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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 7, 2024

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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HEADNOTE INDEX

ADMINISTRATIVE LAW

Animal waste management system permitting—new conditions for general permits—rules under NCAPA—required rulemaking process—In a case involving the permitting process for farmers who use certain animal waste management systems, where the North Carolina Farm Bureau filed petitions in the Office of Administrative Hearings alleging that the Division of Water Resources had unlawfully added three new conditions for general permits, the superior court erred by concluding that the challenged general permit conditions were not rules under the North Carolina Administrative Procedure Act (NCAPA). Because the new conditions were regulations (authoritative rules dealing with details of animal waste management systems) of general applicability (intended to be used for most animal waste management systems), the new conditions were rules under the NCAPA and therefore were invalid because they were not adopted through the NCAPA's rulemaking process. **N.C. Dep't of Env't Quality v. N.C. Farm Bureau Fed'n, Inc., 188.**

APPEAL AND ERROR

Interlocutory order—denying motion to dismiss for improper venue—substantial right—breach of contract action—enforceability of forum selection clauses—In an action alleging breach of contract, fraud, and other claims arising from a set of contracts plaintiff entered into with defendant companies, defendants were entitled to immediate appeal from an interlocutory order in which the trial court denied defendants' motion to dismiss the action for improper venue under Civil Procedure Rule 12(b)(3). A key issue in the case dealt with the enforceability of forum selection clauses found in the contracts between the parties, and therefore the denial of defendants' Rule 12(b)(3) motion affected a substantial right. **Clapper v. Press Ganey Assocs., LLC, 136.**

Preservation of issues—custody standard—different theory argued on appeal—In a custody dispute, the child's father failed to preserve for appellate review the issue of whether the trial court erred by determining custody based on the best interests of the child rather than the substantial change of circumstances standard, where he argued exclusively before the trial court that best interests would determine the outcome. Even assuming the argument was properly preserved, it had no merit because the appealed-from order was an initial custody determination for which best interests was the appropriate standard. **Urvan v. Arnold, 300.**

CHILD CUSTODY AND SUPPORT

Custody—final decision-making authority—effect of parties' inability to communicate—In a custody dispute, the trial court did not err by granting the child's mother (who was the primary custodial parent) final decision-making authority regarding major decisions affecting the parties' child in the event the parties could not reach a mutual decision, where the court's award was supported by findings of fact detailing the parties' past contentious communications and the negative effect that such communications would have on the child. **Urvan v. Arnold, 300.**

Custody—modification—findings of fact—substantial evidence—In a child custody modification matter, the appellate court rejected the mother's numerous challenges to the trial court's findings of fact—including those regarding the mother's disdain and contempt for anyone she perceived to be "against" her, an incident in which her children were "beating on the door and crying" because they wanted to travel with their father, and the mother's erratic behavior and poor decisionmaking. Having reviewed the record, the appellate court concluded that substantial evidence supported each of the legally relevant and necessary findings of fact that the mother challenged on appeal. **Conroy v. Conroy, 145.**

Custody—modification—substantial change of circumstances—long history of relational problems—effect on children—In a child custody modification matter—where the mother asserted on appeal that she always had poor interpersonal relationships, that her overall behavior toward the father had been erratic and unpredictable for years, and that she has often made disparaging remarks about the father while the children were present—the trial court did not err by determining that a substantial change of circumstances had occurred affecting the welfare of the children. Notwithstanding the long history of the mother's behavior and the parties' poor communication, there was no error in the trial court's finding that those issues were presently having a negative impact on the children that constituted a change of circumstances. Furthermore, the trial court did not abuse its discretion by awarding primary custody of the children to the father. **Conroy v. Conroy, 145.**

Custody—motion to continue—waiver—duration of hearing—In a child custody modification matter, the trial court did not abuse its discretion by denying the mother's motion to continue where the mother fired her attorney the day before the prior-noticed scheduled date of the hearing. By failing to argue at trial that the denial of the motion to continue denied her the constitutional right to parent her children, the mother waived the constitutional argument on appeal. Furthermore, the appellate court rejected the mother's argument that the trial court abused its discretion by limiting each side to two-and-one-half hours to present evidence, as the duration of the hearing was within the trial court's discretion. **Conroy v. Conroy, 145.**

Modification of custody—substantial change in circumstances—previously disclosed events—lack of support—In an action to modify custody, the trial court erred by concluding that a substantial change in circumstances had occurred where it primarily relied on evidence—including that the child's mother had gotten married, had given birth to another child, had gotten honorably discharged from the military, and had moved back to North Carolina—that had been previously disclosed to and considered by the trial court, as shown by facts contained in a prior motion filed by the mother and in the first custody order itself. Without those previously addressed events, the remaining evidence considered by the court—that the child had incurred various injuries, none of which amounted to abuse or neglect according to relevant authorities, and that the father failed to inform the mother that he had tested positive for a viral infection before returning the child to the mother's custody—was insufficient to support modification. **Smith v. Dressler, 197.**

CONSPIRACY

Criminal conspiracy—to traffic drugs—evidence of agreement—hotel room rental application—In a drug prosecution of three defendants arising from a search by law enforcement of two apartments (all three defendants were apprehended in one apartment, while both apartments contained illegal substances and drug paraphernalia), the State presented substantial evidence from which a jury could conclude that each defendant agreed to participate in a conspiracy to traffic in opium or heroin and in a conspiracy to traffic in cocaine. In addition to the illegal substances found in both apartments, there was sufficient evidence of other incriminating circumstances to prove defendants' constructive possession of the drugs in the unoccupied apartment, and, in the apartment where defendants were found, there was a key and a rental agreement for the other apartment; the rental agreement was signed by one of the defendants and dated the same day the search warrants were executed. **State v. Clawson, 234.**

To commit trafficking in methamphetamine—sufficiency of the evidence— The trial court properly denied defendant's motion to dismiss a charge of conspiracy to commit trafficking in methamphetamine where the State presented sufficient evidence to submit the charge to the jury. According to the evidence, law enforcement saw defendant repeatedly enter and leave a motel room along with three other individuals, each of whom were later found with methamphetamine in their possession; one of the three individuals was a known drug dealer who was seen taking a large box out of a car that was parked outside the motel and bringing the box to the motel room; law enforcement found defendant driving the car where the drug dealer had retrieved the large box; at the time of his arrest, defendant had thousands of dollars and a set of digital scales in his possession; and, days later, two hidden packages of methamphetamine were retrieved from the car that defendant was driving. **State v. King, 264.**

CRIMINAL LAW

Expungement—eligibility—multiple unrelated charges—guilty plea to lesser-included offenses—The district court did not err by denying defendant's petition to expunge multiple unrelated speeding misdemeanors pursuant to N.C.G.S. § 15A-146 where, for each charge, defendant had pleaded guilty to lesser-included offenses. Contrary to defendant's argument on appeal, pleading guilty to a lesser-included offense does not equate to a "dismissal" of the original charge for purposes of the expungement statute; further, because this argument was meritless, the superior court did not abuse its discretion by denying defendant's petition for a writ of certiorari. **State v. Lebedev, 274.**

Joinder—multiple defendants—trafficking and conspiracy charges—lack of conflicting defenses—The trial court did not err by granting the State's motion to join the cases of three defendants, who were each charged with the same drug-related trafficking and conspiracy offenses after law enforcement apprehended them in an apartment in which illegal substances and drug paraphernalia were found. There were no confessions, affirmative defenses such as alibi, or conflicting defenses that would have deprived defendants of a fair trial. **State v. Clawson, 234.**

Prosecutor's closing argument—comparison of punishments—objection sustained—curative instruction not requested—In defendant's trial for first-degree murder, where the trial court sustained defendant's objection to the prosecutor's statement during closing argument comparing the punishment for second-degree murder to the punishment for first-degree murder and where defendant did not request a curative instruction, there was no prejudice to defendant given that the objection was sustained and that the court gave the jury a general instruction to disregard material for which an objection had been sustained. **State v. Branche, 214.**

Prosecutor's closing argument—defendant's admission of guilt—no reference on failure to plead guilty—In defendant's trial for first-degree murder, the trial court was not required to intervene ex mero motu during the portion of the prosecutor's closing statement regarding defendant's inability to directly admit to his guilt, in which the prosecutor noted that defendant admitted his guilt only through his counsel. The statement did not constitute an improper comment on defendant's failure to plead guilty, but was part of the State's broader argument that defendant had the requisite intent for first-degree murder based on premeditation and deliberation. **State v. Branche, 214.**

Prosecutor's closing argument—right against self-incrimination—reference to lack of witnesses—harmless error—In defendant's trial for first-degree murder, although the prosecutor's statement during closing argument pointing out that defendant did not call any witnesses on his behalf was improper because it was an indirect reference to defendant's failure to testify, any error was harmless where the trial court sustained defendant's objection to the prosecutor's direct statement referencing defendant's failure to testify and where defendant's identity as the perpetrator of the shooting was not in doubt given his admission at trial, through counsel, that he killed the victim. **State v. Branche, 214.**

Prosecutor's closing statement—law regarding provocation—curative instruction—In defendant's trial for first-degree murder based on premeditation and deliberation, where, after the prosecutor's request to include a statement in the jury instructions that provocation required more than "mere words" was denied by the trial court, the prosecutor still argued during closing that provocation required more than "mere words," to the extent that the statement was not entirely applicable—because it came from a case that discussed provocation in the context of voluntary

manslaughter and not first-degree murder—any misstatement of law was cured by the court's jury instructions explaining what the State had to prove regarding the required state of mind for premeditation and deliberation. **State v. Branche, 214.**

DAMAGES AND REMEDIES

Restitution—fraud and false pretense—evidence of monetary loss—proximate cause—In a case involving forgery, residential mortgage fraud, and obtaining property by false pretenses regarding a home loan application, the trial court did not err in ordering defendant to pay restitution to a credit union in the amount of $25,061.46, where there was sufficient evidence that defendant's wrongdoing—by submitting false documentation in order to obtain a loan and, later, forbearance of mortgage payments—was a direct and proximate cause of the credit union's monetary loss in issuing the original loan and granting subsequent forbearance requests. **State v. Hussain, 253.**

Restitution—mortgage fraud case—ability to pay—In a case involving forgery, residential mortgage fraud, and obtaining property by false pretenses regarding a home loan application, the trial court did not err in ordering defendant to pay restitution to a credit union in the amount of $25,061.46, where, despite defendant's argument that the trial court failed to take into consideration defendant's ability to pay, the record reflected that the court was aware of defendant's marital status, childcare obligations, and employment status and that the court extended the length of defendant's probation to allow her more time to pay back the amount of restitution. **State v. Hussain, 253.**

DRUGS

Maintaining a vehicle—for keeping or using controlled substance—sufficiency of the evidence—The trial court properly denied defendant's motion to dismiss a charge of maintaining a vehicle for unlawfully keeping and/or using a controlled substance where sufficient evidence showed that, based on a totality of the circumstances, defendant maintained the car he was driving when law enforcement arrested him (for a different drug crime) for the purpose of keeping controlled substances, including two packages of methamphetamine that were hidden in the car's taillights. Factors supporting the "maintaining" element included: upon arrest, defendant admitted to possessing marijuana located in the center console of the car; a duffel bag belonging to defendant and containing thousands of dollars and a set of digital scales was found inside the trunk of the car; although the two packages of methamphetamine were not discovered until a few days after defendant's arrest, evidence showed that the bags were already hidden inside the car when defendant was driving it; and defendant made a phone call from jail in which he described the hidden location of the packages to another individual and instructed that individual on how to properly extract them from the car. **State v. King, 264.**

Trafficking by possession—constructive possession—knowingly possess—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge of trafficking in methamphetamine by possession, where the State presented substantial evidence that defendant knowingly, constructively possessed two packages of methamphetamine that were hidden inside the taillights of a car. Specifically, the evidence showed that defendant regularly used that car and was driving it when law enforcement arrested him for a different drug crime; upon searching the vehicle, law enforcement found a duffel bag belonging to defendant

and containing thousands of dollars and a set of digital scales; and, in a phone call he made from jail, defendant instructed another individual on where to find the hidden packages of methamphetamine and how to retrieve them. **State v. King, 264.**

Trafficking by transportation—elements—knowingly transporting drugs—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge of trafficking in methamphetamine by transportation, where the State presented substantial evidence that defendant knowingly transported two packages of methamphetamine that were hidden inside the taillights of a car that he was driving when law enforcement arrested him (for a different drug crime). The fact that the packages were not discovered until days after defendant's arrest did not support a finding that he lacked knowledge of their existence. To the contrary, the evidence showed that defendant made a phone call from jail in which he described the hidden location of the packages to another individual and instructed that individual on how to properly extract them from the car. **State v. King, 264.**

Trafficking offenses—possession—constructive—other incriminating circumstances—In a drug trafficking prosecution arising from a search by law enforcement of two apartments, the State presented substantial evidence from which a jury could conclude that two defendants each had constructive possession of the heroin and fentanyl mixture and the cocaine base that were each discovered in both apartments, even though defendants were apprehended in just one of the apartments. Although neither defendant had exclusive possession of the premises in which the substances were found, the State presented other incriminating circumstances of constructive possession, including that each defendant had a large amount of money on their person and that both apartments contained the same illegal substances and similar drug-related items. **State v. Clawson, 234.**

EVIDENCE

Defendant as driver of vehicle—hearsay analysis—personal observation—explanation for subsequent surveillance—There was no error in a drug prosecution by the admission of testimony from detectives regarding their identification of defendant as the driver of a particular vehicle on multiple occasions and their knowledge of previous complaints made about the vehicle. The statements were not hearsay because they were either based on direct knowledge and/or were offered not to prove the truth of the matter asserted but, rather, to explain the reason why law enforcement subsequently targeted that vehicle for surveillance. **State v. Clawson, 234.**

Photographs—burial site and condition of victim's body—first-degree murder—plain error analysis—There was no plain error in defendant's trial for first-degree murder by the introduction of over 150 photographs of the area where the victim's body was found and of the victim's remains because the photos were not overly duplicative or irrelevant; they were used to illustrate the State's theories of the case and witness testimony, including how the investigation to find the victim's body unfolded; they did not depict gory or gruesome material; and there was no suggestion that the photos were displayed in a prejudicial manner. **State v. Branche, 214.**

FALSE PRETENSE

Obtaining property by false pretenses—home loan—elements—actual deception—In defendant's trial for forgery, residential mortgage fraud, and related

FALSE PRETENSE—Continued

offenses regarding a home loan application and subsequent mortgage modification requests, the State presented substantial evidence of each element of the offense of obtaining property by false pretenses to send the charge to the jury, including that the credit union was actually deceived by altered paystubs and a child support order which defendant submitted—first, to illustrate her income for a loan and, later, to show loss of income to receive forbearance of her mortgage payments. There was no merit to defendant's argument that, because the credit union had flagged the documents as suspicious, it was not actually deceived, since defendant's loan was contingent upon verification of her income, and the loan was granted only after the credit union received the flawed and altered documentation. **State v. Hussain, 253.**

HOMICIDE

First-degree murder—premeditation and deliberation—actions of defendant—sufficiency of evidence—The State presented sufficient evidence of premeditation and deliberation in a first-degree murder prosecution, including that defendant and the victim had been seen arguing but not physically fighting on the afternoon that the victim was killed, which indicated that defendant had not become so impassioned as to lose the ability to reason; that defendant, by using a smaller gun than the one he usually carried to shoot the victim, demonstrated some planning because the smaller gun would have been cleaner and quieter; and that the steps taken by defendant after the killing to dispose of the body and conceal his identity as the perpetrator by lying could be seen as part of a planned strategy. Evidence that the victim made threats to arouse defendant's jealousy could have been viewed by the jury as motivation for the murder rather than provocation, and defendant's description of his state of mind that "something clicked off" in his head—which defendant alleged was exculpatory—was offset by the State's other evidence supporting first-degree murder. **State v. Branche, 214.**

IDENTIFICATION OF DEFENDANTS

First-degree murder—witness testimony—evidentiary impossibility—sufficiency of evidence—In a prosecution for first-degree murder and other charges arising from an incident in which a hooded gunman entered a house and shot multiple people, killing two, the trial court properly denied defendant's motion to dismiss where the State presented sufficient evidence to allow a jury to conclude that the sole witness who identified defendant as the shooter was physically located where she could make that identification. Although defendant argued that the identification was an evidentiary impossibility, the testimony was not inherently incredible as being in conflict with physical facts or laws of nature, and any contradictions in the evidence or issues with the witness's credibility were for the jury to resolve. **State v. Wilson, 279.**

IMMUNITY

Qualified—hospital and licensed professional counselor—medical malpractice case—no allegation of gross negligence—In a medical malpractice case filed by plaintiff, the wife of a nursing student who committed suicide days after being treated at defendant hospital's emergency room and undergoing a psychiatric evaluation performed by defendant professional counselor, the trial court properly granted defendants' motion for summary judgment based on immunity under N.C.G.S. § 122C-210.1 (providing qualified immunity to health care providers from

liability for actions arising out of their care for individuals with mental health issues, substance abuse issues, or developmental disabilities). Plaintiff's argument that the statute only provides immunity for claims other than medical malpractice claims was meritless, as it was based on inapposite case law. Furthermore, plaintiff failed to include in her complaint an allegation of gross negligence, which was required in order to overcome defendants' statutory immunity. **Kirkman v. Rowan Reg'l Med. Ctr., Inc., 178.**

JURY

Selection—Batson challenge—third step of inquiry—insufficient findings— In defendant's first-degree murder trial, the trial court erred by overruling defendant's *Batson* challenge—regarding the State's exercise of peremptory challenges to excuse two African-American female prospective jurors—without meeting the procedural requirements of *State v. Hobbs*, 374 N.C. 345 (2020). Where the trial court's determination that defendant had not established a prima facie case of racial discrimination during jury selection was made only after hearing the State's race-neutral reasons for its challenges, the court, by effectively engaging in steps two and three of the *Batson* inquiry, was required to make findings of fact explaining how it weighed various factors regarding purposeful discrimination, including a comparative juror analysis between those who were excused and those alleged to have been similarly situated. The matter was remanded for the trial court to conduct a full analysis of defendant's arguments that the State engaged in purposeful discrimination. **State v. Wilson, 279.**

OBSTRUCTION OF JUSTICE

Altering court documents—lack of evidence—conviction vacated—In a case involving forgery, residential mortgage fraud, and related offenses regarding a home loan application, the trial court erred by denying defendant's motion to dismiss the charge of altering court documents where, as the State conceded, no evidence was presented that defendant altered an official court document, as required by N.C.G.S. § 14-221.2, since the Florida child support order that she had submitted with her loan application as documentation of her income was a copy that she had altered, while the official order remained unaltered. The conviction was vacated and, where the offense had been consolidated with other convictions and defendant did not receive the lowest possible sentence in the presumptive range, the matter was remanded for resentencing. **State v. Hussain, 253.**

PLEADINGS

Complaint—medical malpractice—motion for leave to amend—to add allegation of gross negligence—undue delay—prejudice—In a medical malpractice case filed by plaintiff, the wife of a nursing student who committed suicide days after being treated at defendant hospital's emergency room and undergoing a psychiatric evaluation performed by defendant professional counselor, the trial court properly denied plaintiff's motion for leave to amend her complaint to add an allegation of gross negligence, which was intended to overcome defendants' assertion of immunity under N.C.G.S. § 122C-210.1 (providing qualified immunity for health care providers from liability for actions arising out of their care for individuals with mental health issues, substance abuse issues, or developmental disabilities). Plaintiff did not seek to amend her complaint until four and a half years after defendants first

raised their statutory immunity defense and only three weeks before trial. Further, this undue delay prejudiced defendants given that discovery in the matter had concluded at the time plaintiff filed her motion to amend. **Kirkman v. Rowan Reg'l Med. Ctr., Inc., 178.**

PROBATION AND PAROLE

Extended term imposed—based on restitution award—Where the trial court properly imposed a restitution award against defendant after her conviction of forgery, fraud, and obtaining property by false pretenses—based on her submission of false documents to a credit union in order to obtain a home loan and, later, to receive forbearance of mortgage payments—the trial court's imposition of an extended term of probation pursuant to N.C.G.S. § 15A-1343.2(d) was proper. **State v. Hussain, 253.**

SENTENCING

Double jeopardy—convictions for offense and lesser-included offense—judgment arrested—resentencing not required—Where defendant was convicted of driving while impaired (DWI), felony hit and run, felony serious injury by vehicle, and habitual felon status, the trial court erred by failing to arrest judgment on defendant's conviction for DWI, because it is a lesser-included offense of felony serious injury by vehicle. Accordingly, the appellate court arrested judgment on the DWI conviction; however, the matter did not need to be remanded for resentencing because the trial court had consolidated defendant's convictions for DWI, felony hit and run, and habitual felon status together and sentenced defendant in the presumptive range, then sentenced defendant in the presumptive range for his felony serious injury by vehicle and habitual felon status convictions, and then ordered both sentences to run concurrently. **State v. Harper, 246.**

TERMINATION OF PARENTAL RIGHTS

Grounds for termination—sexually related offense resulting in conception of juvenile—indecent liberties with a child—The trial court did not err in determining that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(11) ("the parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile") to terminate respondent-father's parental rights to his son where the father had been convicted of taking indecent liberties with a child pursuant to N.C.G.S. § 14-202.1—which is a sexually related offense—for the sexual relations with the mother—who was fifteen years old at the time—which resulted in the conception of the child. **In re N.J.R.C., 174.**

Parental right to counsel—forfeiture—egregious, dilatory, and abusive conduct—causing numerous court-appointed attorneys to withdraw—frivolous lawsuits and appeals—In a termination of parental rights proceeding, the trial court did not err by concluding that both parents had forfeited their statutory right to court-appointed counsel where the trial court found, among other things, that the parents had purposefully attempted to delay their court proceedings by causing numerous court-appointed attorneys to withdraw and filing frivolous lawsuits and appeals. Abundant evidence in the record supported these findings, which in turn supported the trial court's conclusion that the parents' actions amounted to egregious, dilatory, and abusive conduct that totally undermined the purpose of the right to court-appointed counsel by effectively making representation impossible and seeking to prevent a trial from happening. **In re D.T.P., 165.**

VENUE

Motion to dismiss—improper venue—breach of contract—enforceability of forum selection clauses—place of last act—In an action alleging breach of contract, fraud, and other claims arising from a set of contracts plaintiff entered into with defendant companies, including a limited partnership agreement with a forum selection clause identifying Delaware as the venue for any legal disputes arising from the agreement, the trial court erred in denying defendants' motion to dismiss the action for improper venue under Civil Procedure Rule 12(b)(3). Under North Carolina law, the enforceability of a forum selection clause depends on the place where the contract was entered into, which, under the applicable legal test, is defined as the place where the last act "essential to a meeting of minds" was done by either of the parties to the contract. Here, the "last act" was committed in Delaware when the general partners for one of the defendants signed the limited partnership agreement; therefore, the forum selection clause in the agreement was presumptively valid, thereby making North Carolina an improper venue for plaintiff's action. **Clapper v. Press Ganey Assocs., LLC, 136.**

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.

CRAIG CLAPPER, Plaintiff
v.
PRESS GANEY ASSOCIATES, LLC and
AZALEA PARENT HOLDINGS, LP, Defendants

No. COA23-372

Filed 7 November 2023

1. Appeal and Error—interlocutory order—denying motion to dismiss for improper venue—substantial right—breach of contract action—enforceability of forum selection clauses

In an action alleging breach of contract, fraud, and other claims arising from a set of contracts plaintiff entered into with defendant companies, defendants were entitled to immediate appeal from an interlocutory order in which the trial court denied defendants' motion to dismiss the action for improper venue under Civil Procedure Rule 12(b)(3). A key issue in the case dealt with the enforceability of forum selection clauses found in the contracts between the parties, and therefore the denial of defendants' Rule 12(b)(3) motion affected a substantial right.

2. Venue—motion to dismiss—improper venue—breach of contract—enforceability of forum selection clauses—place of last act

In an action alleging breach of contract, fraud, and other claims arising from a set of contracts plaintiff entered into with defendant companies, including a limited partnership agreement with a forum selection clause identifying Delaware as the venue for any legal disputes arising from the agreement, the trial court erred in denying defendants' motion to dismiss the action for improper venue under Civil Procedure Rule 12(b)(3). Under North Carolina law, the enforceability of a forum selection clause depends on the place where the contract was entered into, which, under the applicable legal test, is defined as the place where the last act "essential to a meeting of minds" was done by either of the parties to the contract. Here, the "last act" was committed in Delaware when the general partners for one of the defendants signed the limited partnership agreement; therefore, the forum selection clause in the agreement was presumptively valid, thereby making North Carolina an improper venue for plaintiff's action.

