly like those presented in this case." *Food Lion*, 194 F.3d at 512. "Thus, we must offer our best judgment about what we believe those courts would do if faced with [plaintiff's] claim[ ] today." *Id.* (citation omitted). The Supreme Court of Colorado has held, "[w]hen construing a statute, courts must ascertain and give effect to the intent of the General Assembly . . . and must refrain from rendering judgments that are inconsistent with that intent. To determine legislative intent, we therefore look first to the plain language of the statute." *State v. Nieto*, 2000 CO 689, ¶ 17, 993 P.2d 493, 500. Therefore, we find it prudential to employ "the most fundamental semantic rule of interpretation"—the ordinary-meaning rule that "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69 (2012). In the case *sub judice*, the plain language of Colorado's statute prescribes the general rule that the death of a party terminates an obligation to pay future maintenance unless "otherwise agreed in writing or expressly provided in the decree. . . ." Colo. Rev. Stat. § 14-10-122(2)(a).

Applying the plain-meaning rule of statutory construction, we find sounder logic underlies the more temporally proximal cases of *Williams* and *Cerrone*. Therefore, we are compelled to the same result: defendant-estate no longer had an obligation to continue the monthly payments to plaintiff in light of the decedent's passing. Here, the Separation Agreement stated that decedent "shall pay 60[, later amended to 84,] consecutive monthly payments of $2,000 (two thousand dollars) to [plaintiff] as and for maintenance." Like the agreement in *Williams*, the provision only stated that decedent "shall pay," and did not provide that payments would continue posthumously. *See Williams* at ¶ 18, 410 P.3d at 1275–76. Also, by analogy, the agreement at issue here fails for reasons comparable to the one in *Cerrone*—the parties did not include

an "express provision" that maintenance would continue upon the occurrence of an event listed in Colo. Rev. Stat. § 14-10-122(2)(a). *See Cerrone* at ¶ 20, 499 P.3d at 1067. Simply put, in absence of an express provision to the contrary, the Colorado Dissolution of Marriage Decree cannot be interpreted to conclude that maintenance obligations continue after death. Since plaintiff and decedent did not agree in writing to posthumous payments, that obligation terminated upon decedent's death under Colo. Rev. Stat. § 14-10-122(2)(a). Consequently, plaintiff's claim fails as matter of law under Rule 12(b)(6). *See Grich*, 228 N.C. App. at 589, 746 S.E.2d at 318 (noting that a complaint may be dismissed per Rule 12(b)(6) when the complaint, on its face, reveals that no law supports the claim).

Plaintiff's attempt to distinguish *Williams* and *Cerrone* is unavailing. Plaintiff argues that the facts in the present case are distinguishable from *Williams* "[b]ecause those contracts included different terms and clauses than does the Separation Agreement and the Amendment here[.]" While that may be so, plaintiff misconstrues the crux of the *Williams* holding—if the parties want posthumous maintenance payments, then they must contract for them. *Williams*, at ¶ 23, 410 P.3d at 1276 ("Accordingly, without a clear expression of intent to continue the payment obligation beyond husband's lifetime, the period that husband was obligated to pay, during which the amount of the payments was nonmodifiable, ended with his death."). Plaintiff's effort to discredit *Cerrone* also falls short. As discussed above, the text of Colo. Rev. Stat. § 14-10-122(2)(a) anticipates that "the death of either party" will terminate the obligation to pay future maintenance unless "agreed in writing or expressly provided in the decree." Colo. Rev. Stat. § 14-10-122(2)(a) (emphasis added); *see* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 116 (2012) ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives."). The instrument at issue is a decree and there is no express provision to negate the statutorily presumed termination event. On account of Colo. Rev. Stat. § 14-10-122(2)(a)'s mandate and an application of the *Williams* and *Cerrone* decisions, plaintiff cannot interpret in North Carolina what she could have bargained for in Colorado years ago. Here, defendant-estate's duty to pay ended when the decedent passed away. *See* Colo. Rev. Stat. § 14-10-122(2)(a).

Since we affirm the trial court's order on the ground discussed *supra*, we are not compelled to consider additional alternative grounds for dismissal. *See, e.g.*, *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 357, 323 S.E.2d 294, 314 (1984) ("In view of our conclusion that the trial court correctly dismissed the complaint on [one ground] . . . as to all

defendants, we need not address the trial court's alternative ground for dismissal of the complaint[.]"); *Bulloch v. N.C. Dep't of Crime Control & Pub. Safety*, 223 N.C. App. 1, 10, 732 S.E.2d 373, 380–81 (2012) ("[W]here a lower court's ruling is based on alternative grounds, a court on appeal need not address the second alternative ground where the appellate court determines the first alternative ground was correct[.]").

IV. Conclusion

Our *de novo* determination of the trial court's dismissal begins and ends with Colorado precedent. Defendant-estate's obligation to pay plaintiff the outstanding $104,000 balance ended when decedent passed away. The trial court's dismissal of plaintiff's complaint for failure to state a claim under Rule 12(b)(6) stands.

AFFIRMED.

Judges DILLON and CARPENTER concur.

IN THE MATTER OF J.M.

No. COA23-215

Filed 3 October 2023

Appeal and Error—mootness—child custody appeal—issue already resolved—public interest exception—capable of repetition yet evading review exception

In a matter involving numerous juvenile delinquency petitions, the county department of social services' (DSS) appeal of the trial court's disposition order—as to the portion of the order placing the juvenile in the temporary custody of DSS—was rendered moot by a later permanency planning order—made during the pendency of the appeal of the disposition order—which removed DSS as custodian for the juvenile and placed her in her grandmother's custody. Because the appealed issue was resolved by the permanency planning order, the appellate court dismissed the appeal as moot. The public interest exception to the general rule of dismissal for moot appeals did not apply because the interests in the case were confined to the parties and the legal standards concerning dispositional orders did not need clarification. Furthermore, the exception for cases capable of repetition yet evading review did not apply

because the challenged conduct was not too fleeting to be litigated before the conduct ended, as juvenile custody cases allow ample time for litigation.

Appeal by Cumberland County Department of Social Services from order entered 9 August 2022 by Judge Cheri Siler-Mack in Cumberland County District Court. Heard in the Court of Appeals 22 August 2023.

Cumberland County Department of Social Services, by Mariamarta Tye Conrad & Patrick Andrew Kuchyt, for Appellant.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden W. Hayes, for the State-Appellee.

CARPENTER, Judge.

The Cumberland County Department of Social Services ("CCDSS") appeals from the trial court's order granting CCDSS custody of Janet,[1] the affected juvenile in this case. After careful review, we dismiss this case as moot.

I. Factual & Procedural Background

On 12 October 2021, Cumberland County filed twenty-one delinquency petitions[2] against Janet, who lived with her grandmother at the time. On 18 October 2021, Hoke County filed nineteen additional delinquency petitions against Janet. On 18 January 2022, Hoke County filed another delinquency petition against Janet. And on 16 June 2022, Cumberland County filed two more delinquency petitions against Janet. All of Janet's petitions involved theft allegations.

On 18 July 2022, Janet admitted to two of the petitions, and on 9 August 2022, she admitted to two other petitions. The State dismissed the remaining petitions. On 9 August 2022, the trial court found Janet delinquent and imposed a "Level 2" disposition. As part of its order (the "Disposition Order"), the trial court placed Janet in the temporary

1. We shall use this pseudonym to preserve the juvenile's confidentiality.

2. Delinquency petitions serve as charging documents for juveniles.

custody of CCDSS. CCDSS timely appealed the Disposition Order to this Court, but only concerning Janet's custody.

On 4 October 2022, the trial court entered a permanency-planning order (the "Planning Order"). In the Planning Order, the trial court ruled that "[CCDSS] is removed as custodian for the juvenile, and there should be no further involvement in these matters by [CCDSS]." The trial court then found "[i]t [wa]s in the best interest of the juvenile that legal and physical custody of the juvenile should be with [her grandmother]." The trial court noted the grandmother's custody "remain[ed] temporary until the disposition of the appeal pursuant to N.C. [Gen. Stat.] § 7B-2605." Thus, the grandmother's custody of Janet will become permanent after the disposition of this appeal. After entry of the Planning Order, CCDSS's appeal from the Disposition Order remained pending at this Court. On 22 May 2023, the State moved to dismiss this case.

II. Jurisdiction

We first address whether this Court has jurisdiction to hear this case. Specifically, we consider the State's motion to dismiss the appeal as moot. The State argues the appealed issue is resolved, and thus moot. And CCDSS argues the issue warrants review, despite its resolution. After careful review, we agree with the State.

A case is moot when the appealed controversy is resolved. *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994). If a case is moot, it should generally be dismissed. *In re Peoples*, 296 N.C. 109, 148, 250 S.E.2d 890, 912 (1978).

Here, CCDSS's appeal only concerns a portion of the Disposition Order: the trial court's grant of custody to CCDSS. Indeed, "CCDSS is not asking this Court to disturb any other provisions in the Disposition Order." But in the Planning Order, the trial court removed CCDSS as Janet's custodian, and the trial court granted the grandmother custody of Janet. Therefore, this case is moot because CCDSS already received the relief it sought: removal from its role as Janet's custodian. *See Simeon*, 339 N.C. at 370, 451 S.E.2d at 866. So under the general rule, this case must be dismissed as moot. *See In re Peoples*, 296 N.C. at 148, 250 S.E.2d at 912.

Nevertheless, there are five exceptions to this general rule of dismissal: (1) when a defendant voluntarily stops the challenged conduct; (2) when the challenged conduct involves an important public interest; (3) when the challenged conduct evades review but is capable of repetition; (4) when there are adverse collateral consequences of denying

review; and (5) when other claims of class members remain. *In re Brook*s, 143 N.C. App. 601, 604–05, 548 S.E.2d 748, 751 (2001).

CCDSS argues two exceptions apply here: the public-interest exception and the capable-of-repetition-yet-evading-review exception. We shall address each argument in turn.

A. Public-Interest Exception

Under the public-interest exception, this Court may "consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). But "this is a very limited exception that our appellate courts have applied only in those cases involving clear and significant issues of public interest." *Anderson v. N.C. State Bd. of Elections*, 248 N.C. App. 1, 13, 788 S.E.2d 179, 188 (2016). After all, "self-serving contentions . . . cannot defeat the principle of judicial restraint that sustains our State's mootness doctrine." *Id.* at 14, 788 S.E.2d at 189.

Here, the interests involved are confined to CCDSS, Janet, and Janet's grandmother—not the public. *See Randolph*, 325 N.C. at 701, 386 S.E.2d at 186. Further, the legal standards concerning dispositional orders are clear; this Court has clarified the standards, and this Court enforces them. *See, e.g.*, *In re I.W.P.*, 259 N.C. App. 254, 263–64, 815 S.E.2d 696, 704 (2018) (discussing the N.C. Gen. Stat. § 7B-2501(c) factors and the controlling caselaw). This case would not clarify the law, nor does it involve any other "clear and significant issues of public interest." *See Anderson*, 248 N.C. App. at 13, 788 S.E.2d at 188.

Thus, because the public-interest exception is "very limited," and resolving this case would only resolve "self-serving contentions," this case falls outside of the exception. *See id.* at 13–14, 788 S.E.2d at 188–89.

B. Capable of Repetition Yet Evading Review

A case is capable of repetition, yet evades review, " 'only in exceptional situations.' " *Id.* at 8, 788 S.E.2d at 185 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 1669, 75 L. Ed. 2d 675, 689 (1983)). More specifically, a case is capable of repetition, yet evades review, when: (1) the challenged conduct is too fleeting to be litigated before the conduct ends; and (2) there is a reasonable expectation that the complaining party will be affected by the same conduct again. *Id.* at 8, 788 S.E.2d at 185. Under this exception, "the underlying conduct upon which the relevant claim rests [must be] necessarily of such limited duration that the relevant claim cannot be fully litigated prior to its

cessation and the same complaining party is likely to be subject to the same allegedly unlawful action in the future." *Chavez v. McFadden*, 374 N.C. 458, 468, 843 S.E.2d 139, 147 (2020).

The first prong requires a brief controversy with a "firmly established" endpoint. *See Anderson*, 248 N.C. App. at 8, 788 S.E.2d at 185. An example of such a controversy includes election misconduct. An election is short, and its conclusion is established by statute and "beyond the control of litigants." *See id.* at 8, 788 S.E.2d at 185. Because an election winner is declared soon after any alleged election misconduct, the scenario is too fleeting to be litigated before the election ends. *See id.* at 8, 788 S.E.2d at 185. Juvenile-custody controversies, however, are not too fleeting to be litigated before the controversy ends. Indeed, we regularly review juvenile-custody cases. *See, e.g.*, *In re K.T.L.*, 177 N.C. App. 365, 373, 629 S.E.2d 152, 158 (2006) (reviewing a dispositional order placing a delinquent juvenile in DSS's custody).

Here, the challenged conduct is this: The trial court granted temporary custody of Janet to CCDSS. Yet CCDSS no longer has custody of Janet; the trial court granted Janet's custody to her grandmother. As mentioned, this Court regularly reviews similar cases; a dispositional order granting juvenile custody is not the type of controversy that evades review because of its short duration. *See In re K.T.L.*, 177 N.C. App. at 373, 629 S.E.2d at 158. Indeed, juvenile custody can last for several years, allowing ample time to litigate. Disputed juvenile custody is not "necessarily of such limited duration that [it] cannot be fully litigated prior to its cessation." *See Chavez*, 374 N.C. at 468, 843 S.E.2d at 147. Therefore, this is not an "exceptional" case that is capable of repetition and evading review. *See Anderson*, 248 N.C. App. at 8, 788 S.E.2d at 185. Because the challenged conduct is not too fleeting to be litigated, we need not reach the second prong of this exception. *See id.* at 8, 788 S.E.2d at 185.

Accordingly, this case is moot, and neither of the tendered exceptions apply. Therefore, we must dismiss this appeal. *See In re Peoples*, 296 N.C. at 148, 250 S.E.2d at 912.

III. Conclusion

We hold that this appeal is moot. Therefore, we lack jurisdiction and grant the State's motion to dismiss.

DISMISSED.

Judge ARROWOOD and Judge COLLINS concur.

KLEIN v. KLEIN

[290 N.C. App. 570 (2023)]

KIMBERLY KLEIN, PLAINTIFF
v.
GARY KLEIN, DEFENDANT

No. COA22-378

Filed 3 October 2023

1. Divorce—equitable distribution—classification and distribution of property—numerous arguments—support of competent evidence

In an equitable distribution, alimony, and child custody and support matter, where the husband lodged numerous challenges on appeal, the Court of Appeals affirmed the trial court's first order regarding equitable distribution. The trial court did not err in its classification and distribution of the parties' property as to: a familial loan (the classification as a marital debt was supported by the findings and competent evidence; the husband ultimately admitted it was a loan to purchase the marital home; there did not have to be a written agreement memorializing the debt), loans to the husband's colleague (the characterization of the payments to the husband's colleague as loans was supported by competent evidence; there did not have to be a written agreement memorializing the debt), one of the wife's retirement accounts (the finding that the account had marital and separate components was supported by competent evidence), the proceeds of a lawsuit (the classification of the proceeds as marital instead of separate was supported by competent evidence regarding the purpose of the lawsuit—to protect the husband's income-earning ability during the marriage), and payments toward a marital debt (the husband made a payment on the parties' joint tax liability using marital funds, not his separate funds).

2. Divorce—appeals—order final as to some claims—trial court's jurisdiction over unresolved claims

Where the trial court's first order in a divorce-related matter fully resolved claims related to child custody, child support, and alimony but did not fully resolve claims related to equitable distribution, N.C.G.S. § 50-19.1 allowed immediate appeal of the order as to those fully resolved claims. However, because the order was not final as to the equitable distribution claims, the husband's first notice of appeal (timely filed within thirty days of entry of the first order) did not deprive the trial court of jurisdiction to enter additional orders distributing two of the husband's retirement

accounts. Furthermore, the husband waived his alternative arguments regarding the retirement account orders because he failed to provide any support for his conclusory statements.

3. Child Custody and Support—child support—gross income—work-related childcare costs—school tuition

In a divorce-related matter, the trial court did not abuse its discretion in the child support provisions of its order, to which the husband made numerous challenges on appeal. As for the calculation of the wife's gross income, the trial court's findings were supported by competent evidence of the wife's current income (additionally, the court was not required to make findings on the wife's reasonable expenses arising from her self-employment), and the court was not required to treat the wife's non-recurring, one-time early withdrawal from a retirement account as income. As for the allocation of summer camp expenses as work-related childcare costs, the trial court's finding that the wife had $386.56 in monthly work-related childcare costs was supported by competent evidence in the form of the wife's financial affidavit and her testimony. Finally, as for the child's school tuition expenses, which the trial court ordered the husband to pay, the trial court properly utilized the Child Support Guideline Worksheet and allocated all of the expenses based on the parties' respective percentage responsibility for the total support obligation (in other words, contrary to the husband's argument, he was not "solely responsible" for the tuition costs).

4. Divorce—alimony—sufficiency of findings—standard of living, reasonable needs, capacity to earn future income—marital misconduct

In a divorce-related matter, the trial court's award of alimony was proper where the court made sufficient findings regarding the parties' accustomed standard of living, the wife's reasonable needs, and the wife's capacity to earn future income. The trial court also made sufficient findings regarding the husband's marital misconduct—illicit sexual behavior and indignities—where the wife presented circumstantial evidence showing that the husband had the opportunity and inclination to commit marital misconduct. Specifically, the husband spent nearly $100,000 on: hotel stays that corresponded with dates of large cash withdrawals, lingerie and sex store purchases for individuals other than the wife, pornography, a payment to at least one woman for sex, spyware on the wife's phone, a secret email account, numerous background checks for potential sexual partners, and online services intended for customers to

contact women for the purpose of arranging sexual encounters. In addition, the trial court found that the husband lacked credibility. The alimony order was affirmed on appeal.

Appeal by defendant from order and judgment entered 8 October 2021 and orders entered 10 January 2022 by Judge Tracy H. Hewett in District Court, Mecklenburg County. Heard in the Court of Appeals 10 January 2023.

James, McElroy & Diehl, P.A., by Preston O. Odom, III and Haley E. White, for plaintiff-appellee.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, for defendant-appellant.

STROUD, Chief Judge.

Defendant-husband appeals from three orders. The first order and judgment grants equitable distribution, awards child support to plaintiff-wife, and awards alimony to plaintiff-wife. The other two orders distribute specific retirement plans and were entered after defendant-husband's notice of appeal from the first order. For the reasons below, we affirm the judgment and order and two orders regarding retirement plans.

I. Background

Defendant-husband ("Husband") and plaintiff-wife ("Wife") were married on 29 October 2005. During the parties' marriage, the parties had one child, David,[1] who was born in 2012. During the marriage, Husband practiced as a physician, having obtained his license in 1992. Up until 2011, Husband alternated employment with private healthcare companies and federal agencies, and from 2011 onward Husband was employed primarily as a physician with the Department of Defense. Wife is self-employed and a business owner, and since 2014 has worked on a part time basis while caring for David. "Throughout the marriage[,]" Husband provided the primary financial support for the family.

In April 2020, Wife's uncle, whom she considered and referred to as her father, passed away. Wife wanted to provide support to her aunt, "whom she considers her mother and [David's] grandmother[,]" who

1. A pseudonym is used.

was living in Virginia. Wife wanted to travel to visit her aunt, but Wife and Husband disagreed about whether Wife should be able to travel to Virginia with David. Wife wanted to take David with her to Virginia to maintain his home-schooling, and Husband was scheduled to fly out of state in early May for an undetermined length of time. However, Husband generally refused to discuss the possibility of Wife travelling to see her aunt. Wife, upset by Husband's unwillingness to discuss the matter, the death of her uncle, and some other circumstances of the parties' marriage, decided to travel to Virginia regardless.

On 22 April 2020, while Husband was at work, Wife left for Virginia with David. Wife also left a letter on Husband's desk, letting him know that she and David were on their way to Virginia, "expressing her unhappiness with their marriage, and outlining the issues that both parties needed to work on in order to attempt to save their marriage." Wife's letter "was not an intention to separate but clearly spelled out the possibility of continuing to work on the marriage." Wife said in her letter that she was "not abandoning [Husband] and [she was] not going [to Virginia] for a long time." Wife's letter "gave no indication that [Wife] was abandoning [Husband] and taking the minor child." Husband and Wife spoke on the phone twice on 22 April 2020, and during these conversations, Husband confirmed he received Wife's letter.

While Wife and David were in Virginia, supporting Wife's aunt and planning her uncle's funeral, Wife received a letter from an attorney representing Husband which "accus[ed] [Wife] of absconding with [David] and threaten[ed] to seek emergency custody." Husband had not indicated to Wife during the 22 April 2020 phone calls that he believed Wife had absconded with David. Aside from alleging Wife absconded with David, the letter from Husband's attorney also stated "[u]pon [Wife's] return, it is [Husband's] desire to begin the separation process." Wife retained an attorney in Virginia and through counsel informed Husband she would be returning to Charlotte with David after her uncle's funeral. At some point in early May, Husband vacated the marital home, and Wife returned to the home with David.

On 26 May 2020, Wife filed a complaint in District Court, Mecklenburg County, alleging claims for temporary and permanent child custody, temporary and permanent child support, postseparation support, alimony, equitable distribution including an unequal share of the marital property and an interim distribution, and attorney's fees. Wife alleged the parties separated on 23 April 2020 "when [Husband] expressed his desire to separate while" Wife and David were in Virginia, as discussed above. Wife also alleged a pattern of marital misconduct, including

sexual misconduct, by Husband. On 15 June 2020, Husband filed a motion to change venue from Mecklenburg County to Union County and an answer to the complaint. Among other things, Husband denied that he initiated the parties' separation but admitted that a dispute had arisen between the parties. Husband also denied any allegations of marital misconduct and denied Wife was entitled to alimony, an unequal distribution of the marital property, an interim distribution, or postseparation support. Husband asserted counterclaims for child custody, equitable distribution, and attorney's fees. Husband later voluntarily dismissed his motion for change of venue.

On 1 October 2020, the trial court entered a consent order resolving the parties' claims for postseparation support, temporary child support, temporary child custody, and an interim distribution ("Consent Order"). The Consent Order awarded joint legal custody of David, with Wife having primary physical custody and Husband secondary physical custody of David. The Consent Order directed Husband to pay Wife $1,373.46 per month in child support and $3,900 per month in postseparation support, to continue providing medical insurance for David and Wife, and to pay child support and postseparation support arrears of $23,806.24. The Consent Order also directed Husband to pay Wife an interim distribution of $65,000, pay the parties' joint 2019 income tax liabilities, and reserved the issue of attorney's fees.

The claims for child custody, child support, equitable distribution, and alimony were heard 14 June 2021 through 16 June 2021. The trial court entered a written order on 8 October 2021 ("First Order"). The First Order (1) granted primary legal and physical custody of David to Wife and secondary physical custody to Husband, (2) ordered Husband to pay Wife $1,166.62 per month in child support pursuant to the North Carolina Child Support Guidelines, (3) ordered Husband to pay Wife $3,685.25 per month in alimony from 14 June 2021 until 14 June 2028, and (4) equitably distributed the parties' marital property. The First Order included an attached Child Support Guideline Worksheet showing the calculation of child support and an exhibit summarizing the equitable distribution of the parties' marital property. As to Husband's two federal retirement accounts, the trial court specifically reserved distribution of these accounts for entry of two additional court orders, a "Court Order Acceptable for Processing" and a "Qualifying Retirement Benefits Court Order." [2]

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2. The trial court reserved distribution of Husband's Thrift Savings Plan through a "Qualified Retirement Benefits Court Order," but later titled the order distributing Husband's retirement plan as a "Retirement Benefits Court Order."

Husband filed notice of appeal from the First Order on 22 October 2021. The trial court entered the two orders distributing Husband's federal retirement accounts on 10 January 2022 and Husband filed separate notices of appeal from each of the orders regarding retirement accounts on 7 February 2022.

II. Jurisdiction

Since the First Order did not entirely dispose of the parties' claims, we must first consider whether it is an interlocutory order and whether this Court has jurisdiction to consider the appeal. The First Order fully resolved the claims of child custody, child support, and alimony, but it did not fully resolve the equitable distribution claims. As to Husband's two retirement plans, in the other two orders, the trial court identified the plans, classified the plans, and directed the division of the plans but did not complete the distribution of the plans. Instead, the First Order noted that the trial court would enter two additional orders to bring about the division of the retirement plans, specifically a "Court Order Acceptable for Processing" for Husband's Federal Employees Retirement System Pension and a "Qualifying Retirement Benefits Court Order" for Husband's Thrift Savings Plan. Thus, the First Order is an interlocutory order, as it did not fully dispose of the case "but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

> Generally, there is no right to appeal from an interlocutory order." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (citations omitted). However, in 2013, our General Assembly enacted section 50-19.1, which provides:
>
> > Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of [Section] 1A-1, Rule 54(b), but for the other pending claims in the same action.
>
> N.C. Gen. Stat. § 50-19.1 (2015).

Kanellos v. Kanellos, 251 N.C. App. 149, 151-52, 795 S.E.2d 225, 228 (2016) (emphasis removed).

All the claims in this case fall under the scope of North Carolina General Statute § 50-19.1, which allows immediate appeal of an order which is final as to some claims but not as to other claims in the same action. *See* N.C. Gen. Stat. § 50-19.1 (2021). The First Order was a final and immediately appealable order as to the claims of child custody, child support, and alimony, and Husband timely appealed within thirty days of entry of the First Order. *See* N.C. R. App. P. 3 (noting appeals must be made within 30 days). Husband's appeal from the First Order as to the claims of child support and alimony is properly before this Court under North Carolina General Statute § 50-19.1. *See* N.C. Gen. Stat. § 50-19.1.

But the First Order was not a final, appealable order as to the claim of equitable distribution and Husband's first notice of appeal did not deprive the trial court of jurisdiction to enter the additional orders distributing the retirement plans. The First Order specifically directed that the trial court would enter two additional orders distributing Husband's federal retirement plans:

> 164. . . . [Husband's] interest in the FERS Pension is a marital asset. [Wife] shall be distributed and assigned a share of [Husband's] benefits under the FERS . . . *by means of a Court Order Acceptable for Processing ("COAP")*. . . . .
>
> 165. [Husband] is a participant in the Thrift Savings Plan . . . . From this account, [Wife] shall be distributed fifty percent (50%) of the account balance . . . . *[Wife's] share of the account shall be distributed to her via a Qualifying Retirement Benefits Court Order ("QRBCO") prepared by [Wife's] attorney.*

(Emphasis added.) Despite Husband's appeal filed on 22 October 2021, the trial court retained jurisdiction to complete its adjudication of the equitable distribution claims under North Carolina General Statute § 50-19.1: "An appeal from an order or judgment under this section *shall not deprive the trial court of jurisdiction over any other claims pending in the same action*." N.C. Gen. Stat. § 50-19.1 (emphasis added).

The equitable distribution claim remained "pending in the same action" and the trial court was not deprived of jurisdiction over the equitable distribution claim by Husband's appeal of the First Order. *See* N.C. Gen. Stat. § 50-19.1 The trial court still had jurisdiction to enter the two orders distributing Husband's retirement plans. Husband also filed notice of appeal from these two orders within thirty days of entry of the orders, so Husband's appeal from the two retirement plan orders is properly before this Court. *See* N.C. R. App. P. 3.