Appeal by defendants from order entered 2 December 2022 by Judge David L. Hall in Iredell County Superior Court. Heard in the Court of Appeals 18 October 2023.

Blanco Tackabery & Matamoros, PA, by Peter J. Juran, and Chad A. Archer, for the plaintiff-appellee.

Littler Mendelson, P.C., by Stephen D. Dellinger, and Elizabeth H. Pratt, for the defendants-appellants.

TYSON, Judge.

Press Ganey Associates, LLC ("Press Ganey") and Azalea Parent Holdings, LP ("Azalea") (collectively "Defendants") appeal from the trial court's order denying their Rule 12(b)(3) motion to dismiss Craig Clapper's ("Clapper") complaint. We reverse the trial court's order and remand.

I. Background

Press Ganey is an Indiana limited liability company, which is licensed to do business in North Carolina. Azalea is a Delaware limited partnership with a principal place of business located in California.

Clapper entered into an employment agreement with Press Ganey on 1 September 2015. Press Ganey was in the process of entering into a Membership Interest Purchase Agreement between Press Ganey, Healthcare Performance Improvement, LLC ("HPI"), and the owners/members of HPI. Clapper was a member of HPI, and was "the sole employee of Craig Clapper LLC, an Arizona limited liability company[.]"

The exclusive Employment Agreement between Clapper and Press Ganey specified Clapper would perform "consulting services on behalf of HPI" and would have "executive-level duties, responsibilities, expectations, and authority." The Employment Agreement specified a three-year term ending on 31 August 2018, but was automatically extended for an additional one-year term, unless either party gave sixty days' prior written notice to terminate. Clapper and Press Ganey also agreed to bring "any disputes or controversies arising out of or relating to th[e] [Employment] Agreement" in Delaware and to submit to "the exclusive jurisdiction of federal and state courts" in Delaware in the Employment Agreement.

Azalea sought to amend its Initial Agreement to admit additional limited partners, including Clapper. Azalea executed an Amended and Restated Limited Partnership Agreement ("Azalea LP Agreement"),

which provided a jury trial waiver and provisions specifying choice of law, venue, and submission to the jurisdiction of Delaware. Clapper signed the agreement on 23 July 2019, while purportedly residing in North Carolina. Many other limited partners also signed the Azalea LP Agreement. Azalea's general partner signed the letter on 25 July 2021 while in Delaware.

Azalea sent Clapper a letter on 16 March 2020, in which Azalea intended to grant him equity shares in Azalea. Azalea and Clapper executed an agreement ("Grant Agreement") on 8 April 2020. The Grant Agreement provided Clapper would receive 26,851 time-vesting units (also referred to as "Class B Units"). The Class B Units were granted as non-cash compensation to retain qualified employees and operated as an "Incentive Equity Plan."

The time-vesting schedule vested the Class B Units on the following dates: (1) 14,500 units on 16 September 2021; (2) 9,666 units on 16 September 2022; and, (3) 2,685 units on 16 September 2023. The agreement also provided Azalea retained the right "to redeem all or any portion of the vested" units if Clapper's "employment terminate[d] for any reason[.]"

In consideration for the grant of Class B Units from Azalea, Clapper agreed to be bound by additional restrictive covenants. The fair market value at the time of transfer of the units was also listed as $0.00. If Clapper was terminated before all units vested, the unvested units would return to Azalea.

The Grant Agreement does not separately contain an express choice of law or forum selection clause, but it refers to and incorporates by reference the terms of the Azalea LP Agreement, which contains provisions regarding choice of law, jury trial waiver, venue, and submission to the jurisdiction of Delaware.

Press Ganey instructed Clapper on 22 December 2020 to "resign from all positions as an officer and/or director (if any) of each of the entities of the Company and all of its respective affiliates" by 31 December 2020. Press Ganey also intended to transition Clapper to different employment tasks and to terminate Clapper's employment effective 30 September 2021.

Press Ganey, Azalea, and Clapper executed an Amendment to Employment Agreement, Transition Agreement, and Release and Waiver of Claims ("Termination Agreement") on 22 December 2020. The Termination Agreement provided Clapper would receive the 14,500

Class B Units on 16 September 2021, contained the Delaware choice of law and forum selection clauses, and also referenced the original Employment Agreement between Press Ganey and Clapper.

After Clapper's employment was terminated on 30 September 2021, Azalea sent Clapper a letter on 21 December 2021. Azalea intended to exercise its "Call Right" and purchase Clapper's remaining Class B Units and asserted:

> Pursuant to Section 3 of the Class B Unit Award Agreement between you and Azalea Parent Holdings LP (the "Partnership"), dated March 16, 2020 (the [Grant Agreement]), the unvested portion of your Class B Units are automatically forfeited without consideration upon termination of your employment with the Company. Following your termination of employment, you continued to hold 1,300.00 Class A Units and 7,250.00 vested Class B Units in the Partnership.
>
> Further, pursuant to Section 4 of the [Grant] Agreement and Section 10.1 of the Limited Partnership Agreement of Azalea Parent Holdings LP (the "LP Agreement"), this notice letter (the "Call Notice") hereby informs you that on December 21, 2021 the Partnership has elected to exercise its Call Right (as defined in the LP Agreement) with respect to your Class B Units that were vested at the date of your termination of employment. The "Call Price" as defined in the LP Agreement was $0.00 per Class B Unit as of the date the Partnership exercised its Call Right and, accordingly, pursuant to the terms of the LP Agreement these Class B Units respectively are redeemed for an aggregate Call Price of $0.00. As such, no payment will be made in regard to your vested Class B Units. For the avoidance of doubt, this Call Notice constitutes a "Call Notice" for purposes of the LP Agreement.

Clapper filed a complaint against Defendants in the Iredell County Superior Court on 23 June 2022. Clapper asserted claims for breach of contract, breach of the covenant of good faith and fair dealing, fraud, and violation of the North Carolina Wage and Hour Act ("NCWHA"). *See* N.C. Gen. Stat. §§ 95-25.1 to 95-25.25 (2021).

Defendants moved to dismiss Clapper's claims pursuant to Rule 12(b)(3), Rule 12(b)(6), and Rule 9 of the North Carolina Rules of Civil Procedure on 6 September 2022. *See* N.C. Gen. Stat. § 1A-1, Rules 9 and

12 (2021). Defendants' motions asserted Clapper brought his claims in the improper venue; dismissal was warranted because Clapper's claims arose under North Carolina law, which violated the Delaware choice of law provisions in the contracts; and Clapper's fraud claim failed to contain the allegations in the requisite particularity, as required per Rule 9. Defendants also moved to strike Clapper's jury demand pursuant to Rules 12(g) and (f).

The trial court granted Defendants' Rule 9 motion regarding Clapper's fraud claim and dismissed the claim without prejudice for Clapper to refile his fraud claim within thirty days. The trial court denied Defendants' motions regarding Rules 12(b)(3) and 12(b)(6). The trial court deferred ruling on Defendants' motion to strike the jury trial, but Defendants were allowed to renew their claim before the judge assigned to try the case. The trial court's order ruling on each of Defendants' motions was filed on 2 December 2022. The trial court's order does not contain a Rule 54(b) certification as immediately appealable.

Defendants timely filed a notice of appeal on 30 December 2022, seeking review of the trial court's denial of its 12(b)(3) motion to dismiss. Defendants also filed a Petition for Writ of Certiorari ("PWC") on 26 April 2023, seeking this Court to also hear its admittedly interlocutory denial of their Rule 12(b)(6) motion. N.C. R. App. P. 21.

II. Jurisdiction – Interlocutory Appeal

[1] The trial court's order is interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court to settle and determine the entire controversy." *Bartley v. City of High Point*, 381 N.C. 287, 293, 873 S.E.2d 525, 532 (2022) (citation omitted). "As a general rule, interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation omitted).

Interlocutory orders, however, can be immediately appealable "when the appeal involves a substantial right of the appellant[,] and the appellant will be injured if the error is not corrected before final judgment." *N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 47-48, 619 S.E.2d 495, 496 (2005) (citations omitted). *See also* N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) (2021). "N.C. Gen. Stat. § 1-277 allows a party to immediately appeal an order that either (1) affects a substantial right or (2) constitutes an adverse ruling as to personal jurisdiction." *Wall v. Automoney, Inc.*, 284 N.C. App. 514, 519, 877 S.E.2d 37, 44-45 (2023) (citation and quotation marks omitted).

This Court has repeatedly held: "Although a denial of a motion to dismiss is an interlocutory order, where the issue pertains to applying a forum selection clause, our case law establishes that defendant may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right." *Hickox v. R&G Grp. Int'l, Inc.*, 161 N.C. App. 510, 511, 588 S.E.2d 566, 567 (2003); *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566 n.1, 566 S.E.2d 160, 161 n.1 (2002) ("[O]ur case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right that would be lost.").

This Court possesses appellate jurisdiction to review the trial court's denial of Defendants' Rule 12(b)(3) motion to dismiss. *Id.*; N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a).

III. Issue – Improper Venue

[2] Defendants argue the trial court improperly denied their Rule 12(b)(3) motion to dismiss for improper venue.

A. Standard of Review

"Our Court reviews an order denying a motion to dismiss for improper venue in such cases using the abuse of discretion standard." *SED Holding, LLC v. 3 Star Properties, LLC*, 246 N.C. App. 632, 636, 784 S.E.2d 627, 630 (2016) (citation omitted).

B. Analysis

"In general, a court interprets a contract according to the intent of the parties to the contract." *Cable Tel Servs., Inc. v. Overland Contr'g, Inc.*, 154 N.C. App. 639, 642, 574 S.E.2d 31, 33 (2002).

The enforceability of forum selection clauses that specify the parties' disputes must be litigated in another state's courts has varied in North Carolina case law. *Id.* ("Historically, North Carolina case law was unclear about the enforceability of forum selection clauses that fix venue in other states."). Our Supreme Court has stated: "Forum selection clauses do not deprive the courts of jurisdiction but rather allow a court to refuse to exercise that jurisdiction in recognition of the parties' choice of a different forum." *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 93, 414 S.E.2d 30, 33 (1992).

> In recent years, there has been an abundance of state and federal cases enforcing forum selection clauses. The leading case in this area is *Bremen*. In *Bremen*, the United

> States Supreme Court [sic] enunciated a standard for the enforceability of forum selection clauses. The Court held that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." The Court further held that the forum selection clause in the contract should be enforced "absent a strong showing that it should be set aside . . . [, a] show[ing] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." Additionally, the Court held that a forum selection clause should be invalid if enforcement would "contravene a strong public policy of the forum in which suit is brought."

Perkins v. CCH Computax, Inc., 333 N.C. 140, 144, 423 S.E.2d 780, 783 (1992) (internal citations omitted) (citing *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 10, 15, 32 L.Ed.2d 513, 520, 523 (1972)).

After *Perkins*, our General Assembly enacted legislation regarding whether contracts *entered into within North Carolina* requiring litigation in a forum outside of North Carolina are enforceable: "any provision in a contract *entered into in North Carolina* that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable." N.C. Gen. Stat. § 22B-3 (2021) (emphasis supplied).

This Court has addressed whether the subsequent enactment of N.C. Gen. Stat. § 22B-3 nullifies or limits our Supreme Court's holding in *Perkins*:

> While [N.C. Gen. Stat.] § 22B-3 clearly limits the holding in *Perkins*, the presumption of validity of forum selection clauses, i.e. the test requiring that a plaintiff seeking to avoid enforcement of a choice of governing law or forum clause entered into outside of North Carolina meet a "heavy burden and must demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable," remains applicable.

Parson v. Oasis Legal Fin., LLC, 214 N.C. App. 125, 135, 715 S.E.2d 240, 246 (2011) (first quoting *Perkins*, 333 N.C. at 146, 423 S.E.2d at 784; then citing *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 501 S.E.2d 353

(1998); and then *Strategic Outsourcing, Inc. v. Stacks*, 176 N.C. App. 247, 625 S.E.2d 800 (2006)).

The initial inquiry regarding whether the holding in *Perkins* or N.C. Gen. Stat. § 22B-3 applies depends on where the contract was entered into. *Szymczyk v. Signs Now Corp.*, 168 N.C. App. 182, 187, 606 S.E.2d 728, 733 (2005) ("The threshold question for determining if the cont[r]act's forum selection clause violates North Carolina law, therefore, is a determination of where the instant contract was formed.").

This test was formulated ninety-two years ago:

> [T]he test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of minds. Until this act was done there was no contract, and upon its being done at a given place, the contract became existent at the place where the act was done. Until then there was no contract.

Bundy v. Commercial Credit Co., 200 N.C. 511, 515, 157 S.E. 860, 862 (1931) (citations omitted).

This Court relied on *Bundy* when determining whether a contract was formed in Florida and *Perkins* applied:

> In *Bundy*, a contract negotiated by the North Carolina office of a Maryland company was not deemed existent until the final signature was made by the company's officers in Maryland. *Id.* at 514-15, 157 S.E. at 862.
>
> Here, the terms of the franchise agreement were discussed with representatives of defendant and a form agreement was signed by plaintiffs in North Carolina. The contract was then returned to Florida and defendant's president signed the agreement. Just as in *Bundy*, the last act of signing the contract was an essential element to formation. As the contract was formed in Florida, N.C. Gen. Stat. § 22B-3 does not apply to the forum selection clause in the instant agreement.

Szymczyk, 168 N.C. App. at 187, 606 S.E.2d at 733.

Here, the "last act" was committed in Delaware when Azalea's general partners signed the Azalea LP Agreement. *Id.* At the hearing held on 28 November 2022 regarding Defendants' motion to dismiss, Defendants' attorney explained:

> And as a result of that, because that is a Delaware company in which Mr. – in which [Clapper] [is a] member[ ], all parties are in Delaware. And there is nothing to indicate showing that the last act of that was done in North Carolina. In fact, if you look at those 153 pages [of the LP agreement] I just gave you, you will see that Mr. Clapper's signature is somewhere in the middle of that.

Although Clapper signed the agreement on 23 July 2019 while residing in North Carolina, Azalea's general partner did not sign the agreement until 25 July 2021 while located in Delaware. The Azalea LP Agreement provided a jury trial waiver and provisions specifying choice of law, venue, and submission to the jurisdiction of Delaware.

The Grant Agreement, which granted Clapper the Class B Units in Azalea, incorporated the terms of the Azalea LP Agreement. The final page of the Grant Agreement states: "I acknowledge the grant of the Granted Units and all of the terms and conditions set forth in this Agreement, the LP Agreement[,] and the Plan, the receipt of which I acknowledge." The Grant Agreement also required Clapper to acknowledge he had "reviewed the Agreement, the LP Agreement[,] and the Plan and have had the opportunity to raise any questions or concerns with the Company about the Granted Units." Clapper affixed his signature directly below that statement to bind his assent to the contract.

The "last act" was committed in Delaware, as opposed to North Carolina. *Bundy*, 200 N.C. at 515, 157 S.E. at 862. *Perkins* applies instead of N.C. Gen. Stat. § 22B-3. *Perkins*, 333 N.C. at 144, 423 S.E.2d at 783; *Parson*, 214 N.C. App. at 135, 715 S.E.2d at 246; *Szymczyk*, 168 N.C. App. at 187, 606 S.E.2d at 733. Defendants have shown the trial court erred by denying Defendants' Rule 12(b)(3) motion to dismiss. *See Szymczyk*, 168 N.C. App. at 187, 606 S.E.2d at 733.

IV. Conclusion

The trial court should have allowed Defendants' Rule 12(b)(3) motion to dismiss for improper venue. *See id.*; *Perkins*, 333 N.C. at 144, 423 S.E.2d at 783; *Parson*, 214 N.C. App. at 135, 715 S.E.2d at 246; *Bundy*, 200 N.C. at 515, 157 S.E. at 862. The trial court's order is reversed.

Defendants' successful Rule 12(b)(3) argument disposes of all of Clapper's claims against Defendants asserted in North Carolina's courts. It is unnecessary to issue a writ of certiorari. Upon remand, the trial court shall enter an order granting Defendants' Rule 12(b)(3) motion to dismiss without prejudice to Clapper bringing or asserting his claims

against Defendants in an appropriate forum according to the Azalea LP Agreement. *It is so ordered.*

REVERSED AND REMANDED.

Judges DILLON and GRIFFIN concur.

KARIN A. CONROY, Plaintiff
v.
MARK. W. CONROY, Defendant

No. COA23-136

Filed 7 November 2023

1. Child Custody and Support—custody—motion to continue—waiver—duration of hearing

In a child custody modification matter, the trial court did not abuse its discretion by denying the mother's motion to continue where the mother fired her attorney the day before the prior-noticed scheduled date of the hearing. By failing to argue at trial that the denial of the motion to continue denied her the constitutional right to parent her children, the mother waived the constitutional argument on appeal. Furthermore, the appellate court rejected the mother's argument that the trial court abused its discretion by limiting each side to two-and-one-half hours to present evidence, as the duration of the hearing was within the trial court's discretion.

2. Child Custody and Support—custody—modification—findings of fact—substantial evidence

In a child custody modification matter, the appellate court rejected the mother's numerous challenges to the trial court's findings of fact—including those regarding the mother's disdain and contempt for anyone she perceived to be "against" her, an incident in which her children were "beating on the door and crying" because they wanted to travel with their father, and the mother's erratic behavior and poor decisionmaking. Having reviewed the record, the appellate court concluded that substantial evidence supported each of the legally relevant and necessary findings of fact that the mother challenged on appeal.

3. Child Custody and Support—custody—modification—substantial change of circumstances—long history of relational problems—effect on children

In a child custody modification matter—where the mother asserted on appeal that she always had poor interpersonal relationships, that her overall behavior toward the father had been erratic and unpredictable for years, and that she has often made disparaging remarks about the father while the children were present—the trial court did not err by determining that a substantial change of circumstances had occurred affecting the welfare of the children. Notwithstanding the long history of the mother's behavior and the parties' poor communication, there was no error in the trial court's finding that those issues were presently having a negative impact on the children that constituted a change of circumstances. Furthermore, the trial court did not abuse its discretion by awarding primary custody of the children to the father.

Appeal by plaintiff from judgment entered 25 May 2022 by Judge Karen D. McCallum in Mecklenburg County District Court. Heard in the Court of Appeals 4 October 2023.

Plumides, Romano & Johnson, PC, by Richard B. Johnson, for the plaintiff-appellant.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Jonathan D. Feit, Kristin J. Rempe, and Caroline D. Weyandt, for the defendant-appellee.

TYSON, Judge.

Karin Conroy ("Mother") appeals from an order modifying the custody of Mother's and Mark Conroy's ("Father") four children. We affirm.

I. Background

Mother and Father were married on 4 October 2003. Mother and Father are parents of four children: Christopher, born on 25 September 2006; Kathryn ("Kate"), born on 11 August 2008; Daniel, born on 27 December 2009; and Michael, born on 5 February 2012.

Mother and Father legally separated on 7 March 2015. A Judgment of Absolute Divorce was entered on 16 July 2018. On 18 June 2019, the district court entered a Permanent Child Custody Order ("2019 Custody Order").

The 2019 Custody Order found the following facts regarding Mother's behaviors and her relationship with Father:

> 11. Plaintiff/Mother has a concerning history of fractured relationships, particularly with members of her family and Defendant/Father's family. Between 2001, when the parties met, and the parties' date of separation, Plaintiff/Mother was often angry with at least one of her family members or close friends.
>
> 12. In demonstrating said anger, the cause of which was often unknown to others, Plaintiff/Mother refused to speak to the person with whom she was angry, sometimes for months and sometimes for years. Once the minor children were born, Plaintiff/Mother often did not allow the person with whom she was angry to interact with the minor children, despite Defendant/Father's requests for her to do so.
>
> . . .
>
> 16. As of March 2018, Plaintiff/Mother's inappropriate behaviors had not improved. Among other concerning behaviors, Plaintiff/Mother routinely disparaged Defendant/Father directly to and in the presence of the minor children; acted in other ways designed to undermine his role as the minor children's father; unreasonably interfered with Defendant/Father's parenting time; and, in making decisions that impacted the minor children, repeatedly failed to put the minor children's best interests first, but instead often prioritized being disagreeable with Defendant/Father and creating and/or furthering difficult and/or less than ideal circumstances for Defendant/Father, often at times the minor children were in his care.
>
> 17. In March 2018, and in an effort to spend more time with the minor children and have a greater opportunity to combat Plaintiff/Mother's inappropriate behaviors, Defendant/Father informed Plaintiff/Mother that he wished to extend his alternating Sunday overnight through Monday morning. He has routinely done so since March 2018.
>
> 18. Since March 2018, Plaintiff/Mother has repeatedly withheld the minor children from Defendant/Father, sometimes for days and once for Defendant/Father's entire custodial weekend.

> . . .
>
> 23. Plaintiff/Mother dislikes Defendant/Father's family and is not supportive of the minor children's relationships with Defendant/Father's family. Plaintiff/Mother has disparaged Defendant/Father's parents in the presence of the minor children, refuses to speak to Defendant/Father's parents at the minor children's activities (at times they are there), and accuses Defendant/Father of relying on his parents for help with caring for the minor children. The Court does not find that Defendant/Father's parents serve primarily as caregivers when visiting Defendant/Father and the minor children, but instead come to Charlotte to spend quality time with their son and grandchildren.

The 2019 Custody Order granted Mother and Father joint legal custody of the minor children. During the school year, Mother and Father shared parenting time with the children on a nine to five schedule, meaning the children spent nine days out of every two weeks with Mother and five days with Father. During the summer, custody between Mother and Father alternated on a weekly basis, and each parent was allowed to plan two continuous weeks of vacation with the children. School-year breaks and holidays, including Memorial Day Weekend, Labor Day, Halloween, Thanksgiving, Christmas, and Winter Break, were evenly divided between Mother and Father and set on an alternating basis, with Spring Break and Easter being the exception. Father was granted custody of the children for the duration of spring break every year, and Mother was awarded Easter weekend beginning in the afternoon on Good Friday.

Mother was represented by attorney Tiyesha DeCosta ("DeCosta") for the hearings held on 12 and 17 November 2020 regarding her claims for equitable distribution, child support, and attorney's fees. Mother was previously represented by attorneys Gena Morris and Caroline Mitchell, and later by attorney Steve Ockerman, before seeking DeCosta's representation.

Almost two years after the 2019 Custody Order was entered, the Honorable Karen D. McCallum ("Judge McCallum") entered an Order and Judgment on 3 March 2021 regarding Mother's and Father's equitable distribution, child support, and attorney's fees claims. After entry of the 2021 Order, Mother was displeased, as "she believed that Defendant/Father [had] 'won' the equitable distribution and child support trial."

A month after Judge McCallum entered the order, Mother filed a Motion for Emergency Custody, Motion for Modification of Custody, and

Motion for Attorney's Fees on 6 April 2021. Mother asserted Father had physically abused Daniel, and she moved for temporary sole custody of all four children and primary physical custody on a permanent basis.

In the same week Mother filed her motion to modify custody, she left a note in Father's mailbox stating, "HAS LEAVING YOUR FAMILY BEEN WORTH IT?" She also reported Father's alleged abuse to Department of Social Services ("DSS"), which was the third time Mother had alleged abuse and reported Father to DSS.

Father responded to Mother's Motion for Emergency Custody and also filed a Motion to Modify Custody, Motion for Temporary Parenting Arrangement, Motion for Sanctions, Motion to Strike, and Motion for Contempt on 14 April 2021. Father's motion referenced Mother's decision to report unsubstantiated allegations concerning him to DSS, leaving a threatening note in his mailbox, and threatening Father by promising "the litigation 'will never end' and that she will 'never stop trying to ruin' Defendant/Father."

A hearing regarding Mother's Motion for Emergency Custody was held on 15 April 2021. Mother, Father, Daniel, Mother's neighbor, and a Child Protective Services ("CPS") investigative social worker testified. Judge McCallum denied Mother's Motion for Emergency Custody on 21 October 2021.