III. Equitable Distribution

We first note Husband's brief raises an unusual number of issues. Although he summarizes his arguments in five "Issues Presented" in the brief, these broad statements of the issues actually contain at least fifteen sub-issues, touching on nearly every aspect of the equitable distribution, alimony, and child support portions of the First Order. We have attempted to address each argument for which Husband has presented a cognizable argument based upon the record and legal authority. *See* N.C. R. App. P. 28. We will begin with Husband's challenges to the portion of the First Order regarding equitable distribution.

A. Standard of Review

This Court reviews the trial court's First Order and two orders regarding retirement to determine if "there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Stovall v. Stovall*, 205 N.C. App. 405, 407, 698 S.E.2d 680, 683 (2010) (citation omitted). "The trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Peltzer v. Peltzer*, 222 N.C. App. 784, 787, 732 S.E.2d 357, 360 (2012) (citation omitted).

"A trial court's determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal if there is competent evidence to support the determination." *Hill v. Hill*, 244 N.C. App. 219, 224, 781 S.E.2d 29, 34 (2015) (quotation marks omitted).[3] "The classification of property in an equitable distribution proceeding requires the application of legal principles, and we therefore review *de novo* the classification of property as marital, divisible, or separate." *Green v. Green*, 255 N.C. App. 719, 724, 806 S.E.2d 45, 50 (2017) (quotation marks omitted).

The equitable distribution award is reviewed for an abuse of discretion:

> A trial court is vested with wide discretion in family law cases, including equitable distribution cases. Accordingly,

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3. This case is named "*Hill v. Sanderson*, 244 N.C. App. 219, 781 S.E.2d 29 (2015)" in Westlaw and the South Eastern Reporter, but "*Hill v. Hill*, 244 N.C. App. 219, 781 S.E.2d 29 (2015)" in the North Carolina Court of Appeals Reports. Therefore, we will refer to this case as "*Hill v. Hill*, 244 N.C. App. 219, 781 S.E.2d 29 (2015)."

> a trial court's ruling in an equitable distribution award . . . will be disturbed only if it is so arbitrary that [it] could not have been the result of a reasoned decision.

Wright v. Wright, 222 N.C. App. 309, 311, 730 S.E.2d 218, 220 (2012) (brackets in original) (citations and quotation marks omitted). "Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion." *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

B. Analysis

[1] Husband argues the trial court made numerous errors in classification and distribution of the parties' marital property. North Carolina General Statute § 50-20 governs the equitable distribution of marital and divisible property. *See* N.C. Gen. Stat. § 50-20 (2021). "Under N.C.G.S. § 50-20(c), equitable distribution is a three-step process; the trial court must (1) determine what is marital and divisible property; (2) find the net value of the property; and (3) make an equitable distribution of that property." *Watson v. Watson*, 261 N.C. App. 94, 97, 819 S.E.2d 595, 598 (2018). "Furthermore, in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness." *Id.*

Husband specifically challenges several findings of fact and alleges six errors the trial court committed when classifying and distributing the parties' property. Husband argues the trial court (1) erred by misclassifying a familial gift of money as a loan and distributing the marital debt to Husband; (2) erred by misclassifying a gift of money by Husband to his colleague as a loan and distributing the "loan[;]" (3) erred by distributing one of Wife's retirement accounts to Wife as separate property because Wife failed to sufficiently trace the funds, and "[t]he entire contents of the account were marital[;]" (4) erred by classifying the proceeds of a lawsuit as marital property instead of distributing those proceeds to Husband in full as his separate property; (5) erred by failing to credit Husband for postseparation payments Husband made on the parties' mortgage and joint tax liability and for Wife's $65,000 interim distribution; and (6) erred by distributing Husband's federal retirement benefits because the trial court lacked subject matter jurisdiction to enter subsequent orders after Husband filed his first notice of appeal.

1. Familial Loan

Husband first challenges finding of fact 170 as "not supported by competent evidence." (Capitalization altered.) Finding of fact 170 states:

> 170. **Loan for Purchase of [the Marital Home]:**
>
> a. In 2011, [Wife] and [Husband] desired to purchase a home located at . . . . They were unable to obtain a mortgage on their own, so [Wife's] aunt and uncle ("the Kellys") agreed to purchase the house for the parties. The Kellys, [Husband], and [Wife] agreed that [Husband] and [Wife] would lease the house from the Kellys and pay the monthly mortgage payments until they were able to purchase the house from them. The Kellys paid a down payment of $110,000.00 for the purchase of the . . . home. [Wife's aunt] and [Husband] agreed that [Husband] would repay the $110,000.00 down payment shortly after the purchase of the . . . home.
>
> b. After leasing the house for three (3) years, the parties desired to purchase the house from the Kellys, but **[Husband] said they could not purchase the house for fair market value, so the Kellys and [the parties] agreed that the parties could purchase the . . . residence for the original purchase price and the Kellys gifted the equity of $84,000.00 to [Wife], [Husband], and the minor child**.
>
> c. Unbeknownst to [Wife], the $110,000.00 loan for the down payment was never repaid to the Kellys.
>
> d. [Wife] contends the $110,000.00 loan is a debt subject to equitable distribution.
>
> e. **[Husband] initially contended that the $110,000.00 was a gift from the Kellys and not subject to equitable distribution. [Husband] testified that he never told anyone that he would pay back the $110,000.00.** However, [Wife] introduced an email from the mortgage lender to Mrs. Kelly which stated: "*I talked to* [*Husband*] *after talking with you. He would be prepared to repay you the monies you will have to expend for the down payment and closing costs (as evidenced on the attached Itemized Fee Worksheet). He could give these monies to you immediately after closing.*"

> f. **The Court finds [Husband's] contention that the $110,000.00 was a gift is not credible.**
>
> g. **[Husband] testified that he has a moral obligation to repay the $110,000.00 loan, but not a legal obligation because the loan was not memorialized in writing.**
>
> h. **[Husband] ultimately changed his testimony and testified that the $110,000.00 from the Kellys was a loan.**
>
> i. The Court finds that the $110,000.00 loan from the Kellys is a marital debt that should be distributed to [Wife].

(Bolding added, italics in original).

We first note that subsections (a) through (h) of finding 170 are findings of fact. "The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Stovall*, 205 N.C. App. at 407, 698 S.E.2d at 683. The classification of the loan as marital in subsection (i) is a conclusion of law, which we review *de novo*. *See Green*, 255 N.C. App. at 724, 806 S.E.2d at 50. This conclusion of law must be supported by written findings of fact. *See Hunt v. Hunt*, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993).

In his challenge to the findings of fact in subsections (a) through (h), Husband's argument mostly addresses conflicting evidence as to the intentions of the parties, the intentions of the Kellys, and the circumstances of the payment of the $110,000 by the Kellys, but the trial court has the duty to consider the credibility of the evidence and to resolve those conflicts in the evidence. *See Williamson v. Williamson*, 217 N.C. App. 388, 392, 719 S.E.2d 625, 628 (2011) ("Because the trial court is in the best position to weigh the evidence, determine the credibility of witnesses and the weight to be given their testimony, we refuse to re-weigh the evidence on appeal." (quotation marks and brackets omitted)). The trial court found Husband's claims about the loan not to be credible. We cannot second-guess the trial court's finding as to Husband's credibility in finding of fact 170(f). *See id.*

Husband's only specific substantive argument as to a lack of competent evidence supporting finding 170 addresses the reference to the email from the mortgage lender referenced in subsection (e). But even if we were to assume the trial court should have sustained Husband's

objection to admission of the email as evidence, and thus the portion of finding 170(e) referring to the contents of the email was not supported by the evidence, the rest of finding 170 is supported by the evidence.

Subsection (h) finds that Husband "ultimately changed his testimony and testified that the $110,000.00 from the Kellys was a loan." This finding is supported by the evidence. Husband initially testified the $110,000 from the Kellys was a gift, and the parties "[n]ever borrowed" the money. However, during cross-examination, the trial court had to repeatedly remind Husband to answer the questions he was asked. Eventually, after being reminded he was under oath, Husband changed his testimony and testified that he and Wife did, in fact, borrow $110,000 from the Kellys for the purchase of the marital home. Husband then testified that, although he acknowledged the parties borrowed the money, it was his "position that because there was no legal instrument memorializing [the obligation to repay the loan], that [he didn't] have a legal obligation to repay" the $110,000 loan, only a moral obligation to do so.

The remainder of Husband's argument regarding finding of fact 170 addresses the trial court's classification of the payment as a loan, which we review *de novo*. *See Green*, 255 N.C. App. at 724, 806 S.E.2d at 50. Husband, quoting *Geer v. Geer*, argues "[l]oans from close family members must be closely scrutinized for legitimacy." *See Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 430 (1987). Husband also argues the "loan" was not "an obligation recognized by law" because there was no written agreement signed by the parties. Husband cites no apposite legal authority to support his argument there must be a written agreement to support a marital debt.[4] The case Husband cites for this proposition, *Lewis v. Lester*, is inapposite; it deals with an agreement to transfer land and states: "It is settled law in North Carolina that an oral contract to convey or to devise real property is void by reason of the statute of frauds (G.S. § 22-2)." *Lewis v. Lester*, 235 N.C. App. 84, 87, 760 S.E.2d 91, 93 (2014).

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4. While, as cited by Husband, *Geer* indicates that who is legally liable for a debt is a concern that the trial court must remain cognizant of, *see Geer*, 84 N.C. App. at 475, 353 S.E.2d at 429, we note this Court has declined to extend the rationale in *Geer* and concluded the enforceability of a loan is but a distributional factor to be considered in the trial court's discretion. *See Mrozek v. Mrozek*, 129 N.C. App. 43, 47, 496 S.E.2d 836, 839 (1998) ("Plaintiff additionally argues that 'loans from close family members must be closely scrutinized for legitimacy.' However, any concerns the trial court may have with respect to the fact that this marital debt is owed to defendant's parents or that defendant is the sole signatory and may have an affirmative defense to repayment are more properly treated as distributional factors.") (citations omitted).

Further, in *Geer*, the wife argued that "unsecured debts do not qualify as marital property as defined in G.S. 50-20(b)(1) and therefore are not subject to distribution by the court." *Geer*, 84 N.C. App. at 475, 353 S.E.2d at 429. This Court rejected this argument and affirmed the trial court's classification of a debt to the husband's parents as a marital debt. *Id.* at 476, 353 S.E.2d at 430. Indeed, in *Geer*, the evidence supported the trial court's finding that

> the parties borrowed $5,000.00 from defendant's parents in 1970 for the purchase of a mobile home with the promise that it would be repaid with interest. There is also evidence to show that subsequently the parties bought defendant's parents' Peugeot automobile by paying them $800 at the time of the purchase and promising to pay the balance of $3,700.00 plus 6% interest at a later time. *Plaintiff did not deny the existence or amount of the loan from defendant's parents in her testimony.* This evidence is sufficient to support the court's finding that the loans from defendant's parents were legitimate debts and that the value of the two debts totaled at least $9,000.00, inclusive of interest; therefore, this finding of fact is conclusive on appeal.

Id. (emphasis added).

"Marital debt is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Comstock v. Comstock*, 240 N.C. App. 304, 317, 771 S.E.2d 602, 612 (2015) (quotation marks omitted). The trial court's findings of fact support its classification of the $110,000 as a marital debt. It was incurred during the marriage and before the date of separation. It was used to purchase the marital home of the parties; this purchase was clearly for the joint benefit of the parties. Husband ultimately admitted that the $110,000 was a loan from the Kellys to purchase the parties' marital home. The trial court did not err by classifying the $110,000 from the Kellys as a loan, not a gift, and a marital debt subject to distribution.

2. Loans to Husband's Colleague

Husband next purports to challenge findings of fact 181, 184, and 185 as unsupported by competent evidence, but Husband's argument solely focuses on finding of fact 181.[5] *See* N.C. R. App. P. 28(b)(6) ("Issues not

5. We also note finding of fact 184 is a conclusion of law that simply states an equal distribution is equitable, *see In re Helms*, 127 N.C. App. 505, 510-11, 491 S.E.2d 672, 675-76

presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Finding of fact 181 states:

> 181. During the marriage, [Husband] loaned money to [Husband's colleague] on two (2) occasions. The total amount loaned to [Husband's colleague] was $15,000.00. [Husband] discussed the first loan with [Wife] and the parties agreed to loan [Husband's colleague] $5,000.00. [Husband] told [Wife] that [Husband's colleague] would repay the money once he was able to. [Husband] did not discuss the second loan of $10,000.00 with [Wife] prior to making the loan to [Husband's colleague]. Both loans were made from [Husband's] SECU Money Market Account # . . . . The Court finds that [Husband's] right to repayment of the $15,000.00 loan to [Husband's colleague] is a marital asset, is valued at $15,000.00, and should be distributed to [Husband].

Husband argues finding of fact 181 is not supported by competent evidence. Similar to the familial loan in finding of fact 170, Husband argues there was insufficient evidence to classify the payment as a loan since there was no written agreement memorializing the debt between the parties and Husband's colleague, and Wife could not testify as to any terms associated with the loan. Husband does not argue that the payments were not made from a marital account or during the parties' marriage.

There is competent evidence in the record to support the trial court's findings regarding the circumstances of the loan to Husband's colleague. Wife testified the parties made two payments to Husband's colleague. Wife testified Husband told her about the first $5,000 payment to Husband's colleague and that she "thought it was a loan . . . . [*She*] *thought* [*Husband's colleague*] *was going to pay it back*." (Emphasis added.) When asked whether Husband told her it was a loan, Wife testified she believed he told her that. Wife also testified Husband did not discuss the second $10,000 payment to Husband's colleague with her, and she was unaware of any "arrangements [Husband] and [his colleague] had with one another about the second $10,000 payment[.]" Husband did not deny that he paid $15,000 to his colleague, but he testified it was a gift to help fund the colleague's needs and educational expenses, and he never expected his colleague to pay the money back.

(1997), and finding 185 states the trial court attached and incorporated a chart summarizing the distribution of the parties' property.

Again, the trial court had to make a credibility determination between the parties. *See Williamson*, 217 N.C. App. at 392, 719 S.E.2d at 628. The testimony presented as to these payments is more ambiguous than the testimony regarding the loan from the Kellys, but there is nevertheless competent evidence to support the trial court's finding characterizing the payments to Husband's colleague as a loan and not a gift. There was competent evidence as to the purpose of the payments. *See generally Stovall*, 205 N.C. App. at 407, 698 S.E.2d at 683 (noting competent evidence is needed to support the trial court's findings of fact). The parties received no property or benefit from the colleague in return for the funds, but based upon Wife's testimony, the payment was a loan and the parties expected the colleague to repay the loan. Husband's arguments as to the enforceability of the loan, again, do not change the classification of the loan; the enforceability of the loan was but a distributional factor to be considered by the trial court. *See Mrozek v. Mrozek*, 129 N.C. App. 43, 47, 496 S.E.2d 836, 839 (1998).

3. Charles Schwab IRA

Husband next argues finding of fact 168 is not supported by competent evidence. Finding of fact 168 states:

> 168. [Wife] is the owner of a Charles Schwab IRA (formerly USAA Traditional IRA . . .), which has marital and separate components. The total balance on the date of separation was $120,253.00. The total current balance is $153,086.00. [Wife] presented compelling, credible evidence tracing the source of funds held in the Charles Schwab IRA, which showed that only twenty nine percent (29%) of the balance of the Charles Schwab IRA is marital and the remaining seventy one percent (71%) is [Wife's] separate property resulting from her employment at the University of Pennsylvania, which ended in 1998. Twenty nine percent (29%) of the current balance of the Charles Schwab IRA equals $44,395, which should be distributed to [Wife]. The remaining balance of $108,691.00 shall be and remain [Wife's] separate property.

First, Husband does not challenge the finding as to the total values of the account. Husband contends there was "insufficient competent evidence" to classify any portion of the IRA as Wife's separate property. We accordingly narrow our review of finding 168 to whether there is competent evidence to support the finding that the account "has marital and separate components." *Stovall*, 205 N.C. App. at 407, 698 S.E.2d at 683.

Once again, Husband's primary argument is based mainly upon an objection to introduction of evidence presented at trial which he characterizes as a "letter prepared by her attorney." Wife referred to this letter during her testimony regarding the IRA. When the letter was first mentioned, Husband objected to certain statements in the letter as hearsay. However, later in the trial, Wife presented additional testimony regarding the letter, as well as the 335 pages of account statements that accompanied the letter, without any objection from Husband. Husband did not renew his objection to any statements in the letter during Wife's extensive testimony regarding her contributions to the IRA prior to and during the marriage at this point in the trial, and he never objected to the account statements with the letter.[6] Husband has therefore waived any argument on appeal as to Exhibit 44. *See generally State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) ("Any benefit of the prior objection was lost by the failure to renew the objection, and defendant is deemed to have waived his right to assign error to the prior admission of the evidence.").

The trial court's findings are supported by the evidence. Wife testified the funds in the Charles Schwab account began "as a TIAA-CREF account" when she worked at the University of Pennsylvania, prior to the parties' marriage. Wife testified that she made no other contributions after she left the University. Then, in 2010, Wife transferred the balance of the TIAA-CREF account to Fidelity; the entire balance was her separate property. Then, also in 2010, Wife opened up her USAA retirement account and moved the funds in the Fidelity account to the USAA account. From 2011 through 2018, relatively small, recurring annual transfers were made from the TIAA-CREF account to the USAA account; Wife testified that "the way the contract worked," the TIAA-CREF balance "could only come over in small payments at a time[.]"

Further, Wife then testified while the account was at USAA, and during the parties' marriage, she made contributions to the account. In 2014, Wife transferred her balance from a retirement account she contributed to while working at Novant Health to the USAA account; Wife testified that the Novant Health funds created a marital component in the USAA account. Wife also testified "69 percent of the total deposits were separate, and 29 percent of the total deposits were marital[,]" and that there was an additional 2% separate component from the small, recurring

6. When the trial court was reviewing the exhibits which had been admitted later in the trial, Husband again "noted for the record" without elaboration his original objection to the letter in Exhibit 44.

TIAA-CREF transfers. The portions of finding of fact 168 regarding the marital and separate components of the account are supported by competent evidence. *See Stovall*, 205 N.C. App. at 407, 698 S.E.2d at 683.

4. Lawsuit Proceeds

Husband next challenges findings of fact 125 to 141 regarding classification of proceeds of a lawsuit by Husband during the marriage and contends these findings were not supported by competent evidence, but his argument does not actually challenge the findings of fact. Instead, Husband argues the trial court erred by classifying the lawsuit proceeds as marital instead of separate. Since Husband does not challenge the findings of fact, they are binding on this Court. *See Peltzer*, 222 N.C. App. at 787, 732 S.E.2d at 360 (noting unchallenged findings of fact are binding on this Court).

Findings of fact 125 through 141 state:

> 125. Regarding the legal settlement and [Husband's] contention that the settlement proceeds are his separate property, the Court finds that [Husband] failed to meet his burden to prove that the settlement proceeds are his separate property.
>
> 126. [Husband] failed to prove that the settlement proceeds were to compensate for an injury or damages that were personal to him. Instead, the preponderance of the evidence shows that the efforts in the lawsuit were to protect the plaintiffs' income earning abilities while he was married to [Wife].
>
> 127. Moreover, the settlement agreement failed to allocate specific amounts for specific types of damage and waived all claims–whether marital or separate.
>
> 128. In 2010, [Husband] and three other physicians were dismissed from the American Association of Physician Specialists ("AAPS"). As a result, they retained . . . a law firm in Glen Allen, VA.
>
> 129. [Wife] was involved in the discussions with attorneys at [the Virginia law firm], and the other Plaintiffs/physicians in the case. The money [Wife] earned through mEDhealth went to pay legal fees related to [Husband's] dismissal from the AAPS.
>
> 130. [The Virginia law firm] referred the case to G. Donovan "Don" Conwell, an attorney in Florida.

131. The Court heard testimony from Attorney Conwell. The Court also heard testimony from Dr. Castillo, who was the lead plaintiff in the lawsuit against the AAPS.

132. Attorney Conwell testified, and the Court so finds, that one objective of the lawsuit was to reinstate the physicians in the AAPS. To that end, he filed a motion for summary judgment to reinstate the physicians in the AAPS, and the motion for summary judgment was granted. The AAPS appealed, forcing Attorney Conwell and the physicians to defend against the appeal. Attorney Conwell and the physicians prevailed on appeal and were reinstated to the AAPS.

133. Attorney Conwell testified, and the Court so finds, that the lawsuit generally stated a demand for damages for lost income, among other things. The case settled upon a total amount to be paid and split between the four physicians. There was no delineation of the award for different injuries.

134. There was no evidence presented showing that a portion of the settlement was intended to compensate for a particular category or categories of damages.

135. Dr. Castillo testified, and the Court so finds, that as a result of being dismissed from the AAPS, the physicians could not hold themselves out as being board certified by the AAPS, and the lawsuit enabled them to keep their certifications and licenses so that they were able to continue to work and earn an income.

136. The physicians sought an injunction to prevent the loss of their board certification and licensure.

137. The loss of the physicians' board certification would greatly impact their ability to work and earn an income; it would result in the loss of the physicians' ability to practice their respective specialties.

138. Dr. Castillo testified, and the Court so finds, that without the injunction, he would have lost not only his licensure and his ability to serve and practice at his hospital, but the ability to participate with most insurance plans is dependent on licensure.

> 139. [Husband] received $587,063.63 from the settlement and deposited into his SECU Account # . . . . Of that, $325,463.48 went to reimbursing Dr. Castillo for fronting legal fees for [Husband].
>
> 140. Based on the above, [Husband] failed to meet his burden to show that the settlement proceeds are his separate property.
>
> 141. However, even if [Husband] had met his burden to show that the settlement proceeds are his separate property, [Husband] failed to trace the funds held in SECU Account # . . . on the date of separation back to the funds received from the legal settlement.

Based upon the findings of fact, Husband and other physicians brought the lawsuit to prevent the loss of their board certification and licensure because the loss of board certification would "greatly impact [their] ability to work and earn an income[.]" Yet Husband's argument on appeal relies upon cases dealing with classification of proceeds from personal injury claims. Husband notes that North Carolina applies the "analytic approach" by focusing on what the proceeds are intended to replace.

> The analytic approach asks what the award was intended to replace, and has been adopted by statute or case law in eight of the nine community property states. Generally, under the analytic approach the personal injury award may be seen as composed of three potential elements of damages: (1) those compensating the injured spouse for pain and suffering, disability, disfigurement, or lost limbs; (2) those compensating for lost wages, lost earning capacity, and medical and hospital expenses; and (3) those compensating the non-injured spouse for loss of services or loss of consortium.

Johnson v. Johnson, 317 N.C. 437, 446-47, 346 S.E.2d 430, 435-36 (1986) (brackets in original) (citations and footnotes omitted).

Ignoring the trial court's unchallenged findings regarding the purpose of the lawsuit – to protect Husband's certification to practice and his ability to earn income as a physician – Husband argues "[t]he overwhelming evidence established the primary claim in [the] lawsuit was for defamation – personal injury to [Husband's] reputation and character." Husband points to evidence he presented regarding injury to his reputation and his "emotional distress and mental anguish." But even

if the trial court's unchallenged findings were not binding, and even if there was evidence that Husband made claims for "emotional distress and mental anguish," the trial court's findings of fact are supported by competent evidence. *See Stovall*, 205 N.C. App. at 407, 698 S.E.2d at 683. The trial court found Husband failed to carry his burden of proving the settlement proceeds were his separate property because he "failed to prove that the settlement proceeds were to compensate for an injury or damages that were personal to him." *See O'Brien v. O'Brien*, 131 N.C. App. 411, 418, 508 S.E.2d 300, 305 (1998) (discussing the parties' "dual burdens of proof" as to classification of marital property).

Contrary to Husband's characterization of his lawsuit, the evidence presented at trial overwhelmingly indicates that the purpose of this suit was to seek an injunction reinstating Husband's status with the professional organization, because without membership and certification by the organization, he would risk loss of his license and be unable to continue practicing medicine. While the plaintiffs, including Husband, had asserted a claim that included damages for non-economic loss, the claim also asserted damages for economic loss, and the settlement simply grants a sum of money but does not specify for which claims and what type of damages the award is intended to address. Wife testified that this money was acquired during the marriage, and both Wife and Dr. Castillo, a co-plaintiff, testified this lawsuit was to recover compensation for economic loss; these findings are therefore supported by competent evidence. *See generally Stovall*, 205 N.C. App. at 407, 698 S.E.2d at 683. Husband's argument is overruled.

5. Credit for Payments Toward Marital Debt

Husband next argues he was not given proper credit for payments he made to the parties' joint tax liability of $27,000.[7] Husband agreed to pay the parties' 2019 joint income tax liability in the Consent Order, and he asserts he was entitled to a credit for paying Wife's share of the parties' joint 2019 tax liability from his separate property, as the taxes were paid from Husband's SECU account.

Husband's argument is based upon his claim that the funds in the SECU account were his separate property. We have already addressed the classification of the funds in the SECU account as marital; this

7. We note Husband asserts the Consent Order "required [Husband] to pay the parties' joint tax liability in the amount of $27,087.23." However, the interim distribution order does not state the amount that Husband was required to pay; the order simply states that whatever tax liability resulted from the parties' joint 2019 taxes were to be paid from Husband's SECU account.

account held the proceeds of the lawsuit discussed above. Husband contended the proceeds were his separate property, but as addressed above, the trial court properly held the proceeds in the SECU account were marital property. Thus, Husband paid the 2019 tax liability – a marital obligation – from the SECU account and he paid it from marital funds, not from his separate funds. Husband's argument that he did not receive a credit or offset for post-separation payments is without merit. *See generally Bodie v. Bodie*, 221 N.C. App. 29, 34, 727 S.E.2d 11, 15 (2012) ("A spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (*from non-marital or separate funds*) for the benefit of the marital estate." (emphasis added) (quotation marks omitted)).

6. Federal Retirement Benefits

[2] Husband's final argument as to the equitable distribution is that the trial court was without jurisdiction to enter the two orders distributing his federal retirement benefits after his notice of appeal from the First Order, or in the alternative, that these orders violate North Carolina and federal law. We have already addressed Husband's argument regarding jurisdiction of the trial court above; the trial court had jurisdiction to enter the orders under North Carolina General Statute § 50-19.1. *See* N.C. Gen. Stat. § 50-19.1. We have also previously addressed Husband's arguments regarding the substance of the equitable distribution contained in the First Order, and we have affirmed the equitable distribution provisions in the First Order. The First Order directed the entry of the two retirement plan orders. Husband has not raised any argument that the two retirement plan orders failed to comply with the provisions of the First Order.

Husband's alternative arguments – perhaps they may be better characterized as general statements of objections – regarding the two retirement plan orders are presented in one-half of a page in his brief. These arguments are generally that the two orders "are not supported by competent evidence" and that they do not correctly address any "post separation salary adjustments."

Husband has not identified any specific findings of fact in the two orders he challenges as unsupported by the evidence, nor has he presented any specific argument regarding the conclusions or decrees of the two orders. Husband has consequently waived any challenges to the findings and conclusions in these orders, and we therefore affirm the two orders, Court Order Acceptable for Processing and Retirement Benefits Court Order. *See generally Eaton v. Campbell*, 220 N.C. App. 521, 522, 725 S.E.2d 893, 894 (2012) ("Because defendants' limited and

unsupported arguments give us no reason to disturb the trial court's judgment in which its conclusions of law are supported by its findings of fact which are, in turn, supported by the record evidence, . . . we affirm." (citation omitted)).

IV. Child Support

[3] Husband next challenges the portion of the First Order establishing child support and argues the child support provisions of the First Order should be reversed because these provisions were "not entered in accordance with the Child Support Guidelines." (Capitalization altered.) For the reasons below, the trial court correctly applied the Child Support Guidelines and did not abuse its discretion.

A. Standard of Review

Generally, "[c]hild support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Ferguson v. Ferguson*, 238 N.C. App. 257, 260, 768 S.E.2d 30, 33 (2014) (quotation marks omitted). "Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Id.*

In a child support proceeding, "our review of the trial court's findings is limited to whether those findings are supported by competent evidence in the record." *Kaiser v. Kaiser*, 259 N.C. App. 499, 510, 816 S.E.2d 223, 231 (2018) (citations omitted). "Findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary." *Johnson v. Johnson*, 259 N.C. App. 823, 827, 817 S.E.2d 466, 471 (2018) (quotation marks omitted). Conclusions of law are reviewed *de novo*, and "[i]f the trial court labels a conclusion of law as a finding of fact, the appellate court still employs *de novo* review." *Thomas v. Burgett*, 265 N.C. App. 364, 367, 852 S.E.2d 353, 356 (2019) (citations omitted).

B. Analysis

Child support is governed by North Carolina General Statute § 50-13.4. *See* N.C. Gen. Stat. § 50-13.4 (2021). As noted by Husband:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the

> child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c). Here, child support was determined by "applying the presumptive [child support] guidelines[,]" N.C. Gen. Stat. § 50-13.4(c), and the trial court incorporated Worksheet B, calculating child support under the Guidelines, and attached it to the First Order.[8] *See* N.C. Gen. Stat. § 50-13.4(c1) (requiring the prescription of "uniform statewide presumptive guidelines for the computation of child support obligations").

Husband argues the trial court failed to follow the Guidelines and (1) erred in calculating Wife's gross income, (2) erred by assigning some expenses as childcare costs, and (3) erred by requiring Husband to pay education expenses. Husband argues these findings, as well as those findings that rely upon the unsupported or erroneous findings, should be vacated and the trial court abused its discretion in entering the child support portion of the Order. For the reasons below, the trial court did not abuse its discretion when entering the child support provisions of the First Order.

1. Wife's Gross Income

Husband first argues the trial court failed to calculate Wife's gross income, as defined by the Child Support Guidelines. "[D]eterminations of gross income are conclusions of law reviewed *de novo*." *Thomas*, 265 N.C. App. at 367, 852 S.E.2d at 356. The North Carolina Child Support Guidelines define "gross income" as "actual gross income from any source," including "self-employment . . . ownership or operation of a business . . . and annuities." N.C. Child Support Guidelines, AOC-A-162, at 3 (2020). "When income is received on an irregular, non-recurring, or one-time basis, the court may average or prorate the income over a specified period of time[.]" *Id.* Additionally, "[t]he court must determine the parent's gross income as of the time the child support order was originally entered, not as of the time of remand nor on the basis of the parent's average monthly gross income over the years

8. The North Carolina Child Support Guidelines use standardized worksheets to calculate a child support obligation. *See* N.C. Child Support Guidelines, AOC-A-162, at 5 (2020). Worksheet B is published by the North Carolina Administrative Office of the Courts, Form AOC-CV-628. *See* Worksheet B Child Support Obligation Joint or Shared Physical Custody, AOC-CV-628 (2020).

preceding the original trial." *State ex rel. Midgett v. Midgett*, 199 N.C. App. 202, 207, 680 S.E.2d 876, 879 (2009) (citations, quotation marks, and brackets omitted).

The trial court only made one finding regarding Wife's gross income in the First Order: "[Wife] is self-employed as a consultant . . . . She earns a total gross monthly income of $6,861.25, which is comprised of $6,630.00 wages/salary; $165.00 business income; and $66.25 from cosmetic sales for LimeLife." This finding is consistent with Wife's 4 June 2021 financial affidavit and her testimony at trial. Husband argues the trial court (1) failed to account for pension and annuity payments Wife received in 2020 and (2) failed to make findings regarding ordinary and necessary business expenses from Wife's self-employment income. We first address Wife's pension and annuity payments.

Husband argues the trial court erred because Wife listed $46,512 received as distributions from pensions and annuities on her 2020 individual tax return, which was absent from Wife's 2021 financial affidavit, and the trial court's First Order does not account for any of Wife's pensions and annuities income. Wife's financial affidavit, in and of itself, is competent evidence. *See Rea v. Rea*, 262 N.C. App. 421, 427, 822 S.E.2d 426, 431 (2018) (noting the wife's financial affidavit is competent evidence). As to the $46,512 in annuities Wife claimed on her 2020 taxes, but the trial court did not find as income, Wife testified she "cashed in an annuity in order to pay off some of [her] bills and credit card debt that [she] had as mostly legal fees and some other purchases[.]" Wife testified the $46,512 was withdrawn from a pension retirement account she cashed in to pay her legal bills, and also testified that the $46,512 was "cashed out of [her] IRA[.]" Regardless of the exact account the $46,512 was withdrawn from, there was evidence in the record to show that the $46,512 was a non-recurring, one-time early withdrawal from one of Wife's retirement accounts.

The trial court is not required to treat the conversion of an asset into cash as income for purposes of a child support calculation. Depending upon the evidence in the particular case, the trial court has the discretion to treat a non-recurring, early withdrawal from a retirement account as income for purposes of child support, but here, Husband has failed to demonstrate any abuse of discretion in the trial court's findings as to Wife's income. *See McKyer v. McKyer*, 179 N.C. App. 132, 144, 632 S.E.2d 828, 835 (2006) (applying the 2006 Child Support Guidelines). "[T]he mere fact that a non-recurring payment has occurred, in the absence of evidence that the payment was 'income' at all, is alone insufficient to establish that the payment was necessarily non-recurring

income." *Id*. Here, similar to *McKyer*, Husband simply asserts "[t]he trial court did not make findings to reflect how often [Wife] receives such irregular or non-recurring income as required by the guidelines[,]" but Husband "makes no argument as to why receipt of the [payment] constitutes 'income.' " *Id*.

Additionally, although the Guidelines require "current income must be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period[,]" N.C. Child Support Guidelines, AOC-A-162, at 3 (2020), "this Court has established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Holland v. Holland*, 169 N.C. App. 564, 568, 610 S.E.2d 231, 234 (2005) (quotation marks and emphasis omitted). Wife's tax return was filed in April 2021, based on her income from the year prior to entry of the First Order. Wife then filed an updated financial affidavit on 4 June 2021. The hearing on the parties' claims took place 14 June 2021 through 16 June 2021, and the trial court entered its First Order on 8 October 2021.

Here, the trial court had competent evidence of Wife's income in 2021 available, and the trial court did not err by utilizing the most recent figures from the current year to calculate Wife's income. *See Rea*, 262 N.C. App. at 427, 822 S.E.2d at 431; *Holland*, 169 N.C. App. at 568, 610 S.E.2d at 234. The trial court did not err by entering a finding without accounting for Wife's retirement withdrawal when the trial court applied the Guidelines, using Wife's current income, because "[u]nder the Child Support Guidelines, [c]hild support calculations . . . are based on the parents' current incomes at the time the order is entered." *Midgett*, 199 N.C. App. at 207, 680 S.E.2d at 879 (quotation marks and emphasis omitted). Husband's arguments as to the trial court's treatment of Wife's early retirement withdrawal are overruled.

Husband also argued the trial court erred in determining Wife's gross income by "failing to make findings regarding the 'ordinary and necessary' expenses incurred for self-employment or operation of a business." The Guidelines define "[g]ross income from self-employment . . . as gross receipts minus ordinary and necessary expenses required for self-employment or business operation." N.C. Child Support Guidelines, AOC-A-162, at 3 (2020). "Expense reimbursements or in-kind payments . . . received by a parent in the course of employment, self-employment, or operation of a business are counted as income if they are significant and reduce personal living expenses." *Id*.

Husband asserts the trial court failed by making findings as to Wife's "ordinary and necessary" business expenses because Wife paid

for "regular business expenses like internet, phone, [her] computer, support, and some legal fees" through her business but the trial court made "no findings regarding the reasonableness of these expenses in the determination of [Wife's] income." Husband notes "the trial court received substantial evidence regarding mEDhealth's profits and losses" upon which such findings could be made. However, Husband does not clearly articulate an argument. Husband does not identify any specific unreasonable expense the trial court might have disregarded nor does he state how the trial court should have treated any specific expense.

Additionally, Husband's argument is somewhat baffling, since Wife's gross income would be reduced by deduction of these alleged business expenses from her business income, leaving Wife with a lower income for purposes of the child support obligation. A lower income would simply *reduce* Wife's share of the child support obligation and *increase* Husband's child support obligation based upon the percentage of the total child support obligation assigned to Husband. Here, Husband notes the trial court "received substantial evidence" of Wife's self-employment income and simply points to the absence of findings to assert the trial court erred. But "the trial court need not make a finding as to every fact which arises from the evidence." *Matter of M.S.E*, 378 N.C. 40, 54, 859 S.E.2d 196, 209 (2021). The trial court made sufficient ultimate findings of fact as to the parties' incomes as needed to calculate Guideline child support. In this case, there is no indication that either party requested to deviate from the Guidelines, and the trial court did not do so *sua sponte*. As a result, the trial court was not required to make findings on Wife's reasonable expenses arising from her self-employment as they relate to her income and relative ability to pay child support. *See generally Ferguson*, 238 N.C. App. at 260-61, 768 S.E.2d at 33-34. The trial court made the required finding as to Wife's gross income based upon the evidence. *See* N.C. Child Support Guidelines, AOC-A-162, at 3 (2020). Husband's argument that the trial court erred by failing to make findings regarding Wife's business expenses and the impact of these expenses on her income is overruled.

2. Work-Related Child Care Costs

Husband next argues the trial court "erred in allocating summer camp expenses as work-related child care costs[,]" (capitalization altered), because there was evidence in the record indicating not all of Wife's claimed child care expenses "had any relationship to her employment responsibilities." Husband asserts, therefore, "[t]he trial court's inclusion of summer camp expenses was not in accordance with the child support guidelines and constitutes an abuse of discretion." We disagree.

"Reasonable child care costs that are, or will be, paid by a parent due to employment or job search are added to the basic child support obligation and prorated between the parents based on their respective incomes." N.C. Child Support Guidelines, AOC-A-162, at 4 (2020). The trial court found Wife "ha[d] a monthly work-related childcare cost of $386.58" and entered an adjustment to Worksheet B for these expenses when determining the parties' child support obligation under the Guidelines.

This finding is supported by competent evidence. Wife's June 2021 financial affidavit is included in the record. In this affidavit, Wife attested that her monthly work-related childcare costs averaged over a full year were $386.58 per month. Wife also testified that these figures were calculated based on David's usual after-school care and "the average of all of" the summer camps David participates in "because they're all different prices." Wife then testified that she uses after-school childcare and summer camps to facilitate meeting her professional obligations. Wife testified that David "goes to summer camp so that [she] can work, [and] so that he can have a camp experience." When questioned whether "[t]he summer camp has nothing to do with childcare so you can perform your work responsibilities, correct[,]" Wife answered "[n]o. It has something to do with it, but it also has to do with [David] wanting/needing those same activities, just like lots of kids, activities for growth and opportunity, being with friends, learning new skills, whatever it is." Wife continued "[a]nd *I also would not be able to work and bring in the income, which would then just decrease my income and increase* [*Husband's*] *need to support us*." (Emphasis added.)

Wife's financial affidavit and her testimony are competent evidence to support the trial court's finding that Wife has $386.56 in "monthly work-related childcare cost[s,]" *see Rea*, 262 N.C. App. at 427, 822 S.E.2d at 431, and "[f]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary." *Johnson*, 259 N.C. App. at 827, 817 S.E.2d at 471. Husband's argument is overruled.

3. Private School Tuition and Expenses

Husband next argues the trial court made insufficient findings regarding tuition expenses, including that the trial court failed to make a finding accounting for increases in tuition and failed to make a finding regarding registration and institution fee expenses. Husband also argues the trial court did not explain why he "should be solely responsible for these costs or provide analysis of this shared expense between the parties." For the reasons below, Husband's argument does not have merit.

The trial court found "the minor child attends school . . . at a cost of $1,211.25 per month. This is a reasonable extraordinary expense for the minor child. [Husband] should continue to pay the minor child's private school tuition expense at" the child's school. The trial court included this expense in the Child Support Guidelines Worksheet attached to the First Order. The trial court then ordered Husband to pay "monthly school tuition (including the registration and institution fee expenses) directly to the minor child's school."

The Child Support Guidelines provide for extraordinary expenses:

> Other extraordinary child-related expenses (including (1) expenses related to special or private elementary or secondary schools *to meet a child's particular education needs* . . .) may be added to the basic child support obligation and ordered paid by the parents *in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest.*

N.C. Child Support Guidelines, AOC-A-162, at 5 (2020) (emphasis added). "According to the child support guidelines, the trial court may make adjustments for extraordinary expenses and order payments for such term and in such manner as the court deems necessary." *Ferguson*, 238 N.C. App. at 265, 768 S.E.2d at 36 (quotation marks and brackets omitted). The trial court has the authority to add extraordinary expenses to the basic child support obligation set under the Guidelines and prorate these expenses based on the parties' incomes, so long as the trial court determines the expenses "are reasonable, necessary, and in the child's best interest." *Id.* (quotation marks and citation omitted). Adjustments for extraordinary expenses are not deviations from the Guidelines, and therefore, "absent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses." *Id.* (quotation marks omitted).

The trial court found "[i]t is in [David's] best interests that he continues to attend [his current school][,]" and Husband does not challenge the trial court's findings regarding his current school. The trial court found David had attended his private school since kindergarten, the parties agreed he should continue to attend the school, and the school's religious values motivated their decision to send David to that school. David was "thriving" at this school and "has established strong, close relationships with his teachers and peers." Consistent with the Guidelines, the trial court added David's education expenses to the basic child

support obligation on Worksheet B and prorated those expenses based on the parties' respective incomes. *See* N.C. Child Support Guidelines, AOC-A-162, at 5 (2020).

The trial court did not abuse its discretion by not making a finding regarding any increase in tuition. Any increase in tuition, should it occur, may be addressed in a future proceeding upon a motion to modify Husband's support obligation. *See* N.C. Gen. Stat. § 50-13.7 (2021). Additionally, we cannot determine the basis of Husband's argument the trial court failed to make specific findings regarding "registration and institution fee expenses." As best we can tell from the record, the bill for tuition from the school includes various fees, and some of those fees are characterized as registration and institution fees, but it is not clear what amount of fees Husband is responsible for, or how often those fees are due. Finding 60 states that "the minor child attends school at [name of school redacted] at a cost of $1,211.25 per month." Husband did not challenge this finding of fact, and it is binding on appeal. *See Peltzer*, 222 N.C. App. at 787, 732 S.E.2d at 360. This argument is without merit.

As to Husband's argument that the trial court did not explain why he "should be solely responsible for these costs or provide analysis of this shared expense between the parties[,]" Husband's argument shows a misunderstanding of the effect of the calculations on Child Support Guidelines Worksheet B. Husband is not "solely responsible" for the tuition costs, and the Worksheet itself is an "analysis of this shared expense between the parties." Additionally, Husband does not challenge the use of Worksheet B to calculate his support obligation.

On Worksheet B, the parties' total support obligation was "adjust[ed]" by $1,211.25 for private school "expenses paid directly by" Husband. Worksheet B accounts for the total child support obligation and the percentages owed by each party, based upon their individual incomes and the custodial time with the child, and prorates the parties' obligations based upon their share of their total income, including adjustments for expenses paid for both parties. Here, the trial court included adjustments for $386.58 per month in "[w]ork-related child care costs" to be paid by Wife, $244.21 per month in "[h]ealth [i]nsurance premium costs – child's portion" to be paid by Husband, and, as an extraordinary expense, $1,211.25 per month in tuition costs to be paid by Husband.

The calculation of child support accounted for the allocation of all these expenses paid by both parties, based upon their respective percentage responsibility for the total support obligation. Consequently, the

Worksheet accounts for the full $1,211.25 per month paid by Husband for David's education costs, prorates it between the parties based on their income, and Husband's ultimate child support obligation takes into account the expenses he pays. The trial court did not abuse its discretion in utilizing Worksheet B or its calculation for child support, and Husband's argument is without merit.

V. Alimony

[4] We next address Husband's challenge to the portion of the First Order establishing alimony. Continuing his blunderbuss approach, Husband purports to challenge nearly every potential aspect of the alimony award: the findings of fact the trial court made; the findings of fact the trial court did not make; Wife's status as a dependent spouse; the parties' accustomed standard of living; Wife's current income and expenses; the possibility that Wife may earn a greater income in the future; the trial court's consideration of factors under North Carolina General Statute § 50-16.3A; and of course the amount of alimony awarded. To the extent we can separate the wheat from the chaff, we will address the arguments properly presented.

A. Standard of Review

Husband's arguments address both entitlement and the amount of alimony the trial court awarded. "[A]limony is comprised of two separate inquiries[,]" whether a spouse is entitled to alimony and if so, the amount. *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000).

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether . . . competent evidence . . . support[s] the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Collins v. Collins*, 243 N.C. App. 696, 699, 778 S.E.2d 854, 856 (2015) (ellipses and brackets in original) (citations and quotation marks omitted). "If the court's findings of fact are supported by competent evidence, they are conclusive on appeal, even if there is contrary evidence." *Id.* "The trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Peltzer*, 222 N.C. App. at 787, 732 S.E.2d at 360.

"Whether a spouse is entitled to an award of alimony or post-separation support is a question of law. This Court reviews questions of law *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *Collins*, 243 N.C. App. at 699, 778 S.E.2d at 856 (citations and quotation marks omitted).

> Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

Kelly v. Kelly, 228 N.C. App. 600, 601, 747 S.E.2d 268, 272-73 (2013) (citations and quotation marks omitted).

B. Status of Wife as Dependent Spouse

We have grouped Husband's arguments based on the findings his arguments address.

1. Findings Regarding the Parties' Accustomed Standard of Living and Wife's Reasonable Needs

Husband first contends Wife "is not a dependent spouse because she is not actually and substantially dependent upon [Husband] for her maintenance and support." (Capitalization altered.) But there are two types of dependent spouses; a dependent spouse is one "who is actually substantially dependent upon the other spouse for his or her maintenance and support or is *substantially in need of maintenance and support* from the other spouse." N.C. Gen. Stat. § 50-16.1A(2) (2021) (emphasis added). "A party is 'actually substantially dependent' upon her spouse if she is currently unable to meet her own maintenance and support." *Carpenter v. Carpenter*, 245 N.C. App. 1, 4, 781 S.E.2d 828, 832 (2016) (quoting *Barrett*, 140 N.C. App. at 370, 536 S.E.2d at 644). "A spouse is 'substantially in need of maintenance' if he or she will be unable to meet his or her needs in the future, even if he or she is currently meeting those needs." *Barrett*, 140 N.C. App. at 371, 536 S.E.2d at 644-45.

Husband first contends the "trial court did not make factual findings regarding the parties' accustomed standard of living during the marriage." (Capitalization altered.) Husband also contends that the "trial court's findings related to [Wife's] dependency and the parties' expenses are not supported by competent evidence. Findings of fact 68 through 88 should be vacated." Thus, Husband claims the trial court did not make sufficient findings of fact regarding the parties' standard of living

during the marriage while *also* claiming that the trial court's findings of fact addressing exactly that should be vacated. Essentially, Husband seems to contend the trial court should have been more specific as to the details of the parties' accustomed standard of living during the marriage as opposed to their current needs and expenses.

Findings of fact 68 through 79 address the parties' income and expenses. We will not quote these findings, which are highly detailed findings, including several tables summarizing the reasonable expenses for each party and the child, contained in two single-spaced pages of the order. Husband does not articulate any specific argument challenging any of these findings as unsupported by the evidence, and therefore they are binding on appeal. *See Peltzer*, 222 N.C. App. at 787, 732 S.E.2d at 360. The trial court also made extensive, detailed findings regarding the parties' property and financial circumstances during the marriage in the portion of the First Order addressing equitable distribution. Those findings address the parties' marital home, vehicles, bank accounts, retirement plans, jewelry, art collection, household goods, debts, life insurance policies, business interests, credit cards, and frequent flyer miles. Clearly, the trial court considered all these findings in coming to its evaluation of the accustomed standard of living and its conclusion regarding Wife's status as a dependent spouse.

2. Findings Regarding Wife's Capacity to Earn Future Income

Husband also contends the trial court "failed to make any findings regarding [Wife's] capacity to earn future income." First, the trial court need not make specific findings regarding capacity to earn income unless a spouse is suppressing her income in bad faith and the court imputes income. *See Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) ("Alimony is ordinarily determined by a party's *actual* income, from all sources, at the time of the order. To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith." (emphasis in original) (citation omitted)). The trial court's findings show Wife was appropriately and gainfully employed and there was no basis for imputation of income. In addition, the trial court made the following findings addressing Wife's work history and future earning potential, and these findings are supported by the evidence:

> d. For the majority of the parties' marriage, [Wife] made substantial sacrifices that advanced [Husband's] career and increased his earning capacity. [Wife] agreed to relocate many times for [Husband's] career even though she was required to find a new employment as a result of

> the relocations. In addition to agreeing to relocate, [Wife] assisted [Husband] in editing his journal articles and reviewing documents for his articles and research. [Wife] took care of the household and the minor child while [Husband] attended numerous conferences and meetings. All of these contributions increased [Husband's] income and earning capacity.
>
> e. [Wife] sacrificed her career to a large extent to care for the household and the minor child. The parties agreed that [Wife] would work part-time in order to be the primary caretaker for the minor child.
>
> f. [Husband] has a higher income than [Wife]. His earning capacity will remain the same or increase.
>
> g. [Wife] cares for the parties' child the majority of the time. [Wife's] earning capacity is limited due to her role as the primary caregiver for the minor child. [Wife] could not increase her income without traveling and increasing her work hours, which she cannot do as long as she . . . is the minor child's primary caregiver.
>
> h. [Wife] is 47 years old. Her earning capacity will likely stay the same with a *potential* to increase once the minor child is sixteen (16) years old and takes on more responsibility for his care and transportation.

(Emphasis in original.) The trial court addressed the proper factors, based upon the evidence. *See* N.C. Gen. Stat. § 50-16.3A (2021).

The trial court made sufficient findings of fact regarding the parties' accustomed standard of living during the marriage as well as Wife's current reasonable needs for support, and Wife's capacity to earn future income. These findings are supported by the evidence. This argument is without merit.

3. Marital Misconduct

The trial court made detailed findings regarding the alimony factors stated in North Carolina General Statute § 50-16.3A. *See* N.C. Gen. Stat. § 50-16.3A(b). As noted above, Husband has generally challenged all the findings regarding the alimony factors as unsupported by the evidence, but he does not make a specific argument on most of them, so we will not address those factors. Husband *does* address the trial court's findings as to marital misconduct in detail.

Husband purports to challenge "[f]indings of fact 40 through 43, 46, 79, 84, and 152" and argues "[t]he evidence regarding marital misconduct was pure conjecture and all attendant findings should be vacated." We preliminarily note findings 40 through 43 were in the section of the First Order addressing child custody, and although Husband nests additional arguments here, including challenging various statements of the minor child as hearsay, we need not address his evidentiary arguments because as relevant to alimony, these findings all address Husband's credibility, or lack thereof, and even if we disregard findings 41 through 43, the trial court's other findings make its assessment of Husband's lack of credibility abundantly clear. For purposes of Husband's argument as to entitlement to alimony, we do not address these findings.

The challenged findings state in relevant part:

> 79. In determining the amount, duration, and manner of payment of alimony, the Court finds, in addition to the above findings, as follows:[9]
>
> . . . .
>
> i. [Wife] was a faithful and dutiful wife, who supported and loved [Husband] through a difficult revelation in their marriage.
>
> j. [Wife] did not commit marital misconduct.
>
> k. [Husband] has committed acts of "marital misconduct" as that term is defined in N.C.G.S. § 50-16.1A(3)(a) and (f). Specifically: [Husband] committed acts of illicit sexual behavior with at least one woman other than [Wife] during the parties' marriage. [Husband] wasted marital assets for non-marital purposes in furtherance of his illicit sexual activities as detailed further in Finding of Fact 152, below.

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9. The majority of finding of fact 79 has nothing to do with marital misconduct, and instead simply recounts evidence regarding the length of the marriage, how much the parties worked, and the disparity in the parties' income. These are factors the trial court was required to consider in determining whether Wife was entitled to alimony and the amount of alimony she was entitled to receive. *See* N.C. Gen. Stat. § 50-16.3A(a)-(b). Husband's argument focuses on the challenges quoted here; Husband does not articulate an argument against the omitted findings and they are binding on appeal. *See Peltzer*, 222 N.C. App. at 787, 732 S.E.2d at 360; *see also* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

> l. [Wife] did not condone [Husband's] illicit sexual behavior or other marital misconduct as described herein.
>
> m. [Husband's] marital misconduct set forth above rendered the condition of [Wife] intolerable and her life burdensome.
>
> . . . .
>
> 152. [Wife] analyzed the expenditures from [Husband's] USAA Checking Account # . . . and presented evidence of [Husband's] marital waste. [Husband] spent substantial sums of money for non-marital purposes, including but not limited to, lingerie and sex store purchases for individuals other than [Wife]; pornography; numerous hotel charges; PayPal charges to at least one female, for sex; spyware that he installed on [Wife's] phone; charges for a secret email account; numerous background checks for potential sexual partners; Match.com; among other similar expenditures for non-marital purposes.

In addition to the challenged findings, the trial court made two findings relevant to Husband's marital misconduct that Husband does not challenge:

> 153. Of the $123,869.00 that [Husband] claimed was used for home improvements, only $29,603.00 was used for home improvements.
>
> 154. Accordingly, $29,603.00 was used for marital purposes and should be distributed equally to the parties. The remainder was used by [Husband], for non-marital purposes in furtherance of his illicit extramarital activities and should be distributed to [Husband].

Husband's argument focuses mostly on the finding of illicit sexual behavior, finding 79(k).

Marital misconduct may be a factor considered by the trial court in determining alimony, *see* N.C. Gen. Stat. § 50-16.3A(b)(1), but "[i]f the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, then the court *shall* order that alimony be paid to [the] dependent spouse." N.C. Gen. Stat. § 50-16.3A(a) (emphasis added). "Illicit sexual behavior" is distinguished from other

forms of marital misconduct as it mandates an award of alimony to a dependent spouse, whereas other forms of marital misconduct may simply be considered as a factor, in the trial court's discretion, in determining alimony. *See Romulus v. Romulus*, 215 N.C. App. 495, 521-22, 715 S.E.2d 308, 325 (2011); *see also* N.C. Gen. Stat. § 50-16.3A(b)(1).

Here, the trial court found Husband had committed both illicit sexual behavior and indignities. As noted above, Husband's marital misconduct under Subsection 50-16.1A(3)a. mandates an award of alimony, but indignities under Subsection 50-16.1A(3)f. is a factor the trial court may consider when determining entitlement to alimony. *See* N.C. Gen. Stat. § 50-16.3A(a).