Judge McCallum found Mother's testimony "completely uncredible[,]" because: (1) it appeared Mother had coached Daniel and Michael; (2) the other children had "purportedly slept through the entire incident, which is not believable if Defendant/Father w[as] really punching Dan[iel] 'repeatedly' in the nose, head, and neck"; (3) Mother admitted she had "encouraged" Daniel to get inside the car with Father after the alleged incident; (4) Mother did not check on the child at school following the alleged incident; (5) Mother did not report the incident to the school or the police; (6) Mother failed to take Daniel to receive any medical treatment; and, (7) Mother had waited four days to report the alleged abuse to DSS. Judge McCallum also noted and found Mother's three prior allegations of Father's actions to DSS each came "on the eve of an important court date[,]" and each of the prior reports were "unsubstantiated."

In the months following the emergency custody hearing, Mother filed many motions, which delayed hearings on some of her motions and Father's motions. Mother filed a Motion to Recuse Judge McCallum on 29 April 2021 ("First Motion to Recuse"). Mother asserted she could not receive a fair and impartial hearing, citing Judge McCallum's purported

facial expressions and remarks she had made during the 15 April 2021 hearing concerning Mother's improper retrieval of documents from DSS, and Mother's unlawful *ex parte* emails to Judge McCallum.

A hearing on Father's claim of contempt was originally scheduled for 2 June 2021. The trial court continued Father's motion for contempt, reasoning Mother's First Motion to Recuse needed resolution before proceeding on any of the other pending motions and issues before the Court. Mother voluntarily dismissed her First Motion to Recuse without prejudice and filed a second Motion to Recuse ("Second Motion to Recuse") at approximately 2:15 p.m. on 2 June 2021, the date of the hearing. The hearing was scheduled to begin at 4:00 p.m. At 4:01 p.m., DeCosta emailed Judge McCallum and Father's attorney, Jonathan Feit ("Feit") a copy of the voluntary dismissal and the Second Motion to Recuse.

DeCosta sought a continuance of the 2 June 2021 hearing in light of dismissal of her Second Motion to Recuse. Father waived prior notice, and Judge McCallum denied Mother's request for continuance. At the hearing, DeCosta explained she had filed the Second Motion to Recuse because Judge McCallum had issued an order for DeCosta to show cause in an unrelated matter, and she believed this order to show cause demonstrated Judge McCallum's "animus" and "bias" towards her as counsel.

Judge McCallum denied Mother's Second Motion to Recuse because: "neither the allegations made nor the evidence presented constitute[d] sufficient evidence to objectively demonstrate that recusal [wa]s warranted[,]" Mother's testimony regarding Judge McCallum's purported denial of DeCosta's request to cross-examine the CPS caseworker was "patently false," and DeCosta had "elicited perjured testimony from her client[.]"

Father rescheduled the hearing on his Motion for Contempt for 3 August 2021. On 20 July 2021, the court continued the 3 August 2021 hearing, per Mother's request, due to a previously scheduled vacation. Father's Motion for Contempt hearing was again rescheduled to 31 August 2021. On 4 August 2021, Mother filed another Motion to Recuse ("Third Motion to Recuse"), citing Father's Attorney's previous representation of Judge McCallum before she was appointed to the bench. Judge McCallum referred Mother's motion to another judge, who heard the matter on 6 August 2021. Mother's Third Motion to Recuse was denied after that judge concluded the court "was unable to find that objective grounds for disqualification" existed, citing *Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003).

On 27 August 2021, Father filed an *Ex Parte* Motion for Emergency Custody Relief. The motion provided:

> Over the past four (4) months, Plaintiff/Mother's behavior and treatment of the minor children has become increasingly violent, erratic, and unstable, culminating in a recent incident, described hereinbelow, in which she hit the parties' daughter, Kate, pulled Kate's hair, took Kate's personal items, choked Kate, and told Kate to "punch me [Plaintiff/Mother] in the face" so that Plaintiff/Mother could call the Department of Social Services ("DSS"), which she has done on multiple occasions in the past. Since the incident, Kate has been in Defendant/Father's exclusive custody, terrified to return to Plaintiff/Mother's residence. Defendant/Father immediately called DSS himself, who, after interviewing Kate, indicated that Kate should be in Defendant/Father's exclusive custody pending further investigation. Although the DSS worker communicated the same to Plaintiff/Mother, Plaintiff/Mother stated that she "expected" Kate home on Friday, August 27 for her regular weekend visitation - in direct contrast with the DSS caseworker's directive.

Judge McCallum granted Father's motion for *ex parte* temporary emergency custody on 30 August 2021.

On 31 August 2021, the third date Father's Motion for Contempt was scheduled for hearing, Mother filed yet another Motion to Recuse ("Fourth Motion to Recuse"). Mother alleged other details regarding Feit's, Father's counsel's, prior professional relationship with Judge McCallum. Judge McCallum denied Mother's Fourth Motion to Recuse because: Feit had "represented Judge McCallum for a relatively brief period of time, terminating their professional relationship in July 2018 (before Judge McCallum was elected to the bench)[,]" and both Feit and Judge McCallum had followed the North Carolina Judicial Standards Commission's directions regarding when Feit was allowed to appear before her.

Father filed an Amended Notice of Hearing on 1 September 2021 for his Motion for Contempt, Motion to Modify Child Custody, *Ex Parte* Motion for Emergency Custody Relief, Alimony and Attorney's Fees. The hearing was calendared for 16 September 2021.

Mother met with DeCosta on 1 September 2021 for more than seven hours to discuss the case. At some point, Mother also met with

another attorney, because she was purportedly dissatisfied with DeCosta's representation.

Father filed a Motion for Sanctions and Motion to Dismiss on 10 September 2021. Mother was required to file a financial affidavit by 7 September 2021 for Father to prepare for the hearing on 16 September 2021 on, among other things, Mother's pending alimony claim. DeCosta emailed Father's attorney on 8 September 2021, asserting she was out of the country on secured leave and would forward the documents upon her return.

Mother fired DeCosta on or around 15 September 2021. DeCosta also filed a Motion to Withdraw from representing Mother on 15 September 2021.

DeCosta attended the virtual hearing on 16 September 2021, per the North Carolina State Bar's instructions. Both Mother and DeCosta petitioned Judge McCallum for a continuance. Judge McCallum denied Mother's motions to continue given the numerous prior continuances, motions, and petitions filed throughout the duration of this case, but she granted DeCosta's motion to withdraw. She also explained Father's Motion to Modify Post-Separation Support would not be discussed at the hearing because it "wasn't calendared" and Mother did not receive "fair notice that [the motion] was going to happen."

Mother proceeded *pro se* for the 16 September 2021 hearing. Although Mother expressed she was able to defend against Father's motion to modify custody, Mother moved to voluntarily dismiss her own motion to modify custody. Mother expressed she was purportedly unaware she had filed a motion to modify custody on 6 April 2021, which had started this entire series and sequence of current legal proceedings.

Mother called several witnesses to testify on her behalf. Throughout the hearing, Mother repeatedly and vehemently expressed her disdain for and belittled attorney DeCosta. Mother stated on numerous occasions that she had fired DeCosta and asked her to exit and "go off the screen" of the virtual hearing. Mother also repeatedly interrupted Father's counsel.

Judge McCallum granted Father's motion for contempt in an order entered on 2 March 2022, finding Mother guilty of criminal contempt for failing to abide by the terms of the custody order. Mother was ordered to spend thirty days in jail, although her sentence would be suspended if she obtained a mental health evaluation. Judge McCallum also granted Father's motion for sanctions and motion dismiss and dismissed Mother's alimony claim on 7 March 2022.

An order modifying custody was entered on 25 May 2022. The trial court found "any trust between the parties ha[d] completely deteriorated" since the entry of the 2019 custody order. The trial court found the following findings of fact regarding Mother's repeated frustration of Father's efforts to co-parent the children effectively:

> a. Plaintiff/Mother has exhibited a disconcerting pattern of unstable interpersonal relationships, which the Court finds has a severe, negative impact on the minor children who are at risk of severe emotional distress. Throughout the trial on this matter, Plaintiff/Mother expressed significant disdain and contempt for [any] person that she apparently perceived to be "against" her, including, but not limited to, multiple DSS workers; various lawyers (including her own); the undersigned Judge; the minor children's teachers and coaches; and, most commonly, Defendant/Father. Plaintiff/Mother even expressed that her thirteen (13) year old daughter, Kate, was to blame for a number of the issues and concerns raised to the Court.
>
> b. Plaintiff/Mother has repeatedly made disparaging remarks about Defendant/Father in front of the minor children, including referring to Defendant/Father as a "Jerk," "f[***]ing loser," and [an] "a[**]hole."
>
> c. Plaintiff/Mother's behavior is erratic and unpredictable. When she becomes angry at Defendant/Father or others, she punishes the minor children, showing a willingness to humiliate them in front of their peers and others. The minor children are suffering because of the unpredictability of Plaintiff/Mother's actions. For example:
>
>> i. Plaintiff/Mother prevented the minor children from traveling on a pre-planned Spring Break trip to Florida with Defendant/Father in April 2021. When Defendant/Father arrived at Plaintiff/Mother's home to pick the minor children up, the minor children had been locked inside, and Defendant/Father could hear them beating on the door and crying to be let out so that they could go with Defendant/Father. Plaintiff/Mother made comments to the minor children that they would "burn" inside the house.
>>
>> ii. Plaintiff/Mother has frequently prevented the minor children from attending their extracurricular

activities when the minor children are in her care. On one (1) occasion, when Kate was riding to soccer practice with Defendant/Father, Plaintiff/Mother threatened to "call the police" and report that Kate had been "kidnapped." She further threatened to "yank" Kate off of the soccer field in front of her friends and coaches. Plaintiff/Mother[ ] [has] caused Kate to become hysterical, ultimately causing Kate to miss her practice.

iii. Likewise, when Plaintiff/Mother has attended the minor children's extracurricular events, she has actively tried to prevent Defendant/Father from attending same and, on occasions, has caused an excessive, unnecessary scene simply because of Defendant/Father's presence. By way of example, on an occasion where Defendant/Father attended [ ] two (2) of the minor children's basketball games (happening at the same time and location), Plaintiff/Mother attempted to have Defendant/Father removed from the premises because of a policy related to the COVID-19 pandemic under which the league only allowed (1) parent to attend games. When Plaintiff/Mother learned that, because of low attendance, the league would allow both she and Defendant/Father to attend the minor children's games, she wrote to multiple of the league officials, accusing them of "sexism."

d. Multiple witnesses described incidents in which the minor children were present, and Plaintiff/Mother displayed a complete lack of judgment regarding the safety and welfare of the minor children.

i. Following the election of Joe Biden in November 20[20], Plaintiff/Mother became offended by a comment made by one of Chris's friends. Plaintiff/Mother responded by telling the child in the presence of her own minor children that he had "no friends;" by calling him names, including a "little shit;" and by confiscating and keeping the child's cell phone. Bizarrely, Plaintiff/Mother brought this child's mother, Karin Simoneau (hereinafter "Ms, Simoneau") in to testify on her behalf. Ms.

Simoneau testified that her son was so afraid of Plaintiff/Mother after the Incident that her husband had to go to Plaintiff/Mother's home to retrieve their son's cell phone on their son's behalf. Throughout her own and Ms. Simoneau's testimony, Plaintiff/Mother completely failed to recognize any problem with her own behavior (directed at a child) and, instead, blamed said child for "provoking" her.

ii. Plaintiff/Mother has destroyed the minor children's electronic devices as a means of punishment on multiple occasions in the minor children's presence by throwing them, cracking them, and hitting them until they shatter. It is not in the minor children's best interests to witness such violent outbursts.

e. Plaintiff/Mother's choices and actions are largely focused on her anger toward and disdain for Defendant/Father, and she fails entirely to recognize how her actions have a negative impact on her children. For example:

i. As mentioned above, Plaintiff/Mother has arbitrarily kept the minor children from attending their extracurricular activities on a number of occasions without any justification or reasoning. At the end of Kate's soccer season, Plaintiff/Mother refused to allow Kate to attend a tournament with her team in which all of the teammates stayed together in a hotel and that acted as an end of the season celebration. Although Defendant/Father both offered to take Kate to the tournament and to pay for lodging for Plaintiff/Mother to take Kate to the tournament, Plaintiff/Mother refused to allow Kate to attend. Plaintiff/Mother seemed to have no understanding or acknowledgement of the minor children's feelings related to arbitrary feelings like this one.

ii. Plaintiff/Mother regularly interferes in the minor children's ability to communicate with Defendant/Father when the children are in her care. She frequently takes the children's electronic devices, requiring Defendant/Father to go through Plaintiff/Mother in order to speak to the children, which

> often involves Plaintiff/Mother verbally berating and/or disparaging Defendant/Father in the minor children's presence. On at least one occasion, Plaintiff/Mother has even unplugged the landline so that the children and Defendant/Father had no way of contacting one another.
>
> iii. Plaintiff/Mother has, on numerous occasions, intentionally interfered in Defendant/Father's time and plans with the minor children. In addition to interference in the Florida spring break trip, described hereinabove, Plaintiff/Mother also interfered in Defendant/Father's summer vacation to Boston with the minor children. When Defendant/Father told Plaintiff/Mother that he needed to pick the minor children up at a specific time to make their flight to Boston, Plaintiff/Mother chose to arbitrarily withhold the children until later in the afternoon, causing the family to miss their original flight.

The trial court also made several findings regarding the ways Mother "presents danger to the minor children's physical and emotional well-being":

> i. On Wednesday, August 25, 2021, the parties' daughter, Kate, began to frantically text Defendant/Father regarding one of Plaintiff/Mother's outbursts, stating that Plaintiff/Mother was "going crazy," "attacking [Kate]," and "throwing my stuff away." Kate further stated "shes (sic) hurting me and I cant (sic) do this anymore she grabbed my throat multiple times and tried to choke me." Defendant/Father immediately drove to Plaintiff/Mother's home, where Kate was standing in the front yard, crying hysterically. As Defendant/Father pulled up, Kate ran to Defendant/Father's car. Defendant/Father learned that Plaintiff/Mother had hit Kate, pulled Kate's hair, took Kate's personal items, choked Kate, and told Kate to "punch me [Plaintiff/Mother] in the face" so that Plaintiff/Mother could call DSS. She further told Kate, as she has on numerous occasions in the past, that Kate is no longer welcome to live in her home and that she should go live with Defendant/Father.
>
> ii. The repeated involvement of DSS is not in the minor children's best interests. The DSS caseworker, Elisa Guarda

("Ms. Guarda"), testified related to her concerns about Kate's well-being specifically, including that Kate expressed that she had to "walk on eggshells" around Plaintiff/Mother. She also expressed concern about the shocking nature of Kate's allegations of Plaintiff/Mother's physical violence.

iii. Plaintiff/Mother has historically focused her anger on one of the minor children at a time, often encouraging the other three (3) children to "gang up" on the child who is currently the object of her ire. Plaintiff/Mother has encouraged her three (3) sons to bully their sister, including allowing, and even encouraging, the three (3) boys to call their sister "fat."

iv. On other occasions, Plaintiff/Mother has told whichever child is her current focus that they are "no longer welcome" in Plaintiff/Mother's home. Since the entry of the 2019 Order, she has, on numerous occasions, dropped one (1) or more of the minor children off at Defendant/Father's house unannounced, stating that that child (or children) are no longer welcome to live with her. She has stated that she will "sign" the children over to Defendant/Father when she becomes angry at the children, including in the presence of one or all of the children.

v. Plaintiff/Mother's emotional outbursts have led her to behave recklessly in front of the minor children. Plaintiff/Mother has waved a gun around while "fake" bullets fall out. Likewise, Plaintiff/Mother has repeatedly destroyed the minor children's property – in the minor children's presence – including smashing at least three (3) iPads by throwing them violently to the ground.

vi. Plaintiff/Mother has resorted to physical discipline in the past, including, beating the minor children with a wooden spoon and digging her nails into the minor children until she draws blood.

The trial court concluded "[a] substantial change in circumstances affecting the best interests of the minor children ha[d] occurred" to warrant a modification of the 2019 Custody order. The court changed the visitation schedule between Mother and Father. Mother was awarded visitation with Chris, Daniel, and Michael every other weekend from Friday evening until Monday morning, as well as dinner each

Wednesday evening. Mother was awarded a FaceTime phone call once each evening. The schedule regarding holidays and school-year breaks remained unchanged and were evenly divided between Mother and Father. The only change in the holidays and school-year breaks schedule was that "Kate [was] allowed, but not required, to follow" the schedule.

Mother filed a timely notice of appeal regarding the custody order on 23 June 2022. Mother's notice of appeal regarding the trial court's denial of two of her motions to recuse, both entered on 21 October 2021, were not timely made, are not properly before us, and are dismissed.

II. Jurisdiction

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

III. Issues

Mother argues: (1) the trial court abused its discretion by denying Mother's motion to continue the 16 September 2021 hearing; (2) erred by not allowing Mother additional time to present her case or rebuttal evidence; (3) the trial court's findings of fact are not supported by the evidence; (4) the trial court erred by determining a substantial change of circumstances had occurred affecting the welfare of the children; and, (5) the trial court abused its discretion by determining the children's best interests were served by placing them in Father's primary custody.

IV. Motion to Continue & Duration of Hearing

[1] Mother argues the trial court abused its discretion by denying her motion to continue and asserts the trial court's failure to allow her motion to continue "denied her [of her] constitutional right to parent her children." She also argues the trial court abused its discretion by limiting each side to two-and-a-half hours to present evidence.

A. Standard of Review

"Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *In re A.L.S.*, 374 N.C. 515, 516-17, 843 S.E.2d 89, 91 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24, 463 S.E.2d 738, 748 (1995)).

When the motion to continue is based on a constitutional right *and asserted before the trial court*, "the motion presents a question of law[,] and the order of the court is reviewable." *Id.* at 517, 843 S.E.2d at 91 (quoting *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970)). If the movant failed to "assert in the trial court that a continuance was

necessary to protect a constitutional right," then the unpreserved constitutional argument is waived, and the appellate court "review[s] the court's ruling on the motion to continue for abuse of discretion." *In re A.M.C.*, 381 N.C. 719, 722-23, 874 S.E.2d 493, 496 (2022) (citations and internal quotation marks omitted).

B. Analysis

Mother cites *Pickard Roofing Co., Inc. v. Barbour* to support her argument that the trial court abused its discretion by failing to continue the hearing due to DeCosta's withdrawal. 94 N.C. App. 688, 381 S.E.2d 341 (1989). Father asserts Mother's reliance on *Pickard Roofing* defeats her claim. In *Pickard Roofing*, the counsel's decision to withdraw "was necessitated by the party's decision to terminate his employment one day before the day on which the party knew his case was scheduled to be tried." *Id.* at 692, 381 S.E.2d at 343.

This Court held the trial court did not abuse its discretion by finding: the defendant "should have made a decision with respect to representation by counsel prior to the eve of trial," and "[n]o circumstances beyond the control of the defendant ha[d] prevented him from appearing in court with an attorney of his choice." *Id.* at 691, 381 S.E.2d at 343.

Similar to the defendant in *Pickard Roofing*, Mother has "overemphasize[d] the fact that h[er] attorney was allowed to withdraw the day before the trial was scheduled to commence[,]" and "simultaneously de-emphasize[d] the reason why the attorney withdrew, because [Mother] terminated h[er] employment." *Id.* at 692, 381 S.E.2d at 343.

The trial court did not abuse its discretion by denying the oral motion on the prior-noticed and scheduled date of the hearing to continue the hearing. *Id. See also Chris v. Hill*, 45 N.C. App. 287, 290, 262 S.E.2d 716, 718 (1980) ("[A] party to a lawsuit must give it the attention a prudent man gives to his important business." (citations omitted)); *Wayne v. Jones*, 79 N.C. App. 474, 475, 339 S.E.2d 435, 436 (1986) ("The defendant received reasonable notice of his attorney's withdrawal as evidenced by the defendant's statement in court that he did not want a lawyer."); *McIntosh v. McIntosh*, 184 N.C. App. 697, 702, 646 S.E.2d 820, 824 (2007) (finding no abuse of discretion in trial court's denial of a motion for continuance "[i]n light of the numerous and lengthy delays in hearing th[e] case"). Mother's argument is without merit.

Mother failed to argue the trial court's denial of her motion to continue denied her the constitutional right to parent her children. Mother's purported constitutional arguments on appeal are waived and dismissed. *In re A.M.C.*, 381 N.C. at 722-23, 874 S.E.2d at 496.

Mother was fully aware of the time constraints the court established. The trial court explained at the beginning of the trial that the duration was set for five hours, divided evenly between the two parties. Mother was also aware she needed to track her time. Mother asked the trial court: "And Ms. – I mean, Your Honor, as far as time goes, how are we doing time?· Is this, like, my time, and I need to start putting down the time that I start speaking?"

The trial court also addressed how long each party should take for lunch to make sure each side had an equal amount of time to present their case.

> MR. FEIT:· And Your Honor, just before Ms. Conroy asks a question, we've got until five o'clock, from a budgeting time perspective. What time would you like to break?· What time would you like to come back, so we can all make sure that we have the – equal, same amount of time.
>
> THE COURT: All right. Do we want to do an hour for lunch, or half hour?
>
> MR. FEIT:· Half hour's fine –
>
> MS. CONROY:· Half hour's fine with me.

Furthermore, while Mother only left five minutes for her closing arguments, the trial court and Feit allowed Mother to give a twenty-minute closing argument. Mother's argument is without merit. *See Watters v. Parrish*, 252 N.C. 787, 791, 115 S.E.2d 1, 4 (1960) ("[T]here is power inherent in every court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants." (citation omitted)).

V. Findings of Fact

[2] Mother argues several of the court's findings of fact are not supported by the evidence, including the findings that: Mother had "disdain and contempt for any person that she apparently perceived to be 'against' her," including her lawyer, Father's lawyer, Judge McCallum, multiple DSS workers, and the children's teachers and coaches; the children were "beating on the door and crying" to travel for spring break with Father, and Mother said she would let them "burn"; Mother behaved erratically; Mother was "oblivious" to the consequences of her actions; Mother failed to recognize her own "poor decision-making" and "blamed others," including Kate; Mother wrote to multiple league officials saying they were "sexist" when Father was allowed to attend the children's games; Mother displayed a "complete lack of judgment" for

the "safety and welfare" of the children, including the incident with her child's friend about Joe Biden following the 2020 election; and, the DSS worker's concerns about Kate's "well-being" and her shock regarding Mother's "physical violence" towards Kate.

A. Standard of Review

> When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Shipman v. Shipman, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citations and internal quotation marks omitted).

The trial court is vested with broad discretion over the admission of and credibility accorded to evidence, because the court has the opportunity to hear and observe the witnesses and to assess credibility. *Id.*; *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998). "As a result, we have held that the trial court's 'findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.' " *Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903 (quoting *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975)).

Unobjected-to findings of fact are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." (citations omitted)). When a challenged finding of fact is not necessary to support a trial court's conclusions, those findings "need not be reviewed on appeal." *See In re C.J.*, 373 N.C. 260, 262, 837 S.E.2d 859, 860 (2020) (citation omitted).

B. Analysis

Here, substantial evidence, through properly admitted testimony and other evidence in the record, exists to support each of the legally relevant and necessary findings of fact Mother challenges on appeal. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. We need not review those portions of the findings of fact unnecessary to support the trial court's conclusions, such as specific evidence of the kids crying and banging on

the door to leave with Father on spring break. *In re C.J.*, 373 N.C. at 262, 837 S.E.2d at 860. Mother's argument is without merit.

VI. Substantial Change & Custody Determination

[3] Mother asserts the trial court erred by determining a substantial change of circumstances had occurred affecting the welfare of the children. Mother argues the trial court erred by finding her behavior constituted a substantial change because: she has always had "poor interpersonal relationships[,]" her "overall behavior" towards Father has been erratic and unpredictable for years, and she has often "ma[de] disparaging remarks about [Father] while the children were present[.]"

Although Mother concedes those alleged behaviors may have made the trial court "unhappy," she asserts all of the behaviors contained in the modification order "existed at the time of the original trial" in 2019. Mother argues those findings of fact cannot serve as a basis for a "substantial change" of circumstances.

Mother also argues the trial court abused its discretion by placing the children in Father's primary custody. If this Court holds a substantial change occurred to warrant a modification of the 2019 Custody Order, she argues the trial court failed to determine how any purported changes affected the welfare of the children.

A. Standard of Review

Wide discretion is vested in the trial judge when awarding primary custody of a minor child. *Shamel v. Shamel*, 16 N.C. App. 65, 66, 190 S.E.2d 856, 857 (1972). "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason[,]" or has misapprehended and committed an error of law. *Id.*

A trial court may not modify a permanent child custody order unless it finds a substantial change in circumstances exists affecting the welfare of the child. *Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003). Whether a substantial change in circumstances exists for the purpose of modifying a child custody order is a legal conclusion. *Spoon v. Spoon*, 233 N.C. App. 38, 43, 755 S.E.2d 66, 70 (2014). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted).