Husband's main argument here centers on finding 79(k). Husband argues Wife "had no personal knowledge of any fact found by the trial court regarding illicit sexual activity by [Husband]" and that she "could not identify any individual with whom [Husband] had the relationship." Wife counters by noting the evidence of Husband's tremendous expenditures for lingerie, sex toys, hotels, pornography, "SmartSextalk," secret emails, a subscription to Match.com, and online payment to someone named "Jenna." Wife relies upon *Rea v. Rea*, which states that "[i]t is well-established that direct evidence of illicit sexual behavior or indignities as a result of that behavior is not required but can be shown by circumstantial evidence." *Rea*, 262 N.C. App. at 424, 822 S.E.2d at 429. This case has different facts from prior cases, such as *Rea*, addressing the sufficiency of circumstantial evidence under the "opportunity and inclination" doctrine to support a finding of "illicit sexual behavior," so we must consider if the evidence in this case will also suffice to support the trial court's findings.

In *Rea*, this Court explained,

> Where adultery is sought to be proved by circumstantial evidence, resort to the opportunity and inclination doctrine is usually made. Under this doctrine, adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations.
>
> Thus, if a plaintiff can show opportunity and inclination, it follows that such evidence will tend to support a conclusion that more than mere conjecture exists to prove sexual intercourse by the parties.

> *Coachman v. Gould*, 122 N.C. App. 443, 447, 470 S.E.2d 560, 563 (1996) (citation and quotation marks omitted).
>
> The evidence at trial included a private investigator ("PI") who testified that on 6 August, before separation, she witnessed and photographed Husband kissing Ms. Smith. The investigative report, admitted as an exhibit, shows that the investigator parked near Husband's truck in the parking lot of a shopping mall at 1:09 p.m. and waited until 3:45 p.m., when Husband and Ms. Smith arrived, and Ms. Smith parked her car next to Husband's truck. Husband and Ms. Smith kissed. Husband then got into his own truck, and both vehicles left at the same time. Thereafter, on 18 and 19 August, two nights in a row only ten days after the parties' separation, the PI saw Husband's and Ms. Smith's vehicles parked overnight at a hotel. Although the overnight stays at the hotel were shortly after the parties separated, "[n]othing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation[.]" N.C. Gen. Stat. § 50-16.3A(b)(1) (2015).
>
> Furthermore, Wife testified that prior to their separation Husband began to repeat specific suspicious behaviors he exhibited in 2011 when he had a prior affair; these actions prompted her to hire the PI. For example, Husband failed to come home one night. Wife also saw Husband and Ms. Smith together, including at Husband's temporary residence, shortly after the date of separation, and when Wife confronted the Husband about the other woman, he said, "she was a better woman than" Wife. We conclude there was competent evidence to support finding of fact 11(a) and (b). This argument is overruled.

Id. at 424-25, 822 S.E.2d at 429-30 (formatting altered).

In *Rea*, there was evidence the husband was having a relationship with a specific woman, Ms. Smith. *See id.* The two of them were observed together overnight at a hotel twice. *See id.* Other cases using the "opportunity and inclination" doctrine present similar facts. *See*, *e.g.*, *Wallace v. Wallace*, 70 N.C. App. 458, 319 S.E.2d 680 (1984); *Horney v. Horney*, 56 N.C. App. 725, 289 S.E.2d 868 (1982); *Owens v. Owens*, 28 N.C. App. 713, 222 S.E.2d 704 (1976).

The statutory definition of "illicit sexual behavior" is quite specific:

> Illicit sexual behavior. For the purpose of this section, illicit sexual behavior means acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.20(4), voluntarily engaged in by a spouse with someone other than the other spouse[.]

N.C. Gen. Stat. § 50-16.1A(3)a. The term "sexual act" as used in this context is also specifically defined, by reference to North Carolina General Statute § 14-27.20(4):

> (4) Sexual act. — Cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body. It is an affirmative defense that the penetration was for accepted medical purposes.

N.C. Gen. Stat. § 14-27.20 (2021).

Some of the terms of North Carolina General Statute § 50-16.1A are not so well-defined. For example, "deviate sexual acts" apparently means something other than the "sexual acts" as defined by North Carolina General Statute § 14-27.20(4), but no case has explained exactly what it is.[10] In this case, the facts of the "opportunity" and "inclination" do not present the traditional situation with evidence of someone observing an overnight stay at a hotel or residence, *see Rea*, 262 N.C. App. at 424, 822 S.E.2d at 429, but the circumstantial evidence of Husband's illicit sexual behavior is still compelling. Finding 152 summarizes this extensive evidence:

> 152. [Wife] analyzed the expenditures from [Husband's] USAA Checking Account . . . and presented evidence of [Husband's] marital waste. [Husband] spent substantial

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10. In *Haddon v. Haddon*, it seems the alleged "deviate sexual acts" were between the husband and the wife, not with a third party, but we do not know what they did as the Court was apparently too appalled by the evidence to describe it:

> Evidence of abnormal and unnatural sexual conduct was offered by both plaintiff and defendant. There was conflicting evidence on the question of whether such conduct was abhorrent and intolerable to the plaintiff. However, the plaintiff did offer abundant evidence that defendant's persistent sexual conduct was intolerable to her and that she was forced against her will to engage in them with defendant.

Haddon v. Haddon, 42 N.C. App. 632, 635, 257 S.E.2d 483, 485 (1979).

> sums of money for non-marital purposes, including but not limited to, lingerie and sex store purchases for individuals other than [Wife]; pornography; numerous hotel charges; ATM withdrawals of large sums of cash that lined up with the hotel charges; PayPal charges to at least one female, for sex; spyware that he installed on [Wife's] phone; charges for a secret email account; numerous background checks for potential sexual partners; Match.com; among other similar expenditures for non-marital purposes.

Taking all these purchases in context, along with the testimony of both Husband and Wife about their relationship and the circumstances of Husband's many nights away in hotels, a permissible inference for the trial court to make from Husband's "opportunity and inclination" to commit illicit sexual behavior was to find Husband had committed illicit sexual behavior with at least one woman during the marriage. The evidence of Husband's activities was circumstantial, but the trial court properly considered the weight of the evidence and made findings of fact which are supported by this evidence. The evidence showed "inclination" to engage in sexual activity with other women, as demonstrated by the online services and purchases of lingerie and sex toys not used with Wife, as well as "opportunity" for sexual activities with the many hotel nights which corresponded with the dates of cash withdrawals and other purchases. *See Rea*, 262 N.C. App. at 424-25, 822 S.E.2d at 429-30. There was evidence of a PayPal payment "for sex" to "at least one female." Further, the evidence showed that some of the online services used by Husband are specifically intended to allow customers to contact women for the purpose of arranging sexual encounters. Husband did background checks on "potential sexual partners." Husband spent nearly $100,000 on these purchases, including hotels, lingerie, and sex toys. The large ATM withdrawals of cash matched up to the nights of the hotel charges. Although caselaw discussing inclination and opportunity warns against application of the doctrine where the evidence might only support a conjecture "that an adulterous affair had taken place[,]" in this case the evidence supports a reasonable inference of both Husband's opportunity and inclination to engage in illicit sexual behavior during the parties' marriage. *See Wallace*, 70 N.C. App. at 461-62, 319 S.E.2d at 682-83 (citation omitted); *see also Coachman v. Gould*, 122 N.C. App. 443, 446-47, 470 S.E.2d 560, 563 (1996).

There was competent evidence to support the trial court's finding that Husband engaged in illicit sexual behavior during the marriage. Additionally, Husband did not articulate an argument against the trial

court's finding Husband committed indignities and his "marital misconduct set forth above rendered the condition of [Wife] intolerable and life burdensome[,]" so this finding of fact is binding on appeal. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). While indignities do not mandate an award of alimony as illicit sexual behavior does under North Carolina General Statute § 50-16.3A(a), the trial court's findings also support the trial court's conclusions that "[a]n award of alimony from [Husband] to [Wife] is equitable" and "[Wife] is entitled to an award of alimony from [Husband]." *See* N.C. Gen. Stat. § 50-16.3A(a) ("The court shall award alimony to the dependent spouse upon a finding . . . that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section."), *see also* N.C. Gen. Stat. § 50-16.3A(b)(1) (requiring the trial court to consider marital misconduct as an equitable factor in establishing entitlement and amount of alimony). We therefore affirm the First Order regarding alimony.

VI. Conclusion

We affirm the First Order as to the equitable distribution of the parties' property as well as the trial court's two orders regarding retirement, Court Order Acceptable for Processing and Retirement Benefits Court Order distributing Husband's federal retirement plans. We also conclude the trial court did not abuse its discretion when applying the Child Support Guidelines and affirm the First Order as to the trial court's child support determination. As to the portion of the trial court's First Order awarding alimony, we conclude the evidence supports the trial court's finding that Husband committed "acts of illicit sexual behavior with at least one woman" other than Wife during the marriage and the trial court's findings also support the trial court's conclusion that an award of alimony was equitable. The trial court did not err in finding Husband committed marital misconduct, did not err in determining Wife was entitled to alimony, and did not abuse its discretion in awarding alimony to Wife. The alimony provisions of the First Order are also affirmed.

AFFIRMED.

Judges ZACHARY and COLLINS concur.

STATE OF NORTH CAROLINA
v.
JAMES KELLY MOORE, III

No. COA22-714

Filed 3 October 2023

1. Constitutional Law—right to counsel—criminal trial—waiver—forfeiture

Defendant's constitutional right to counsel was not violated in his trial for first-degree murder where defendant executed a written waiver of counsel after the trial court conducted a colloquy in accordance with N.C.G.S. § 15A-1242 informing defendant of his rights. Although the written waiver was not included in the record on appeal, its absence did not invalidate defendant's waiver. Further, presuming without deciding that defendant did not give a knowing and voluntary waiver, he engaged in misconduct sufficiently serious to forfeit the right to counsel, including having seven different attorneys during various stages of hearings and the trial (one of whom was his sister, whose *pro hac vice* admission was revoked on the trial court's own motion), warning his attorney during trial that she should withdraw for her own safety, and showing purported State Bar complaints about that same attorney to her and to the prosecutors during trial. The trial court's findings and conclusion that defendant's conduct was an attempt to delay or obstruct the proceedings and constituted egregious conduct were supported by competent evidence.

2. Criminal Law—motion for continuance—time to seek other counsel—during first-degree murder trial

The trial court did not err by denying defendant's motion to continue his first-degree murder trial, which defendant made during the State's case-in-chief in order to seek other counsel, where defendant had already waived and forfeited his right to counsel three days earlier after the court allowed defendant's trial counsel to withdraw at defendant's request.

3. Evidence—testimony of witness—first-degree murder trial—other crimes, wrongs, or acts—plain error review

The trial court did not commit plain error in defendant's trial for first-degree murder of a prostitute by admitting the testimony of a second prostitute regarding her interactions with defendant—including an allegation that defendant raped and robbed her—during

an encounter that took place a day after defendant interacted with the victim and after the victim's last known contact with her family. The testimony was admissible as relevant and probative of defendant's identity as the perpetrator of the murder. Further, the acts related by the witness were close enough in proximity and place to those involving the victim to be properly included under Evidence Rule 404(b), and their probative value was not outweighed by the danger of unfair prejudice, where defendant used the same phone number to locate, message, and solicit both prostitutes; the location the witness identified as the site of her encounter with defendant was the same location where the victim's body was later discovered; and the victim's text messages also alleged she had been raped.

Appeal by defendant from judgment entered 17 February 2022 by Judge Henry L. Stevens in Onslow County Superior Court. Heard in the Court of Appeals 6 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan P. Babb, for the State.

Mark L. Hayes, for the defendant-appellant.

TYSON, Judge.

James Kelly Moore, III ("Defendant") appeals from judgment entered on a jury's verdict finding him guilty of first-degree murder. We find no error.

I. Background

Defendant and his girlfriend, Erica Gaines ("Gaines") moved to and resided on East Fort King Street in Ocala, Florida in March 2017. After Thanksgiving 2017, Defendant borrowed Gaines' Kia Sorento SUV to purportedly visit his family in North Carolina for the weekend. Defendant failed to return the vehicle until approximately two to three weeks later.

After arrival in North Carolina, Defendant and Amanda Bell ("Bell") visited Laura Saldana's home in the Northwoods area of Jacksonville in the early morning hours of 3 December 2017. Defendant and Bell left Saldana's house in Gaines' Kia Sorento. Defendant drove to a field located off Thomas Humphrey Road, parked, and the two "made out" in the vehicle. Defendant later drove Bell to a hotel, arrived around 6:00 a.m., and engaged in sexual intercourse.

Defendant and Bell left the hotel after a few hours to eat and later returned to the hotel. Defendant left, while Bell stayed at the hotel. Throughout the morning of 4 December 2017 Defendant left and returned to the hotel a few times. Defendant returned to the hotel for the last time at approximately 12:30 p.m.

Defendant had access to two cell phone numbers. Both of those phone numbers exchanged hundreds of text messages with a cell phone number associated with a prostitute, Shelby Brown ("Brown"), on 3 and 4 December 2017. Brown advertised on Backpage.com, a website used for sexual solicitations, and was "pimped" by Tamara Jackson ("Jackson"). Jackson had provided Brown with a cell phone to use for her prostitution contacts.

Brown lived with Jackson in a mobile home Jackson had rented, located on 183 Orvin Drive in Sneads Ferry. A camera recording on Orvin Drive showed a Kia Sorento SUV going to 183 Orvin Drive and leaving multiple times on 3 December 2017 and 4 December 2017. The camera showed the Kia Sorento: arrive at 4:14 p.m. and leave at 4:42 p.m. on 3 December 2017; arrive at 11:37 p.m. on 3 December 2017 and leave at 1:15 a.m. on 4 December 2017; and, arrive at 2:41 a.m. and leave at 3:11 a.m. on 4 December 2017.

Wendy Moore, Brown's mother, awoke to a text message from Brown saying "This ni--a I'm wit might kill me he jus beat me up n raped me in the back seat so I love you if I don't see u again." Moore called and spoke with Brown. While talking on the telephone Moore and her daughter also exchanged text messages. Moore asked Brown over the telephone where she was located or where she was going. Brown replied via text message "Belgrade." Moore replied *via* text message: "U want me to call popo" and "Call 911 or I will."

Brown responded by text message asking "Are u high?" Moore replied "Stop playing f--king games." Moore called Brown. Brown sounded upset to her, was crying, and asked Moore why she had done that. Moore did not speak with Brown again after 4 December 2017.

Moore contacted Mariann Milan ("Milan"), Brown's best friend, and asked her to contact Brown and learn what was happening to her. Milan contacted Brown via Facebook Messenger, but she was suspicious of Brown's purported replies, because the messages incorrectly used the homophones: "too" and "to." Brown regularly used the words correctly when she had written prior messages. Milan never heard from Brown again after 4 December 2017.

Jackson, the pimp, exchanged text messages with Brown's cell telephone number at 1:30 p.m. on 4 December 2017. Jackson texted Brown stating she needed her cell phone back. Brown replied she would return the cellphone and further stated: "Mama. Chill. I'm coming ok. And I might have some thing good for u. I just seen a bag full of mone[money bag emoji.] 25 thousand[.] Looking at it right now[.]" Brown texted she needed to be picked up in the Northwoods area. A text message sent at 6:39 p.m. gave an address of 308 Doris Avenue and the description "Black. Older guy."

Jackson went to the address given on the corner of Vernon Drive and Doris Avenue around 9:00 p.m. that evening, but Brown was not there. The text message exchange purportedly from Brown also incorrectly used the homophones: "too" and "to." Later analysis of the phone records showed the numbers for both Brown and Defendant were located in Sneads Ferry, about 20 minutes from the Northwoods area.

Defendant's cell phone number (336)-830-XXXX was carried on Gaines' Verizon account. Defendant called Gaines and asked her to change his cell phone number while he was in North Carolina. A few hours later, Defendant called Gaines screaming and yelling because she had not yet changed his phone number. Gaines changed Defendant's phone number to (336)-978-XXXX.

Denell Sharek ("Sharek") also worked as a prostitute and advertised on Backpage.com. Sharek requires new prospective "tricks" to send a picture of themselves to her. Defendant, who Sharek later identified as "June" sent her a picture of himself from phone number (352)-600-XXXX on 3 December 2017 at 4:12 a.m.

Defendant texted Sharek and requested to see her for an hour on 5 December 2017. Defendant's visit was quoted to cost $200. In the text messages between Defendant and Sharek, Defendant incorrectly used the homophones: "too" and "to." Sharek took a cab to Defendant's location for their encounter. Defendant had Sharek get into his dark colored SUV. Sharek panicked because she did not do "car dates." They drove off of the paved road, through gravel, and into a field. Sharek later identified this location as at the end of Thomas Humphrey Road off the paved portion.

Defendant parked the SUV, exited the SUV, and got into the backseat. Defendant pulled Sharek out of the front passenger's seat and into the backseat. Sharek testified Defendant raped her. When Defendant completed his crimes, he told her to get out of the SUV and walk. Defendant kept Sharek's cell phone and purse, which contained around

$600 to $700 in currency. As Sharek walked towards the hotel where she was staying, Defendant drove up in the SUV beside her and told her to get inside. Defendant returned her purse and cellphone, but the money from inside the purse was gone. Sharek did not report this incident to law enforcement until they began investigating Brown's homicide.

At 7:39 a.m. Sharek received a missed call and four text messages from (910)-548-XXXX, a cell number Brown had used. No prior communications had occurred between Brown and Sharek. The text messages stated: "Hey there beautiful sexy lady;" "Are you doing out calls;" "Hello;" and, "Hey babe." Sharek did not respond to the missed call or the text messages. Sharek also received text messages from (910)-335-XXXX and (336)-978-XXXX, both numbers associated with Defendant.

Defendant returned Gaines' Kia Sorento SUV to her in Florida before Christmas. Gaines testified her Kia Sorento contained a "really bad odor" inside, unlike any odor Gaines had smelled before. When Gaines asked Defendant about the smell, he responded a friend had left a bag of chicken in the back. The floorboard and third-row seats were wet. Gaines used carpet freshener to try to alleviate the odor. The stench was so strong Gaines would leave the windows down.

Gaines noticed Defendant had an open wound on his chest. When Gaines questioned him, Defendant said he had been bitten. Defendant had scratches on his arms, which Defendant asserted had resulted from mosquito bites. Gaines' Kia Sorento SUV was repossessed by the lender on 7 January 2018. Gaines' child had left a Batman mask inside the vehicle.

Children from Onslow County found a partially burned and decomposed body in a grassy area near a dirt road off Thomas Humphrey Road on 31 December 2017. The grass around the corpse did not appear to be burned. Law enforcement officers had walked in that area investigating gunfire previously and had not seen a body. An individual who had walked his dog there a week prior to discovery did not see anything at that time.

The corpse was decomposing with extensive maggot infestation. The body had multiple areas of burning with significant burning around her pelvic area. The State Medical Examiner identified the body as Brown's through fingerprints.

Dr. Zachary O'Neill performed the autopsy on 8 January 2018. Dr. O'Neill observed ten stab wounds to the left and right of Brown's neck. Nine of the wounds were located close together, and at least one of the stabs caused a lethal injury of the right jugular vein. Dr. O'Neill testified

the stabbing had occurred first and was the cause of Brown's death. The burning occurred after Brown was deceased, and then the decomposition occurred.

The *Jacksonville Daily News* published an article on 11 January 2018 stating a body was found off of Thomas Humphrey Road on 31 December 2017. Google search records associated with the account Junehova@gmail.com showed a search was performed on 11 January 2018 asking: "can autopsies show sperm in a decomposed body[?]" The GPS cellular records for the inquiry originated from an address on East Fort King Street in Ocala, Florida, where Defendant and Gaines lived.

Gaines' former Kia Sorento was sold by the lender to an overseas buyer located in Costa Rica. Law enforcement officers located the Kia vehicle in a Florida port the day before it was scheduled to be shipped abroad. Law enforcement officers found white powder, which appeared to be carpet deodorizer, and the vehicle's interior was damp. Positive indications for the presence of blood were located on: the front carpet on the drivers' side, an access panel in the back of the vehicle, and the vehicle's third row. A Batman mask was inside the vehicle. Several swabs taken from the vehicle were submitted for DNA testing.

The vehicle's access panel swab had a DNA profile, which was a mixture of two contributors: the major profile being consistent with Brown's DNA profile and a minor profile that was inconclusive. The third-row seat sample had a DNA profile which was consistent with Brown's DNA profile. The sample from the driver's side front carpet was insufficient for DNA analysis.

Defendant was indicted for first-degree murder on 12 June 2018. Krystal Moore, Defendant's sister, a licensed attorney in Georgia, was permitted *pro hac vice* to appear in Onslow County Superior Court. Moore had listed George Battle of Mecklenburg County as her North Carolina sponsoring counsel. *See* N.C. Gen. Stat. § 84-4.1(5) (2021) ("A statement to the effect that the attorney has associated and is personally appearing in the proceeding, with an attorney who is a resident of this State, has agreed to be responsible for filing a registration statement with the North Carolina State Bar, and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with the legal proceedings, or any disciplinary matter, with the same effect as if personally made on the foreign attorney within this State."). The record contains no evidence of Battle appearing in Onslow County Superior Court at any time during Moore's representation of Defendant.

Defendant retained Thomasine Moore, who was not related to Krystal Moore or Defendant, as co-counsel. Thomasine Moore filed a motion to withdraw due to a conflict of interest on 23 August 2018, which the court allowed on 19 December 2018. Krystal Moore submitted a motion dated 23 July 2018 and filed 13 December 2018 requesting for the trial court to appoint additional counsel. The trial court appointed Walter Hoyt Paramore, III on 19 December 2018.

Paramore filed a motion to withdraw as counsel, which was allowed. Paul Castle ("Castle") was next appointed as Defendant's attorney on 30 January 2019. A trial date was set for 30 September 2019. Castle filed a motion to withdraw due to his inability to work with Krystal Moore. The trial court held a hearing on 23 August 2019 to hear Castle's motion. At the hearing, Castle asserted: "an irreparable conflict arose between him and [Krystal] Moore." Castle further asserted he was asked to withdraw by Krystal Moore. Castle acknowledged one counsel cannot force another to withdraw from representation, but the situation was conflicted because Defendant and Krystal Moore are siblings. Castle was also unable to contact Defendant.

The 23 August 2019 hearing began at 2:03 p.m. Krystal Moore was not present when the hearing commenced. The trial court heard from Castle, the State, and Defendant. The trial court then addressed Defendant:

> THE COURT: Okay. [Defendant], do you understand the motion that we're here for today?
>
> . . .
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And do you understand that Mr. Castle is asking to withdraw?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And you understand that's because he can't effectively assist you, apparently because of your sister's representation. Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Okay. Do you want to be heard as to his motion to withdraw?
>
> DEFENDANT: He can withdraw, yes, sir.
>
> THE COURT: Okay. And you told me last time that you were going to hire an attorney, is that correct?

DEFENDANT: I am.

THE COURT: Have you hired anybody?

DEFENDANT: I would have to get in contact with my sister and talk to her about it, and my family members.

THE COURT: Okay. And I understand that your sister is representing you, and this matter has been set at least twice in front of me with an order that she be here, and she hasn't appeared yet. Do you understand that?

DEFENDANT: Yes, sir.

. . .

THE COURT: Okay. Anything you want to say, [Defendant], before I make the decision?

DEFENDANT: I mean, he can withdraw.

The trial court then addressed the State. The State spoke on Krystal Moore's non-attendance in court, the requirements for admission *pro hac vice*, and Defendant's current representation:

[DISTRICT ATTORNEY]: Judge, you know, of course, Krystal Moore is not here. We've not seen Krystal Moore in this courtroom since January the 23rd of 2019. She was ordered to be here today. She was ordered to be here today. And, Judge, as the Court is also well aware, sir, that she's in this case pro hac vice with another attorney and, Judge, I know the Court is aware of the statute. We've reviewed the same. Let's see. It's G.S. 84-4.1, and one of the requirements, it does appear, to be some personal appearance from that attorney. That attorney she's listed is an individual in Mecklenburg County by the name of George Battle. He has also never appeared in this court. We've never had any contact with him. I think [my co-counsel] attempted to reach him early in the proceedings, and he never spoke to him. Is that correct?

[ASSISTANT DISTRICT ATTORNEY]: That's right.

[DISTRICT ATTORNEY]: So, Judge, we've got a lot of issues here, in terms of representation. But if the record would reflect that Ms. Moore is not present today.

The trial court then revoked Krystal Moore's *pro hac vice* admission *ex mero motu*:

> THE COURT: Okay. Sir, on my review of the statute that [the State] is referencing, which is North Carolina General Statute 84-4.1, it indicates in that that when she was let in - - I understand from previous discussion that Ms. Thomasine Moore was representing you, who is a local counsel here who is experienced. And to be admitted to - - it says you're going to associate with local counsel who is going to be appearing in the proceedings with you. And that local counsel is no longer included.
>
> So, in my discretion, under 84.4 - - 84-4.2, on my own motion, I'm going to revoke your sister's pro hac vice status here. That's going to leave you without a counsel, because I'm going to allow Mr. Castle to withdraw. What I'm going to do is, I'm going to appoint IDS immediately to represent you so that you've got somebody there to appear for you that can answer your questions. Do you understand what I'm saying so far?
>
> DEFENDANT: So are we trying to say she's not going to be my lawyer no more?
>
> THE COURT: Yes. She's not - - doesn't have the authority to practice law in the State of North Carolina. So I'm going to appoint a capital defender to represent you. They will participate, if they can - - if they're the lead counsel.

Krystal Moore arrived at 2:11 p.m. after the above colloquy. The following exchange took place:

> THE COURT: Is this Ms. Moore? Ms. Moore, we started at 2:00.
>
> MOORE: I understand, Your Honor. I'm traveling from out of town.
>
> THE COURT: Okay. Did you communicate with anybody that you were going to be late?
>
> MOORE: Yes, I communicated - - it was earlier this week - - that I was going to be late. Ms. Caitlin Emmons.
>
> THE COURT: Okay. You're talking about the judicial assistant - -
>
> MOORE: Yes.
>
> . . .

THE COURT: I understand from my judicial assistant that she notified you that the hearing was going to be today and there was no response after you asked to appear by telephone.

MOORE: When she said that it was going to go forward and I had already told her that I had a conflict in my schedule, I'm here as soon as possible.

THE COURT: Okay. I understand that Mr. Castle has asked to withdraw. You can put your stuff down. At this point, I have allowed Mr. Castle to withdraw, which gets us back to the issue of do you have counsel in the State of North Carolina that is appearing with you?

MOORE: We would have to move to appoint new counsel.

THE COURT: Say again.

MOORE: We would have to move to appoint new counsel. I do have someone, as far as my sponsor, for my pro hac, yes. And so --

THE COURT: Okay. Well, there's nobody that's appearing in this case. Nobody has appeared in this case, with the exception of Thomasine Moore, who was removed or withdrew. I don't know when the date was, but I can look through the file and figure it out, but it's been at least one attorney back.

THE STATE: It was December 13th of '18, sir.

THE COURT: Of 2018?

THE STATE: Mm-hmm.

THE COURT: So what's the plan? I understand that He's [sic] on trial in a first-degree murder case in September, next month.

MOORE: That is correct, Your Honor.

THE COURT: And this is the first time you've been here since January?

MOORE: I'm not sure when the last time I've been here.

THE COURT: Okay. Is there anything you want to say?

MOORE: We would like to move to appoint new counsel, and would like an order entered doing so.

THE COURT: I understand from Mr. Castle that he's had problems communicating with your brother because of your involvement; that he didn't get discovery from you and had to go to the D.A.'s office to get it. Is that the case?

MOORE: Absolutely not, Your Honor.

THE COURT: If I have IDS coming in, they're the ones that have the experience in representing people in capital cases in the State of North Carolina. I would appoint them as lead counsel, unless you're planning on hiring somebody that you're going to associate that is going to be appearing in this courtroom with you at every proceeding that we have.

. . .

THE COURT: Okay. I'm going to do that, under one condition, but let me ask you this. How much criminal experience do you have doing criminal cases? Because he's on trial for first-degree murder.

MOORE: I'm aware of that, Your Honor.

THE COURT: So how much time, criminal?

MOORE: Are you asking how many cases?

THE COURT: Yes.

MOORE: I already went over my qualifications with the other judge.

THE COURT: Right. And I have the authority to remove you right this second from it. So I'm asking a question, and I would appreciate an answer.

MOORE: It's part of my practice.

THE COURT: Okay. I'm going to assume that to be none, since you can't answer it.

MOORE: No. I mean, you asked me a question. I said it's part of my practice. I do it often.

THE COURT: Okay. Anything else from the state?

. . .

THE COURT: And so you're asking me to appoint somebody else. He had a great lawyer in there with Mr. Castle,

and now he's out. And I understand, again, this matter, at least, was set for September 30th, if I'm not mistaken.

[THE STATE]: September 30th, that's right, Judge.

THE COURT: Okay. Is there anything else you want to say, ma'am?

MOORE: I would like to say that Mr. Castle also has a conflict that he did not disclose to the client or to myself, and that is one of the reasons that I asked him to withdraw.

THE COURT: Okay. Do you want to be heard?

MR. CASTLE: I'm not aware of any such conflict.

THE COURT: Okay. All right. In this case – this is a very serious case, ma'am, and these guys do this for a living and have for decades, doing these type of cases. I have, in the interest as a judge on the North Carolina Superior Court, to ensure that he has a fair trial, that he's represented competently. And so, again, I've allowed Mr. Castle to withdraw. I don't have anyone here that is appearing with you in this case that you have associated. You're asking me to associate them by making them the -- by me appointing somebody.

MOORE: No, Your Honor. I actually do have association in the case for my pro hac. That's not an issue.

THE COURT: That's a guy in Charlotte, from what I understand in the hearing when you weren't here. And I don't know what he does, either, but he's not appearing in this case and hasn't appeared.

MOORE: That's all that we needed, as far as my pro hac. Your Honor, we're actually asking for an appointment of counsel to assist with the case.

THE COURT: Okay. Well, I'm going to do it the other way around. I'm going to – I'm going to, under my own motion, ma'am, and in my discretion, I'm going to revoke your pro hac vice status. I am going to appoint IDS, Indigent Defense Services, to represent him. If y'all hire somebody here, then they can take it over, that's fine, but we'll get a name of the counsel and we'll provide it to [Defendant], okay?

> MOORE: And, Your Honor, why are you revoking my --
>
> THE COURT: It's totally in my discretion. I don't feel like it's moving forward. I think we're going to have an ineffective assistance of counsel. You haven't appeared here in a murder case since January. I mean, I could keep going. I don't feel like you have -- I don't feel like that it's going to be in [Defendant]'s best interests to be represented by his sister.
>
> MOORE: Your Honor, you're saying that I haven't appeared here since January. We actually set the matter for trial, and there was only one other admin date that the D.A.'s office said that they actually needed. And so that's one of the reasons why I haven't appeared here, because there is no more admin dates.
>
> THE COURT: Okay. We had one two weeks ago, on Friday. Weren't we here on Friday, two weeks ago?
>
> [THE STATE]: Yes, sir.
>
> MOORE: That -- from my understanding, that was not an admin hearing, with regards to --
>
> THE COURT: That was a hearing in which [Defendant] was in here and I was addressing Mr. Castle's motion to withdraw. So at this point, with the matter as serious as it is and with it drawing near for time to have the trial, that's the Court's order, and I will appoint IDS. If we can contact them and let them know. Okay. Anything else?

Attorney Scott Jack ("Jack") was appointed to represent Defendant on 23 August 2019. The parties agreed on 12 August 2020 to a proposed trial date of 1 February 2021 subject to the jury not being required to wear face masks due to COVID-19. Jack was allowed to withdraw as Defendant's attorney at Defendant's request on 8 September 2020. Defendant told the trial court he and Jack had developed "different views on certain issues." At the hearing Defendant stated he was going to retain his own counsel or otherwise to represent himself. The trial court engaged in a colloquy regarding counsel and waiver with Defendant, who signed a waiver of counsel.

On 3 December 2020, with trial still scheduled to begin on 1 February 2021, Defendant told the trial court he was still in the process of finding an attorney because "those attorneys that was for Onslow County was

not for me" but "if it doesn't come in, [he's] still good enough to handle [his] own situation." Attorney Bellonora McCallum ("McCallum") was appointed as standby counsel.

Defendant informed the trial court he wanted McCallum to represent him on 7 January 2021. McCallum was appointed as trial counsel that day. Defendant's trial date was continued and re-scheduled for 28 June 2021. Defendant's 28 June 2021 trial was later continued until November 2021, and was then continued again until 7 February 2022. No speedy trial motion was filed or objection was raised by Defendant prior to trial.

Jury selection ended on 8 February 2022. The next day the parties made opening statements. On 10 February 2022 McCallum informed the trial court she had received an email from Defendant's sister, Krystal Moore, on the previous day with an attachment which contained a complaint to the North Carolina State Bar containing Defendant's typewritten signature. The trial court questioned Defendant about his satisfaction with McCallum's representation and services. Defendant responded and informed the trial court he had "no problem" with McCallum's services.

Krystal Moore also emailed the district attorney and assistant district attorney assigned to the case on 9 February 2022. Attached to her email was a drafted complaint about both attorneys to the North Carolina State Bar. The complaint was signed by Krystal Moore.

The State proceeded with its case-in-chief. McCallum informed the trial court Defendant requested for her to withdraw from representation on 14 February 2022. McCallum informed the trial court she had also received an email from Krystal Moore demanding McCallum not to harass her anymore. McCallum did not respond to the email and continued to prepare and communicate with Defendant and his parents. In chambers, McCallum reported to the court that Defendant had advised her to withdraw from representing him for her safety.

McCallum further reported she was unable to provide effective legal assistance after conversations with Defendant concerning his request for her to withdraw from representation. McCallum also asserted she could not effectively represent Defendant under constant threat of having frivolous bar complaints filed against her.

When the trial court addressed and questioned Defendant on his request for McCallum to withdraw, he stated "I was going to handle this first, but from my understanding I can get some more attorneys in here." McCallum requested a continuance to allow Defendant to find new counsel. The trial court informed Defendant that he had time to

prepare for this trial for years and months and a new attorney would not be able to "come in and start handling a case" in the middle of a trial already underway.

Defendant stated he wanted the trial court to "stop the trial because there is too much going on." The trial court told Defendant the trial had already begun and would continue. The trial court further warned Defendant he would be forfeiting his right to appointed counsel if he persisted in having McCallum removed.

The trial court engaged in the following colloquy with Defendant and his counsel out of the presence of the jury:

> THE COURT: Okay? That is not being ugly. We have gone through all of this time and this is a 2017 case. So it's time to get it done. She is a very good attorney. She can stay in the case or I'm going to find out what you want to do about attorney.
>
> DEFENDANT: No. I want to excuse [McCallum].
>
> THE COURT: Let me go through these questions with you because that probably means you're going to be representing yourself. Do you understand that? You've, basically, forfeited your right to have an attorney if you fire her because you have gotten rid of every other one since then. Do you understand that?
>
> DEFENDANT: Yes, sir, I do.
>
> THE COURT: Let me go through these questions with you real quick.
>
> MCCALLUM: Can you give them some time to see if there's an attorney that they found who can show up this week? I will just say that. Can you give him an opportunity to call up the attorney they found to see if they can show up this week?
>
> THE COURT: My only issue with that is before you got in the case. When I was talking to [Defendant], they were going to have Black Lives Matter bring an attorney in and that attorney has yet to show up. At this point, we have jurors that are missing their work to be here. That poor lady at the end said that she can't afford two-weeks, and this is just dragging it out further. Let me go over these questions with you real quick, [Defendant]. I know that

you can hear me and understand me. Are you now under the influence of any alcohol, drugs, narcotics, medicines, pills, or any other substance?

DEFENDANT: No, sir, I'm not.

THE COURT: Any other pills?

DEFENDANT: No, sir.

THE COURT: For the record how old are you, sir?

DEFENDANT: Fourty-four,[sic] forty-five. One of them.

THE COURT: Fourty-five? [sic] How far did you go in school?

DEFENDANT: Graduated high school.

THE COURT: You understand how to read and write; is that correct?

DEFENDANT: Yes, sir.

THE COURT: Do you have any mental handicaps?

DEFENDANT: No, sir, I don't.

THE COURT: You understand you do have the right to be represented by an attorney, and the Court has appointed a multitude of them, and now this one is still sitting beside you and I'm about to let her out. You understand you do have the right to be represented?

DEFENDANT: Yes, sir, I do.

THE COURT: Do you understand that if you decide to represent yourself by getting rid of her that you have to follow the rules of evidence and procedures that lawyers do?

DEFENDANT: Yes, sir, but I am not representing myself.

THE COURT: If you let her go I'm telling you that you're going to be forfeiting your right to have an attorney.

DEFENDANT: That's fine.

THE COURT: You understand if you do represent yourself that you are held to the same legal standards. I can't give you legal advice?

DEFENDANT: Yes, sir, I understand.

> THE COURT: Do you understand that you are charged with murder, and the maximum sentence is life without parole, and you're willing to handle that without an attorney?
>
> DEFENDANT: Yes, sir, I understand. I will have an attorney come in.
>
> THE COURT: Okay. Anything else from the State?
>
> [THE STATE]: I just want to make sure that it is clear that he does not want this attorney that is sitting next to him right now, Ms. Bellonora McCallum. That is his intent.
>
> THE COURT: I think he's been clear. Is that your intent for her to withdraw?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: You're positive?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Okay. I'm going to allow her to withdraw.

The trial court permitted McCallum to withdraw from representing Defendant and concluded Defendant had forfeited his right to further appointed counsel by his conduct. Defendant's trial proceeded. Defendant was advised of his right to be present and participate to represent himself. Defendant elected to leave the courtroom to make "phone calls." Defendant represented he did not wish to be present in court, cross-examine witnesses, present evidence, or to provide a closing argument.

Defendant made three oral motions at the beginning of court on 17 February 2022 asking for new counsel to be appointed, a mental health evaluation to be performed on him, and for a mistrial. The trial court denied all three motions. The same day, Defendant was convicted of first-degree murder. The trial court found Defendant to be a prior record level V offender with 16 prior level points. Defendant was sentenced to life imprisonment without the possibility of parole. Defendant gave oral notice of appeal in open court.

Defendant filed a *pro se* motion for appropriate relief ("MAR") in the trial court on 28 February 2022. The trial court denied the MAR by order filed 11 April 2022. Defendant filed a written notice of appeal of the order denying his MAR on 14 April 2022. On 17 May 2022 Defendant filed a motion to consolidate the appeals of the original judgment and the denial of the MAR, which was granted by order on 20 May 2022.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1414, and 15A-1444(a) (2021).

III. Issues

Defendant argues the trial court erred by: (1) denying his right to counsel when he sought to change attorneys during trial; (2) denying his motion for a continuance when he sought to change attorneys during trial; and, (3) allowing Sharek to testify about unrelated allegations.

IV. Defendant's Right to Counsel

[1] Our Court previously articulated two means by which a defendant may lose his right to be represented by counsel: (1) a knowing and voluntary waiver after being fully advised under N.C. Gen. Stat. § 15A-1242; and, (2) forfeiture of the right by serious misconduct in *State v. Blakeney*, 245 N.C. App. 452, 459-61, 782 S.E.2d 88, 93-94 (2016), holding:

> First, a defendant may voluntarily waive the right to be represented by counsel and instead proceed *pro se*. Waiver of the right to counsel and election to proceed *pro se* must be expressed clearly and unequivocally. Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel. A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242.
>
> . . . .
>
> The second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel. Although the right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution, in some situations a defendant may lose this right:
>
> > Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. Unlike waiver, which requires a knowing and

> intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right. A defendant who is abusive toward his attorney may forfeit his right to counsel.

Id. (internal citations, ellipses, alterations, and quotation marks omitted).

This Court in *Blakeney* also describes a third manner, a mixture of waiver and forfeiture, in which a defendant may lose the right to counsel:

> Finally, there is a hybrid situation (waiver by conduct) that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel. Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a waiver by conduct could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a waiver by conduct requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se*. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed *pro se* cannot complain that a court is forfeiting his right to counsel.

Id. at 464-65, 782 S.E.2d at 96 (citation, ellipses, and quotation marks omitted).

A. Standard of Review

This Court reviews a trial court's findings of fact to determine whether they are "supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). This Court "reviews conclusions of law pertaining to a constitutional matter de novo." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citation omitted); *see State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011) ("Prior cases addressing waiver

of counsel under N.C. Gen. Stat. § 15A-1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*. We . . . review this ruling *de novo*.") (citations omitted)).

Whether a defendant was entitled to or forfeited counsel is also reviewed *de novo*. *State v. Poole*, 305 N.C. 308, 318, 289 S.E.2d 335, 341-42 (1982) (citations omitted); *Blakeney*, 245 N.C. App. at 459, 782 S.E.2d at 93.

B. Challenged Findings of Fact

Defendant challenges the following findings of fact:

> 28. The trial of the State v. James Moore case began on Monday, 7 February 2022. Jury selection continued until the end of the day on Tuesday, 8 February 2022. Wednesday morning, 9 February 2022, the parties made opening statements. On Thursday, 10 February 2022 Ms. McCallum told the Court that on Wednesday before opening statements she received an e-mail from Ms. Krystal Moore and attached to the email was a bar complaint. At first, Ms. McCallum thought it was something from Ms. Moore, but after going through it in court, she noticed that it appeared to have been signed by her client. The bar complaint was typed. Ms. McCallum thought the matter should be addressed by the Court, so she notified the Court of the issue. The Court questioned the defendant in open court outside the presence of the jury and concluded that the defendant was satisfied with his counsel.
>
> . . .
>
> 30. On Monday, 14 February 2022, Ms. McCallum represented to the Court that the defendant told her that the defendant wanted Ms. McCallum to withdraw from this matter. Ms. McCallum made this representation in chambers to the Court and then on the record. In chambers, Ms. McCallum added that the defendant told Ms. McCallum that for her safety, she should withdraw from the case. Ms. McCallum advised that she has spoken to the defendant regularly and that she believed she is unable to provide effective legal assistance after her conversation with the defendant concerning his request that she withdraw from representation of the defendant. Further, Ms. McCallum received an e-mail at midnight, 11 February 2022, from Ms.

Krystal Moore directing Ms. McCallum to stop threatening Ms. Moore and stop sending messages. Ms. McCallum stated that she has not communicated or responded back or emailed Ms. Moore. The Court finds Ms. McCallum to be credible. The defendant's parents, Mr. James Moore, II and Ms. Rose Moore were present during the trial. Ms. McCallum stated that she has communicated with them and believed that the defendant's parents wanted her to continue to represent the defendant.

31. During the afternoon of Friday, 11 February 2022 Denell Sharek testified in the trial of the above captioned case. Ms. Sharek testified that the defendant sexually assaulted Ms. Sharek on 5 December 2017 in the same secluded location where Shelby Brown's Body [sic] was found. Ms. Sharek was able to identify the defendant based on a picture the defendant sent of himself to Ms. Sharek. Ms. Sharek's testimony was very unfavorable for the defendant and highly inculpatory. The Court finds that the defendant asked Ms. McCallum to withdraw as counsel in an effort to secure a mistrial because of Ms. Sharek's testimony.

. . .

35. The defendant acknowledged that he understood that he had the right to be represented by an attorney, and that he was forfeiting his right to have an attorney by asking Ms. McCallum to withdraw. Further the defendant acknowledged that he understood that if the defendant proceeded to represent himself by terminating Ms. McCallum's representation of the defendant, he would have to follow the rules of evidence and procedures that lawyers do and that he would be held to the same legal standards as attorneys. The Court instructed the defendant that he could not provide legal advice during the trial to the defendant. The defendant acknowledged that he understood that he was charged with murder and the maximum sentence for that crime is life without parole. The defendant on multiple occasions made [it] clear his desire for Ms. McCallum to withdraw as counsel. The defendant clearly indicated that he was not satisfied with any attorneys who have been appointed to represent the defendant including Walter H. Paramore, III, Paul Castle, Scott Jack and Bellonora McCallum. All of these attorneys are well qualified and

> the only conflicts these attorneys had, with the exception of Mr. Paramore's conflict, were engineered by the defendant either individually or acting together with his sister, Krystal Moore.

The challenged findings of fact are supported by competent evidence in the record. *State v. Thomsen*, 242 N.C. App. 475, 485 776 S.E.2d 41, 48 (2015) (citation omitted), *aff'd*, 369 N.C. 22, 789 S.E.2d 639 (2016). Defendant's challenges are without merit.

C. Waiver of Counsel

Defendant argues the trial court erred in concluding he had waived and/or forfeited his right to counsel.

Both the Constitution of the United States and the North Carolina Constitution recognize criminal defendants have a right to assistance of counsel. U.S. Const. Amend. VI.; N.C. Const. Art I, §§ 19, 23; *see also Powell v. Alabama*, 287 U.S. 45, 66, 77 L.Ed. 158, 169 (1932); *State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 ((1977) (citations omitted); *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000).

Criminal defendants also have the absolute right to waive counsel, represent themselves, and handle their case without the assistance of counsel. *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972).

Before a defendant is allowed to waive the right to counsel, a trial court must conduct a statutorily-required colloquy to determine that "constitutional and statutory safeguards are satisfied." *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (citation omitted). Courts "must determine whether the defendant knowingly, intelligently and voluntarily waives the right to in-court representation by counsel." *Id.* (citation omitted).

The procedure to waive counsel is codified in N.C. Gen. Stat. § 15A-1242 (2021). Courts may only enter an order to allow defendants to waive their right to counsel after being satisfied the movant: (1) has been clearly advised of his rights to the assistance of counsel, including his right to the assignment of appointed counsel when he is so entitled; (2) understands and appreciates the consequences of the decision; and, (3) comprehends the nature of the charges and proceedings and the range of permissible punishments. *Id.* (citation omitted). A "trial court must obtain a written waiver of the right to counsel." *State v. Thomas*, 331 N.C. 671, 675, 417 S.E.2d 473, 476 (1992) (citation omitted).

The record indicates Defendant executed a written waiver of court-appointed attorney on 8 September 2020 after the trial court had conducted a colloquy into Defendant's present mental state, not being under the influence of any drugs or intoxicants, understanding of the charge and its possible punishment, level of education attained, right to appointed or retained counsel, right to represent himself, and Defendant's obligations and responsibilities if he decided to represent himself. The transcript also reflects the trial court conducted a similar colloquy when Defendant sought to remove McCallum as his counsel during trial.

Written waivers of counsel, certified by the trial court, create a rebuttable presumption that the waiver was executed knowingly, intelligently, and voluntarily pursuant to N.C. Gen. Stat. § 15A-1242. *State v. Kinlock*, 152 N.C. App. 84, 89, 566 S.E.2d 738, 741 (2002) (citation omitted), *aff'd per curiam*, 357 N.C. 48, 577 S.E.2d 620 (2003).

"Once a written waiver of counsel is executed and certified by the trial court, subsequent waivers or inquiries are not necessary before further proceedings." *State v. Harper*, 285 N.C. App. 507, 517, 877 S.E.2d 771, 780 (2022) (citation omitted).

The signed waiver and certification by the superior court judge that a proper inquiry and disclosure was made in compliance with N.C. Gen. Stat. § 15A-1242 was not included in the record on appeal. The only mention of the signed waiver was in the transcript of the hearing where it was signed and in the order denying Defendant's MAR. ("The defendant signed a waiver of court-appointed counsel and was sworn on the same.").

This absence in the record does not invalidate Defendant's waiver. *See State v. Heatwole*, 344 N.C. 1, 18, 473 S.E.2d 310, 318 (1996) (holding *inter alia* the lack of a written waiver neither alters the conclusion that the waiver was knowing and voluntary, nor invalidates the defendant's waiver of counsel); *State v. Fulp*, 355 N.C. 171, 176, 558 S.E.2d 156, 159 (2002) (affirming *Heatwole* holding "that a waiver was not invalid simply because there was no written record of the waiver" (citation and internal quotation marks omitted)).

Defendant further asserts he did not intend to represent himself, asserting his answer below during the 14 February 2022 colloquy stated his intention:

> THE COURT: Do you understand that if you decide to represent yourself by getting rid of her that you have to follow the rules of evidence and procedures that lawyers do?

DEFENDANT: Yes, sir, but I am not representing myself.

Defendant's argument is misplaced. The transcript quoted above shows the trial court had unequivocally warned Defendant before the now-asserted reply of the practical effect and consequence of his decision dismissing McCallum would be to represent himself. However, the trial court continued the inquiry with Defendant:

> THE COURT: If you let her go I'm telling you that you're going to be forfeiting your right to have an attorney.
>
> DEFENDANT: That's fine.
>
> THE COURT: You understand if you do represent yourself that you are held to the same legal standards. I can't give you legal advice?
>
> DEFENDANT: Yes, sir, I understand

The trial court also stated Defendant would not have the right to another appointed attorney, and Defendant would have to hire his own attorney or represent himself. Defendant stated he understood.

At each colloquy, the trial court advised and counseled Defendant about his right to an attorney, including his right to appointed counsel. The trial court counseled Defendant on the complexity of handling his own jury trial and the fact the judge would neither be able to offer legal advice nor excuse non-compliance with any rules of evidence or procedure.

The trial court addressed the seriousness of the first-degree murder charge. The trial court advised a conviction by the jury of first-degree murder carried a life sentence without the possibility of parole. The trial court further told Defendant that no other appointed counsel would be able or willing to immediately step into the middle of an ongoing trial. After being fully advised, Defendant proceeded to fire McCallum and was left to acquire his own counsel or proceed *pro se*.

Defendant clearly waived and/or forfeited his right to further court-appointed counsel. Defendant's argument is overruled.

D. Forfeiture of Counsel

Presuming, without deciding, Defendant did not give a knowing and voluntary waiver of his right to counsel, we will also examine the trial court's and MAR court's holdings Defendant had forfeited his right to counsel.

Defendant asserts the trial court and MAR court judge erred in concluding he had forfeited his right to appointed counsel by his conduct.

Our Supreme Court has long held "the right to be defended by chosen counsel is not absolute." *McFadden*, 292 N.C. at 612, 234 S.E.2d at 745 (citation omitted). "[A]n indigent defendant does not have the right to have counsel *of his choice* to represent him." *State v. Anderson*, 350 N.C. 152, 167, 513 S.E.2d 296, 305 (1999) (citing *State v. Thacker*, 301 N.C. 348, 351-52, 271 S.E.2d 252, 255 (1980)).

"Forfeiture of counsel is separate from waiver because waiver requires a knowing and intentional relinquishment of a known right[,] whereas forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *State v. Schumann*, 257 N.C. App. 866, 879, 810 S.E.2d 379, 388 (2018) (citation and quotation marks omitted).

Our Court has held when a defendant has forfeited their right to counsel, then a "trial court is not required to determine, pursuant to N.C. Gen. Stat. § 15A-1242, that [the] defendant knowingly, understandingly, and voluntarily waived such right before requiring him to proceed *pro se*." *State v. Leyshon*, 211 N.C. App. 511, 518, 710 S.E.2d 282, 288 (2011) (citation omitted).

In *Montgomery*, this Court examined the issue of a criminal defendant forfeiting their right to counsel as an issue of first impression. *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 ("Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture."). This Court held, *inter alia*, "a defendant who is abusive toward his attorney may forfeit his right to counsel." *Id.* at 525, 530 S.E.2d at 69 (citing *U.S. v. McLeod*, 53 F.3d 322, 325 (11th Cir. 1995)).

This Court further held "[a] forfeiture results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine[ ] to justify a forfeiture of defendant's right to counsel[.]" *Id.* at 524, 530 S.E.2d at 69 (citing LaFave, Israel, & King *Criminal Procedure*, § 11.3(c) at 548 (1999) (quotation marks omitted)). The defendant had been afforded "ample opportunity" to obtain counsel over a period of over a year; had twice fired appointed counsel and had retained a private attorney; had been disruptive in the courtroom, causing the trial to be delayed; had refused to cooperate with his counsel when his counsel was not allowed to withdraw; and, had physically assaulted his counsel. *Id.* at 525, 530 S.E.2d at 69. This Court ultimately held the defendant had forfeited his right to counsel and the trial court did not have to follow the waiver procedures outlined in N.C. Gen. Stat. § 15A-1242. *Id.*

Since the decision in *Montgomery*, this Court has upheld a forfeiture only in "situations involving egregious conduct by a defendant." *See Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93. The Supreme Court of North Carolina first examined and recognized a defendant's forfeiture of counsel in *State v. Simpkins*, 373 N.C. 530, 535, 838 S.E.2d 439, 445-46 (2020) ("We have never previously held that a criminal defendant in North Carolina can forfeit the right to counsel."). Our Supreme Court recognized a defendant's forfeiture, holding: "in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel." *Id.* at 535, 838 S.E.2d at 446.

While the Supreme Court, in *Simpkins*, recognized the ability of a criminal defendant to forfeit by "egregious misconduct" the right to counsel, the Court held the defendant's conduct in that case had not arisen to a forfeiture. *Id.* at 539, 838 S.E.2d at 448. The defendant did not employ counsel before appearing at trial and put forth "frivolous legal arguments about jurisdiction throughout the proceedings." *Id.* at 540, 838 S.E.2d at 448. The defendant had different counsels representing him previously during the pre-trial proceedings. *Id.*

The trial court did not conduct a colloquy to determine if the defendant was waiving his right to counsel under N.C. Gen. Stat. § 15A-1242. Our Supreme Court held this was error to fail to determine if the defendant desired to waive his right to counsel using the proper procedure and further held, under the facts in *Simpkins*, this defendant did not forfeit his right to counsel at trial. *Id.* at 540, 838 S.E.2d at 449. The record did not lead our Supreme Court to "conclude that h[is] failure to retain counsel was an attempt to delay the proceedings, and certainly not an attempt so egregious as to justify forfeiture of the right to counsel." *Id.*

In 2022, the Supreme Court of North Carolina further examined the forfeiture of counsel in both *State v. Harvin*, 382 N.C. 566, 879 S.E.2d 147 (2022) and *State v. Atwell*, 383 N.C. 437, 881 S.E.2d 124 (2022).