B. Analysis

"A trial court may order the modification of an existing child custody order if the court determines that there has been a substantial change of circumstances affecting the child's welfare and that modification is in the child's best interests." *Spoon*, 233 N.C. App. at 41, 755 S.E.2d at 69 (citing *Shipman*, 357 N.C. at 473, 586 S.E.2d at 253); N.C. Gen. Stat. § 50-13.7 (2021). The reason a substantial change of circumstances is required before a trial court may modify a custody order is to prevent dissatisfied parties from relitigating in another court in hopes of reaching a different conclusion. *Newsome v. Newsome*, 42 N.C. App. 416, 425, 256 S.E.2d 849, 854 (1979).

1. Substantial Change

This Court has previously addressed whether two parents' poor communications with and maltreatment of one another constitutes a substantial change in circumstances, notwithstanding the parents' prior longstanding history of conflicts and poor communication with one another:

> It is beyond obvious that a parent's unwillingness or inability to communicate in a reasonable manner with the other parent regarding their child's needs may adversely affect a child, and the trial court's findings abundantly demonstrate these communication problems *and* the child's resulting anxiety from her father's actions. While father is correct that this case overall demonstrates a woeful refusal or inability of both parties to communicate with one another as reasonable adults on many occasions, we can find no reason to question the trial court's finding that these communication problems are *presently* having a negative impact on Reagan's welfare that constitutes a change of circumstances. In fact, it is foreseeable the communication problems are likely to affect Reagan more and more as she becomes older and is engaged in more activities which require parental cooperation and as she is more aware of the conflict between her parents. Therefore, we conclude that the binding findings of fact support the conclusion that there was a substantial change of circumstances justifying modification of custody. This argument is overruled.

Laprade v. Barry, 253 N.C. App. 296, 303-04, 800 S.E.2d 112, 117 (2017) (citing *Shipman*, 357 N.C. at 473-75, 586 S.E.2d at 253-54). *See also Shell v. Shell*, 261 N.C. App. 30, 36-38, 819 S.E.2d 566, 572-73 (2018) (citing *id.*).

The facts before us are similar to those in *Laprade*. While Mother and Father have always had conflicts and struggled to communicate effectively, those "communication problems are *presently* having a negative impact on [the four children's] welfare that constitutes a change of circumstances." *Laprade*, 253 N.C. App. at 304, 800 S.E.2d at 117 (citation omitted).

It is also "foreseeable" that Mother's and Father's inability to communicate and cooperate as parents of minor children are "likely to affect" Daniel, Michael, Christopher, and Kate "more and more as [the children] become[ ] older and [are] engaged in more activities which require parental cooperation and as [they become] more aware of the conflict between [their] parents." *Id.*

The trial court did not err by determining Mother's and Father's continued communication problems and their failure or inability to cooperate and co-parent constituted a substantial change. *Id.*; *Shell*, 261 N.C. App. at 36-38, 819 S.E.2d at 572-73. Mother's argument is overruled.

2. Custody Determination

If a trial court fails to determine whether a change "positively or negatively" affected the child, the custody matter must be remanded to the trial court to determine whether the changes affected the child and, if so, what custody determination is in the child's best interest. *Johnson v. Adolf*, 149 N.C. App. 876, 878, 561 S.E.2d 588, 589 (2002) (citing *Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900).

Here, the trial court made specific findings of fact regarding how Mother's current and more aggressive behaviors had affected the "physical and emotional stability and well-being" of the children and provided a six-part list with specific examples of findings. The trial court also concluded "[a] substantial change in circumstances affecting the best interests of the minor children ha[d] occurred[.]"

The trial court made the necessary and supported findings of fact to find a substantial change of circumstances had occurred and the conclusions of law to warrant a modification of the 2019 Custody Order. The trial court did not abuse its "best interests" discretion by awarding primary custody of the children to Father. *See id.*; *Shamel*, 16 N.C. App. at 66, 190 S.E.2d at 857; *White*, 312 N.C. at 777, 324 S.E.2d at 833. Mother's argument is overruled.

VII. Conclusion

Mother's failure to raise her constitutional parental rights arguments before the trial court on her motions to continue waived her argument on appeal.

Mother's challenge to the trial court's discretionary denial of her untimely and unsupported motion to continue lacks merit. Her actions to undermine and terminate her counsel's representation supports the court's allowance of her counsel's motion to withdraw. Mother had prior notice of the trial court's allowance of five (5) hours for the parties to equally present their evidence and arguments. She was granted additional time to present her closing arguments within the discretion of the trial court.

The evidence supports and the trial court made the necessary findings of fact of a substantial change of circumstances to warrant a conclusion to modify the 2019 Custody Order in the best interests of the minor children. The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judge HAMPSON and Judge CARPENTER concur.

IN THE MATTER OF D.T.P. & B.M.P.

No. COA23-29

Filed 7 November 2023

Termination of Parental Rights—parental right to counsel—forfeiture—egregious, dilatory, and abusive conduct—causing numerous court-appointed attorneys to withdraw—frivolous lawsuits and appeals

In a termination of parental rights proceeding, the trial court did not err by concluding that both parents had forfeited their statutory right to court-appointed counsel where the trial court found, among other things, that the parents had purposefully attempted to delay their court proceedings by causing numerous court-appointed attorneys to withdraw and filing frivolous lawsuits and appeals. Abundant evidence in the record supported these findings, which in turn supported the trial court's conclusion that the parents' actions amounted to egregious, dilatory, and abusive conduct that totally undermined the purpose of the right to court-appointed counsel by effectively making representation impossible and seeking to prevent a trial from happening.

Appeal by Respondents from orders entered 12 September 2022 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 3 October 2023.

Matthew J. Putnam, Esq., for Petitioner-Appellee Buncombe County Department of Health and Human Services.

Michael N. Tousey for Appellee Guardian ad Litem.

Edward Eldred for Respondent-Appellant Mother.

Garron T. Michael, Esq., for Respondent-Appellant Father.

COLLINS, Judge.

Respondent-Mother ("Mother") and Respondent-Father ("Father") (collectively "Parents") appeal from orders terminating their parental rights to their children Dee and Bea.[1] Parents argue that the trial court erred by determining that Parents had forfeited their statutory right to court-appointed counsel during termination proceedings. Because the trial court's findings regarding Parents' conduct is supported by the record, and because those findings support the trial court's conclusion that Parents' conduct justified forfeiture of their right to court-appointed counsel, we affirm.

I. Background

This matter commenced on 20 July 2017 when the Buncombe County Department of Health and Human Services ("BCHHS") filed a petition alleging that Dee was a neglected juvenile. Parents requested court appointed counsel, and the trial court-appointed Ile Adaramola ("Adaramola") as Mother's counsel and Diane Walton ("Walton") as Father's counsel. Dee was adjudicated a neglected juvenile on 27 February 2018. Walton withdrew as Father's counsel on 28 August 2018, and the trial court appointed Eric Rainey ("Rainey") as Father's counsel.

Bea was born in July 2018. On 21 August 2018, BCHHS filed a petition alleging that Bea was a neglected juvenile. Parents requested court-appointed counsel for Bea's case, and the trial court appointed Adaramola as Mother's counsel and Rainey as Father's counsel.

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1. Pseudonyms are used to protect the identities of the children. *See* N.C. R. App. P. 42(b).

Adaramola and Rainey withdrew in October 2018, and Parents retained Mark Upright ("Upright") as private counsel for both cases at the beginning of November. On 29 November 2018, Upright withdrew without objection, and the trial court appointed Terry Young ("Young") as Mother's counsel and Thomas Diepenbrock ("Diepenbrock") as Father's counsel in both cases.

In September 2019, Young moved to withdraw as Mother's counsel due to the relationship becoming irreparably damaged, and the trial court appointed Laura Hooks ("Hooks") to represent Mother. On 3 December 2019, Diepenbrock moved to withdraw as Father's counsel "[b]ased on irreconcilable differences and completely differing views about how [Father's] interests should be represented in these matters[.]" A week later, Hooks moved to withdraw as Mother's counsel because "grounds exist[ed] pursuant to Rule 1.16 of the North Carolina Rules of Professional Conduct." The trial court allowed both attorneys to withdraw and appointed Heidi Stewart ("Stewart") as Mother's counsel and Carol Goins ("Goins") as Father's counsel.

On 8 June 2020, Bea was adjudicated neglected. Parents appealed Bea's adjudication to this Court, which was affirmed by opinion filed on 6 April 2021. *See In re B.M.P.*, No. COA20-794, 2021 WL 1258763 (N.C. Ct. App. Apr. 6, 2021). While Bea's case was on appeal with this Court, BCHHS filed a petition to terminate Parents' parental rights to Dee, which it later dismissed without prejudice. On 7 October 2021, BCHHS filed petitions to terminate Parents' parental rights to both Dee and Bea. Mother, through Stewart, moved to dismiss the termination petition in Bea's case on 30 November 2021. After considering Mother's motion, the trial court issued a memo to counsel for each party stating:

> After review of the applicable law and making such inquiry as the Court deemed appropriate, it is the determination of the Court that the pending motions to dismiss in [this matter] should be dismissed.
>
> [Counsel for BCHHS], please draft a proposed Order for my consideration at your earliest convenience.

Although still represented by Stewart, Mother filed a pro se notice of appeal to this Court from the memo.

On 20 January 2022, Parents, acting pro se, filed a civil action against their own counsel, Stewart and Goins, and several other individuals. On 28 January 2022, the trial court allowed Goins to withdraw as Father's counsel. On 8 February 2022, the trial court allowed Stewart to withdraw as Mother's counsel.

On 8 February 2022, the trial court held a hearing to determine the status of counsel, which Parents appeared pro se. During the hearing, Parents testified that they were aware that filing a lawsuit against Stewart and Goins would result in their withdrawal from representation, and that withdrawal and reappointment of counsel would lead to a continuance in the case. Father also acknowledged that he appealed to the United States Supreme Court, stating, "That was discretionary. I didn't really try to get it[2] into the United States [Supreme Court] because I knew it was just a neglect case. It wasn't an appeal for a [termination of parental rights] yet."

On 10 February 2022, the trial court issued a memo to Parents, counsel for BCHHS, and counsel for the guardian ad litem, stating:

> After review of the Court Files, the credible evidence presented and the applicable law, it is the determination of the Court that the [Parents], by their intentional acts, have forfeited the right to Court appointed counsel.

Termination of parental rights proceedings were held over eight days between March and May 2022, during which parents appeared pro se. On 12 September 2022, the trial court issued orders terminating Parents' rights to Dee and Bea ("Termination Orders"), as well as an order formalizing the trial court's determination that Parents had forfeited their right to court-appointed counsel ("Forfeiture Order"). In the Forfeiture Order, the trial court found:

> 13. The respondent father has had five different court appointed attorneys since the Court became involved with his family. The respondent mother has had six different court appointed attorneys since the Court became involved with her family.
>
> 14. Both respondent parents have exhibited a calculated plan to delay the court proceedings as much as possible. They have filed invalid appeals with the Courts of Appeal of North Carolina. At one point the respondent parents filed an appeal attempting to appeal a memorandum of law issued by the court which had not been reduced to a court order. The respondent parents also filed invalid appeals with the Supreme Court of the United States. While all these attempted appeals were dismissed by the respective

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2. The record does not disclose what was appealed to the United States Supreme Court.

> courts, the parents used these tactics as ways to delay the court from moving forward with the Termination of Parental Rights case.
>
> 15. The respondent parents also learned that having an appointed attorney withdraw and a new attorney appointed resulted in the hearing being continued by the court to allow the new attorney time to prepare for the hearing.
>
> 16. The respondent parents have taken advantage of this practice of the court in order to delay the [termination of parental rights] hearing by repeatedly waiting to at or near the time of a hearing to request their counsel to withdraw.
>
> 17. The respondent parents filed a lawsuit in Buncombe County Superior Court for the purpose to make their latest court appointed attorneys withdraw and to delay the trial court in reaching the hearing on the termination of parental rights petition. . . . While this lawsuit was also dismissed with prejudice it shows the lengths the respondent parents were willing to use to frustrate, disrupt, and delay the court process.
>
> 18. The respondent parents have forfeited their right to counsel by engaging in actions which totally undermine the purposes of that right to counsel by making representation impossible and seeking to prevent a trial from happening. This conduct has been egregious, dilatory, and abusive conduct on the part of respondent parents and has disrupted the court from proceeding to trial on the termination case in a timely manner.

From its findings, the trial court concluded that "respondent parents have each separately and together forfeited their right to court appointed counsel by their deliberate acts[,]" and ordered that "respondent parents shall not have new court appointed attorneys appointed in the matters pending before this Court." Parents appealed.

II. Discussion

A. Standard of Review

A trial court's conclusion that a parent waived or forfeited his or her statutory right to counsel in a termination of parental rights proceeding is a question of law and is thus reviewed de novo. *In re K.M.W.*, 376 N.C.

195, 209-10, 851 S.E.2d 849, 860 (2020) (citation omitted). Additionally, when the trial court makes findings of fact, those findings are binding on appeal if they are supported by competent evidence in the record. *See State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation omitted); *see also State v. Simpkins*, 373 N.C. 530, 533 n.3, 838 S.E.2d 439, 444 n.3 (2020) (noting that a trial court's findings of fact regarding whether a defendant forfeited their right to counsel would be entitled to deference (citation omitted)). This is true even if the record could support an alternative finding. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975) (citation omitted); *see also State v. Williams*, 362 N.C. at 632, 669 S.E.2d at 294 ("Even if evidence is conflicting, the trial judge is in the best position to resolve the conflict." (quotation marks and citation omitted)). In such circumstances, this Court determines whether the trial court's findings of fact support its conclusions of law. *State v. Williams*, 362 N.C. at 632, 669 S.E.2d at 294 (citation omitted).

Here, the trial court made findings of fact. Accordingly, we review to determine whether the trial court's findings are supported by competent evidence, and, if so, whether those findings support its conclusion that "respondent parents each separately and together forfeited their right to court appointed counsel by their deliberate acts."

B. Right to Counsel

Parents argue that the trial court erred by concluding that Parents had forfeited their statutory right to court-appointed counsel.

"[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (quotation marks and citation omitted). Thus, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures, which meet the rigors of the due process clause." *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397 (1992) (quotation marks and citation omitted). To protect a parent's due process rights in a termination of parental rights proceeding, the General Assembly has created a statutory right to counsel for parents involved in those proceedings. *See* N.C. Gen. Stat. § 7B-1101.1 (2022).

Section 7B-1101.1 provides that, in a termination of parental rights proceeding, "[t]he parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." *Id.* § 7B-1101.1(a). The statute further provides that "[a] parent qualifying

for appointed counsel may be permitted to proceed without the assistance of counsel only after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary." *Id.* § 7B-1101.1(a1).

The right to court-appointed counsel is not absolute; a party may forfeit the right "by engaging in 'actions [which] totally undermine the purposes of the right itself by making representation impossible and seeking to prevent a trial from happening at all.' " *In re K.M.W.*, 376 N.C. at 209, 851 S.E.2d at 860 (quoting *Simpkins*, 373 N.C. at 536, 838 S.E.2d at 446). A conclusion that a parent has forfeited the right to counsel is restricted to situations involving "egregious dilatory or abusive conduct on the part of the [parent]." *Id.* (quoting *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449).

In *K.M.W.*, our Supreme Court considered whether a parent's behavior was sufficiently egregious to warrant forfeiture of her right to court-appointed counsel. In that case, two children were removed from their mother's care and adjudicated as neglected juveniles. *Id.* at 196-97, 851 S.E.2d at 852. The mother participated in several hearings on the matter alongside court-appointed counsel before indicating that she wished to waive her right to a court-appointed attorney to hire private counsel. *Id.* at 197-200, 851 S.E.2d at 852-54.

Four months later, the mother's private counsel filed a motion seeking leave to withdraw his representation, which was served on the department of social services, but not on the mother. *Id.* at 201, 851 S.E.2d at 854. At the hearing on his motion to withdraw, counsel informed the court that he had attempted to secure the mother's presence in court but had been unable to do so, and that he had been requested to withdraw by the mother. *Id.* The trial court allowed counsel to withdraw without further inquiry. *Id.*

The mother arrived late for the subsequent termination of parental rights hearing, which the trial court conducted without inquiring whether the mother was represented by counsel, whether she wished to have counsel appointed, or whether she wished to represent herself. *Id.* at 201, 851 S.E.2d at 855. Upon hearing the trial court's determination that grounds existed to terminate her parental rights, the mother left the courtroom without any explanation for approximately fifteen minutes before returning and apologizing to the court. *Id.* at 201-02, 851 S.E.2d at 855.

Our Supreme Court held that the trial court erred by allowing the mother to proceed pro se without making any inquiry regarding her

waiver of counsel. *Id.* at 211, 851 S.E.2d at 861. The Court also rejected the guardian ad litem's alternative argument that the mother, through her conduct, had forfeited her right to counsel, holding that "nothing in respondent-mother's conduct had the repeatedly disruptive effect necessary to constitute the 'egregious' conduct that is required to support a determination that respondent-mother had forfeited her statutory right to counsel." *Id.* at 212-13, 851 S.E.2d at 862 (citation omitted).

Here, the trial judge, who has presided over the case at the trial court since its inception in 2017, found that:

> 13. The respondent father has had five different court appointed attorneys since the Court became involved with his family. The respondent mother has had six different court appointed attorneys since the Court became involved with her family.
>
> 14. Both respondent parents have exhibited a calculated plan to delay the court proceedings as much as possible. They have filed invalid appeals with the Courts of Appeal of North Carolina. At one point the respondent parents filed an appeal attempting to appeal a memorandum of law issued by the court which had not been reduced to a court order. The respondent parents also filed invalid appeals with the Supreme Court of the United States. While all these attempted appeals were dismissed by the respective courts, the parents used these tactics as ways to delay the court from moving forward with the Termination of Parental Rights case.
>
> 15. The respondent parents also learned that having an appointed attorney withdraw and a new attorney appointed resulted in the hearing being continued by the court to allow the new attorney time to prepare for the hearing.
>
> 16. The respondent parents have taken advantage of this practice of the court in order to delay the [termination of parental rights] hearing by repeatedly waiting to at or near the time of a hearing to request their counsel to withdraw.
>
> 17. The respondent parents filed a lawsuit in Buncombe County Superior Court for the purpose to make their latest court appointed attorneys withdraw and to delay the trial court in reaching the hearing on the termination of parental rights petition. . . . While this lawsuit was also

> dismissed with prejudice it shows the lengths the respondent parents were willing to use to frustrate, disrupt, and delay the court process.
>
> 18. The respondent parents have forfeited their right to counsel by engaging in actions which totally undermine the purposes of that right to counsel by making representation impossible and seeking to prevent a trial from happening. This conduct has been egregious, dilatory, and abusive conduct on the part of respondent parents and has disrupted the court from proceeding to trial on the termination case in a timely manner.

The trial court's findings are supported by abundant evidence in the record, including Mother's invalid notice of appeal from a memorandum; Father's appeal to the United States Supreme Court, which he acknowledged he did not expect the Court to accept; numerous motions and orders allowing for withdrawal and appointment of counsel; Parents' testimony that they understood withdrawal and appointment of counsel would lead to a continuance; and Parents' pro se lawsuit against Stewart and Goins, which Parents acknowledged was intended, at least in part, to force Stewart and Goins to withdraw. Additionally, these findings are sufficient to support the conclusion that Parents' actions amounted to egregious, dilatory, and abusive conduct, which totally undermined the purpose of the right to court-appointed counsel by effectively making representation impossible and seeking to prevent a trial from happening. Accordingly, the trial court did not err by concluding that "respondent parents have each separately and together forfeited their right to court appointed counsel by their deliberate acts."

III. Conclusion

For the foregoing reasons, the trial court's orders concluding that Parents had forfeited their right to court-appointed counsel and terminating their parental rights are affirmed.

AFFIRMED.

Judges GRIFFIN and THOMPSON concur.

IN THE MATTER OF N.J.R.C.

No. COA23-221

Filed 7 November 2023

Termination of Parental Rights—grounds for termination—sexually related offense resulting in conception of juvenile—indecent liberties with a child

The trial court did not err in determining that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(11) ("the parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile") to terminate respondent-father's parental rights to his son where the father had been convicted of taking indecent liberties with a child pursuant to N.C.G.S. § 14-202.1—which is a sexually related offense—for the sexual relations with the mother—who was fifteen years old at the time—which resulted in the conception of the child.

Appeal by Respondent-Father from order entered 1 December 2022 by Judge William Helms, III, in Union County District Court. Heard in the Court of Appeals 3 October 2023.

Jeffrey William Gillette for Respondent-Appellant Father.

No brief filed for Petitioner-Appellee Mother.

GRIFFIN, Judge.

Father appeals from the trial court's order terminating his parental rights to Nathan.[1] Father contends the trial court erred in determining grounds existed to terminate his parental rights under N.C. Gen. Stat. § 7B-1111(a)(4), (5), and (11). Specifically, Father argues there was insufficient evidence to support a termination under section 7B-1111(a)(4) and (5), and that neither ground was pled in the petition, thus leaving him without reasonable notice of what would be contested. Further, Father argues there was insufficient evidence to support a termination under section 7B-1111(a)(11) because he was not convicted of a sexually related offense. We hold the trial court did not commit error.

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1. We use a pseudonym for ease of reading and to protect the identity of the juvenile. *See* N.C. R. App. P. 42(b).

I. Factual and Procedural Background

In or around January 2019, Father and Mother were twenty-one and fifteen years old, respectively. The couple engaged in sexual relations through which they conceived a child, Nathan, who was born 17 October 2020. As a result of his relations with Mother, Father was convicted, on 16 October 2020, of taking indecent liberties with a child. On 28 June 2022, Mother filed a petition alleging there existed facts sufficient to warrant a determination that Father's parental rights should be terminated, including:

> a. [Father] has not provided any financial support or care to the minor child and has neglected the minor child.
>
> b. [Father] has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the minor child.

The petition came on for hearing in Union County District Court on 17 November 2022. On 1 December 2022, the trial court entered an order terminating Father's parental rights after finding clear, cogent, and convincing evidence to support grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(4), (a)(5), and (a)(11) and that termination would be in Nathan's best interest. On 3 January 2023, Father timely filed a notice of appeal.

II. Standard of Review

Termination of parental rights proceedings are conducted in two phases—an adjudicatory phase and a dispositional phase. *In re I.E.M.*, 379 N.C. 221, 223, 864 S.E.2d 346, 348 (2021). "At the adjudicatory phase, the trial court determines whether any of the statutory grounds for terminating a parent's parental rights delineated in N.C.G.S. § 7B-1111 exist, . . . with the petitioner being required to prove the existence of any applicable ground for termination by clear, cogent, and convincing evidence." *Id.* (citation omitted). Where the trial court determines there exists grounds for termination, the case will move to the dispositional phase where "the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (2021). Upon the conclusion of these proceedings, the trial court shall enter an order as to the termination of parental rights. *See id.*

Where such an order is on appeal before this Court with the respondent specifically challenging the court's adjudication decision, we must review the decision to determine "whether the findings of fact are supported by clear, cogent and convincing evidence and whether

[the] findings, in turn, support the conclusions of law." *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 5 (2004) (citations and quotation marks omitted). Further, we review the trial court's conclusions of law de novo. *In re A.S.T.*, 375 N.C. 547, 556, 850 S.E.2d 276, 282 (2020) (citations omitted).

III. Analysis

Father contends the trial court erred in concluding grounds existed to terminate his parental rights under N.C. Gen. Stat. § 7B-1111(a)(4), (5) and (11).[2] Father argues the trial court erred in its conclusion as the crime for which he was convicted, taking indecent liberties with children under N.C. Gen. Stat. § 14-202.1, is not a sexually related offense because it does not require a sexual act. We disagree.

Under our North Carolina General Statutes, section 7B-1111(a)(11), the trial court may terminate a parent's rights upon finding "[t]he parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(11) (2021). Chapter 14, section 202.1, defines the crime of taking indecent liberties with children stating, in relevant part:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> > (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
> >
> > (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1(a)(1), (a)(2) (2021). We recognize this statute, by its plain language, criminalizes certain actions which are not explicitly required to be sexual acts. Moreover, we note this Court has previously stated "[a] lewd or lascivious act constituting an indecent liberty

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2. We recognize "an adjudication of any single ground for terminating a parent's rights under [section 7B-1111(a)] will suffice to support a termination order." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (citations omitted). Therefore, where we hold the trial court did not err in terminating Father's parental rights under section 7B-1111(a)(11), we need not address Father's contentions regarding § 7B-1111(a)(4) or (a)(5).

need not include [a] sexual act[.]" *State v. Manley*, 95 N.C. App. 213, 216, 381 S.E.2d 900, 902 (1989) (citation and internal marks omitted).

Nevertheless, Father's argument is misplaced. Section 7B-1111(a)(11) does not require a respondent to be convicted of a sexual act or offense, but only of a "sexually *related* offense." *See* N.C. Gen. Stat. § 7B-1111(a)(11) (emphasis added). While neither our Juvenile Code nor our General Statutes specifically state what constitutes a "sexually related offense" as referenced in section 7B-1111(a)(11), Black's Law Dictionary defines "Related" as "[c]onnected in some way; having relationship to or with something else." *Related*, *Black's Law Dictionary* (11th ed. 2019). It is clear section 7B-1111(a)(11) was intentionally drafted in a manner broad enough to encompass not only acts and offenses which may explicitly involve sex, but also offenses associated with sex or that have some sexual component.

A conviction of indecent liberties with children pursuant to N.C. Gen. Stat. § 14-202.1 certainly constitutes a conviction of a "sexually related offense" under section 7B-1111(a)(11) as the crime unequivocally contains a sexual component. Most notably, section 14-202.1(a)(1) requires an act or attempted act to be taken "for the purpose of arousing or gratifying *sexual* desire." N.C. Gen. Stat. § 14-202.1(a)(1) (emphasis added). Similarly, a "lewd or lascivious act," as referenced in section 14-202.1(a)(2), is defined as an act which is "obscene or indecent; tending to moral impurity or wantonness." *Lewd*, *Black's Law Dictionary* (11th ed. 2019). Although section 14-202.1(a)(2) does not explicitly contain language of a sexual nature, our Courts have repeatedly recognized, without distinguishing between the alternative subparts of section 14-202.1, "[t]he offense of taking indecent liberties with children requires proof that the crime be willful and that it be for the purpose of arousing or gratifying sexual desire." *State v. Williams*, 303 N.C. 507, 514, 279 S.E.2d 592, 596 (1981) (internal marks omitted); *see also State v. Elam*, 302 N.C. 157, 162, 273 S.E.2d 661, 663 (1981) ("[N.C. Gen. Stat. § 14-202.1] clearly prohibits sexual conduct with a minor child."); *State v. Wilson*, 87 N.C. App. 399, 402, 361 S.E.2d 105, 108 (1987); *State v. Moir*, 369 N.C. 370, 386, 794 S.E.2d 685, 696 (2016). Additionally, our General Statutes indicate indecent liberties with children, per N.C. Gen. Stat. § 14-202.1, is a sexually related offense. Specifically, N.C. Gen. Stat. § 14-208.6(5), defines "Sexually violent offense[s]" to include, among other offenses, taking indecent liberties with children, specifically citing N.C. Gen. Stat. § 14-202.1. *See* N.C. Gen. Stat. § 14-208.6(5) (2021).

Here, Father concedes he and Mother engaged in sexual relations around January 2019 while he was twenty-one and she was fifteen years

old; that those relations resulted in the birth of their child Nathan; and that he was convicted of taking indecent liberties with a child. Further, the "Related" language provided in the statute, together with our Courts' precedent, indicates the offense of taking indecent liberties with children under N.C. Gen. Stat. § 14-202.1 constitutes a sexually related offense within the meaning of N.C. Gen. Stat. § 7B-1111(a)(11).

Because Father was convicted of taking indecent liberties with children under N.C. Gen. Stat. § 14-202.1—a sexually related offense—and because the relations which resulted in the conception of Nathan also led to Father's conviction under Chapter 14, the trial court did not err in finding grounds for termination of Father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(11).

IV. Conclusion

For the aforementioned reasons, we hold the trial court did not err in terminating Father's parental rights.

AFFIRMED.

Judges COLLINS and THOMPSON concur.

TRACI C. KIRKMAN, AS ADMINISTRATOR OF THE ESTATE OF CHAD WAYNE KIRKMAN, DECEASED, Plaintiff

v.

ROWAN REGIONAL MEDICAL CENTER, INC., D/B/A NOVANT HEALTH ROWAN MEDICAL CENTER; AND MINDY P. FRANCE, LPC., Defendants

No. COA23-282

Filed 7 November 2023

1. Immunity—qualified—hospital and licensed professional counselor—medical malpractice case—no allegation of gross negligence

In a medical malpractice case filed by plaintiff, the wife of a nursing student who committed suicide days after being treated at defendant hospital's emergency room and undergoing a psychiatric evaluation performed by defendant professional counselor, the trial court properly granted defendants' motion for summary judgment based on immunity under N.C.G.S. § 122C-210.1 (providing qualified immunity to health care providers from liability for actions arising

out of their care for individuals with mental health issues, substance abuse issues, or developmental disabilities). Plaintiff's argument that the statute only provides immunity for claims other than medical malpractice claims was meritless, as it was based on inapposite case law. Furthermore, plaintiff failed to include in her complaint an allegation of gross negligence, which was required in order to overcome defendants' statutory immunity.

2. Pleadings—complaint—medical malpractice—motion for leave to amend—to add allegation of gross negligence—undue delay—prejudice

In a medical malpractice case filed by plaintiff, the wife of a nursing student who committed suicide days after being treated at defendant hospital's emergency room and undergoing a psychiatric evaluation performed by defendant professional counselor, the trial court properly denied plaintiff's motion for leave to amend her complaint to add an allegation of gross negligence, which was intended to overcome defendants' assertion of immunity under N.C.G.S. § 122C-210.1 (providing qualified immunity for health care providers from liability for actions arising out of their care for individuals with mental health issues, substance abuse issues, or developmental disabilities). Plaintiff did not seek to amend her complaint until four and a half years after defendants first raised their statutory immunity defense and only three weeks before trial. Further, this undue delay prejudiced defendants given that discovery in the matter had concluded at the time plaintiff filed her motion to amend.

Appeal by plaintiff from orders entered 7 November 2022 by Judge Eric C. Morgan in Rowan County Superior Court. Heard in the Court of Appeals 3 October 2023.

The Law Offices of Wade Byrd, P.A., by Wade E. Byrd, for plaintiff-appellant.

Batten Lee PLLC, by Jaye E. Bingham-Hinch and Leigh Ann Smith, for defendant-appellees.

THOMPSON, Judge.

Plaintiff, as administrator of her deceased husband's estate, appeals from orders entered by the superior court on 7 November 2022 granting defendants' motion for summary judgment and denying plaintiff's

motion to amend her complaint. Plaintiff contends the trial court erred in (1) granting defendants' motion for summary judgment based on immunity under N.C. Gen. Stat. § 122C-210.1, (2) denying plaintiff's motion for leave to amend the complaint, and (3) granting defendants' motion for summary judgment based on proximate causation. After careful consideration, we affirm the trial court.

I. Factual Background and Procedural History

In 2016, decedent Chad Wayne Kirkman was a nursing student at Rowan-Cabarrus Community College. On 13 February 2016, Kirkman and other nursing students were at Rowan Regional Medical Center (RRMC) for clinical instruction when in an unprovoked outburst, Kirkman accused his nursing instructor, Melissa Zimmerman, of being the devil. Kirkman stated, "I have been hunting this mother f****r for years," and, after pulling off a cross he had been wearing around his neck, Kirkman held the cross in Zimmerman's face and touched her arm with it, indicating he wanted her to hold the necklace. Zimmerman further reported that Kirkman began "speaking some sort of unintelligible language[,] his eyes were dilated," and he prevented her from leaving the room. Zimmerman feared for her safety and the safety of others, and immediately filed an Affidavit and Petition for Involuntary Commitment regarding Kirkman. At 9:11 a.m. on the morning of 13 February 2016, a Rowan County magistrate issued a custody order for the involuntary commitment of Kirkman on the basis that Kirkman was likely "mentally ill and dangerous to self or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness."

On the same morning, plaintiff and Kirkman went to defendant hospital's emergency room, where Kirkman was admitted to the emergency department. Kirkman was examined by Dr. Maria Saffell, an emergency medicine physician who was an independent contractor and not an employee of defendant hospital or Novant Health. Saffell reviewed the involuntary commitment paperwork; performed a physical examination of Kirkman; ordered lab work, medications—including Ativan, a medicine used to treat anxiety—and IV fluids; and medically cleared Kirkman for a psychiatric evaluation.

The mental health assessments at RRMC occurred as telehealth assessments from Forsyth Medical Center Behavioral Health Outpatient Center (Forsyth Medical Center). Mindy France, a licensed professional counselor, performed Kirkman's telemedicine behavioral health assessment. France's examination of Kirkman included, *inter alia*, questions

regarding his sleep, appetite, and moods; his potential risk to self and others; if he had any history of substance abuse; as well as his thought content, mental status, and legal issues. Kirkman reported no history of self-harm or suicide and no thoughts of hurting others but did admit to stress and lack of sleep as a result of his upcoming final exams. In response to France's inquiries regarding anxiety, hopelessness, hallucinations, or being socially withdrawn, Kirkman further denied experiencing any such emotions. Plaintiff was in the room with her husband throughout France's assessment and agreed with Kirkman's answers to the questions posed by France. However, when France inquired whether Kirkman had any firearms in the home, he answered in the negative, although he and plaintiff—who did not amend or correct her husband's denial of owning any guns—were both aware that Kirkman had access to a number of hunting rifles, shotguns, and handguns in their home.

Upon her evaluation of Kirkman, France determined, based on the information available to her at the time, that "there was no indication that he was a current threat to anybody or himself[,]" concluded that Kirkman was suffering from anxiety, and reported these opinions to Saffell. Kirkman had remained calm and compliant throughout his examinations by Saffell and by France, and during the majority of the period in which he was a patient in the emergency department of RRMC. Based on her own observations of Kirkman, her review of the results of his medical examination, and France's telemedicine behavioral health assessment, Saffell diagnosed Kirkman with behavioral outburst and determined that he was not mentally ill or mentally retarded and that he was not a danger to himself or to others. At 3:40 a.m. on 14 February 2016, Kirkman was discharged from RRMC by Saffell. He was immediately taken into custody by the Rowan County Sheriff's Office and at 4:20 a.m., Kirkman was released on bond.

On 15 February 2016, Kirkman appeared in court in connection with the incident involving Zimmerman. He waived his right to the assistance of appointed counsel and after his first appearance, he and plaintiff met with an attorney. Later in the day on 15 February 2016, after refusing to be voluntarily admitted to a behavioral health facility, Kirkman assaulted plaintiff, breaking her nose and hand and causing her to require stitches in her mouth. Plaintiff gave a statement to law enforcement officers at the hospital, and upon her release, plaintiff and her son moved out of the family home.

On 16 February 2016, plaintiff executed involuntary commitment papers against Kirkman which were subsequently denied by the court. Later that day, Kirkman died from a self-inflicted gunshot wound.

On 15 February 2018, plaintiff filed a complaint against RRMC, Saffell, France, and other entities, alleging that during Kirkman's 13–14 February 2016 admission to defendant hospital's emergency department, "each [d]efendant . . . was negligent and deviated from the applicable standard of care . . . and thereby caused, directly, proximately, and in fact, the injury(ies), condition(s) of ill-being to Chad Wayne Kirkman[, and] the death of Chad Wayne Kirkman . . . ." Plaintiff subsequently voluntarily dismissed all defendants aside from RRMC and France, each of whom moved for summary judgment on 26 August 2022.

On 7 November 2022, the trial court entered an order granting summary judgment to defendants on the grounds that defendants were entitled to qualified immunity in accordance with N.C. Gen. Stat. § 122C-210.1 and, alternatively, that plaintiff had presented no forecast of evidence in support of the existence of the essential element of proximate cause. The trial court entered an additional order on 7 November 2022 denying plaintiff's motion to amend her complaint to add claims of gross negligence. Plaintiff timely appealed from the orders of the trial court.

II. Analysis

Plaintiff argues that the trial court erred in entering summary judgment for defendants pursuant to the immunity provided under N.C. Gen. Stat. § 122C-210.1 and abused its discretion in denying plaintiff's motion for leave to amend the complaint to add an allegation of gross negligence. We reject both contentions.

A. Summary judgment

[1] Plaintiff presents a number of inter-related and overlapping contentions in support of her argument that the grant of summary judgment in favor of defendants was improper: that N.C. Gen. Stat. § 122C-210.1 does not apply to medical malpractice actions; that even if the statute did apply to such actions, France "violated accepted professional standards, thereby precluding immunity under the statute"; that a showing of gross negligence is not required to place a defendant outside the immunity from liability provided under the statute; and that, in any event, plaintiff established gross negligence by France and was not required to allege gross negligence "before [d]efendants raised their affirmative defense under the statute."

> Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is

> entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. *Singleton v. Stewart,* 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). Moreover, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (internal quotation marks omitted). The standard of review for summary judgment is de novo. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

Forbis v. Neal, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007). A defendant may show entitlement to summary judgment in its favor "by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." *Wilkins v. Safran*, 185 N.C. App. 668, 671, 649 S.E.2d 658, 661 (2007) (quoting *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (internal quotation marks omitted), *aff'd*, 358 N.C. 131, 591 S.E.2d 521 (2004)).

At the time plaintiff filed her complaint, the portion of Chapter 122C, the "Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985" titled "Immunity from liability" provided:

> *No facility or any of its officials, staff, or employees, or any physician or other individual who is responsible for the custody, examination, management, supervision, treatment, or release of a client and who follows accepted professional judgment, practice, and standards is civilly liable, personally or otherwise, for actions arising from these responsibilities or for actions of the client.* This immunity is in addition to any other legal immunity from liability to which these facilities or individuals may be entitled and applies to actions performed in connection with, or arising out of, the admission or commitment of any individual pursuant to this Article.

N.C. Gen. Stat. § 122C-210.1 (2017)[1] (emphases added).

1. The statute was amended effective 1 October 2019.

Before this Court, plaintiff relies primarily on this Court's decision in *Alt v. Parker*, 112 N.C. App. 307, 435 S.E.2d 773 (1993), *cert. denied*, 335 N.C. 766, 442 S.E.2d 507 (1994), to support her summary judgment arguments. According to plaintiff, *Alt* stands for the proposition "that a defendant is entitled to immunity under N.C.G.S. § 122C-210.1 if the challenged act or omission was a professionally acceptable choice." Plaintiff argues that this language from *Alt* stands for the proposition that the version of N.C. Gen. Stat. § 122C-210.1 applicable in this case only provided immunity from liability to covered health care providers whose acts or omissions conformed to the relevant standard of practice as discussed under the general medical malpractice statute, N.C. Gen. Stat. § 90-21.12(a).[2] In other words, plaintiff appears to assert that N.C. Gen. Stat. § 122C-210.1 only provides immunity for claims other than medical malpractice or where a claim for medical malpractice would already fail based upon a plaintiff's failure to establish negligence under the standard of care set forth in N.C. Gen. Stat. § 90-21.12(a).

Our review of the decision in *Alt* indicates that the case sheds no light on the statute's applicability in medical malpractice cases, rendering it inapposite to the matter at bar. In *Alt*, the plaintiff's appellate arguments were "that the trial court erroneously entered summary judgment on . . . three . . . claims, malicious prosecution, false imprisonment, and deprivation of due process," but the plaintiff had not asserted any claim for medical malpractice. *Alt*, 112 N.C. App. at 310, 435 S.E.2d at 774. Plaintiff's citation to *Alt* comes from the portion of that decision resolving the plaintiff's argument that the trial court had wrongly granted summary judgment in favor of the defendant psychiatrist on the plaintiff's false imprisonment claim. *Id.* at 313, 435 S.E.2d at 776. The Court first held that because "[t]he essence of the tort of false imprisonment is illegal restraint of a person against his will," the plaintiff in *Alt* could not prevail given that he was lawfully restrained, citing *Youngberg v. Romeo*, 457 U.S. 307 (1982) for the proposition that "[a] client in a state institution is not entitled to absolute freedom from restraint; rather, the

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2. This subsection provides that in medical malpractice actions, health care providers are not liable for damages unless the plaintiff persuades the fact finder that the defendant provider's care "was not in accordance with the standards of practice among members of the same health care profession . . . ." N.C. Gen. Stat. § 90-21.12(a) (2021). This standard is understood to require a plaintiff to establish ordinary negligence to prevail in a medical malpractice case. *See, e.g.*, *Beaver v. Hancock*, 72 N.C. App. 306, 311, 324 S.E.2d 294, 298 (1985) ("In a medical malpractice case, the plaintiff must prove that defendant was negligent in his care of plaintiff and that such negligence was the proximate cause of plaintiff's injuries and damage. . . . The defendant physician's negligence must be established by showing the standard of care owed to plaintiff and that defendant violated that standard of care.") (citation and internal quotation marks omitted).

client's freedom from restraint must be balanced against the safety of other clients and the client himself." *Id.* at 313, 435 S.E.2d at 776–77 (additional citation omitted).

Then the Court quoted N.C. Gen. Stat. § 122C-210.1 and discussed *Youngberg*'s holding as to what Fourteenth Amendment liberty interests a client in a state hospital retained, before noting:

> Since we are today concerned with the provisions of the North Carolina Constitution, the U.S. Supreme Court's opinion has no direct precedential weight. Nonetheless, we believe that its reasoning is sound and coincides with our reading of N.C.G.S. § 122C-210.1, and we adopt the standard enunciated in *Youngberg*. *Thus, in this case, so long as the requisite procedures were followed and the decision to restrain the plaintiff was an exercise of professional judgment, the defendants are not liable to the plaintiff for their actions.* Plaintiff alleges both that [the defendant] failed to follow the established procedures and that he did not exercise his professional judgment in deciding to restrain plaintiff.

Id. at 313–14, 435 S.E.2d at 777 (emphasis added). Because here, unlike in *Alt*, plaintiff's claims sound in tort and do not implicate any constitutional issue, whether state or federal, we find the above-quoted language from *Alt* inapplicable to plaintiff's case.

Instead, we look to the precedent established by other decisions issued by this Court which do address the impact of N.C. Gen. Stat. § 122C-210.1 in the context of medical malpractice or negligence. For example, this Court has held, in applying the pertinent version of the statute in a medical malpractice case, that "[q]ualified immunity, if applicable, is sufficient to grant a defendant's motion for summary judgment," and moreover, in the specific context of N.C. Gen. Stat. § 122C-210.1, that "*gross negligence must be alleged to overcome the statutory immunity once it attaches.*" *Boryla-Lett v. Psychiatric Sols. of N.C., Inc.*, 200 N.C. App. 529, 533, 685 S.E.2d 14, 18 (2009) (emphasis added). That decision, in turn relies in great part on *Snyder v. Learning Servs. Corp.*, a negligence case in which this Court held that

> [u]nder North Carolina law, "[c]laims based on ordinary negligence do not overcome . . . statutory immunity" pursuant to Section 122C-210.1; a plaintiff must allege gross or intentional negligence. *Cantrell v. United States*, 735 F. Supp. 670, 673 (E.D.N.C. 1988); *see also Pangburn v. Saad*, 73 N.C. App. 336, 347, 326 S.E.2d 365, 372 (1985)

> ("We therefore conclude that G.S. Sec. 122-24 [the precursor to N.C. Gen. Stat. § 122C-210.1] was intended to create a qualified immunity for those state employees it protects, extending only to their ordinary negligent acts. It does not, however, protect a tortfeasor from personal liability for gross negligence and intentional torts.").

187 N.C. App. 480, 484, 653 S.E.2d 548, 551 (2007). We conclude that the precedent established by *Boryla-Lett* and *Snyder*—each of which addresses a negligence claim and the latter of which involves medical malpractice particularly—constitute controlling authority by which we are bound in deciding this appeal. Those decisions make plain that a plaintiff in a malpractice case must allege *gross* negligence by a covered defendant in order to overcome the immunity from liability established by the legislature in N.C. Gen. Stat. § 122C-210.1. Plaintiff here failed to include such an allegation in her complaint. Accordingly, we hold that the trial court did not err in granting summary judgment in favor of defendants here.[3]

B. Motion for leave to amend

[2] Plaintiff next argues that the trial court abused its discretion in denying her motion for leave to amend her complaint to add an allegation of gross negligence. We disagree.

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3. While the absence from plaintiff's complaint of an allegation of gross negligence as required by the statutory immunity provision just discussed fully supports the trial court's summary judgment ruling here, we observe that, even under ordinary negligence precedent, defendants would have been entitled to summary judgment on plaintiff's claims in light of the forecast of evidence regarding proximate cause. *See, e.g.*, *Hawkins v. Emergency Med. Physicians of Craven Cnty., PLLC*, 240 N.C. App. 337, 346, 770 S.E.2d 159, 165 (2015) ("Proximate causation is a cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all of the facts then existing.") (internal quotation marks and citation omitted). Each of plaintiff's four expert witnesses testified that a physician, here Saffell, rather than an LPC, here France, makes the decision regarding whether the patient should be involuntarily committed or discharged. Indeed, the Licensed Professional Counselors Act does not permit an LPC to admit, discharge, or involuntarily commit a patient. N.C. Gen. Stat. § 90-330(3) (2021). Saffell herself agreed that the decision to discharge Kirkman was hers and not France's, a fact further demonstrated by the discharge paperwork. Moreover, given the professional care exercised by Saffell here—including observing Kirkman for more than ten hours, inquiring directly of the patient about any suicidal or homicidal ideations he might have experienced, consulting with plaintiff as Kirkman's wife, and reviewing France's notes on her evaluation—Kirkman's suicide was not reasonably foreseeable and no different assessment by either Saffell or France could have been expected to have prevented Kirkman's suicide two days later. *See Williamson v. Liptzin*, 141 N.C. App. 1, 10–12, 539 S.E.2d 313, 319–20 (2000). Thus, even were we to review the trial court's summary judgment ruling in light of ordinary negligence principles, the result here would be the same.

> According to well-established North Carolina law, after the time for answering a pleading has expired, a motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse. A trial court abuses its discretion in the event that its decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

Azure Dolphin, LLC v. Barton, 371 N.C. 579, 603, 821 S.E.2d 711, 727–28 (2018) (citations and quotation marks omitted).

A "delay in seeking to amend a pleading, and particularly where it causes prejudice to a party, can justify a decision to deny the amendment." *Chappell v. N.C. DOT*, 374 N.C. 273, 280, 841 S.E.2d 513, 519 (2020) (citing *News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 485, 412 S.E.2d 7, 19 (1992) ("Among proper reasons for denying a motion to amend are undue delay by the moving party and unfair prejudice to the non-moving party.")). The trial court here noted both bases for its denial of plaintiff's motion for leave to amend.

We see no abuse of discretion by the trial court in denying plaintiff's motion given that defendants raised the defense of N.C. Gen. Stat. § 122C-210.1 immunity in their answer on 23 April 2018, while plaintiff did not seek to amend her complaint to allege gross negligence until 3 October 2022, four and one-half years after defendants' answer and only three weeks prior to trial. Given the undue delay in plaintiff's decision to move for leave to amend, in conjunction with apparent prejudice to defendants, arising from the fact that discovery in the matter had concluded at the time of plaintiff's motion, we hold that the trial court was justified in denying plaintiff's motion and did not act arbitrarily without reason in so doing. *See id.* Plaintiff's argument to the contrary is therefore overruled.

III. Conclusion

Plaintiff has not shown any error or abuse of discretion by the trial court in connection to either of the lower court's decisions as challenged on appeal. Accordingly, the trial court's orders denying plaintiff's motion for leave to amend and for summary judgment in favor of defendants are affirmed.

AFFIRMED.

Judges COLLINS and GRIFFIN concur.

N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WATER RESOURCES, Petitioner
v.
N.C. FARM BUREAU FEDERATION, INC., Respondent

NORTH CAROLINA ENVIRONMENTAL JUSTICE NETWORK AND NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Petitioners
v.
N.C. FARM BUREAU FEDERATION, INC.
and
N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WATER RESOURCES, Respondents.