In *Harvin*, our Supreme Court analyzed over two decades of persuasive Court of Appeals precedent and found two circumstances where forfeiture of counsel could occur:

> The first category includes a criminal defendant's display of aggressive, profane, or threatening behavior. *See, e.g.*, *id.* at 536-39 (first citing *State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000) (finding forfeiture where a defendant, *inter alia*, disrupted court proceedings with profanity and assaulted his attorney in court); then citing *State v. Brown*, 239 N.C. App. 510, 519, 768 S.E.2d 896

> (2015) (finding forfeiture where a defendant "refus[ed] to answer whether he wanted assistance of counsel at three separate pretrial hearings [and] repeatedly and vigorously objected to the trial court's authority to proceed"); then citing *State v. Joiner*, 237 N.C. App. 513, 767 S.E.2d 557 (2014) (finding forfeiture where a defendant, *inter alia*, yelled obscenities in court, threatened the trial judge and a law enforcement officer, and otherwise behaved in a belligerent fashion); then citing *United States v. Leggett*, 162 F.3d 237 (3d Cir. 1998) (finding forfeiture where a defendant physically attacked and tried to seriously injure his counsel); and then citing *Gilchrist v. O'Keefe*, 260 F.3d 87 (2d Cir. 2001) (same)). . . .
>
> The second broad type of behavior which can result in a criminal defendant's forfeiture of the constitutional right to counsel is an accused's display of conduct which constitutes a "[s]erious obstruction of the proceedings." *Simpkins*, 373 N.C. at 538. Examples of obstreperous actions which may justify a trial court's determination that a criminal defendant has forfeited the constitutional right to counsel include the alleged offender's refusal to permit a trial court to comply with the mandatory waiver colloquy set forth in N.C.G.S. § 15A-1242, "refus[al] to obtain counsel after multiple opportunities to do so, refus[al] to say whether he or she wishes to proceed with counsel, refus[al] to participate in the proceedings, or [the] continual hir[ing] and fir[ing of] counsel and significantly delay[ing] the proceedings." *Id.* at 538. In *Simpkins*, we further cited the decisions of the Court of Appeals in *Montgomery* and *Brown*, *inter alia*, as additional illustrations of this second mode of misconduct which can result in the forfeiture of counsel.

Id. at 587, 879 S.E.2d at 161.

In *Harvin*, the defendant had five court-appointed attorneys prior to trial. *Id.* at 590, 879 S.E.2d at 163. Two of the defendant's attorneys withdrew due to no fault of the defendant, and two others withdrew as a result of "respective incompatible attorney-client relationships with [the] defendant [and] did so *not* because of [the] defendant's willful tactics of obstruction and delay" but "due to differences related to the *preparation* of [the] [d]efendants defense" not a "refus[al] to *participate* in preparing a defense." *Id.* (citation omitted).

The defendant in *Harvin* indicated his intent to not represent himself at trial at a hearing approximately a month before trial. *Id.* at 574, 879 S.E.2d at 154. At a pre-trial hearing three weeks prior to trial, the defendant's stand-by-counsel stated he was prepared to serve as standby counsel, but was not prepared to assume full representation of the defendant. *Id.* On the morning of trial, the defendant also indicated his intent to not represent himself during a colloquy with the court to comply with N.C. Gen. Stat. § 15A-1242. *Id.* at 575, 879 S.E.2d at 154. The trial court took a recess and attempted to locate any of the prior counsel who could come in, but none could. *Id.* at 579, 879 S.E.2d at 156.

The Supreme Court of North Carolina held the trial court erred by finding the defendant had forfeited his right to counsel and requiring the defendant to proceed *pro se*. *Id.* at 592, 879 S.E.2d at 164. The Supreme Court further held the defendant's behavior in requesting two of his counsel to be removed, seeking to proceed *pro se*, and then deciding he needed the help of counsel before proceeding at trial while remaining polite, cooperative, and constructively engaged in the proceedings was not "the type or level of obstructive and dilatory behavior which [would] allow[ ] the trial court . . . to permissibly conclude that [the] defendant had forfeited the right to counsel." *Id.*

The Supreme Court further examined forfeiture of counsel and applied reasonings from both *Simpkins* and *Harwin* in *Atwell*. During a pretrial hearing, the State had requested for the case to move forward after previously agreeing to a continuance to give more time for the defendant to hire a private attorney. *Atwell*, 383 N.C. at 448-54, 881 S.E.2d at 132-35. The defendant, appearing *pro se*, told the trial court "she had made payments to a private attorney," but could not afford to continue to make payments and wanted another court-appointed attorney. *Id.* at 440, 881 S.E.2d at 127. The trial court then responded with a history of her firing two prior attorneys, signing four waivers of appointed counsel, and asking why she now wanted another continuance to hire yet another attorney. *Id.*

Once the State indicated it was prepared to calendar the case for trial, the trial court addressed the defendant:

> THE COURT: Well, *what I'm going to do is I'm going to put an order in the file basically saying you waived your right to have an attorney.* If you would like to hire your own attorney, that will be fine, but based on these — *the history of this file, it appears to me that your process in moving this case along has been nothing more than to*

see how long you can delay it until it goes away. The way you've behaved appears to be nothing more than a delay tactic and that's what I'm going to put an order in the file and I'm going to make specific findings as to everything I just told you and to some other things that are in the file. I'm going to let the prosecutor arraign you and set this case for trial. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, that doesn't preclude you from hiring your own attorney. *You can hire your own attorney but you're going to have to do that and have your attorney ready by the time the prosecutor has this case on the trial calendar. Additionally, if you don't hire an attorney, you're going to be responsible for representing yourself. Do you know what that means?*

THE DEFENDANT: Representing myself.

THE COURT: Yes.

THE DEFENDANT: It means representing myself.

THE COURT: It does. It means you're going to have to negotiate any plea deal if there is one with the prosecutor. You're going to have to handle all the [d]iscovery in this case. If there is a jury trial you're going to have to select a jury and keep up with any motions and try the case just as if you were an attorney and be held to the same standard as an attorney. You're not going to get legal advice from me or whoever the judge is. Do you understand that?

. . .

THE COURT: I don't know what's ultimately going to have [to] happen to this case but you are entitled to a jury trial most definitely. *What I want you to understand is that if you represent yourself, you're going to be held to the same standards of an attorney. Do you understand that?*

THE DEFENDANT: *You're giving me no choice. I mean, I asked for another court appointed attorney and you said no*, so—

THE COURT: You've had choice after choice after choice. *You've been given a court appointed attorney on three occasions, which is two more than you usually get.*

> THE DEFENDANT: I've got the e-mails from one of the lawyers that was actually giving me wrong court dates to be in court.
>
> THE COURT: Well, one of the attorneys there is no indication as to why that attorney withdrew, the other took—you took them off the case, basically. So do you understand what's going on here, ma'am?
>
> THE DEFENDANT: *You've denied me a court appointed attorney. Yes, I understand that.*
>
> THE COURT: I've denied you a fourth court appointed attorney.
>
> THE DEFENDANT: I understand that, yes.

Id. at 440-43, 881 S.E.2d at 128 (footnote omitted).

The trial court, in *Atwell*, did not conduct an N.C. Gen. Stat. § 15A-1242 colloquy and entered an order stating the defendant had forfeited her right to counsel through her delay tactics prior to trial. *Id.* at 454, 881 S.E.2d at 135. The Supreme Court held this was error.

Relying on the analysis of *Harvin*, the Supreme Court of North Carolina held "the record likewise does not permit an inference, much less a legal conclusion, by the trial court or a reviewing court that defendant engage[d] in the type of egregious misconduct that would permit the trial court to deprive defendant of [her] constitutional right to counsel." *Id.* at 453, 881 S.E.2d at 135 (internal quotation marks omitted). The defendant had not forfeited her right because she had "ongoing, nonfrivolous concerns about her case." *Id.* at 454, 881 S.E.2d at 135. The defendant could not waive her right to counsel without expressing "*the express*[ ] *desire to proceed without counsel*" through the statutory colloquy of N.C. Gen. Stat. § 15A-1242. *Id.*

A defendant may also forfeit their right to counsel by engaging in "serious misconduct." *Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93. This Court has recognized forfeiture by misconduct when a defendant (1) engages in "flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys;" (2) employs "offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court;" or (3) "refus[es] to acknowledge the trial court's jurisdiction or participate in the judicial process, or insist[s] on nonsensical and nonexistant legal 'rights.' " *Id.* at 461-62, 782 S.E.2d at 94.

The State asserts these facts present a "hybrid" situation from *Blakeney*. While this may be true, Defendant both gave knowing and

voluntary waivers of counsel, and he forfeited his right to counsel under our precedents. Defendant met all of the instances of "serious misconduct" to forfeit counsel. *See id.*

Including Krystal Moore, his sister, and her North Carolina sponsor, Defendant had seven attorneys representing him during the various stages of hearings and trial. Thomasine Moore and Paramore withdrew due to conflicts of interests. Moore's *pro hac vice* admission was revoked due to her conduct, noncompliance with our State's rules of *pro hac vice* admission, lack of participation or appearance by or responses from her North Carolina sponsor, and her lack of experience handling first-degree murder cases that could potentially result in an ineffective assistance of counsel claim. The trial court also found and concluded Moore was not "credible and [she] did not demonstrate candor with the Court."

While acknowledging that one counsel cannot command a co-counsel to withdraw, Castle petitioned to withdraw due to conflict between himself and Krystal Moore. Moore had requested for him to withdraw and had prevented contact between himself and Defendant. Defendant terminated appointed counsel Jack because of "different views."

At Defendant's express request, McCallum was appointed as trial counsel after she was initially appointed as his standby counsel. Defendant also later confirmed during trial he was satisfied with McCallum's representation. In the middle of trial following the testimony of Sharek, whose testimony the court found was highly inculpatory, Defendant sought to terminate McCallum's representation and warned of her safety if she did not withdraw.

Unlike *Simpkins*, *Harvin*, and *Atwell*, wherein our Supreme Court held there was no egregious misconduct, none of those cases involve a defendant's decision to fire a counsel during the middle of trial after the jury was empaneled and the State had presented its case in chief. This incident was not Defendant's only misconduct.

McCallum informed the trial court she should be allowed to withdraw because she had been informed by Defendant she should withdraw for her safety. This threat was documented in the trial court's denial of Defendant's MAR as constituting "offensive or abusive behavior." *Id.*

The trial court also documented misconduct by Krystal Moore and Defendant of preparing and sharing purported complaints to the North Carolina State Bar against both district attorneys and McCallum during trial. Defendant purportedly "signed" the complaint against McCallum electronically, despite not having access to a computer and testifying in open court on 9 February 2022 that he was satisfied with McCallum's

services. The trial court attributed the change from 9 February 2022 to 14 February 2022 to the testimony of Sharek. The purported "conflicts" with the attorneys, which were attributable to Defendant and/or Krystal Moore, were found and concluded to be "attempts to disrupt the orderly administration of justice."

The trial court specifically found and concluded Defendant's decision to fire McCallum "was an attempted effort to delay, disrupt and obstruct the proceedings and prevent them from coming to completion which undermines the purposes of the right to counsel and constitutes 'egregious misconduct.' "

After Defendant was allowed to terminate McCallum's representation, but learned the trial underway was going to proceed, Defendant informed the Court he did not want to be physically present in the courtroom. Defendant's egregious conduct forfeited his right to further appointed counsel. The trial court did not err in concluding Defendant had forfeited his right to appointed counsel and by later denying his MAR on this ground.

Defendant's MAR asserted he was denied the counsel of his choice in violation of his rights under the Sixth Amendment to the United States Constitution when the trial court revoked Krystal Moore's *pro hac vice* admission *ex mero motu*. *See* N.C. Gen. Stat. § 84-4.2 (2021) ("Permission granted under G.S. 84-4.1 may be summarily revoked by the General Court of Justice . . . on its own motion and in its discretion."). The order denying the MAR properly denied relief based upon the lack of sponsoring counsel's appearance in Onslow County; Krystal Moore's conduct, lack of attendance in court, lack of candor with the court, errors in North Carolina law and procedure, and lack of criminal trial experience; the role of appointed counsel; and Defendant's right to competent counsel. Defendant did not advance this argument on appeal and has abandoned this argument. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Defendant's argument is without merit and is dismissed.

E. Motion for Appointment of Counsel

Defendant argues the trial court erred by denying his 17 February 2022 motion for a court-appointed attorney. This argument is deemed abandoned for his failure to cite any authority in support thereof. N.C. R. App. P. 28(b)(5). As held above, Defendant had already waived and forfeited his right to an attorney three days earlier during trial outside of the presence of the jury.

V. Motion for Continuance

[2] Defendant argues the trial court erred in denying his motion to continue the trial during trial to enable him to secure other counsel, after allowing his trial counsel to withdraw at his request, after the jury was empaneled, and while the State was presenting its case in chief.

A. Standard of Review

A motion to continue generally rests within the trial court's discretion and is reviewable on appeal only for an abuse of discretion. *State v. Thomas*, 294 N.C. 105, 111, 240 S.E.2d 426, 431 (1978) (citations omitted). When the motion to continue is based on a constitutional right, "the question presented is one of law and not of discretion, and the order of the court below is reviewable" on appeal. *State v. Harris*, 290 N.C. 681, 686, 228 S.E.2d 437, 440 (1976) (citations omitted).

B. Analysis

"To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993) (citation omitted).

Defendant sought to continue his trial in progress to enable him to fire his appointed attorney, who had entered appearance, filed motions, represented him for jury selection, opening statement, and during the State's case-in-chief. Defendant was informed no other appointed counsel would be able to effectively represent him by immediately appearing in the middle of a first-degree murder trial. As held above, Defendant had already waived and forfeited his right to an attorney three days earlier during trial. The trial court did not err in denying Defendant's motion to continue.

VI. Sharek's Testimony

[3] Defendant contends the trial court erred in admitting testimony from Sharek under Rules 401, 402, 403, and 404(b).

A. Preservation

Our appellate rules provide: "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Our Supreme Court has held:

> To preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial. [The defendant's] failure to object at trial waived his right to have this issue reviewed on appeal.

State v. Golphin, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (internal citations omitted).

"To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (citation and quotation marks omitted).

It is insufficient to rely upon the objections lodged pre-trial or after similar evidence has previously been admitted without protest as "the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Hudson*, 331 N.C. 122, 151, 415 S.E.2d 732, 747-48 (1992) (citation and quotation marks omitted).

Defendant's counsel, McCallum, filed a motion *in limine* to exclude the testimony of Sharek "pursuant to North Carolina General Statute § 8C-1 Rules 401, 402, 403, & 404(b); and Rules 701-02; and North Carolina General Statute § 15A-951-952[.]"

The trial court held a hearing on Defendant's motion on 1 October 2021. McCallum argued:

> Again, this is limited. We're just asking that the term "rapist" or "barber" -- "rapist barber," those two terms not be allowed into testimony or the State be able to present anything, type of compilation that showed that's what was stated in her phone. We understand her testimony is going to be her testimony, but to allow a term such as "rapist" or "rapist barber" or to show that's how she stated it is highly prejudicial, improper character evidence on top of that. It will just inflame the jury. So at this point, you know, if her testimony is sufficient (phonetic), we just ask that those terms not be used by her any other -- anyone else, that he's been labeled as a rapist or that she had saved in her phone that he was a rapist or a rapist barber is the term that was used.

McCallum continued:

> Right. We understand she's going to testify. We're just asking that "rapist" or "rapist barber" should not be a part of any testimony, whether officer or her or anything shown in any exhibits where her phone had it saved as that, or her alluding to saying that. That's what we're asking for. We definitely feel the probative value substantially outweighs the danger of unfair prejudicial.

The trial court redacted the term "rapist" from Sharek's cellular phone information. McCallum never argued the entirety of Sharek's testimony of her encounter with Defendant should be excluded during the motion *in limine*.

When Officer Michael Gibbs, the officer who had downloaded cellular data, including a photo purportedly of Defendant from Sharek's cell phone, was on the stand and the line of questioning was leading toward this information from Sharek and Defendant's image on her cell phone, McCallum renewed her objection for the same grounds as her motion *in limine*. The trial court heard arguments from McCallum outside of the presence of the jury:

> Yes, Your Honor, just to reiterate what was argued concerning excluding testimony from Denell Sharek. Because I know that is where this is going since Officer Gibbs is the one that downloaded the cell phone to the Cellebrite and obtained the photo of [Defendant] based on her allegations of rape. So I know we are starting to get out into it. I'm renewing the objection on the record. I'm confident. I'm sure once the jury comes back in and once she is called as a witness I'm going to have to renew it again. The objection is concerning the testimony and the photo that is trying to be published to the jury and entered into evidence pursuant to 8C-1 Rules 401, 402, 404B and Rule 701 and 702, and that is pursuant to the North Carolina General Statute 15[A]-1951 and 1952. If I need to file another copy of what was filed. We, again, argue that is going to be very prejudicial to allow her to get up and there are no charges that have been filed against him. This is something that was brought to attention when she was under investigation -- I don't want to say she was under investigation, but she was being questioned about being one of the last persons to speak to Ms. Brown. Then it turns into a situation where a photo was provided to her and, Your Honor, it definitely there would

> be some information provided where she will say, as she has said in her statements, that it happens. Where someone will take a photo -- someone took her photo and used it and pretend like there [sic] someone else; and this goes to identification. There was no identification done prior to today, and so that is a part of what is going to happen today. *I will also have to renew the objection when that happens also if the Court allows her to testify and this photo to be brought into evidence.* There was no out-of-court identification of [Defendant] except for the photo that was presented from her phone.

(emphasis supplied). The trial court subsequently overruled Defendant's objection and allowed Officer Gibbs to testify about the photograph, which had been sent from one of Defendant's phones to Sharek.

When Sharek was called to the stand, McCallum objected on the grounds of: "8C-1 Rules 401, 402, 403, and 404B in the due process of my client." Defendant did not object during Sharek's testimony. Defendant asserts this objection preserves his arguments asserting Sharek's testimony violated Rules 401, 402, 403, and 404(b) on appeal, citing N.C. Gen. Stat. § 15A-1446(d)(10) (2021) and *State v. Corbett*, 376 N.C. 799, 826, 855 S.E.2d 228, 248 (2021).

"In N.C. [Gen. Stat.] § 15A-1446(d) (2017), the General Assembly enumerated a list of issues . . . appealable without preservation in the trial court." *State v. Meadows*, 371 N.C. 742, 747-48, 821 S.E.2d 402, 406 (2018). Our Supreme Court reviewed N.C. Gen. Stat. § 15A-1446(d)(10) and held "notwithstanding a party's failure to object to the admission of evidence at some point at trial, a party may challenge subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning." *Corbett*, 376 N.C. at 826, 855 S.E.2d at 248 (citation, quotation marks, and alteration omitted).

In *Corbett*, the defendants objected to testimony based upon purported blood splatters found on their clothing on numerous occasions. The defendants objected to a portion of the blood splatter expert's report, but failed to object again when he testified at trial. Our Supreme Court held *inter alia*, N.C. Gen. Stat. § 15A-1446(d)(10) preserved their objections by operation of law.

McCallum's only objection to Sharek's testimony at trial was the general objection on the grounds of: "8C-1 Rules 401, 402, 403, and 404B in the due process of my client" prior to her testimony. The trial court had

previously redacted text references to Defendant as "rapist" and other prejudicial text references after her pre-trial motion.

This objection, presuming it was directed toward Sharek's entire involvement with Defendant and no charges currently pending related to that incident, was untimely and did not specifically preserve the admission for appellate review. *See State v. Williams*, 355 N.C. 501, 576, 565 S.E.2d 609, 652 (2002) (citations omitted). This assertion was not an "improperly overruled objection" to trigger N.C. Gen. Stat. § 15A-1446(d)(10).

Defendant argues in the event he did not preserve his evidentiary arguments, he seeks plain error review of these issues. We review these arguments under that standard. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

B. Standard of Review

Our Supreme Court has held plain error:

> is always to be applied cautiously and only in the exceptional case where, after the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right to the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings[.]

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and internal quotation marks omitted).

C. Analysis

1. Rules 401 & 402

Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2021). Irrelevant evidence is evidence "having no tendency to prove a fact at issue in the case." *State v. Hart*, 105 N.C. App. 542, 548, 414 S.E.2d 364, 368, (1992). Evidence is admissible so long as it is relevant, unless excluded under

another Rule. N.C. Gen. Stat. § 8C-1, Rule 402 (2021). Defendant argues the rape and other allegations of the encounter between Defendant and Sharek is not relevant to whether he killed Brown. Defendant only argued it was inadmissible on appeal under Rule 401.

Defendant's argument is misplaced. The challenged testimony was relevant under Rule 401 and admissible under Rule 402. The evidence was admissible, relevant, and probative to show the identity of the person who is alleged to have committed the crimes. Defendant has failed to show Sharek's testimony was irrelevant and inadmissible under Rules 401 and 402. N.C. Gen. Stat. § 8C-1, Rules 401, 402.

2. Rule 404(b)

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021).

The Supreme Court of North Carolina has repeatedly interpreted Rule 404(b) to be a rule of inclusion, and not exclusion. *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012). This rule of inclusion of Rule 404(b) testimony or evidence is constrained by the requirements of similarity and temporal proximity of the evidence of the acts. *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). Rule 404(b) is "subject to but *one exception* requiring the exclusion of evidence if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (citation omitted).

Defendant argues the alleged rape and robbery of Sharek is too dissimilar from the murder of Brown to be admitted under Rule 404(b). The trial court allowed Sharek to testify about the circumstances leading up to an alleged rape of her and the subsequent events, which occurred 5 December 2017, the day after Brown was last seen or heard from alive. The trial court admitted this testimony for the purpose of showing the "identity of the person who committed the crime charged in this case."

"When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence

lacks probative value." *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 114 (1999). "[T]he passage of time between the commission of the two acts slowly erodes the commonality between them[.]" *State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 824 (1988).

"Further, where the perpetrator's identity is in question, there must be significant similarities and little passage of time between incidents." *State v. Enoch*, 261 N.C. App. 474, 490, 820 S.E.2d 543, 555 (2018) (citing *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 420 (1986) (alterations and quotation marks omitted)).

Substantial evidence of similarity between the Defendant's prior bad acts with Sharek and of Brown's murder exists. Sharek alleged she was raped and robbed by Defendant the day after Brown's last known contact. Defendant used the same phone number to locate, message, and solicit both prostitutes: Brown and Sharek. The location Sharek identified where her assault and robbery had occurred was the location where Brown's stabbed and burned body was later discovered. Sharek was allegedly raped inside the Kia Sorento SUV, which was later found to contain Brown's DNA. Brown texted her mother she had been raped and assaulted in the back seat of a vehicle by a man fitting Defendant's description. Sharek testified she was raped in the back seat of the Kia Sorento. Defendant stole both Sharek's and Brown's phones. The temporal proximity and place of both events and Sharek's testimony identifying Defendant far exceed any assertion that "its *only* probative value [was] to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Lyons*, 340 N.C. at 668, 459 S.E.2d at 782. Defendant's argument is overruled. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021).

3. Rule 403

Even relevant, probative, and admissible evidence under Rules 401, 402, and 404(b) "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2021). Defendant argues the probative value of admitting this evidence is outweighed by the danger of unfair prejudice, and asserts the alleged prior actions with Sharek was admitted solely to establish his general propensity to commit the crime charged.

When prior incidents are offered for a proper purpose, "the ultimate test of admissibility is whether they are sufficiently similar and not so

remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991). "[E]very circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) (citation omitted).

The alleged incident where Sharek was raped and robbed by Defendant occurred the day after Brown's last contact with her family and the day the State alleged she was murdered. The alleged attack and robbery occurred in the same location where Brown's body was later found. Brown's text messages alleged she had been raped. The trial court did not err, and certainly did not commit plain error, in admitting Sharek's testimony under Rules 403 and 404(b). N.C. Gen. Stat. § 8C-1, Rules 403, 404(b). Defendant's argument is overruled.

VII. Conclusion

Defendant knowingly and voluntarily waived his right to counsel by terminating his latest among many appointed counsels following highly detrimental testimony during trial and after being repeatedly advised and informed of the consequences of this decision. Defendant's conduct during pre-trial and through trial in superior court supports a finding and conclusion that he repeatedly dismissed appointed counsel during pre-trial and while trial was underway and waived and forfeited his right to counsel.

The trial court did not err in denying his motion for appointment of new counsel. Defendant waived and forfeited his right to counsel through dilatory tactics and serious and egregious misconduct after being warned multiple times of the consequences of his behavior.

Sharek's testimony was properly admitted under North Carolina Rules of Evidence 401, 402, 403, and 404(b) under plain error review. N.C. Gen. Stat. § 8C-1, Rules 401, 402, 403 and 404(b).

Defendant received a fair trial, free of prejudicial errors he preserved and argued and failed to show any plain error. There is no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges CARPENTER and GORE concur.

STATE v. PARKER

[290 N.C. App. 650 (2023)]

STATE OF NORTH CAROLINA
v.
TERRELL JERMAINE PARKER, DEFENDANT

No. COA23-90

Filed 3 October 2023

1. Constitutional Law—effective assistance of counsel—murder trial—statements during closing argument—no concession of guilt—contradiction of defendant's testimony

In a prosecution for first-degree murder, defendant did not receive ineffective assistance of counsel where his trial counsel never conceded defendant's guilt to the charged crime, and therefore the issue of whether counsel committed a *Harbison* error (by failing to obtain defendant's consent to concede guilt) was rendered moot. Instead, counsel's statements during his closing argument—including a statement that if the jury found defendant had used excessive force against the victim, defendant would be guilty of voluntary manslaughter—signaled an attempt to convince the jury that defendant lacked the requisite intent to be found guilty of first-degree murder, and that the most defendant could be convicted of was the lesser offense of voluntary manslaughter. Although counsel did contradict defendant's testimony regarding how defendant arrived at the scene of the crime, none of counsel's statements to that effect were so serious as to deprive defendant of a fair trial.

2. Homicide—first-degree murder—jury instructions—aggressor doctrine—"stand your ground" laws—sufficiency of record

After defendant went to the driveway of another man's home, got into a fight with the man, and then fatally shot him, there was no plain error in defendant's prosecution for first-degree murder where the trial court instructed the jury on the aggressor doctrine but not on "stand your ground" laws. The record contained enough evidence warranting an instruction on the aggressor doctrine, including testimony indicating that defendant may have initiated the fight during a phone call with the victim just before arriving at the victim's home. On the other hand, "stand your ground" laws apply only to spaces where a person has a lawful right to be, and there was insufficient evidence supporting defendant's argument that he had a lawful right to be at the victim's residence during the fight.

3. Criminal Law—prosecutor's closing argument—murder trial —statements regarding severity of sentences—not grossly improper

The trial court was not required to intervene ex mero motu during the prosecutor's closing argument in a first-degree murder trial, where the prosecutor made certain statements implying that defendant's minimum sentence would not be severe enough if the jury convicted him of voluntary manslaughter instead of murder. Although these statements might not have been good trial practice, they were neither "grossly improper" nor against the law, since trial attorneys have the right to inform the jury of the punishments prescribed in a case, and here, counsel for both defendant and the State commented on what defendant's minimum and maximum sentences could be.

Appeal by defendant from judgment entered 21 July 2022 by Judge Wayland J. Sermons Jr. in Gates County Superior Court. Heard in the Court of Appeals 22 August 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Montgomery for the State.

Sarah Holladay, for defendant-appellant.

FLOOD, Judge.

Terrell Jermaine Parker ("Defendant") appeals his conviction for first-degree murder arguing (1) he received ineffective assistance of counsel, (2) the trial court erred in its jury instructions, and (3) the trial court erred by failing to intervene *ex mero motu* in the State's closing argument. For the reasons discussed below, we disagree.