No. COA22-1072

Filed 7 November 2023

Administrative Law—animal waste management system permitting—new conditions for general permits—rules under NCAPA—required rulemaking process

In a case involving the permitting process for farmers who use certain animal waste management systems, where the North Carolina Farm Bureau filed petitions in the Office of Administrative Hearings alleging that the Division of Water Resources had unlawfully added three new conditions for general permits, the superior court erred by concluding that the challenged general permit conditions were not rules under the North Carolina Administrative Procedure Act (NCAPA). Because the new conditions were regulations (authoritative rules dealing with details of animal waste management systems) of general applicability (intended to be used for most animal waste management systems), the new conditions were rules under the NCAPA and therefore were invalid because they were not adopted through the NCAPA's rulemaking process.

Appeal by Respondent from order entered 20 June 2022 by Judge Mark A. Sternlicht in Wake County Superior Court. Heard in the Court of Appeals 6 September 2023.

North Carolina Farm Bureau Legal Foundation, Inc., by Phillip Jacob Parker, Jr., Steven A. Woodson, & Stacy Revels Sereno, for Respondent-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc Bernstein & Assistant Attorney General Taylor Hampton Crabtree, for Petitioner-Appellee.

Southern Environmental Law Center, by Julia F. Youngman, Blakely E. Hildebrand, & Iritha Jasmine Washington, for Appellee-NC Environmental Justice Network, et al.

Irving Joyner, for Appellee-NC Environmental Justice Network, et al.

Lawyers Committee For Civil Rights Under Law, by Edward Caspar, admitted pro hac vice, & Sophia E. Jayanty, admitted pro hac vice, for Appellee-NC Environmental Justice Network, et al.

CARPENTER, Judge.

The North Carolina Farm Bureau Federation, Inc. ("Farm Bureau") appeals from the superior court's order reversing the Office of Administrative Hearing's (the "OAH's") grant of summary judgment for Farm Bureau on one issue and affirming the OAH's denial of partial summary judgment for Farm Bureau on another issue. After careful review, we agree with Farm Bureau concerning the superior court's reversal, and we need not reach the superior court's affirmance. For the reasons explained below, we reverse the superior court's order.

I. Factual & Procedural Background

This case involves a permitting process for farmers. "It is the public policy of the State to maintain, protect, and enhance water quality within North Carolina." N.C. Gen. Stat. § 143-211(b) (2021). To that end, the General Assembly authorized the Environmental Management Commission (the "EMC") to establish a permitting system to regulate animal-waste management systems within North Carolina. *See id.* §§ 143-215.10C(a), 143B-282(a). Specifically, subsection 143-215.10C(a) provides:

> No person shall construct or operate an animal waste management system for an animal operation or operate an animal waste management system . . . without first obtaining an individual permit or a general permit under this Article . . . . The Commission shall develop a system of individual and general permits for animal operations and dry litter poultry facilities based on species, number

> of animals, and other relevant factors . . . . It is the intent of the General Assembly that most animal waste management systems be permitted under a general permit. The Commission, in its discretion, may require that an animal waste management system be permitted under an individual permit if the Commission determines that an individual permit is necessary to protect water quality, public health, or the environment.

Id. § 143-215.10C(a).

In other words, farmers who use certain animal-waste management systems must first obtain either a general or an individual permit ("General Permit" and "Individual Permit," respectively) to do so. *See id.* Although it "is the intent of the General Assembly that most animal waste management systems be permitted under a general permit," the EMC may grant Individual Permits when it deems necessary. *See id.*

The EMC delegated its permitting authority to the Division of Water Resources (the "DWR") of the Department of Environmental Quality (the "DEQ"). *See id.* § 143-215.3(a)(4). In order to enforce permit conditions, the Secretary of Environmental Quality may assess civil penalties for thousands of dollars for failing to comply. *Id.* § 143-215.6A(a).

On 3 September 2014, the North Carolina Environmental Justice Network, along with other nonprofits (collectively, "Complainants"), filed a complaint against the DEQ with the United States Environmental Protection Agency's Office of Civil Rights, alleging that permits issued by the DEQ discriminated on the basis of race. On 3 May 2018, the DEQ settled with Complainants. The settlement agreement included a draft General Permit that included conditions that the DEQ agreed to submit "for consideration during its Stakeholder Process." Farm Bureau participated in the stakeholder process by submitting written comments following stakeholder meetings, providing oral comments at public meetings, and submitting comment letters. The DWR issued final versions of the revised General Permits on 12 April 2019.

On 10 May 2019, Farm Bureau filed three case petitions in the OAH. The OAH consolidated the cases. Farm Bureau contended the DWR unlawfully included three conditions in the General Permits. First, Farm Bureau argued the conditions were not properly adopted as "rules" under the North Carolina Administrative Procedure Act (the "NCAPA"). Second, Farm Bureau argued the DWR was improperly influenced by the settlement agreement.

Through these arguments, Farm Bureau specifically challenged three General Permit conditions: (1) farmers with waste structures within the 100-year floodplain must install monitoring wells; (2) certain farmers must conduct a Phosphorus Loss Assessment Tool ("PLAT") analysis; and (3) all permitted farmers must submit an annual report summarizing the system's operations. The North Carolina Environmental Justice Network and the North Carolina State Conference of the National Association for the Advancement of Colored People (collectively, "Intervenors") moved to intervene in the case, but the OAH denied their motion.

At a summary-judgment hearing on 9 February 2021, the OAH concluded that the three challenged conditions were "rules" under the NCAPA, and because they were not noticed and adopted as such, they were unlawfully included in the General Permits. The OAH also concluded that the DWR was not improperly influenced by the settlement agreement. The OAH did, however, find that "[t]he genesis of the terms of the special conditions under review are part of the Settlement Agreement reached in order to end the Title VI lawsuit." The DWR appealed, contesting the OAH's holding on the rule issue. Intervenors appealed the OAH's denial of their motion to intervene. And Farm Bureau appealed the OAH's conclusion on the settlement-agreement issue. The parties appealed all issues to Wake County Superior Court.

On 20 June 2022, the superior court resolved all of the issues in a single order, reversing the OAH concerning the rule issue and affirming the OAH concerning the settlement-agreement issue. The superior court also held that the OAH improperly denied Intervenors' motion to intervene. Farm Bureau timely appealed from the superior court on 8 July 2022.

The parties have stipulated that intervention is no longer an issue before this Court. As a result, Farm Bureau is the sole appellant; the DWR and Intervenors are co-appellees. On appeal, Farm Bureau challenges the superior court's reversal of the OAH's rule determination and the superior court's affirmance of the OAH's settlement-agreement determination.

II. Jurisdiction

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

III. Issues

The issues on appeal are whether the superior court erred in concluding: (1) the challenged General Permit conditions are not rules; and

(2) the DWR was not improperly influenced by the settlement agreement when it created the challenged General Permit conditions.

IV. Standard of Review

The purpose of the NCAPA is to "establish[] a uniform system of administrative rule making and adjudicatory procedures for agencies." N.C. Gen. Stat. § 150B-1(a) (2021). The NCAPA governs the review of OAH decisions. *Sound Rivers, Inc. v. N.C. Dep't of Env't Quality, Div. of Water Res.*, 271 N.C. App. 674, 693, 845 S.E.2d 802, 816 (2020). When reviewing OAH decisions, courts apply different standards based on "the substantive nature of each assignment of error." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004). A reviewing court may:

> reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §§] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2021). We review asserted errors under subsections (1) through (4) de novo. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 896. We review asserted errors pursuant to subsections (5) or (6) under the "whole record" test. *Id.* at 659, 599 S.E.2d at 896.

" 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

V. Analysis

A. Rules Under the NCAPA

The first issue is whether the conditions within the General Permits are rules under the NCAPA. This is a question of law, which we review de novo. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 896.

In statutory interpretation, "[w]e take the statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27, 53 S. Ct. 417, 420, 77 L. Ed. 1004, 1010 (1933). This is because "a law is the best expositor of itself." *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 52, 2 L. Ed. 199, 205 (1804). And when examining statutes, words that are undefined by the legislature "must be given their common and ordinary meaning." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202–03 (1974). Nonetheless, we must follow precedent if our appellate courts have already interpreted a statute. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

The NCAPA defines a "rule" as "[a]ny agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly . . . ." N.C. Gen. Stat. § 150B-2(8a). A rule is invalid "unless it is adopted in substantial compliance with" the NCAPA's rulemaking requirements. *Id.* § 150B-18.

Here, the parties do not dispute that the General Permit conditions "implement[] or interpret[] an enactment of the General Assembly." *See id.* §§ 150B-2(8a), 143-215.10C(a) (authorizing a permitting system to regulate animal-waste management systems within North Carolina). But the parties do dispute whether the challenged General Permit conditions are "regulation[s], standard[s], or statement[s] of general applicability." *See id.* § 150B-2(8a).

1. Whether the General Permit Conditions are Regulations, Standards, or Statements

We begin with whether the conditions are "regulations." The NCAPA does not define "regulation." *See id.* § 150B-2. Therefore, we must discern its "common and ordinary meaning." *See In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 202–03. Absent precedent, we look to dictionaries to discern a word's common meaning. *Midrex Techs., Inc. v. N.C. Dept. of Rev.*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016). Merriam-Webster's defines "regulation" as "an authoritative rule dealing with details or procedure." *Regulation*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003).

Here, any farmer who uses certain animal-waste management systems must obtain a permit and comply with its conditions. *See* N.C. Gen. Stat. § 143-215.10C(a). The challenged General Permit conditions concern details like installation of monitoring wells within the 100-year floodplain, PLAT analysis, and submission of annual reports summarizing waste-management system operations. These conditions are authoritative, as the DWR has the authority to grant permits, which are required to operate the animal-waste systems. *See id.* Further, the Secretary of

Environmental Quality has the authority to assess civil penalties for thousands of dollars if a farmer fails to comply with these conditions. *See id.* § 143-215.6A(a).

Therefore, the General Permit conditions are regulations under the NCAPA because they are "authoritative rule[s] dealing with details" of animal-waste management systems. *See*, Merriam-Webster's Collegiate Dictionary, *supra*; N.C. Gen. Stat. § 150B-2(8a). Because the conditions are "regulations," we need not determine whether the conditions are also "standards" or "statements." *See* N.C. Gen. Stat. § 150B-2(8a). To be a "rule," an agency action only needs to be one of the three. *See id.*

2. Whether a Regulation Must be Generally Applicable

We must now determine whether "general applicability" applies to regulations. Under the last-antecedent canon, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . . ." *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 380, 157 L. Ed. 2d 333, 340 (2003). Following that principle, "general applicability" should be read as only modifying "statement." *See id.* at 26, 124 S. Ct. at 380, 157 L. Ed. 2d at 340. Thus, if we apply the last-antecedent canon, all regulations and standards are rules, regardless of applicability. *See* N.C. Gen. Stat. § 150B-2(8a). This Court, however, has not interpreted subsection 150B-2(8a) that way.

Specifically, we did not apply the last-antecedent canon when we interpreted subsection 150B-2(8a) in *Wal-Mart Stores East, Inc. v. Hinton*, 197 N.C. App. 30, 56, 676 S.E.2d 634, 652–53 (2009). There, this Court analyzed an agency "standard" and held that the standard did not have "general applicability" and was, therefore, not a "rule." *Id.* at 56, 676 S.E.2d at 652–53. Bound by our logic in *Wal-Mart*, if a standard requires general applicability, then so does a regulation. *See id.* at 56, 676 S.E.2d at 652–53; *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

In other words, if the last-antecedent canon does not prevent extending "general applicability" to "standard," the canon should not prevent extending general applicability to "regulation," either. *See Wal-Mart*, 197 N.C. App. at 56, 676 S.E.2d at 652–53; N.C. Gen. Stat. § 150B-2(8a); *see also Barnhart*, 540 U.S. at 26, 124 S. Ct. at 380, 157 L. Ed. 2d at 340 (stating that the last-antecedent canon is not absolute).

Therefore, because we do not apply the last-antecedent canon to subsection 150B-2(8a), a "regulation" must have "general applicability" to be a "rule." *See* N.C. Gen. Stat. § 150B-2(8a); *Wal-Mart*, 197 N.C. App. at 56, 676 S.E.2d at 652–53; *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

3. Whether the General Permit Conditions are Generally Applicable

We must now decide whether the General Permit conditions are generally applicable. Again, the NCAPA does not define "general applicability," *see* N.C. Gen. Stat. § 150B-2, so we must discern its "common and ordinary meaning," *see In re Clayton-Marcus Co.*, 286 N.C. at 219, 210 S.E.2d at 202–03. The *Wal-Mart* Court, however, has already discerned the common meaning of "general applicability." *See Wal-Mart*, 197 N.C. App. at 56, 676 S.E.2d at 652–53. So we must adhere to it. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

In *Wal-Mart*, this Court defined "general applicability" in the negative, stating that a rule is not generally applicable if it "is exceptional, and not allowed unless specifically required." *Id.* at 56, 676 S.E.2d at 652–53. In other words, a rule is generally applicable if it is not exceptional and is allowed without specific requirements. *See id.* at 56, 676 S.E.2d at 652–53. Said another way: A rule is generally applicable if it applies to most situations. *See id.* at 56, 676 S.E.2d at 652–53.

Here, General Permits and "general applicability" share the same descriptor: general. And the explicit "intent of the General Assembly [is] that most animal waste management systems be permitted under a general permit." *See* N.C. Gen. Stat. § 143-215.10C(a). On the other hand, Individual Permits are intended to be the second option. *See id.* Individual Permits are exceptional; whereas General Permits are not. *See id.* Aptly named, General Permit conditions have general applicability because the General Permits are to be used for "most animal waste management systems," and the General Permits are applicable notwithstanding special circumstances. *See id.*; *Wal-Mart*, 197 N.C. App. at 56, 676 S.E.2d at 652–53.

The DEQ argues that General Permits are not generally applicable because farmers can obtain Individual Permits instead. First, we question the DEQ's premise that Individual Permits are guaranteed. Allotting Individual Permits under section 143-215.10C is within the DEQ's "discretion." *See* N.C. Gen. Stat. § 143-215.10C(a). Thus, contrary to the DEQ's suggestion, Individual Permits are not automatic. *See id.* Second, if farmers can avoid the challenged General Permit conditions simply by seeking an Individual Permit, all farmers would likely do so. Following the DEQ's reasoning would render General Permits worthless and fly in face of section 143-215.10C: Our General Assembly expressly stated that General Permits are to be used for "most animal waste management systems." *See id.*

Therefore, the conditions within General Permits are generally applicable regulations under the NCAPA. They are rules, and the superior court erred when it held to the contrary. *See id.* § 150B-2(8a). Because rules are invalid "unless [they are] adopted in substantial compliance with" the NCAPA rulemaking requirements, we reverse the superior court on the rule issue. *See id.* § 150B-18. The challenged conditions are invalid until they are adopted through the rulemaking process. *See id.*

B. Settlement Agreement

The second issue on appeal is whether the settlement agreement improperly influenced the DWR in creating the challenged General Permit conditions. We need not reach this issue, however, because the challenged conditions were unlawfully adopted, notwithstanding the settlement agreement. *See id.* Thus, we need not determine whether the superior court erred in affirming the OAH's denial of summary judgment for Farm Bureau on the settlement-agreement issue. *See id.*

VI. Conclusion

The superior court erred in reversing the OAH's grant of summary judgment to Farm Bureau concerning whether the challenged General Permit conditions are rules under the NCAPA. We conclude the challenged conditions are rules, and they must be adopted as such. Therefore, we reverse the superior court's order concerning the rule issue. We need not address the settlement-agreement issue, as the challenged conditions are invalid, regardless of the effect of the settlement agreement.

REVERSED.

Judges TYSON and GORE concur.

HUNTER LEE SMITH (Now known as HUNTER SMITH WILLETTE), Plaintiff
v.
REID ALAN DRESSLER, Defendant.

No. COA22-909

Filed 7 November 2023

Child Custody and Support—modification of custody—substantial change in circumstances—previously disclosed events—lack of support

In an action to modify custody, the trial court erred by concluding that a substantial change in circumstances had occurred where it primarily relied on evidence—including that the child's mother had gotten married, had given birth to another child, had gotten honorably discharged from the military, and had moved back to North Carolina—that had been previously disclosed to and considered by the trial court, as shown by facts contained in a prior motion filed by the mother and in the first custody order itself. Without those previously addressed events, the remaining evidence considered by the court—that the child had incurred various injuries, none of which amounted to abuse or neglect according to relevant authorities, and that the father failed to inform the mother that he had tested positive for a viral infection before returning the child to the mother's custody—was insufficient to support modification.

Appeal by defendant from judgment entered 20 January 2022 by Judge Teresa R. Freeman in Halifax County District Court. Heard in the Court of Appeals 9 August 2023.

Tharrington Smith, LLP, by Jeffrey R. Russell, for the plaintiff-appellee.

Wyrick, Robbins, Yates & Ponton, LLP, Charles W. Clanton, K. Edward Greene, and Jessica B. Heffner, for the defendant-appellant.

TYSON, Judge.

Reid Alan Dressler ("Father") appeals an order modifying child custody entered on 20 January 2022, which granted Hunter Lee Smith ("Mother") primary legal custody of Mother's and Father's minor child. We vacate the trial judge's order and remand for entry of an order concluding a substantial change in circumstances was not shown.

I. Background

Mother and Father are the parents of minor child, W.D., born on 14 September 2017. *See* N.C. R. App. P. 42(b) (pseudonyms and initials used to protect the identity of minors). Mother and Father began a romantic relationship in August 2016, while both were undergraduate students at North Carolina State University, which resulted in W.D. being conceived. After W.D.'s birth, Mother's and Father's relationship deteriorated and ultimately ended.

Mother filed a complaint for Child Custody and Child Support on 2 March 2018. At that time, Mother was residing in her parents' home in Halifax County. After a hearing was held in April, the trial court awarded temporary primary custody to Mother on 24 May 2018. Three hearings were held to modify the Order for Temporary Custody and Child Support between July 2018 and June 2019, but the order was only changed to grant Father additional visitation. The Honorable W. Turner Stephenson, III, ("Judge Stephenson") presided over the trial and hearings.

Mother informed Father on 20 October 2019 that she had joined the United States Air Force and would be leaving for basic training in Texas in approximately one week.

On 1 November 2019, Father filed a Motion for Temporary Custody and to Present New Evidence. Father asserted Mother "misled" Father regarding her current employment and pretended she was still employed at Braswell Family Farms. He also included information about Mother's failure to inform Father she had enlisted in the military until approximately one week prior to departing from the state.

Mother filed a motion to stay the proceedings on 18 November 2019 pursuant to section 3932 of the Servicemember Civil Relief Act. *See* 50 U.S.C. § 3932. The trial court postponed the hearing because "it did not have jurisdictional authority to proceed as [Mother] was in basic training and thus was an active-duty member of the United States Air Force." The trial court re-scheduled a hearing for 16 March 2020, but the hearing did not occur due to COVID-19 protocols.

The trial court granted the motion to reopen the evidence and heard testimony from both parties on 15 June 2020. The trial court orally granted Father primary custody of W.D. and visitation with Mother when she exercised military leave. The order, however, was not written, signed, and entered until over six months later on 22 January 2021 ("First Custody Order").

Mother was stationed at McGuire Air Force Base in New Jersey when the evidentiary hearing was held on 15 June 2020. Shortly after the

hearing, Mother married Dylan Willette ("Stepfather") on 18 September 2020, who also served in the Air Force. Sometime in late July or August 2020, Mother and Stepfather conceived a child, who was due in May of 2021. Mother and Stepfather returned to North Carolina and held a wedding ceremony with Mother's family and W.D. on 10 October 2020.

When Mother returned to duty in New Jersey at the end of October, Mother's superior informed her she was eligible for discharge due to her pregnancy. On 30 October 2020, Mother's honorable discharge from the military was approved. Mother's official date of separation was listed as 20 December 2020, as Mother had accumulated twenty-five days of leave. Mother used her twenty-five days towards her "terminal leave" and permanently moved back to North Carolina on 25 November 2020.

When the evidentiary hearing was held on 15 June 2020, Father lived in Hampstead, in Pender County, but he presented evidence indicating he had purchased land in Burgaw and planned to build a house. In fall 2020, Father and W.D. often stayed in Clayton with Father's parents while his house was being built. When Father and W.D. were not staying with Father's parents, they lived in a two-bedroom guest house owned by Father's paternal aunt and uncle. Father's home in Burgaw was completed in July 2021. From July 2021 until January 2022, Father and W.D. lived Burgaw, where W.D. attended pre-kindergarten classes.

Mother's and Father's counsels communicated with each other and the trial court, and they entered several motions between the evidentiary hearing held on 15 June 2020 and the entry of the order issued on 22 January 2021. After the hearing, "counsel for [each of] the parties had agreed that each would write the trial judge in support of their contentions" and to propose orders based upon Judge Stephenson's oral rendition of the order at trial.

Father's trial counsel sent the proposed custody order on 25 September 2020 to: Judge Stephenson, Mother's counsel, and the trial court administrator. The proposed order was in a "redline format showing the differences remaining between counsel as to the language of the order."

Father's proposed custody order contained the following language:

> 2. [Father] is granted primary physical custody of the aforesaid minor child.
>
> 3. [Mother] shall have visitation with the aforesaid minor child away from the residence of [Father] as follows:
>
> > a. She may have a two-week visit with the child from Saturday, July 18, 2020[,] until August 1, 2020. The

child will be flown to the nearest safe airport near the residence of [Mother] by [Father] and the child will be returned by [Father] to Raleigh-Durham Airport to the custody of [Father] at the conclusion of said visitation. Said visitation will begin at the time a morning flight can be arranged to Philadelphia or whatever major airport is closest *to Joint Base McGuire* and is deemed the safest for transportation of a child. The flight shall leave from Raleigh-Durham Airport. The parties will equally split the cost of the child's airline tickets and will each be responsible for the cost of their own tickets.

b. In addition to the two[-]week visitation period granted to [Mother] above for the remainder of this year and in years to come [Mother] is granted visitation with her child *whenever she is on "Military Leave" or at other times when has* [sic] *the ability to return to North Carolina while still serving in the United States Military*. When the [Mother] is on leave, she should give [Father] as much notice as reasonably possible but in no event less than forty-eight hours' notice of her intent to exercise visitation with her child in the State of North Carolina. [Father] is to be given priority for all holiday periods of Thanksgiving, Easter, Fourth of July, and Labor Day if [Mother] can arrange leave for those periods. As to the Christmas holiday, [Father] shall have the child with him every Christmas Eve from 6:00 o'clock P.M. until 12:00 noon on Christmas Day. Other than this part of the Christmas holiday, [Mother] may have the child with her during this holiday period *whenever she can arrange leave.*

. . .

g. As long as [Mother] gives the required 48 hours' notice of her intent *to exercise military leave visitation* with her son this visitation will be preemptive, and she shall be entitled to said vacation unless the child is ill except for Christmas Eve and Christmas Day as set forth above.

When [Mother] *exercises the military leave visitation* or at any other times when she can return to North Carolina for visitation with the minor child *while still serving in the United States Military Service*, she

> shall inform [Father] where she will be staying with the minor child and provide an emergency address for contact.
>
> In *exercising military leave* or at any other times when she can return to North Carolina for visitation with the minor child *while still serving in the United States Military Service*, [Mother] is free to choose the time she may come but she may not visit more than every other weekend unless it is in connection with Labor Day, Fourth of July, Easter, Thanksgiving or Christmas and New Year's vacation which are special times and are set forth above.

(emphasis supplied).

While Father's proposed order was pending before the court, Mother filed a purported Rule 59 Motion on 20 November 2020. Mother sought temporary custody of W.D. and to present new evidence, because the trial judge had not entered the proposed custody order sent to him on 25 September 2020. Mother's new evidence included the following allegations: Mother had married Stepfather in September 2020 and was expecting a child in May 2021; Mother was being honorably discharged from the Air Force at the end of 2020; Mother owned a home in Wilson County and planned to move into the home on 25 November 2020; and, Mother had contacted her former employer, Pfizer, to discuss gaining re-employment in Rocky Mount.

On 7 December 2020, Father filed a motion for entry of the proposed custody order orally announced after the hearing on 15 June 2020. Father attached a revised copy of the proposed custody order, which was nearly identical to the version sent to the trial court on 25 September 2020, except Father deleted the redlined comments and renumbered certain facts and conclusions that were nonsequential in the previous draft. Father also attached a notice of hearing for 21 December 2020. Father's motion also provided the following assertions:

> 11. Again, as she has frequently done in this case, [Mother] lied to [Father] as on November 16, 2020, [Mother] verified a motion to introduce "allegedly" newly discovered evidence in this case and seeking a new custody order granting custody of the aforesaid minor child to [Mother]. She did not discuss or tell [Father] that she had sworn to said motion on November 16, 2020 or that the same had been filed on November 20, 2020 by her attorney. [Father]

> did not find out about the motion until the undersigned attorney returned from his Thanksgiving vacation and notified [Father] of the existence and filing of said motion on November 30, 2020.
>
> 12. Moreover, unlike she stated she would do, [Mother] did not and has not returned the minor child to the custody of the [Father] and for a period of three days would not even tell [Father] where his son was, how his son was doing physically or mentally, or when she was leaving for North Carolina. Indeed, during this period between Wednesday, November 25, 2020, and Friday, November 27, 2020, [Mother] would not respond to any attempted communication from [Father]. Then from Saturday, November 28, 2020, until Monday, November 30, 2020, [Mother] would not respond to any communication attempted by [Father].
>
> 13. On November 30, 2020, [Mother] advised the [Father] in writing that she had been "legally advised to ignore you {sic [Father]} as long as possible."
>
> 14. When the [Father] pointed out the exact wording of the proposed Judgment herein and pointed out the pronouncement of Judge Stephenson, [Mother] replied in text that "that was never filed or signed by a Judge and it is not an order. I am not going to argue with you over texts. I would be more than happy to go over a new schedule for both of us to spend time with [W.D.]. For now, I am going to enjoy my time with him. Please let me know when you would like to discuss this schedule."

No order was entered regarding whether Mother's motion for temporary custody and to present new evidence was granted or denied. The record also does not indicate whether the scheduled hearing on Father's motion for entry of the First Custody Order was held. The trial court, however, entered the First Custody Order granting primary custody to Father and visitation to Mother on 22 January 2021.

While the findings of facts and conclusions of law contained in the twenty-two pages of the First Custody Order are identical to the draft order sent to the trial court on 25 September 2020, the trial court significantly modified the visitation orally announced at trial on 15 June 2020 and explained: "The Court with the consent of the parties having determined that the visitation originally announced in open court on June 15, 2020[,] is no longer in the best interest of the child, determines that [Mother] shall have visitation with the aforesaid minor child away

from the residence of [Father.]" On appeal, both Mother and Father assert the changes to the visitation rendered on 15 June 2020 were not literally consented to.

The trial court's First Custody Order entered on 22 January 2021 included the following language, which was never consented to by the parties, orally announced at trial, or included in the proposed draft order sent to the trial court on 25 September 2020 or in Father's Motion for Entry of Order:

> 3b. [Mother] shall have additional visitation privileges with the aforesaid minor child away from the residence of [Father] as follows:
>
> > 1. Every other weekend during the public school system year of the child as hereinafter defined from Friday beginning a[t] 7:00 P.M. until the following Sunday at 7:00 P.M. Said visitation is to begin on Friday the 5th day of February 2021 and every other weekend thereafter;[ ]however if [Mother's] work schedule is such she has to work on said weekend, then her every other weekend visitation will begin on Friday February 12th 2020 at 7:00 P.M. until the following Sunday and every other weekend thereafter.
> >
> > 2. During the Christmas season of each even numbered year from 2:00 P.M. on Christmas Day until 6:00 P.M. on the day before the public school system of the county wherein[ ]the minor child resides (hereinafter the school system) resumes after Christmas vacation and during the Christmas season of each odd numbered year from 6:00 P.M. on the day that the school system adjourns for the Christmas holiday until 2:00 PM on Christmas Day.
> >
> > [Father] shall have the custody of the child during the Christmas season of each odd numbered year from 2:00 P.M. on Christmas Day until 6:00 P.M. on the day before the school system resumes after Christmas vacation and during the Christmas season of each even numbered years from 6:00 P.M. on the day the school system adjourns for the Christmas holiday until 2:00 P.M. on Christmas Day.
> >
> > The intention of this Order is that the parties should alternate their respective halves of the Christmas holiday.

3. During the Thanksgiving holiday for each odd numbered year from 6:00 P.M. on the day school recess[es] for the school holiday until 6:00 P.M. on the day before school resumes at the expiration of the holiday.

[Father] shall have the minor child with him during the Thanksgiving holiday of each even numbered year.

4. During the spring break holiday of each even numbered year from 6:00 P.M. on the day school recesses for the holiday until 6:00 P.M. on the day before school resumes at the expiration of the holiday.

[Father] will have the child with him during the spring break holiday of each odd numbered year.

5. [Mother] shall always have Mother's Day Weekend and [Father] shall always have Father's Day Weekend regardless of the every other weekend schedule.

6. During the summer vacation of the child from the county school system, the parties will alternate weeks with the child's summer vacation beginning on the last Friday after school adjourns for the summer at 6:00 P.M. and continuing to the following Friday until 6:00 P.M.

During odd numbered years, [Mother] will have the first week and [Father] will have the next week[,] and they will then alternate weeks until the last Friday before school resumes from summer break at 6:00 P.M. at which time the weekend visitation will resume. Although the summer vacation[,] as does the other holiday visitation periods[,] controls weekend visitation, the parties will not change the count or progression of weekend visitation so it will remain constant and known to the child even though not exercised during summer holiday visitations. Thus, the parties shall simply refer to a calendar and know when to resume the weekend visitation at the conclusion of the summer vacation. Summer vacation will be deemed to end on the last Friday on the summer vacation period before the School System resumes.

During even numbered years, [Father] shall have the first week and [Mother] shall have the next week

> and they shall then alternate weeks until the last Friday before school resumes from summer break at 6:00 P.M. at which time the weekend visitation will resume.
>
> 7. If the parties elect not to have a joint birthday party for the minor child during odd numbered years when the child's birthday is during a weekday[,] the child will celebrate his birthday with [Mother] and during even numbered years with [Father] from the time school is out until 8:00 P.M. During the years when the child's birthday does not fall on a weekend, the parent not with the child may celebrate the child's birthday the day before from the time school is out until 8:00 P.M.
>
> If the child's birthday falls on a weekend, then the child shall be with the parent whose weekend it is and the other parent may have the child to celebrate his birthday from 12:00 P.M. to 8:00 P.M. on the child's birthday during that weekend.
>
> . . .
>
> 9. The provisions for Christmas, Thanksgiving, Spring Break, Mother's Day, Father's Day, birthdays, and summer override the weekend visitation privileges granted herein. When there is a conflict of either party's visitation i.e., Christmas, Thanksgiving, Spring Break, Mother's Day, Father's Day, birthdays, or summer with weekend visits, then the weekend visitations will not occur, will not be made up[,] and will be subordinated to and not occur during these other special periods.

4. The party having the child with him or her will allow the child to have telephone, FaceTime, Skype, Zoom, or other communication, if available, with the other parent one time per day between 5:00 P.M. and 6:00 P.M. The parties shall exchange phone numbers to facilitate the ability of the parties to contact the child by phone, FaceTime, or Skype.

5. When either party has the aforesaid child in his or her physical custody and either party plans to be away from home with the child for a period of more than 48 hours,

> then he or she will provide all travel arrangement information including the times of travel and the places to which travel is being made to the other party.
>
> 6. If the child has scheduled academic, athletic, or other events[,] the parent having physical custody will make sure that the child attends these activities.
>
> 7. Each party will make certain that any prescribed medication for the minor child accompanies the child when the child goes to visit [Mother] and the same is returned with the child to [Father].
>
> 8. The parties shall meet and exchange the child on the occasion of each visitation at 1103 North Breazeale Ave, Mount Olive NC 28365. Either party may use a family member related by blood or marriage to provide transportation for the child.
>
> 9. Each party will notify the other party of any emergency concerning the child as soon as reasonably possible.
>
> 10. If the child is ill, [Father] will let [Mother] know and if this illness impedes a regular weekend visitation[,] then said visitation may be made up the next weekend even if this results in two (2) weekends in a row for [Mother].
>
> 11. If [Mother] has an emergency arise or should some other events arise which means that she cannot exercise her visitation with the minor child, she must let [Father] know this as soon as reasonably possible.

Notably, all references to W.D.'s visitation with Mother being related to her serving in the military or while she was exercising "military leave" were removed from the trial court's entered First Custody Order.

W.D. injured his right leg while jumping on a trampoline at Father's parents' home on Christmas Day in December 2020. Father notified Mother about the injury. Mother took W.D. to an orthopedist on 26 December 2020, who diagnosed W.D. with a probable fracture in his tibia. Mother reported W.D.'s injuries to Child Protective Services ("CPS").

CPS notified Father they had commenced an investigation concerning W.D.'s leg injury in January 2021, along with five other alleged instances of cuts, scrapes, bruises, and a possible tooth injury. An independent medical examination prompted by CPS initially noted evidence of potential neglect and abuse. Upon further review, however, the same

medical examiner "altered the diagnosis to state that significant child neglect cannot be made in this case."

Mother filed a motion on 25 February 2021 to modify the First Custody Order, alleging a substantial change in circumstances had occurred. W.D. was three years old when Mother filed the motion. Hearings were held on 29 and 30 June 2021, 5 August 2021, 14 September 2021, and 19 October 2021. At those hearings, Mother produced evidence tending to show several circumstances had changed since the 15 June 2020 hearing.

The alleged changed circumstances largely mirrored the assertions Mother had included in the purported Rule 59 Motion filed on 20 November 2020, i.e., Mother had married another man, was expecting another child, was medically discharged from the military, and was moving from New Jersey back to North Carolina. The 24 February 2021 motion also included allegations W.D. had sustained injuries while in Father's care and allegations Father had deliberately concealed certain cold symptoms before testing positive for COVID-19.

On 20 January 2022, the court found a substantial change in circumstances had occurred. The court modified the existing child First Custody Order, granted primary custody to Mother, and awarded visitation to Father. Father appeals from the trial court's order ("Second Custody Order") filed on 20 January 2022.

II. Jurisdiction

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

III. Modification of an Existing Custody Order

Father asserts the trial court erred by finding a substantial change in circumstances had occurred to support a modification of custody and erred in awarding primary custody to Mother. Father argues the trial court improperly considered evidence of events, which had occurred prior to and were accounted for in the First Custody Order entered on 22 January 2021. Father further argues the trial court's findings were insufficient to support its conclusions of law.

A. Standard of Review

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted).

A trial court may not modify a permanent child custody order unless it finds a substantial change in circumstances has occurred and exists, which affects the welfare of the child. *Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003). Whether a substantial change in circumstances exists for the purpose of modifying a permanent child custody order is a legal conclusion. *Spoon v. Spoon*, 233 N.C. App. 38, 43, 755 S.E.2d 66, 70 (2014). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted).

Wide discretion is vested in the trial judge when awarding primary custody of a minor child. *Shamel v. Shamel*, 16 N.C. App. 65, 66, 190 S.E.2d 856, 857 (1972). "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason[,]" or has misapprehended and committed an error of law. *Id.*

B. Analysis

1. Previously Disclosed Circumstances

A *substantial change of circumstances* is required to be shown by the movant before the trial court may modify a permanent custody order. This burden of proof is required to prevent dissatisfied parties from relitigating a permanent custody order in another court in hopes of reaching a different conclusion. *Newsome v. Newsome*, 42 N.C. App. 416, 425, 256 S.E.2d 849, 854 (1979) ("The rule prevents the dissatisfied party from presenting those circumstances to another court in the hopes that different conclusions will be drawn."). "A trial court may order the modification of an existing child custody order if [the movant proves and] the court determines that there has been a substantial change of circumstances affecting the child's welfare and that modification is in the child's best interests." *Spoon*, 233 N.C. App. at 41, 755 S.E.2d at 69 (citation omitted); N.C. Gen. Stat. § 50-13.7 (2021). "[W]hen evaluating whether there has been a substantial change in circumstances, courts *may only consider events which occurred after the entry of the previous order, unless the events were previously undisclosed to the court*." *Woodring v. Woodring*, 227 N.C. App. 638, 645, 745 S.E.2d 13, 20 (2013) (emphasis supplied) (citation and internal quotation marks omitted).

Our threshold inquiry is whether the events that occurred between 15 June 2020, the day the evidentiary hearing was held and rendition

of the order, and 22 January 2021, the day the First Custody Order was entered, were previously disclosed to and considered by the trial court. *Id.* at 645-46, 745 S.E.2d at 20. Father argues a significant portion of the assertions and evidence Mother included only one month later in her 24 February 2021 motion to modify the First Custody Order was previously disclosed, considered and addressed by the trial court, and the same evidence cannot be used to support a finding that a substantial change had occurred.

The First Custody Order entered in January 2021 contains findings that were disclosed to the trial court before entry of the First Custody Order. Mother's Rule 59 motion to present new evidence, filed 20 November 2020, asserted Mother: had been recently married, was expecting a child, was honorably discharged from the Air Force, planned to return to North Carolina, owned a home in Wilson, and hoped to gain re-employment with Pfizer.

Mother also expressed her dissatisfaction with Father's compliance with Mother's preferred visitation schedule between W.D. and her parents, W.D.'s maternal grandparents.

In the Second Custody Order entered in January 2022, the trial court relied upon assertions contained in Mother's 20 November 2020 Rule 59 motion to support its finding that a substantial change had occurred. The trial court found Mother had: married, given birth to a child, been honorably discharged from the Air Force, returned to North Carolina, acquired a home in Wilson, gained proximity to and more support from her family, and been re-employed by Pfizer.

The trial court also cited Mother's dissatisfaction with Father's decision to refrain from scheduling visitation with certain members of Mother's family. Before Mother returned to North Carolina, she asserted Father would bring W.D. to his maternal grandfather's house, but not to his maternal grandmother's house or his maternal aunt's house. Notably, Mother's desire for W.D. to spend time separately with both of her parents and her maternal aunt was not contained in the First Custody Order, but instead was a self-asserted expectation.

This court has held that when evaluating whether a substantial change in circumstances has occurred, a trial court "may only consider events which occurred *after the entry of the previous order, unless the events were previously undisclosed to the court.*" *Id.* at 645, 745 S.E. 2d at 20 (emphasis supplied) (citation omitted).

Here, the trial court erred when it considered and re-evaluated events which were disclosed to and considered by the trial court prior

to the entry of the First Custody Order. *Id.*; *Lang v. Lang*, 197 N.C. App. 746, 750, 678 S.E.2d 395, 398 (2009) (explaining a trial court properly considered only those events which occurred *after the entry* of the prior custody order when concluding whether a change of circumstances had occurred); *Ford v. Wright*, 170 N.C. App. 89, 96, 611 S.E.2d 456, 461 (2005) ("As the trial court had already considered the parties' past domestic troubles and communication difficulties in the prior order, without findings of additional changes in circumstances or conditions, modification of the prior custody order was in error.").

Any evidence contained in Mother's Rule 59 motion was previously disclosed to and addressed by the trial court, as is demonstrated by the record before us *and* in the First Custody Order itself. That order provides the trial judge considered evidence and the numerous changes in Mother's status, which had occurred after the 15 June 2020 hearing.

Further, the First Custody Order reveals the trial court clearly considered Mother's discharge from the military and relocation to North Carolina, because the trial court: completely removed all references to Mother visiting with the child while serving in the military or while on "military leave"; included an exact address for Mother and Father to exchange W.D.; and provided an extensive, alternating summer break and holiday schedule.

When comparing the proposed custody order submitted to the trial court on 25 September 2020, which reflected the oral decretal on 15 June 2020, to the First Custody Order entered on 22 January 2021, the changes are striking and evident the trial judge considered and addressed Mother's marriage, pregnancy, discharge from the military, and relocation to North Carolina.

The trial court had already considered Mother's changes in her circumstances through the end of 2020 and could not use these factors again as a basis to support a finding and conclusion a substantial change in circumstances had occurred in its entry of the Second Custody Order. *Id.*

2. Substantial Change in Circumstances

Father further argues the remaining evidence before the trial court did not support a substantial change in circumstances to justify modification of the First Custody Order. The only assertions the trial court had not previously considered to trigger a change in the First Custody Order were the injuries W.D. had sustained and the way Father had handled his COVID-19 infection in April 2021.

The trial court noted injuries W.D. had purportedly received over the two years while in Father's custody to constitute a substantial change:

- W.D. fell, scraped his side, and had minor bruising on his leg.
- W.D. fractured his tibia while jumping on the trampoline with his paternal uncle on Christmas Day.
- W.D. slipped on a rug while running in the bathroom, hit his face on the toilet or wall, and injured his tooth.
- W.D. fell outside on a concrete patio, which caused a bloody nose and scabbing and bruising on his knees, legs, and bottom.
- W.D. scratched his leg when jumping into a pool.
- W.D. bumped heads with another child in the pool, injuring his nose.

Expert evidence was entered at trial to address whether W.D. was either neglected or abused. Father testified W.D. was a "wide open four[-]year[-]old little boy who[ ] climbs, jumps[,] and falls" and any injuries were the result of "normal wear and tear." W.D.'s pediatrician testified he noticed various cuts and bruises on W.D. since June 2020, but they were "not abnormal and didn't cause [him] any concern."

W.D.'s pre-kindergarten teacher was questioned about a black eye W.D. allegedly presented with at school, but she could not recall whether W.D. had ever sustained a black eye. W.D.'s daycare teacher similarly testified she never observed anything concerning regarding W.D.'s health, and volunteered she is a "mandatory reporter." CPS also found no evidence of abuse after investigating Father at Mother's behest.

The trial court also found Father had a runny nose and mild headache before W.D.'s weekend visitation with Mother ended on 4 April 2021 and had failed to inform Mother. Father subsequently tested positive for COVID-19. Father did not disclose he had tested positive until the day before Mother's next weekend visit, which began on 16 April 2021. Father testified he did not inform Mother about his positive test earlier, because he was "out of quarantine" by the time he met with Mother to exchange W.D. He was not in W.D.'s presence until he had passed his isolation period.

A "determination of whether changed circumstances exist is a conclusion of law." *Head v. Mosier*, 197 N.C. App. 328, 334, 677 S.E.2d 191,

196 (2009) (citing *Brooker v. Brooker*, 133 N.C. App. 285, 289, 515 S.E.2d 234, 237 (1999)). "[C]ourts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child." *Metz v. Metz*, 138 N.C. App. 538, 540, 530 S.E.2d 79, 81 (2000).

Even where a substantial change of circumstances is shown, the court must still consider whether the change affected the welfare of the child and if a change in custody is in the child's best interest. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253.

Mother relies on *Shipman* and argues the trial court's findings should be upheld, even if they do not "present a level of desired specificity," because the effects of the changes on the welfare of W.D. are self-evident and supported by some evidence. *Id.* at 479, 586 S.E.2d at 256.

She also asserts the combination of W.D.'s purported injuries, Father's handling of his COVID-19 infection, and her change in familial status and relocation to North Carolina collectively affected W.D.'s welfare, which is "self-evident." *Id.*

Father argues evidence of Mother's re-marriage and newborn child, even if these facts were undisclosed or not considered before entry of the First Custody Order, does not constitute a substantial change. Father cites *Hassell v. Means*, 42 N.C. App. 524, 531, 257 S.E.2d 123, 127 (1979) ("Remarriage in and of itself is not a sufficient change of circumstance to justify modification of a child custody order." (citation omitted)) and *Kelly v. Kelly*, 77 N.C. App. 632, 636, 335 S.E.2d 780, 783 (1985) (explaining the birth of new child does not constitute a substantial change).

The evidence previously disclosed and addressed in the prior order, and which the trial court relied upon, does not support a conclusion that a substantial change occurred. *See Shipman*, 357 N.C. at 478, 586 S.E.2d at 255 ("As our appellate case law has previously indicated, before a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection." (citing *Carlton v. Carlton*, 145 N.C. App. 252, 262, 549 S.E.2d 916, 923 (Tyson, J., dissenting), *rev'd per curiam per dissent*, 354 N.C. 561, 557 S.E.2d 529 (2001), *cert. denied*, 536 U.S. 944, 153 L.Ed.2d 811 (2002))).

The evidence failed to establish W.D. was abused or neglected while in Father's care. Father enrolled W.D. in a private day care and pre-kindergarten programs, and Father adequately provided and cared for W.D. as his primary caretaker for several years. His pediatrician and both of W.D.'s teachers testified. Similarly, this Court has never held the failure to inform another parent of a potential viral infection constituted a substantial change, and more particularly of contacts outside of any quarantine period.

A trial court may not modify an existing custody order unless a substantial change in circumstances has occurred and been proven by the movant. *Spoon*, 233 N.C. App. at 41, 755 S.E.2d at 69. The trial court's conclusion that a substantial change in circumstances had occurred is unsupported and is vacated. This erroneous conclusion was the basis for the trial court to amend the First Custody Order and to enter the Second Custody Order in 2022. We need not address Father's remaining argument that the trial court abused its discretion by granting Mother primary legal custody of W.D., as this argument is moot.

IV. Conclusion

The trial court improperly considered previously disclosed, considered, and addressed events when issuing the Second Custody Order in January 2022. *Woodring*, 227 N.C. App. at 646, 745 S.E.2d at 20; *Lang*, 197 N.C. App. at 750, 678 S.E.2d at 398; *Ford*, 170 N.C. App. at 96, 611 S.E.2d at 461. Without the previously considered evidence, the trial court's findings were inadequate to support a conclusion that a substantial change in circumstances had occurred. *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255; *Spoon*, 233 N.C. App. at 41, 755 S.E.2d at 69.

We vacate the trial court's conclusion that a substantial change in circumstances had occurred and the award of primary custody of W.D. to Mother. We remand for further findings and conclusions in accordance with this opinion.

The parties are free to pursue custody mediation pursuant to N.C. Gen. Stat. § 7A-494 (2021) or the need for appointment of a parenting coordinator pursuant to N.C. Gen. Stat. § 50-90 to 100 (2021) to decrease potential conflicts, recalcitrant conduct, and further litigation. *It is so ordered.*

VACATED AND REMANDED.

Judge CARPENTER and Judge FLOOD concur.

[291 N.C. App. 214 (2023)]

STATE OF NORTH CAROLINA
v.
LEWIS VICTOR BRANCHE, III

No. COA22-768

Filed 7 November 2023

1. Homicide—first-degree murder—premeditation and deliberation—actions of defendant—sufficiency of evidence

The State presented sufficient evidence of premeditation and deliberation in a first-degree murder prosecution, including that defendant and the victim had been seen arguing but not physically fighting on the afternoon that the victim was killed, which indicated that defendant had not become so impassioned as to lose the ability to reason; that defendant, by using a smaller gun than the one he usually carried to shoot the victim, demonstrated some planning because the smaller gun would have been cleaner and quieter; and that the steps taken by defendant after the killing to dispose of the body and conceal his identity as the perpetrator by lying could be seen as part of a planned strategy. Evidence that the victim made threats to arouse defendant's jealousy could have been viewed by the jury as motivation for the murder rather than provocation, and defendant's description of his state of mind that "something clicked off" in his head—which defendant alleged was exculpatory—was offset by the State's other evidence supporting first-degree murder.

2. Evidence—photographs—burial site and condition of victim's body—first-degree murder—plain error analysis

There was no plain error in defendant's trial for first-degree murder by the introduction of over 150 photographs of the area where the victim's body was found and of the victim's remains because the photos were not overly duplicative or irrelevant; they were used to illustrate the State's theories of the case and witness testimony, including how the investigation to find the victim's body unfolded; they did not depict gory or gruesome material; and there was no suggestion that the photos were displayed in a prejudicial manner.

3. Criminal Law—prosecutor's closing argument—comparison of punishments—objection sustained—curative instruction not requested

In defendant's trial for first-degree murder, where the trial court sustained defendant's objection to the prosecutor's statement during closing argument comparing the punishment for second-degree

murder to the punishment for first-degree murder and where defendant did not request a curative instruction, there was no prejudice to defendant given that the objection was sustained and that the court gave the jury a general instruction to disregard material for which an objection had been sustained.

4. Criminal Law—prosecutor's closing argument—right against self-incrimination—reference to lack of witnesses—harmless error

In defendant's trial for first-degree murder, although the prosecutor's statement during closing argument pointing out that defendant did not call any witnesses on his behalf was improper because it was an indirect reference to defendant's failure to testify, any error was harmless where the trial court sustained defendant's objection to the prosecutor's direct statement referencing defendant's failure to testify and where defendant's identity as the perpetrator of the shooting was not in doubt given his admission at trial, through counsel, that he killed the victim.