I. Facts and Procedural Background

At first, the night of 21 December 2018 was as most nights were for Defendant—uneventful. After getting off work, he met his friend Marcus Walton ("Walton") at Defendant's cousin's house where together they drank bourbon, played Spades, and talked about the possibility of going to see a street race later that evening. Around 9:00 p.m., Walton received a call from Dominique Hathaway ("Hathaway") who informed Defendant and Walton that their barber was going on break until after Christmas, so if they wanted to get their hair cut, they would have to go that evening. Upon hearing this news, Walton and Defendant finished

their drinks and headed over to get their hair cut by their barber at his in-home barbershop. Upon arrival, Defendant crossed paths with Isaac Jermaine Hawk ("Hawk"), who was on his way out of the barbershop. Defendant and Hawk had a contentious relationship, dating back to when they were teenagers; so, when Hawk appeared friendly towards Defendant, it took Defendant by surprise. Defendant asked Hawk if the two could speak outside, and Hawk agreed. The two spoke about comments Hawk had allegedly made about the baby Defendant and his girlfriend recently had together—implying Hawk, not Defendant, was the father. Hawk denied making the comments, and the conversation ended in a handshake.

After leaving, Hawk went to the home of Rashawn Goodman ("Goodman"), where a few other people including Aaron Eason ("Eason") had gathered. While there, Hawk told Eason about the conversation he had just had with Defendant, calling it "an argument." After about an hour or two, Eason and Hawk left Goodman's home in separate cars, both driving to Hawk's residence. While on the way to Hawk's residence, Eason began receiving several phone calls from blocked numbers. After five or so calls, Eason answered the phone and recognized the voice of the caller to be Hathaway, who asked to speak with Hawk. Eason explained he was not with Hawk, and the conversation ended.

Upon arrival at Hawk's residence, Eason received another call, this time from Defendant. Eason passed the phone to Hawk, who spoke with Defendant for approximately two minutes. After the conversation ended, Hawk changed out of flip flops and into tennis shoes then reported that Defendant was on his way over.

A few minutes later, a car driven by Hathaway pulled into Hawk's driveway, and Defendant emerged from the back-passenger seat. Defendant walked up the driveway towards Hawk, and the two began arguing face-to-face with each other. As the two argued, they began walking back down the driveway, towards Hathaway's car, with Defendant walking backwards. After about three to five minutes of arguing, a fist-fight broke out between Defendant and Hawk in which both men landed a few blows. Due to it being dark outside, witnesses could not tell who swung the first punch.

After a few minutes of fighting, Defendant continued walking backwards away from Hawk, while Hawk, with his hands up, continued to walk towards Defendant. At that point, Defendant pulled out a gun and began shooting Hawk. Hawk was shot five times and died in his driveway. Before first responders arrived, Defendant, Hathaway, and Walton fled the scene.

A short distance from Hawk's residence, Hathaway wrecked his car. At this point, Defendant got out, threw his gun in the woods, and started walking through the night towards Virginia.

Meanwhile, responding to the emergency call, Deputy David Adkins ("Deputy Adkins") began traveling towards Hawk's residence. On his way, he noticed Hathaway and Walton standing on the side of the road after having wrecked their vehicle. After checking in at the scene of the shooting at Hawk's residence, Deputy Adkins doubled back to check on Hathaway and Walton, each of whom was observed to be uninjured and unharmed.

Approximately four hours after the shooting, a law enforcement officer found Defendant walking on the side of the road and detained him. A search of Defendant revealed no weapon, and while he did smell of alcohol, Defendant showed no signs of impairment and only some minor scratches on his palms.

II. Jurisdiction

Appeal to this Court lies of right from the final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b) (2021).

III. Analysis

Defendant raises several issues on appeal, all of which arise from the proceedings of his trial, which took place between 18 and 21 July 2022. Defendant contends that, during his trial, he received ineffective assistance of counsel, and the trial court erred in both its jury instructions and by failing to intervene *ex mero motu* during the State's closing arguments.

A. Ineffective Assistance of Counsel

[1] To begin, Defendant asserts he received ineffective assistance of counsel ("IAC") when his attorney (1) conceded Defendant's guilt prior to obtaining Defendant's consent, and (2) undermined Defendant's testimony during closing arguments. Upon review, we hold these arguments lack merit and accordingly, conclude there was no IAC.

Whether a defendant received IAC at trial is a question of law reviewable *de novo*. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). "Under a *de novo* review, [this] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted).

To prevail on his IAC claim, Defendant must first "show that counsel's performance was deficient[,]" which requires a showing that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 688 (1984). Next, Defendant must show "that the deficient performance prejudiced the defense[,]" which requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable." *Id.* at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 688.

1. Conceding Guilt Without Prior Informed Consent

In his first IAC claim, Defendant contends he is entitled to a new trial because his counsel "conceded his guilt without first obtaining his express, informed consent."

It is per se prejudicial error for counsel to concede a defendant's guilt without obtaining prior consent. *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985). In addition to an explicit admission of guilt, an "implied admission of guilt can, in fact, constitute a *Harbison* error." *State v. McAllister*, 375 N.C. 455, 475, 847 S.E.2d 711, 723 (2020). Counsel may, however, without consent, remind the jury it could find the defendant guilty of a lesser-included offense, if any, if it does not find defendant guilty of the charged offense. *State v. Campbell*, 359 N.C. 644, 696, 617 S.E.2d 1, 33 (2005).

Here, Defendant claims his counsel violated *Harbison* when he conceded or implied Defendant's guilt during closing arguments without Defendant's consent. In *Harbison*, the defendant was convicted of second-degree murder and assault with a deadly weapon following a closing argument from his counsel in which counsel stated, "I have my opinion as to what happened on that April night, and I don't feel that [defendant] should be found innocent." *Harbison*, 315 N.C. at 177-78, 337 S.E.2d at 506. The *Harbison* court held defense counsel's closing argument was per se prejudicial error because, "[w]hen counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away." *Id.* at 180, 337 S.E.2d at 507.

Here, Defendant draws this Court's attention to certain statements made by defense counsel to bolster his argument that defense counsel conceded guilt without Defendant's prior consent. Defendant's counsel's statements read, in relevant part:

> Now was his use of force excessive? That is a jury question. I will come back to that in a minute. If you find that to

> be excessive, that is manslaughter. That's voluntary manslaughter. If you find the use of force to be excessive, that is voluntary manslaughter.
>
> . . . .
>
> Was the use of force excessive under the circumstances? Consider all things that were happening, consider he is going 116 feet backwards. You decide whether the use of force is excessive. But if it was excessive, that is voluntary manslaughter. That is not first degree murder. That is not second degree murder. That is voluntary manslaughter.

A *de novo* review of the Record, however, reveals Defendant's counsel neither stated nor implied Defendant's guilt. These statements made by Defendant's counsel are more akin to the statements made by defense counsel in *Campbell*, where counsel for the defendant pointed out to the jury that the element of specific intent was the only difference between first and second-degree murder; thus, without specific intent, the most serious crime the defendant could be convicted of was second-degree murder. *See Campbell*, 359 N.C. at 696, 617 S.E.2d at 33. Our Supreme Court held counsel's statements to the jury regarding specific intent did not constitute IAC.

Here, Defendant was charged with first-degree murder, and the transcript reveals his counsel advocating for the jury to find Defendant either not guilty, or guilty of voluntary manslaughter. Under *Campbell*, those statements did not render his assistance ineffective. Further, because our review of the Record reveals that Defendant's counsel neither stated nor implied Defendant's guilt, the inquiry under *Harbison* of whether or not Defendant's consent was obtained is rendered moot. *See Harbison*, 315 N.C. at 180, 337 S.E.2d at 507. Finally, nothing in our review of the Record indicates Defendant's counsel was deficient such that he was deprived a fair trial. *See Strickland*, 466 U.S. at 687, 104 S. Ct. 2064, 80 L. Ed. 2d at 688. For those reasons, we hold there was no IAC pertaining to Defendant's first claim.

2. Undermining Defendant's Testimony in Closing Arguments

In his second IAC claim, Defendant argues his counsel rendered "ineffective assistance by directly undermining [Defendant's] testimony in closing argument."

To prevail on an IAC claim for statements made during closing arguments, a defendant has the burden of showing their counsel's statements were incoherent and failed to negate the elements of the crime

for which they were charged. *State v. Moore*, 286 N.C. App. 341, 351, 880 S.E.2d 710, 717 (2022). When closing arguments fail to provide any positive advocacy, however, then counsel can be considered ineffective. *State v. Davidson*, 77 N.C. App. 540, 545-46, 335 S.E.2d 518, 521–22 (1985).

Here, Defendant specifically contends he received IAC when, during closing arguments, his counsel directly contradicted Defendant's own testimony. The statements made by defense counsel, however, do not rise to the level of being "incoherent" or lacking of any "positive advocacy." *See Moore*, 286 N.C. App. at 351, 880 S.E.2d at 717; *see also Davidson*, 77 N.C. App. at 545-46, 335 S.E.2d at 521–22. For example, Defendant points to the fact that, in his own testimony, he claims to have fallen asleep in Hathaway's car, then woke up to realize he was at Hawk's house; whereas, in closing arguments, defense counsel stated Defendant *intentionally* went to Hawk's house that evening.

> He went over to the house. He shouldn't have gone to the house. That was stupid. He went over to the house but he didn't go to kill nobody, he went over there to talk to him. Boys done pumped him up talking junk. He went there to finish the conversation. He ain't go over there to fight. That man ain't no fighter. Somebody done choked you out. He ain't over there to fight that man. He went over to talk, to finish the conversation.
>
> Things turned sour and this is where we are. There is no premeditation, there is no deliberations. There is no cool state of mind. You have two grown men fighting over a female and they are intoxicated. I can't say it enough.

Here, defense counsel's statement is far from incoherent or lacking positive advocacy. While it is true the statements seem to contradict Defendant's testimony that he had "dozed off" in the car and then woke up to find himself at Hawk's house, nothing else in the Record corroborates Defendant's statement. Additionally, in closing arguments, defense counsel actively worked to negate the elements of first-degree murder by stating:

> Now if it was premeditation and deliberation [Defendant] would have pulled the gun out and shot [Hawk] right then when he got out of the car.
>
> Let me ask you this, why would a man that wants to kill somebody talk to him?
>
> . . .

> So they talk, they have a conversation. And it gets heated. Five to eight minutes. Now why didn't [Defendant] shoot [Hawk]? Then Hawk, who doesn't take no junk, don't take no mess, putting his shoes on, ready to fight, he starts punching on [Defendant] right here. He starts punching on him. [Defendant] is over there to talk. [Defendant] told you. Ladies and gentlemen, if [Defendant] was over there to shoot that man, he would have shot him. There is no way in the world we could get around the fact this man retreated all the way to the end of that driveway and didn't even pull that trigger. You know he was asking for help. You know he was asking for help. There is no way in the world.

The statements made by defense counsel hardly rise to the level of being incoherent or ineffective. *See Moore*, 286 N.C. App. at 351, 880 S.E.2d at 717. Throughout his closing argument, defense counsel made several attempts to impress upon the jury that Defendant lacked the requisite intent to be found guilty of first-degree murder. Moreover, while it is true that counsel's account of how Defendant wound up at Hawk's house on the evening of 21 December differs from Defendant's own testimony, counsel's statements were not so serious as to deprive Defendant of a fair trial. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 688. For those reasons, we hold there was no IAC pertaining to Defendant's second claim.

B. Jury Instructions

[2] Next, Defendant argues the trial court erred in failing to instruct the jury on stand your ground laws and by instructing the jury on the aggressor doctrine.

Decisions regarding the trial court's jury instructions are reviewed by this Court *de novo*. *State v. Jenkins*, 202 N.C. App. 291, 296, 688 S.E.2d 101, 105 (2010). When objections are made to the trial court's jury instruction, this Court reviews to determine whether an error was committed and whether a different result would have been reached but-for that error. N.C. Gen. Stat. § 15A-1443(a) (2021). Where counsel fails to object, however, this Court reviews for plain error. N.C. R. App. P. 10(a)(4). A plain error is one that is so grave, it results in a "miscarriage of justice or in the denial to appellant of a fair trial[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Defendant contends the trial court made two errors—the first in failing to instruct the jury on stand your ground rights under N.C. Gen.

Stat. § 14-51.3 (2021), and the second when it instructed the jury on the aggressor doctrine. Counsel for Defendant did not object to either of the jury instructions, so we review for plain error. *See* N.C. R. App. P. 10(a)(4).

As stated above, a plain error constitutes a "miscarriage of justice" or denial of a fair trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Our *de novo* review of the Record reveals enough facts that jury instructions regarding the aggressor doctrine were warranted, and instructions on stand your ground laws were not. For example, the testimony indicating Defendant may have initiated the fight during a phone call with Hawk, prior to arriving at Hawk's residence, supports the trial court's decision to instruct the jury on the aggressor doctrine. Further, instruction on stand your ground laws is only applicable in spaces where a person has lawful right to be; here, the only evidence supporting Defendant's contention that he had a lawful right to be at Hawk's residence was nebulous testimony about a street race potentially happening nearby. *See* N.C. Gen. Stat. § 14-51.3 ("A person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if . . . he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm[.]").

Given those facts, this Court does not conclude that the instructions given to, or omitted from the jury, constitute a miscarriage of justice. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. For that reason, we conclude there was no plain error in the trial court's jury instructions.

C. *Ex Mero Motu* Intervention

[3] Finally, Defendant asserts the trial court erred when it failed to intervene *ex mero motu* in the State's closing argument.

"When [a] defendant fails to object to an argument, this Court must determine if the argument 'was so grossly improper that the trial court erred in failing to intervene *ex mero motu*.' " *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003) (quoting *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002)). During closing arguments, counsel has "the right to inform the jury of the punishment prescribed by law[.]" *State v. Walters*, 294 N.C. 311, 314, 240 S.E.2d 628, 630 (1978).

Defendant takes specific issue with the following statements made by the State during its closing argument:

> Did [Defendant] tell you the minimum punishment for second degree murder is 144 months? Did [Defendant] tell you the minimum punishment for voluntary manslaughter is 38 months? Less time than it took this case to come to

> trial is the minimum. Who doesn't think this case is serious? Who doesn't think this case is serious? Its just trying to invoke some sympathy or some pity for [Defendant], that's all it is about. That's why they just tell you the max. They don't tell you the minimum.

Defendant argues "[i]t was plainly and grossly improper for the [State] to argue that the jury should not convict [him] of voluntary manslaughter because the sentence he might receive would not be sufficiently severe." While suggesting that the minimum sentence would not be severe enough punishment might run afoul of the unspoken rules of courtroom etiquette, it is not, in fact, against the law. *Walters* tells us that counselors have the right to inform the jury of the punishments prescribed, and here, counsel for both Defendant and the State made clear what the minimum and maximum sentences could be. *See Walters*, 294 N.C. at 314, 240 S.E.2d at 630. For that reason, we conclude the trial court did not err when it failed to intervene during the State's closing argument.

IV. Conclusion

After careful review, we conclude Defendant did not receive ineffective assistance of counsel and accordingly, we dismiss both of Defendant's ineffective assistance of counsel claims. Further, we conclude the trial court neither erred nor plainly erred by deciding to instruct the jury on the aggressor doctrine but not stand your ground laws. Finally, we hold the trial court did not err when it neglected to intervene in the State's closing argument.

NO ERROR.

Chief Judge STROUD and Judge STADING concur.

STATE OF NORTH CAROLINA
v.
ANGELA BENITA PHILLIPS, DEFENDANT

No. COA22-866

Filed 3 October 2023

Assault—with a deadly weapon inflicting serious injury—jury instructions—castle doctrine—prohibition of excessive force improper

Defendant was entitled to a new trial on a charge of assault with a deadly weapon inflicting serious injury—arising from defendant having shot the victim after the victim entered defendant's front porch—where the trial court erroneously included over defendant's objection the statement that "[a] defendant does not have the right to use excessive force" in the court's jury instruction on self-defense within a home. Pursuant to the castle doctrine defense, excessive force is presumed necessary unless the State rebuts the presumption; here, the trial court's statement was prejudicial because it was erroneous, confusing, and possibly resulted in a different verdict than if it had not been included.

Judge HAMPSON dissenting.

Appeal by Defendant from judgment entered 11 May 2022 by Judge James F. Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals on 26 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorneys General John P. Barkley & Hyrum J. Hemingway, for the State.

Reece & Reece, by Mary McCullers Reece, for Defendant-Appellant.

CARPENTER, Judge.

Angela Benita Phillips ("Defendant") appeals from judgment after a jury convicted her of assault with a deadly weapon inflicting serious injury. On appeal, Defendant argues the trial court erroneously instructed the jury by including an instruction on the prohibition of excessive force. After careful review, we agree with Defendant. We vacate the trial court's judgment and remand for a new trial.

I. Factual & Procedural Background

On 4 April 2021, after a verbal altercation between Defendant and Latonya Dunlap ("Victim"), Defendant shot Victim. On 22 June 2021, a Cumberland County grand jury indicted Defendant for assault with a deadly weapon inflicting serious injury. On 9 May 2022, the State tried this case before a jury and the Honorable James Ammons, Jr. in Cumberland County Superior Court.

At trial, witnesses testified that the altercation began with Victim entering Defendant's front porch and ended with Defendant shooting Victim while she was on Defendant's front porch. During the charge conference, Defendant requested the trial court provide North Carolina Pattern Jury Instruction-Criminal ("NCPJI") 308.80 to the jury. NCPJI 308.80 is an instruction on self-defense, specifically, self-defense within a defendant's home. The trial court granted the request but modified NCPJI 308.80 to include language prohibiting the use of "excessive force." Over Defendant's objection, the trial court instructed the jury with the modified charge. On 11 May 2022, the jury found Defendant guilty of assault with a deadly weapon inflicting serious injury. Defendant orally appealed in open court.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issue

The issue on appeal is whether the trial court erroneously instructed the jury by including an instruction on the prohibition of excessive force.

IV. Analysis

This Court reviews the legality of jury instructions de novo. *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010). " 'Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

An erroneous jury instruction "is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a)).

North Carolina General Statute section 14-51.2 is colloquially known as the Castle Doctrine. Under the Castle Doctrine:

> the lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm. . . when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply: (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home . . . . (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C. Gen. Stat. § 14-51.2(b) (2021). In other words, it is presumed that an occupant of a home may use deadly force to prevent an intruder from entering the home if the occupant reasonably believed the intruder was trying to unlawfully enter the home. *See id.* This presumption, however, is rebuttable. *Id.* § 14-51.2(c). For example, an occupant cannot use deadly force if the intruder has "discontinued all efforts to unlawfully and forcefully enter the home." *Id.* § 14-51.2(c)(5).

In Castle Doctrine scenarios, excessive force[1] is not prohibited. *See id.* § 14-51.2(b). Indeed, the Castle Doctrine allows an occupant to use the ultimate force when defending his or her home: "force that is intended or likely to cause death." *Id.* And under the Castle Doctrine, the ultimate force is presumed necessary unless the presumption is rebutted. *See id.*

North Carolina has a "Stand Your Ground" Doctrine, as well: N.C. Gen. Stat. § 14-51.3 (2021). *See State v. Walker*, 286 N.C. App. 438, 448, 880 S.E.2d 731, 739 (2022) (labeling N.C. Gen. Stat. § 14-51.3 the "stand your ground" statute). Section 14-51.3 states:

> A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to

1. Excessive force is force that exceeds what reasonably appears necessary for self-defense. *See State v. Shoemaker*, 80 N.C. App. 95, 102, 341 S.E.2d 603, 608 (1986).

> be if either of the following applies: (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another. (2) Under the circumstances permitted pursuant to [the Castle Doctrine].

N.C. Gen. Stat. § 14-51.3(a). In other words, if a person is in a legally occupied place, that person need not retreat and may use deadly force if he or she "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." *See id.* The Stand Your Ground Doctrine overlaps with the Castle Doctrine because the Stand Your Ground Doctrine also applies in Castle Doctrine scenarios, i.e., self-defense situations within the home. *See id.* So if the Castle Doctrine presumption applies, deadly force is presumed necessary, and you need not retreat. *See id.* Said differently: If you reasonably believe an intruder is unlawfully entering your home, you have a presumed right to use deadly force under the Castle Doctrine, *id.* § 14-51.2(b), and you need not retreat under the Stand Your Ground Doctrine, *id.* § 14-51.3(a).

In *State v. Benner*, the North Carolina Supreme Court discussed both doctrines and contemplated the possibility of excessive force. 380 N.C. 621, 638, 869 S.E.2d 199, 210 (2022). In *Benner*, the defendant shot and killed the victim while the victim was in the defendant's home. *Id.* at 625, 869 S.E.2d at 202. A jury convicted the defendant of first-degree murder, and the defendant appealed, arguing the trial court erred by failing to give him a "complete self-defense instruction." *Id.* at 629, 869 S.E.2d at 205. The Court analyzed both section 14-51.2 and section 14-51.3 and stated that it is a:

> well-established legal principle that, even though a defendant attacked in his own home is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault, such an entitlement would not excuse the defendant if he used excessive force in repelling the assault.

Id. at 636, 869 S.E.2d at 209 (*purgandum*). The Court continued: "the proportionality rule inherent in the requirement that the defendant not use excessive force continues to exist even in instances in which a defendant is entitled to stand his or her ground." *Id.* at 636, 869 S.E.2d at 209.

Although the *Benner* Court addressed an in-home self-defense scenario, its excessive-force language pertained only to the Stand Your

Ground Doctrine. *See id.* at 636, 869 S.E.2d at 209. As mentioned, the Stand Your Ground Doctrine applies to in-home scenarios, N.C. Gen. Stat. § 14-51.3(a), and the *Benner* Court spoke in Stand Your Ground terms: "the proportionality rule inherent in the requirement that the defendant not use excessive force continues to exist even in instances in which a defendant is entitled to *stand his or her ground*," *Benner*, 380 N.C. at 636, 869 S.E.2d at 209 (emphasis added).

In *Walker*, this Court discussed *Benner* and stated: "That decision makes clear that the use of deadly force cannot be excessive and must still be proportional even when the defendant has no duty to retreat and is entitled to *stand his ground* . . . ." *Walker*, 286 N.C. App. at 447, 880 S.E.2d at 738 (emphasis added). In other words, the *Benner* prohibition of excessive force concerns the Stand Your Ground Doctrine, not the Castle Doctrine. *See id.* at 447, 880 S.E.2d at 738. We agree.

This Court went on to compare the Castle Doctrine and the Stand Your Ground Doctrine. We said, "the castle doctrine statute does not obviate the proportionality requirement inherent to lethal self-defense; instead, it simply presumes that the proportionality requirement is satisfied under specific circumstances." *Id.* at 448, 880 S.E.2d at 739. Then concerning the Stand Your Ground Doctrine, we said the defendant "could use deadly force against the victim under Subsection 14-51.3(a) *only* if it was necessary to prevent imminent death or great bodily harm, i.e., if it was proportional." *Id.* at 449, 880 S.E.2d at 739.

Put together: Under the Castle Doctrine, excessive force is impossible unless the State rebuts the Castle Doctrine presumption, but under the Stand Your Ground Doctrine, excessive force is possible if the defendant acts disproportionately. *See id.* at 448–49, 880 S.E.2d at 739. So in Castle Doctrine scenarios, unless the State rebuts the Castle Doctrine presumption, a jury cannot find that a defendant used excessive force. *See id.* at 448–49, 880 S.E.2d at 739.

Here, the trial court instructed the jury based on NCPJI 308.80, but added the following language:

> A defendant does not have the right to use excessive force. The defendant had the right to use only such force as reasonably appeared necessary to the defendant under the circumstances to protect the defendant from death or great bodily harm. In making this determination you should consider the circumstances as you find them to exist from the evidence including the size, age, and strength of the defendant as compared to the victim; the

> fierceness of any assault upon the defendant; and whether the victim possessed a weapon.

Defendant argues the trial court's jury instruction incorrectly stated the law by including language explaining the excessive-force prohibition. Defendant argues the Castle Doctrine provides her with a rebuttable presumption that deadly force is authorized, and since no force exceeds deadly force, excessive force is impossible where the State fails to rebut the presumption. We agree with Defendant.

Here, when the trial court conclusively stated that "[D]efendant does not have the right to use excessive force," the trial court concluded that the State rebutted the Castle Doctrine presumption. But whether the State successfully rebutted the Castle Doctrine presumption was for the jury to decide, as a matter of fact, and the remainder of the equation was a matter of law. *See* N.C. Gen. Stat. § 14-51.2(b). If the jury determined the question of fact—whether deadly force was authorized because the State failed to rebut the presumption—in the affirmative, Defendant, as a matter of law, did not use excessive force when she shot Victim. *See id.*

The trial court could have instructed the jury this way: If the State rebutted the Castle Doctrine presumption, Defendant could not use excessive force to protect herself; but if the State failed to rebut the presumption, the proportionality of Defendant's force was irrelevant. *See id.* Therefore, the trial court erred by categorically stating that Defendant "d[id] not have the right to use excessive force." *See id.* If this case only concerned the Stand Your Ground Doctrine, the excessive-force instruction may have sufficed. *See Benner*, 380 N.C. at 636, 869 S.E.2d at 209. But because this case concerns the Castle Doctrine, the excessive-force instruction was erroneous. *See* N.C. Gen. Stat. § 14-51.2(b).

Further, by stating that Defendant "d[id] not have the right to use excessive force," it is probable that the trial court confused the jury. Indeed, shortly after the trial court instructed the jury, a juror asked the court if it could "repeat the last," to which the court replied, "[i]t is confusing." A special verdict form may have helped the jury discern the nuanced issues arising from the different self-defense doctrines.

Because the trial court's instruction was both erroneous and confusing, there is a reasonable possibility that the jury would have reached a different result if it received a proper instruction. *See Castaneda*, 196 N.C. App. at 116, 674 S.E.2d at 712. Thus, Defendant was prejudiced by the instruction and is therefore entitled to a new trial. *See id.* at 116, 674 S.E.2d at 712.

V. Conclusion

We hold the trial court erred when it instructed the jury, and there was a reasonable possibility of a different result had the trial court correctly instructed the jury. Therefore, we vacate the trial court's judgment and remand for a new trial.

VACATED AND REMANDED.

Judge STADING concurs.

Judge HAMPSON dissents in a separate opinion.

HAMPSON, Judge, dissenting.

The Castle Doctrine, applied as a *statutory* defense, must be viewed in the context of the statutory scheme in which it is found and read together with its accompanying statutes. *See* N.C. Gen. Stat. § 14-51.2 (Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm.); N.C. Gen. Stat. § 14-51.3 (Use of force in defense of person; relief from criminal or civil liability); N.C. Gen. Stat. § 14-51.4 (Justification for defensive force not available). It is not a stand-alone defense but is rather integrated into a defense of justification—or the right to stand one's ground—in defense of person or property. Specifically, N.C. Gen. Stat. § 14-51.3 first provides: "A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force." N.C. Gen. Stat. § 14-51.3(a). That statute further provides two instances where deadly force may be justified:

> a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
>
> (2) Under the circumstances permitted pursuant to G.S. 14-51.2.

Id. These subsections, together, create the basis for the so-called "Stand-Your-Ground" defense. Both rely on a central unifying principle

for justifying the use of deadly force in defense of person or property: the person "reasonably believes that such force is necessary to prevent imminent death or great bodily harm[.]" N.C. Gen. Stat. § 14-51.3(a)(1). Unlike subsection 1, however, under subsection 2—by reference to section 14-51.2—when a lawful occupant of a home, motor vehicle, or workplace knowingly applies deadly force in defense against an unlawful breaking or entering or removal of a person, the lawful occupant is entitled to a presumption that they reasonably feared imminent death or serious bodily harm. N.C. Gen. Stat. § 14-51.2(b). As such, both subsections apply the same "reasonable belief" standard, but under subsection 2, the lawful occupant's belief is presumptively reasonable unless and until the State overcomes that presumption.

Indeed, we have previously observed the Castle Doctrine Statute—N.C. Gen. Stat. § 14-51.2—"functions by creating a presumption of reasonable fear of imminent death or serious bodily harm in favor of a lawful occupant of a home, which in turn justifies the occupant's use of deadly force." *State v. Austin*, 279 N.C. App. 377, 382, 865 S.E.2d 350, 355, *rev. denied*, 871 S.E.2d 519 (N.C. 2022). While N.C. Gen. Stat. § 14-51.2 provides the same self-defense protections to one acting in defense of person or property, it broadens the traditional notion of self-defense by removing the burden from a defendant to prove key elements of traditional self-defense. *Id.* at 380, 865 S.E.2d at 353.

> In effect, this provision eliminates the needs for lawful occupants of a home to show that they reasonably believed the use of deadly force was necessary to prevent imminent death or serious bodily injury to themselves or others—a requirement of traditional self-defense. Instead, that belief is presumed when the statutory criteria are satisfied.

Id. at 382-83, 865 S.E.2d at 355.

Hence, the Castle Doctrine Statute "simply provides that a lawful occupant of a home, workplace, or motor vehicle is entitled to a rebuttable presumption that deadly force is reasonable when used against someone who had or was unlawfully breaking into that location or kidnapping someone from that location." *State v. Walker*, 286 N.C. App. 438, 448, 880 S.E.2d 731, 739, *rev. denied*, 887 S.E.2d 879 (N.C. 2023). "In other words, the castle doctrine statute does not obviate the proportionality requirement inherent to lethal self-defense; instead, it simply presumes that the proportionality requirement is satisfied under specific circumstances." *Id.* Moreover, "the castle doctrine's rebuttable presumption is not limited to the five scenarios listed in the statute."

Austin, 279 N.C. App. at 384, 865 S.E.2d at 356. Viewed correctly, "the castle doctrine . . . is effectively a burden-shifting provision, creating a presumption in favor of the defendant that can then be rebutted by the State." *Id.* "[I]f the State presents substantial evidence from which a reasonable juror could conclude that a defendant did not have a reasonable fear of imminent death or serious bodily harm, the State can overcome the presumption and create a fact question for the jury." *Id.*

This is consistent with how our State Supreme Court has applied the stand-your-ground principles. Indeed, our Supreme Court continues to acknowledge that the statutory Castle Doctrine Defense and Stand-Your-Ground laws track consistently with the respective common law defenses including: "the well-established legal principle that, even though a defendant attacked in his own home is ' "entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault," ' such an entitlement ' "would not excuse the defendant if he used excessive force in repelling the assault," ' " *State v. Benner*, 380 N.C. 621, 636, 869 S.E.2d 199, 209 (2022) (quoting *State v. Francis*, 252 N.C. 57, 60, 112 S.E.2d 756, 758 (1960)).[1]

Furthermore, here, while Defendant contends the trial court erred by giving the "excessive force" instruction, Defendant's argument ignores the trial court's repeated instructions squarely placing the burden of proof to overcome the defense of habitation on the State. "We examine the instructions 'as a whole' to determine if they present the law 'fairly and clearly' to the jury." *Austin*, 279 N.C. App. at 385, 865 S.E.2d at 356 (quoting *State v. Chandler*, 342 N.C. 742, 751–52, 467 S.E.2d 636, 641 (1996)). "The purpose of a jury instruction 'is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.' " *Id.* (quoting *State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006)). "An error in jury instructions 'is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial.' " *Id.* (quoting *State v. Dilworth*, 274 N.C. App. 57, 61, 851 S.E.2d 406, 409 (2020)).

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1. The majority is, of course, correct that both *Benner* and *Walker* discuss these principles in terms of "stand-your-ground" and not expressly in terms of defense of habitation. However, I see that as an outgrowth of the fact that the justification defenses of the statutory Castle Doctrine and defense of person both fall under the umbrella of a Stand-Your-Ground law. The statutory Castle Doctrine simply provides an additional protection to the lawful occupant of a dwelling, vehicle or workplace and places the burden on the State to overcome the presumption.

In this case, the trial court instructed the jury, "If the defendant assaulted the victim to prevent a forcible entry into the defendant's home or to terminate the intruder's unlawful entry the defendant's actions are excused and the defendant is not guilty." "The State has the burden of proving to you from the evidence beyond a reasonable doubt that the defendant did not act in lawful defense of the defendant's home." After listing the circumstances in which Defendant would be justified in using deadly force, the trial court further explained: "A lawful occupant within a home does not have a duty to retreat from an intruder in these circumstances. Furthermore, a person who unlawfully and by force enters or attempts to enter a person's home is presumed to be doing so with the intent to commit an unlawful act involving force or violence." The trial court then instructed specifically on the elements of the Castle Doctrine statute:

> In addition, absent evidence to the contrary, the lawful occupant of a home is presumed to have held a reasonable fear of imminent death or serious harm to herself or others when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply. The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home or if that person had removed or was attempting to remove another person against that person's will from the home, and two, that the person who uses the defensive force knew or had reason to believe that an unlawful and forceful entry or forcible act was occurring or had occurred.

In charging the jury on returning its verdict on the offenses submitted, the trial court instructed: "If you find from a reasonable doubt that the Defendant assaulted the victim, you may return a verdict of guilty only if the State has also satisfied you beyond a reasonable doubt that the defendant did not act in lawful defense of the defendant's home." "If you do not so find or have a reasonable doubt about whether the State has proved any one or more of these things that the defendant would be justified in defending the home, it would be your duty to return a verdict of not guilty." Critically, Defendant does not contend the trial court erred in any of these instructions. Taken as a whole, the trial court's instructions adequately applied the law to the evidence, emphasized the Castle Doctrine presumption, and mandated the jury place the burden of proof on the State to prove Defendant was not justified in the use of deadly force in the face of an intruder—such that there is not a reasonable

possibility, on the facts of this case, that the jury would have returned a different verdict.

Here, Defendant was entitled to the statutory Castle Doctrine presumption. Likewise, the State was entitled to attempt to rebut that presumption; including through evidence Defendant did not actually have a reasonable fear of imminent death or serious bodily harm and the force exercised by Defendant was, in fact, excessive under the factual circumstances of this case. *See Austin*, 279 N.C. App. at 384, 865 S.E.2d at 356. Thus, the trial court's instruction on excessive force was not erroneous. Therefore, there was no error at trial. Consequently, Defendant is not entitled to a new trial. Accordingly, I respectfully dissent.

SCOTT THOMAS, AMY ELIZABETH DUNN, JAMES BRIAN DUNN, DAVE EMONSON, PENNY EMONSON, AND JOHN FARABOW, PLAINTIFFS

v.

VILLAGE OF BALD HEAD ISLAND; PETER QUINN, MAYOR OF VILLAGE OF BALD HEAD ISLAND; VILLAGE COUNCIL MEMBERS OF THE VILLAGE OF BALD HEAD ISLAND, EACH IN THEIR REPRESENTATIVE CAPACITY AS COUNCIL MEMBERS OF THE VILLAGE OF BALD HEAD ISLAND; TO WIT: SCOTT GARDNER, MAYOR PRO TEM; GINNIE WHITE, COUNCILOR; EMILY HILL, COUNCILOR; AND JERRY MAGGIO, COUNCILOR, DEFENDANTS

No. COA23-242

Filed 3 October 2023

Cities and Towns—road closure—challenged by residents—standing—"persons aggrieved"—factual basis

In an action brought against a village (defendant) by a group of residents (plaintiffs) challenging the village council's decision to close a road, the trial court properly granted defendant's Rule 12(b)(6) motion to dismiss where plaintiffs failed to provide a factual basis demonstrating that they had standing to sue under N.C.G.S. § 160A-299(b) as "persons aggrieved" by the road closure. Firstly, plaintiffs could not establish standing by relying on facts from their individual affidavits (which the trial court declined to consider after denying plaintiffs' oral motion to amend their initial petition) where they abandoned any argument in their appellate brief addressing why the affidavits should be considered for the first time on appeal. Secondly, plaintiffs did not meet the statutory definition of "persons aggrieved" where they alleged that they were "nearby property owners" concerned with how the road closure would affect "clear public interests" rather than "adjacent property owners" who suffered

some unique personal injury "distinct from the rest of the community" as a result of the closure. Finally, because plaintiffs were not "persons aggrieved," they could not assert standing as "any person" under section 160A-299(a) to challenge defendant's allegedly deficient notice of the public hearing on the road closure.

Appeal by plaintiffs from order entered 16 September 2022 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 22 August 2023.

John M. Kirby for plaintiffs-appellants.

Brooks Pierce McLendon Humphrey & Leonard, L.L.P., by S. Wilson Quick and Jimmy C. Chang, for defendants-appellees.

FLOOD, Judge.

Scott Thomas, Amy Elizabeth Dunn, James Brian Dunn, Dave Emonson, Penny Emonson, and John Farabow (collectively "Plaintiffs") appeal from the trial court's order granting Defendants' motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs allege the trial court erred in: (1) finding Plaintiffs lacked standing to challenge the decision to close a portion of Lighthouse Wynd; (2) concluding Plaintiffs did not have standing to bring this action where the relevant statute allows "any person" to be heard prior to the closure of a road; and (3) rejecting the doctrine of relation back as to John Farabow ("Farabow") and Dave and Penny Emonson (the "Emonsons"). As we explain in further detail below, the trial court did not err.

I. Factual and Procedural Background

On 3 May 2021, Defendant Village of Bald Head Island (the "Village") received a petition and request from Mark and Robin Prak; Old Ballast Stone, LLC; the Old Baldy Foundation, Inc.; the Village Chapel; Bald Head Limited, LLC; and the Bald Head Island Association, seeking closure of a portion of Lighthouse Wynd (the "Road") that is near Old Baldy lighthouse—specifically, the west end of the Road between where it intersects with Ballast Stone Alley and where it intersects with Timber Bridge. On 18 February 2022, these petitioners renewed their request for closure of the Road. On 18 March 2022, the Village adopted resolution number 2022-0304 (the "Resolution"), whereby the Village declared its intent to consider closing the Road. In the Resolution, the Village also

set the public hearing on the considered Road closing to be held "at 10:00 [a.m.], or shortly thereafter, on Thursday," 14 April 2022.

On or about 30 March 2022, the Village filed a Certification of Mailing and Sign Posting, which read, in relevant part:

> I, Darcy Sperry, Village Clerk, with the Village of Bald Head Island, DO HEREBY CERTIFY that in accordance with [N.C. Gen. Stat. §] 160A-299(a), I mailed, or caused to be mailed, via USPS certified mail a Notice of Public Hearing being held by the Village Council on [14 April] 2022.
>
> This notice informed the abutting property owners of the subject property that the applicant is seeking to close a portion of the subject property. The mailed notice included the date, time, place, and subject of the meeting. The notice also included the process by which interested parties can participate in the public hearing (in person or via email). The notice was mailed on [29 March] 2022.
>
> Staff has also posted the subject parcel with two [] signs indicating that the property is subject to a Public Hearing with instructions to contact the Development Services Department via phone or email.

The Village also filed a copy of the notice that was published in the local newspaper, The State Port Pilot. This notice was published in the 23 March 2022, 30 March 2022, 6 April 2022, and 13 April 2022 editions of the newspaper. On 5 April 2022, the Village issued by email a notice where they changed the start time of the 14 April 2022 Village Council "regular scheduled meeting" from 10:00 [a.m.] to 9:00 [a.m.]. Plaintiff Scott Thomas ("Thomas") was a recipient of this email. The same day, the Village posted notice of this time change.

On 13 April 2022, Thomas sent an email to Village Clerk—Darcy Sperry—and several other people, requesting the Village not close the Road. In the email, Thomas asserted closure of the Road would be detrimental to the "island community because of [Old Baldy's] historical significance, aesthetic appeal and environmental sensitivity[;]" not closing the Road would be in "the public's best interest[;]" and the Village did not provide proper notice prior the 14 April 2022 hearing.

On 14 April 2022, during the Village Council's regularly scheduled meeting, the Village Council held a hearing on the closure of the Road. The Record shows Thomas phoned in to the hearing to speak remotely, and he expressed several concerns regarding closure of the Road "including

but not limited to fire and emergency services, on[-]street parking, tree scape, pedestrian safety, lack of site plan, and Island infrastructure[.]" Thereafter, the Village Council unanimously voted to adopt order number 2022-0402 (the "Order") to permanently close the Road.

On 12 May 2022, Thomas, Amy Elizabeth Dunn, and James Brian Dunn (the "Dunns") filed a Petition to Vacate and Notice of Appeal from the Order (the "Initial Petition"). On 29 June 2022, Thomas and the Dunns filed an Amended Petition (the "Amended Petition"), which added Farabow and the Emonsons as petitioners. The Amended Petition did not add any allegations or circumstances unique to any Plaintiffs. On 2 August 2022, Defendants filed a Motion to Dismiss the Amended Petition pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 12 September 2022, the trial court held a hearing on Defendants' motion to dismiss. At the hearing, Plaintiffs made an oral motion to amend the Amended Petition via affidavits by each of the Plaintiffs, to "give further specifics about the individual positions of each" Plaintiff. The trial court denied Plaintiffs' motion and declined to consider the affidavits.

On 16 September 2022, the trial court entered an order granting Defendants' motion to dismiss, for Plaintiffs' "failure to establish standing pursuant to the requirements of [N.C. Gen. Stat. §] 160A-299" and, as to Farabow and the Emonsons, for "failure to file an appeal [to the trial court] within [thirty] days from the adoption of the Order . . . as required by [N.C. Gen. Stat. §] 160A-299." On 17 October 2022, Plaintiffs filed written notice of appeal.

II. Jurisdiction

Plaintiffs' appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 7A-27(a)(1), and 1-277, and Rule 3(a) of the North Carolina Rules of Appellate Procedure. *See* N.C. Gen. Stat. §§ 7A-27(a)(1), and 1-277 (2021); *see* N.C. R. App. P. 3(a).

III. Standard of Review

"A ruling on a motion to dismiss for want of standing is reviewed *de novo*." *Ring v. Moore Cnty.*, 257 N.C. App. 168, 170, 809 S.E.2d 11, 12 (2017). This Court's review of an order granting a Rule 12(b)(6) motion to dismiss does not entail review of the trial court's reasoning; rather, this Court "affirms or reverses the disposition of the trial court—the granting of the Rule 12(b)(6) motion to dismiss—based on the appellate court's review of whether the allegations of the complaint are sufficient to state a claim." *Taylor v. Bank of America, N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022).

> Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wood v. Guilford Cnty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

"Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004). "For the purpose of the motion [to dismiss under Rule 12(b)(6)], the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Lloyd v. Babb*, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979).[1]

IV. Analysis

Plaintiffs argue on appeal: (A) the trial court erred in concluding Plaintiffs did not have standing to bring this action where Plaintiffs were "persons aggrieved" under N.C. Gen. Stat. § 160A-299; (B) even if Plaintiffs were not persons aggrieved under N.C. Gen. Stat. § 160A-299, they were still persons entitled to be heard prior to a road closure; and (C) the trial court erroneously found Farabow and the Emonsons failed to timely file their claims.

A. Standing as "Persons Aggrieved"

We first address whether Plaintiffs had standing as "person[s] aggrieved" pursuant to N.C. Gen. Stat. § 160A-299. As we explain below, Plaintiffs did not have standing.

Plaintiffs argue, pursuant to N.C. Gen. Stat. § 160A-299(b), they are "persons aggrieved" by the closure of the Road, and therefore, the trial court erred in dismissing their amended complaint for lack of standing. We disagree.

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1. Although standing presents an issue of subject matter jurisdiction under Rule 12(b)(1), standing is sometimes addressed under Rule 12(b)(6). Defendant's motion to dismiss was based only upon Rule 12(b)(6). Plaintiffs' brief on appeal also addresses the argument regarding standing under Rule 12(b)(6), so we have limited our analysis to address the arguments under Rule 12(b)(6) as well. The standard of review of *de novo* is the same either way, although the information the Court may consider is different. *See United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 624, 881 S.E.2d 32, 43–44 (2022).

N.C. Gen. Stat. § 160A-299(b) provides, in pertinent part:

> Any person aggrieved by the closing of any street or alley . . . may appeal the council's order to the General Court of Justice within [thirty] days after its adoption. . . . In addition to determining whether procedural requirements were complied with, the court shall determine whether, on the record as presented to the city council, the council's decision to close the street was in accordance with the statutory standards of subsection (a) of this section and any other applicable requirements of local law or ordinance.
>
> No cause of action or defense founded upon the invalidity of any proceedings taken in closing any street or alley may be asserted, nor shall the validity of the order be open to question[,] . . . except in an action or proceeding begun within [thirty] days after the order is adopted.

N.C. Gen. Stat. § 160A-299(b) (2021). To show standing to challenge a road closing under N.C. Gen. Stat. § 160A-299, a plaintiff must provide a "factual basis to support the argument that he is an aggrieved person in this case." *Cox v. Town of Oriental*, 234 N.C. App. 675, 680, 759 S.E.2d 388, 391 (2014). This Court has defined an "aggrieved party" under N.C. Gen. Stat. § 160A-299 as "one who can either show an interest in the property affected, or if the party is a nearby property owner, some special damage, distinct from the rest of the community, amounting to a reduction in the value of his property." *In re Granting of Variance by Town of Franklin*, 131 N.C. App. 846, 849, 508 S.E.2d 841, 843 (1998) (citation omitted).

In *Cox*, the plaintiff, who appealed to the trial court the Town of Oriental's decision to close a street under N.C. Gen. Stat. § 160A-299, argued he is a person aggrieved as "a member of the public and a taxpaying resident of the Town" and as a "successor in interest to these public rights of way, which were designed and dedicated to provide access to the citizens of the Town." 234 N.C. App. at 679, 759 S.E.2d at 391 (cleaned up). We held, "as [the plaintiff's] property is not adjacent to" the street closure and the plaintiff "has not alleged any personal injury . . . [nor alleged] some special connection to [the street] *distinct from the rest of the community*[,]" the plaintiff was not an "aggrieved person" under N.C. Gen. Stat. § 160A-299, and he lacked standing to bring his claim. *Id.* at 680, 759 S.E.2d at 391 (emphasis in original).

1. Affidavits

Here, Plaintiffs provide as a factual basis, in support of the argument they are aggrieved persons, the contents of the Amended Petition and affidavits from each individual Plaintiff. As to the affidavits, Plaintiffs first presented them at the 16 September 2022 hearing as a means to amend the Amended Petition. The trial court denied Plaintiffs' oral motion to amend and, as such, never considered the contents of the affidavits. Plaintiffs again present the affidavits in the Record on appeal, but in their brief allege no error on part of the trial court in denying their oral motion and posit no reason as to why this Court should consider these affidavits for the first time on appeal. "[A] party's failure to brief a question on appeal ordinarily constitutes a waiver of the issue." *In re N.R.M.*, 165 N.C. App. 294, 296, 598 S.E.2d 147, 148 (2004) (citation omitted); *see* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Plaintiffs, therefore, have abandoned any argument concerning the trial court's denial of their motion to amend the Amended Complaint, and we will not consider the contents of the affidavits for the first time on appeal.

We note that, in their reply brief, Plaintiffs contend we may consider the affidavits in our review of the trial court's decision to grant Defendants' motion to dismiss for lack of standing, as our Supreme Court has provided, "[a]n appellate court considering a challenge to a trial court's decision to grant or deny a motion to dismiss for lack of *subject matter jurisdiction* may consider information outside the scope of the pleadings in addition to the allegations set out in the complaint[,]" and may make findings of fact to that effect. *United Daughters*, 383 N.C. at 624, 881 S.E.2d at 43 (emphasis added); *see Hammond v. Hammond*, 209 N.C. App. 616, 631, 708 S.E.2d 74, 84 (2011).

Our Supreme Court's articulated scope of consideration concerns review of a trial court's decision to grant or deny a 12(b)(1) motion and, here, the trial court made no findings of fact that we may review, nor did Plaintiffs request the court make findings. *See United Daughters*, 383 N.C. at 624, 881 S.E.2d at 43. Moreover, the current appeal concerns the trial court's granting of Defendants' 12(b)(6) motion, not a 12(b)(1) motion, and, as articulated above, Plaintiffs have not argued on appeal that the trial court erred in refusing to consider the affidavits. Additionally, a "reply brief is not an avenue to correct the deficiencies contained in the original brief." *State v. Dinan*, 233 N.C. App. 694, 698–99, 757 S.E.2d 481, 485 (2014). Plaintiffs' argument in their reply brief on this Court's consideration of the affidavits is not sufficient for us to consider the affidavits' contents on appeal.

2. "Persons Aggrieved"

As we do not consider the contents of Plaintiffs' affidavits, per our standard of review we look to only the allegations set forth in the Amended Petition. *See Taylor*, 382 N.C. at 679, 878 S.E.2d at 800. Plaintiffs allege in the Amended Petition that they are statutory "aggrieved persons" as "nearby property owners" and allege that closure of the Road would "contravene the proof of clear public interests in public safety, traffic calming, pedestrian access, historical preservation and conservation." Per *Cox*, where we provided a plaintiff must demonstrate he is an adjacent property owner who has suffered some unique personal injury distinct from the rest of the community, none of these contentions are sufficient to establish standing as an "aggrieved person." 234 N.C. App. at 680, 759 S.E.2d at 391. A "nearby" property owner is not necessarily the same as an "adjacent" property owner, and Plaintiffs' assertions regarding public interests do not demonstrate "some special damage, distinct from the rest of the community, amounting to a reduction in the value of [their properties]." *See id.* at 679, 759 S.E.2d at 390–91; *see Franklin*, 131 N.C. App. at 849, 508 S.E.2d at 843. As such, Plaintiffs have not provided a factual basis demonstrating they are "persons aggrieved" pursuant to N.C. Gen. Stat. § 160A-299, and the Amended Petition "on its face reveals the absence of facts sufficient to make a good claim." *See Cox*, 234 N.C. App. at 680, 759 S.E.2d at 391; *see Wood*, 355 N.C. at 166, 558 S.E.2d at 494. The trial court, therefore, did not err.

As we have determined Plaintiffs had no standing to file the Amended Petition, we need not address Plaintiffs' argument concerning whether Farabow's and the Emonsons' claims "relate back" to the initial Petition under *Baldwin v. Wilkie*, 179 N.C. App. 567, 635 S.E.2d 431 (2006), and N.C. R. Civ. P. 15(c). *See Coderre v. Futrell*, 224 N.C. App. 454, 457, 736 S.E.2d 784, 786 (2012) ("[The p]laintiffs contend that, under this Court's holding in *Baldwin*[,] . . . Rule 15(c) allows a plaintiff to add an additional party plaintiff to an already filed action and have the new plaintiff's claims relate back to the original filing. However, since we have determined that [the plaintiffs] had no standing to file the original complaint, we need not address [the] plaintiffs' Rule 15(c) argument.").

B. Standing as "Any Persons"

Plaintiffs argue that, even if this Court were to determine that Plaintiffs did not have standing as "persons aggrieved" ' under N.C. Gen. Stat. § 160A-299(b), Plaintiffs nevertheless had a "right to be heard" before the Village and have standing under N.C. Gen. Stat. § 160A-299(a) to challenge Defendants' allegedly deficient notice for the hearing on closure of the Road. We disagree.

Under N.C. Gen. Stat. § 160A-299(a),

> When a city proposes to permanently close any street or public alley, the council shall first adopt a resolution declaring its intent to close the street or alley and calling a public hearing on the question. . . . At the hearing, any person may be heard on the question of whether or not the closing would be detrimental to public interest, or the property rights of any individual.

N.C. Gen. Stat. § 160A-299(a) (2021). As provided in N.C. Gen. Stat. § 160A-299(b), however, "[a]ny *person aggrieved* by the closing of any street . . . may appeal the council's order . . . . [On appeal] the court shall determine whether . . . the council's decision to close the street was in accordance with the statutory standards of subsection (a)[.]" N.C. Gen. Stat. § 160A-299(b) (emphasis added).

Per the plain language of N.C. Gen. Stat. § 160A-299(b), and as articulated above, to have standing to appeal a council's decision to close a street or alley under N.C. Gen. Stat. § 160A-299 a plaintiff must provide a factual basis demonstrating he is a "person aggrieved[.]" N.C. Gen. Stat. § 160A-299(b); *see Cox*, 234 N.C. App. at 680, 759 S.E.2d at 391; *see Wood*, 355 N.C. at 166, 558 S.E.2d at 494. Plaintiffs, here, have failed to do so, and we will not consider the alleged deficiencies in Defendants' notice for a public hearing under N.C. Gen. Stat. § 160A-299(a).

V. Conclusion

Plaintiffs have failed to establish a factual basis demonstrating they are "person[s] aggrieved" under N.C. Gen. Stat. § 160A-299, and therefore have failed to establish standing to contest Defendants' decision to close the Road. We affirm the trial court's decision to grant Defendants' motion to dismiss.

AFFIRMED.

Chief Judge STROUD and Judge STADING concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 3 October 2023)

CITY OF GASTONIA v. McDANIEL No. 23-104	Gaston (19CVS2966)	Dismissed
HEISLER v. SUTTON No. 22-933	Davidson (18SP245)	Affirmed
IN RE A.L-R.T. No. 23-166	Burke (19JT58) (19JT59)	Affirmed
IN RE J.S. No. 23-165	Guilford (16JT353) (16JT354)	Affirmed
IN RE K.C.S. No. 23-93	Gaston (21JT199)	Affirmed
IN RE M.L.B. No. 23-25	Robeson (14JT356)	Vacated and Remanded
IN RE R.A.F. No. 21-754-2	Henderson (15JT26) (15JT27)	Affirmed
IN RE S.A.R. No. 23-124	Surry (21JT2) (21JT3) (21JT4) (21JT5)	Affirmed
LEVINE v. CARTER No. 23-113	Mecklenburg (20CVD6864)	Affirmed
LOWRIE v. EST. OF CSANYI No. 23-116	Rowan (21CVS2204)	Affirmed
STATE v. ADAMS No. 23-132	Wilson (19CRS51373)	No Error
STATE v. BLACK No. 23-356	Davidson (18CRS57302) (20CRS54530) (20CRS55347)	Vacated
STATE v. FILMORE No. 22-917	Mitchell (20CRS50278) (21CRS92)	No Error

STATE v. MABLE No. 23-117	Lenoir (20CRS51725)	Vacated
STATE v. RADFORD No. 22-1003	Onslow (19CRS54163) (19CRS54292)	No Error
STATE v. RAMIREZ No. 23-171	Pitt (16CRS54112) (16CRS54199)	AFFIRMED IN PART, AND REMANDED
STATE v. RUTH No. 20-657-2	Forsyth (17CRS55391)	New Trial
STATE v. SIDBERRY No. 23-130	Forsyth (21CRS56217-18)	No Error
STONER v. STONER No. 21-467	Mecklenburg (17CVD1839)	Affirmed
ZHANG v. REALI No. 23-436	Wake (21CVS12685)	Affirmed

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