5. Criminal Law—prosecutor's closing statement—law regarding provocation—curative instruction

In defendant's trial for first-degree murder based on premeditation and deliberation, where, after the prosecutor's request to include a statement in the jury instructions that provocation required more than "mere words" was denied by the trial court, the prosecutor still argued during closing that provocation required more than "mere words," to the extent that the statement was not entirely applicable—because it came from a case that discussed provocation in the context of voluntary manslaughter and not first-degree murder—any misstatement of law was cured by the court's jury instructions explaining what the State had to prove regarding the required state of mind for premeditation and deliberation.

6. Criminal Law—prosecutor's closing argument—defendant's admission of guilt—no reference on failure to plead guilty

In defendant's trial for first-degree murder, the trial court was not required to intervene ex mero motu during the portion of the prosecutor's closing statement regarding defendant's inability to directly admit to his guilt, in which the prosecutor noted that defendant admitted his guilt only through his counsel. The statement did not constitute an improper comment on defendant's failure to plead guilty, but was part of the State's broader argument that defendant had the requisite intent for first-degree murder based on premeditation and deliberation.

Appeal by Defendant from judgment entered 5 April 2022 by Judge Joshua W. Willey, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 24 August 2023.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for Defendant.

WOOD, Judge.

Lewis Victor Branche, III ("Defendant") admitted at trial, through counsel, to having killed Kristen Bennett ("Bennett"), the mother of his son. A jury convicted Defendant of first-degree murder based on theories of premeditation and deliberation as well as lying in wait. Defendant challenges his conviction based on sufficiency of the evidence. We hold substantial evidence supports his conviction based on premeditation and deliberation. We further hold the trial court did not err by admitting numerous gruesome photographs of the body, and the alleged errors contained in the Prosecutor's closing argument did not prejudice Defendant. Therefore, we uphold Defendant's conviction of first-degree murder.

I. Factual and Procedural History

At his trial, Defendant admitted, through counsel, he shot and killed Bennett on 14 August 2018. At the time of her death, Bennett was twenty-four years old and lived with Defendant and their five-year old son on Hibbs Road. Bennett worked as a waitress at a strip club, and Defendant worked at a car dealership. Defendant routinely carried a nine-millimeter handgun but was not known to carry a .22 pistol. Bennett's father, Chuck Bennett ("Chuck") heard Defendant and Bennett argue about the fact that Bennett worked at a strip club. Defendant voiced his displeasure about Bennett's employment, and Chuck described Defendant as "jealous" about it.

On the day of the murder, Ray Gray, Jr. ("Gray") had shopped at Food Lion in Newport and was driving home when he noticed two people fighting in a yard on Hibbs Road. Gray described the altercation as, "they were scrapping, having a fight." Gray decided he should intervene in the altercation, so he turned his car around and parked in a neighbor's driveway. Gray got out of his car, "walked towards the two that were fighting," and told them to stop. Gray was concerned about

whether Bennett was being assaulted and about two children who were playing in a nearby sand pile. Gray stated Defendant and Bennett were flailing their arms in the air. Bennett was advancing on Defendant, and Defendant was backing up and trying to push Bennett back. Bennett told Gray to "get the F out of here," and Gray was only on the scene for approximately two minutes. All of this occurred sometime between 1:30 p.m. and 1:45 p.m.

A different witness, Robert Taylor ("Robert"), had picked up a sandwich during his lunch break and was returning to work when he noticed a young lady, who was later identified as Bennett, walking along the side of the road. She appeared to Robert to be wiping her face. Another witness, Danny Taylor ("Danny"), was driving down Hibbs Road between 2:00 p.m. and 3:00 p.m. on the day of the murder when he saw a blue car pulled over on the side of the road as well as a woman resembling Bennett. Bennett owned a blue Chevrolet. One of the car doors was open and it looked to Danny like Bennett was getting ready to get into the car.

A camera installed at a church across the street from Defendant's and Bennett's residence captured their residence within its view. The camera captured the altercation between Defendant and Bennett at 1:40 p.m. as well as Gray pulling over and attempting to intervene at 1:43-1:44 p.m. Bennett's car pulled out of the driveway between 2:35 p.m. and 2:37 p.m. with Defendant and the two children inside but not Bennett. Bennett's car returned to the driveway between 2:57 p.m. and 2:58 p.m., and Defendant got out of the car. Finally, at 4:07 p.m., the camera captured Defendant pulling out of the driveway in his truck. According to Defendant, he was leaving to return to work.

A few minutes after 4:00 p.m. on the day of the murder, Defendant called Bennett's mother, Christy Bennett ("Christy"), who lived with Defendant and Bennett at their residence on Hibbs Road, to tell her that he and Bennett had been in an argument and that Bennett threw a bottle of red juice at him which hit Christy's mattress and sprayed everywhere. Defendant told her he took the sheets off the mattress to launder them. Christy found this conversation odd. Two days later, Christy called 9-1-1 on 16 August 2018 to report Bennett's disappearance.

After Bennett's death, Defendant acted as though Bennett were simply missing by putting up missing persons fliers and telling people she left him. Defendant told law enforcement he returned home at approximately 2:30 p.m. on the day of the murder to find Bennett, some of her clothes, and her stripper bag missing. At 5:59 p.m., Defendant texted Bennett, "Hey girl." Later, he texted Bennett's father "to see if [Bennett] had said anything to him."

On 23 August 2018, behind Defendant's property, law enforcement found a very large pile of dead tree limbs piled up as well as fresh dirt and pine straw. Investigators removed the branches and found an indentation in the ground. Investigators used a probe to prod the dirt, and they smelled an odor of decomposition on it. They did not discover a body, but they did find a grave approximately five-foot-three inches long, thirty-four inches wide, and seventeen inches deep. Soil from this shallow grave was found to have trace amounts of blood in it.

Defendant was arrested for Bennett's murder on 4 September 2018. While incarcerated, Defendant had conversations with an inmate named William Greene ("Greene"), who agreed to provide information to law enforcement in exchange for a potential dismissal of his own charges. Greene stated that Defendant told him he and Bennett had a big argument because he had seen texts on her phone to a number he did not recognize and had deleted the number from her phone. Bennett then walked away. Defendant took the kids elsewhere, drove back to pick up Bennett, and then returned to the house where they continued fighting. Defendant stated that Bennett threatened to show him videos of her performing fellatio on other people. Defendant told Greene that after Bennett's threat "something clicked off in his head and he just grabbed the gun that was on the counter and shot her in the back of the head." Greene told law enforcement Defendant said he had "lost it," and it was "out of nowhere." Defendant told Greene the gun he used to kill Bennett was "for shooting animals in the yard. . . . any little animal he would go out back, bang bang[.]" Defendant revealed to Greene he ultimately hid Bennett's body in a burn pit next to a doghouse located at Defendant's grandfather's house.

On 16 July 2019, acting on the information provided by Greene, investigators obtained permission from Defendant's grandfather to dig under the burn pit on his property. Investigators used a backhoe to carefully remove layers of earth. Investigators uncovered heavily decomposed remains wrapped in a tarp. The remains were identified as Bennett's, and the cause of death was a gunshot wound to the back of the head. The entrance wound was in the back of the skull. Bullet fragments found in the skull were determined to be from a .22 caliber gun that could be either a rifle or handgun, but more likely a handgun. There was no other trauma to the bones other than that caused by the bullet.

Defendant's trial was held 29 March to 5 April 2022. At the close of the evidence, Defendant made a motion to dismiss the first-degree murder charge based on premeditation. The trial court denied the motion, finding "the evidence is sufficient to go to the jury on the issue

of premeditation, deliberation." The State then gave notice it would seek to instruct on first-degree murder based on a theory of lying in wait.

At the charge conference, the State sought the lying in wait jury instruction. Defendant objected, arguing the relevant caselaw required facts demonstrating the perpetrator was stalking or following someone, which could not be the case here because Bennett was killed in her own dwelling. Defendant contended the circumstances of this case were no "different than any other domestic shooting that takes place." The trial court overruled Defendant's objections and instructed the jury on first-degree murder based on theories of lying in wait and premeditation and deliberation. The trial court also instructed the jury on second-degree murder.

The jury found Defendant guilty of first-degree murder on theories of both lying in wait and premeditation and deliberation. The trial court sentenced Defendant to a term of life imprisonment without parole. Defendant appealed pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a). All other relevant facts are provided as necessary in our analysis.

II. Analysis

The issues before this Court are: (1) whether there was sufficient evidence for the jury to convict Defendant of first-degree murder based on theories of premeditation and deliberation and lying in wait; (2) whether the trial court erred by instructing the jury on lying in wait; (3) whether the trial court erred by admitting numerous gruesome photographs; and (4) whether certain statements by the Prosecutor during his closing argument prejudiced Defendant's trial. We address each argument in turn.

A. Sufficiency of the Evidence

[1] On the issue of whether there was sufficient evidence to submit the charge of first-degree murder to the jury based on theories of premeditation and deliberation and lying in wait, we adhere to the following standard of review:

> This Court reviews challenges to the sufficiency of the evidence de novo. Upon a defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of the defendant's being the perpetrator of such offense. We review the evidence in the light most favorable to the

> State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Court may consider both direct and circumstantial evidence, even when the evidence does not rule out every hypothesis of innocence.

State v. Elder, 278 N.C. App. 493, 499, 863 S.E.2d 256, 264 (2021) (citations, quotation marks, and brackets omitted).

1. Premeditation and Deliberation

Our Supreme Court has defined "premeditation" and "deliberation" as follows:

> "Premeditation" means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. "Deliberation" means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. . . . "[C]ool state of blood" does not mean an absence of passion and emotion. One may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and, to a large extent, controlled by passion at the time."

State v. Bonney, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991) (citations omitted).

If the victim sufficiently provokes the perpetrator, the killing may not be premeditated. *See State v. Taylor*, 337 N.C. 597, 607, 447 S.E.2d 360, 367 (1994). However,

> [t]he fact that defendant was angry or emotional will not negate the element of deliberation during a killing unless there was anger or emotion strong enough to disturb defendant's ability to reason. Evidence that the defendant and the victim argued, without more, is insufficient to show that the defendant's anger was strong enough to disturb his ability to reason.

State v. Geddie, 345 N.C. 73, 94, 478 S.E.2d 146, 156 (1996) (brackets omitted). Evidence regarding motive is probative of the "degree of the

offense," although motive itself is not an essential element of first-degree murder. *State v. Wiseman*, 178 N.C. 784, 791, 101 S.E. 629, 632 (1919).

Moreover, in reviewing the sufficiency of the evidence as it relates to premeditation and deliberation, this Court considers "the conduct and statements of the defendant before and after the killing." *State v. Rose*, 335 N.C. 301, 318, 439 S.E.2d 518, 527 (1994). As for a defendant's conduct after the killing, "any unseemly conduct towards the corpse of the person slain, or any indignity offered it by the slayer, as well as concealment of the body, are evidence of express malice, and of premeditation and deliberation in the slaying." *Id.* at 318, 439 S.E.2d at 527. For example, the *Rose* court upheld the defendant's conviction of first-degree murder in part because there was "evidence of an elaborate process of removing the body, bloody bedclothes and personal items from the scene of the killing." *Id.* at 319, 439 S.E.2d at 527. In *Rose*, the defendant cleaned the victim's apartment, hid the victim's body in one car before moving it to another, and ultimately transported the body to a remote location and buried it. *Id.* at 319. 439 S.E.2d at 527. The *Rose* court held "Defendant's handling of the body from the time of the killing until the body was finally burned and buried is evidence from which a jury could infer premeditation and deliberation." *Id.* at 319, 439 S.E.2d at 527. Additionally, in *State v. Patel*, this Court concluded, "the evidence of defendant's conduct . . . in disposing of the body after the murder was sufficient for a reasonable juror to conclude that defendant killed [the victim] with premeditation and deliberation." 217 N.C. App. 50, 63, 719 S.E.2d 101, 110 (2011). The *Patel* court reasoned, "the fact that [the victim's] body was burned after she was killed constitutes additional evidence of premeditation and deliberation." *Id.* at 62, 719 S.E.2d at 109. Finally, in *State v. Weathers*, our Supreme Court concluded there was sufficient evidence for the jury to find murder with premeditation and deliberation where:

> Defendant's conduct after the killing provides further evidence of premeditation and deliberation. Defendant went to great lengths to conceal the murder, including disposing of the body and destroying or hiding evidence such as the pipe, the sheets, and the mattress. Defendant's uncaring attitude about the victim, evidenced by killing her and then dumping her nude body by the roadside, could be considered by the jury in finding premeditation and deliberation.

339 N.C. 441, 452, 451 S.E.2d 266, 272 (1994).

Here, the evidence demonstrates Defendant was not "under the influence of a violent passion" to the point of murder during either the fight in the front yard nor at the moment he picked up Bennett while she was walking down the side of the road and brought her home. *Bonney*, 329 N.C. at 77, 405 S.E.2d at 154. Although Bennett advanced toward Defendant during their confrontation in front of the home and Defendant attempted to push her back, they were not physically fighting or attempting to hit one another. Greene testified the couple continued fighting even after Defendant picked her up in the car, and, according to Defendant, Bennett made threats arousing his jealousy after they returned home. However, neither instance demonstrates Defendant was impassioned to the point of losing his ability to reason. *Geddie*, 345 N.C. at 94, 478 S.E.2d at 156. Defendant never physically lashed out at Bennett other than attempting to push her away from him as she advanced on him. As for her efforts to make him jealous, the jury could have—and likely did in this case—consider Bennett's threats to arouse jealousy as evidence showing Defendant's motivation to kill her rather than arousing "lawful or just cause or legal provocation." *Bonney*, 329 N.C. at 77, 405 S.E.2d at 154.

Even if Defendant did not form the specific intent to kill Bennett until some point after they returned to the house, there was sufficient evidence for the jury to conclude Defendant committed murder in the first-degree. First, the evidence Defendant argues supports second-degree murder, such as Bennett's work at a strip club and her verbal threats to Defendant to arouse his jealousy, could have demonstrated to a reasonable jury motive rather than provocation. *See Taylor*, 337 N.C. at 607, 447 S.E.2d at 367; *Wiseman*, 178 N.C. at 791, 101 S.E. at 632.

Second, the State argued the fact Defendant murdered Bennett with a .22 caliber handgun rather than with the nine-millimeter he customarily carried demonstrates some planning on his part. Specifically, the State argues the choice of the .22 caliber handgun to commit the crime was likely because such a gun is smaller and easier to dispose of, quieter, and less likely to make an exit wound and therefore less messy. Defendant argues Greene's testimony demonstrates the .22 caliber handgun just happened to be on the kitchen counter, and so it was just the weapon Defendant happened to grab in the heat of the moment. At trial, forensic scientist Hope Bruehl testified the bullet was a .22 and more likely from a handgun than a rifle because it was all lead and not jacketed. Detective Joshua Phillips testified .22 handguns are normally smaller in size than other handguns and fire more quietly than higher caliber handguns. Viewing the evidence in the light most favorable to

the State, the jury could have accepted the foregoing relevant evidence to support a conclusion that Defendant purposely chose the .22 caliber handgun rather than his nine-millimeter because the .22 is cleaner and quieter. *Elder*, 278 N.C. App. at 499, 863 S.E.2d at 264. Therefore, we conclude Defendant's choice to use the .22 caliber handgun constitutes evidence demonstrating premeditation and deliberation.

Third, and most importantly, Defendant's actions following the murder demonstrate a planned strategy to pretend Defendant had nothing to do with the murder and to avoid detection as the perpetrator. Defendant's actions, taken together, constitute a long-term, well-thought out, and strategic plan to avoid being discovered as the perpetrator. Defendant (1) called Bennett's mother to tell her a story he made up about Bennett throwing a bottle at him and red juice spraying on the bed causing him to do laundry; (2) told people Bennett left him; (3) texted Bennett at almost 6:00 p.m. although he knew she was dead; (4) played dumb in a text to Bennett's father about Bennett's whereabouts; (5) pretended to look for Bennett by posting fliers regarding her disappearance; (6) initially disposed of Bennett's body behind the house; and (7) relocated the body to a burn pit away from his home where it was less likely to be discovered by law enforcement. Defendant's conduct after the murder supports first-degree murder based upon premeditation and deliberation because it shows Defendant "went to great lengths to conceal the murder," including initially burying the body behind his house and then reburying it on his grandfather's property. *Weathers*, 339 N.C. at 452, 451 S.E.2d at 272. Considered together, all of Defendant's carefully planned actions constituted substantial evidence for the jury to find Defendant committed the murder with premeditation and deliberation. *Weathers*, 339 N.C. at 452, 451 S.E.2d at 272.

Finally, Defendant, through counsel, admitted he shot and killed Bennett, constituting substantial evidence Defendant was the perpetrator of the offense. *Elder*, 278 N.C. App. at 499, 863 S.E.2d at 264. Because substantial evidence existed for the jury to determine (1) Defendant committed murder with premeditation and deliberation, and (2) Defendant was the perpetrator of the offense, the trial court did not err in denying Defendant's motion to dismiss.

Defendant argues this Court should not consider acts subsequent to a killing as evidence of premeditation and deliberation because of our Supreme Court's words in *State v. Steele:*

> Subsequent acts, including flight or hiding the body, or burning the bloody clothes and otherwise destroying traces of the crime, are competent on the question

> of guilt. The basis of this rule is that a guilty conscience influences conduct. From time immemorial it has been thus accepted:
>
> "The wicked flee when no man pursueth; but the righteous are bold as a lion." 28 Prov. 1.
>
> "Thus conscience doth make cowards of us all." Hamlet, Act III, scene I.
>
> "Guilty consciences always make people cowards." The Prince and his Minister, Pilpay, chap. III, Fable III.
>
> Flight is not evidence of premeditation and deliberation.

190 N.C. 506, 511, 130 S.E. 308, 312 (1925) (citations omitted). Specifically, Defendant argues the holding in *Steele* is controlling law which prevents this Court from considering acts subsequent to a killing as evidence of premeditation and deliberation and that later cases are misstatements of the law. We disagree. *Steele* holds flight, and flight alone, is not evidence of premeditation and deliberation. The *Steele* court states "subsequent acts" are relevant to guilt, but it does not hold that subsequent acts cannot be considered evidence of premeditation and deliberation. We conclude *Steele* means what it says and nothing more. Our courts have held that a defendant's subsequent acts other than flight are probative of premeditation and deliberation. *Patel*, 217 N.C. App. at 63, 719 S.E.2d at 110; *Rose*, 335 N.C. at 318, 439 S.E.2d at 527; *Weathers*, 339 N.C. at 452, 451 S.E.2d at 272.

Defendant further argues a seemingly exculpatory statement to Greene mandates we vacate his murder conviction based on premeditation and deliberation. Greene testified Defendant told him "something clicked off in his head and he just grabbed the gun that was on the counter and shot her in the back of the head." Indeed, our Supreme Court has held that "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." *State v. Carter*, 254 N.C. 475, 479, 119 S.E.2d 461, 464 (1961). The *Carter* court further held the defendant's motion to dismiss should be granted "when the State's evidence and that of the defendant is to the same effect, and tend only to exculpate the defendant." 254 N.C. 475, 479, 119 S.E.2d 461, 464 (1961). "The introduction by the State of exculpatory statements by the defendant, however, does not prevent the State from introducing evidence which shows facts concerning the crime to be different from the incident as described by the exculpatory statements." *State v. Freeman*, 326 N.C. 40, 42–43, 387 S.E.2d 158, 159

(1990) (other evidence presented by the State supported defendant's premeditation and deliberation conviction even though defendant had told someone prior to the shooting that he was thinking of shooting the victim in the shoulder to "keep him under control") (quotation marks omitted). Because the State presented other evidence supporting Defendant's first-degree murder conviction, the holding in *Carter* does not compel us to vacate Defendant's conviction of murder by premeditation and deliberation.

2. Lying in Wait

A first-degree murder verdict as to one theory will stand even if such a verdict as to another theory fails. *See State v. McLemore*, 343 N.C. 240, 249, 470 S.E.2d 2, 7 (1996) (upholding the defendant's conviction based on premeditation and deliberation but finding error in his conviction based on felony murder). Moreover, provided the record demonstrates which "theory or theories the jury relied [upon] in arriving at its verdict," there is no need for a new trial. *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990). Here, the jury marked the verdict form indicating it found Defendant guilty of first-degree murder based on both theories, premeditation and deliberation and lying in wait. Because we uphold Defendant's first-degree murder conviction based on premeditation and deliberation, we need not address the sufficiency of the evidence for the conviction based on lying in wait.

B. Instructing the Jury on Lying in Wait

At trial, the State sought to instruct the jury on lying in wait over numerous objections by Defendant. The trial court ultimately decided to give the instruction. Defendant argues doing so constituted error based on insufficiency of the evidence Defendant committed first-degree murder by lying in wait. Thus, Defendant frames his argument regarding the giving of the instruction essentially in the same manner he argues the evidence was insufficient to convict on lying in wait. Accordingly, based on our discussion above, we need not separately address this argument.

C. Introduction of Numerous Photographs

[2] At trial, the State admitted approximately 150 photographs, including: (1) the tarp containing the body recovered from where Defendant reburied it; (2) tattered, dirty clothes and jewelry removed from the body; (3) the body in its decomposed state and with maggots; (4) arrangements of bones after the body was "rendered"; and (5) numerous photos of the skull, some showing the bullet hole. Defendant argues, based on N.C. R. Evid. 403, many photos were irrelevant, redundant, and prejudicial as they were designed to prey on jurors' sympathies, and there was

a reasonable probability the jury would have reached a different result had it not been subjected to so many such photos. We disagree.

Because Defendant did not object to the admission of photographic evidence at trial, we review for plain error. N.C. R. App. P. 10(a)(4); *see also State v. Miles*, 223 N.C. App. 160, 164, 733 S.E.2d 572, 575 (2012) ("[W]here there is no objection to the admission of the evidence at trial, we are limited to a review for plain error").

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R. Evid. 403. "[P]hotographs showing the condition of the body and its location when found are competent despite their portrayal of a gruesome spectacle. This holds true even where the photographs depict remains in an advanced state of decomposition, and where the cause of death is uncontroverted." *State v. Harris*, 323 N.C. 112, 127, 371 S.E.2d 689, 698 (1988) (citations omitted). "Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988).

Defendant argues we should reach the same conclusion as in *Hennis*, in which the court held repetitive, "grotesque and macabre" photos "added nothing to the [S]tate's case" and were therefore "only for inflaming the jurors." 323 N.C. at 286, 372 S.E.2d at 528. In *Hennis*, the court also found the manner in which the State presented the photographs compounded their prejudicial effect. Specifically, the *Hennis* court held the "erection of an unusually large screen on a wall directly over defendant's head such that the jury would continually have him in its vision as it viewed the slides" and the "thirty-five duplicative photographs published to the jury one at a time just before the state rested its case" were excessively redundant and "enhanced" the prejudicial effect. *Id.* at 286, 372 S.E.2d at 528.

Here, Defendant argues it was error for the trial court to allow the State to admit a "staggering 150+" photographs. It is not the volume of photographs that pose a potential issue in this case, but rather their content and whether they are overly duplicative or irrelevant. We hold they are not. We note that the vast majority of photos cannot be said to inflame the passion of jurors because they depict unemotional subjects, such as: aerial photos of the burn pit, including one photo which shows only trees and what looks like a field of grass; woods and dirt; investigators digging

into the ground; a brush pile and a dirt hole; and entirely mundane photographs of the home, its yard, and surrounding fence.

Some photographs could be considered distressing but not rising to the level of potentially inflaming jurors, specifically depicting: the tarp in which Bennett's body was wrapped; Bennett's hair sticking out of the tarp; dirty clothes and jewelry; and bones after the body was rendered. Although showing jurors photographs of Bennett's dirty clothes, jewelry, and rendered bones, along with the jurors' knowledge that they were sitting for a murder case, had potential to cause emotion, we cannot say such photographs were "grotesque and macabre," as Defendant argues. The photographs do not depict bloody, gory details of any injuries or any identifiable human features that would arouse jurors' sympathy for Bennett to the point of prejudicing their decision to find Defendant guilty based merely on such photographs. It is true that some photographs depicted Bennett's skull, making visible the bullet hole that killed Bennett. However, these photographs were highly relevant to the State's case in proving the cause of death and had some relevance to the charge of first-degree murder by lying in wait. Our Supreme Court recently stated "[t]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. Even a stipulation as to the cause of death does not preclude the State from proving all essential elements of its case." *State v. Richardson*, 385 N.C. 101, 145-46, 891 S.E.2d 132, 171 (2023) (citation and quotation marks omitted). Here, then, the danger of unfair prejudice did not substantially outweigh the photographs' probative value.

Certainly, the most distressing photographs depicted Bennett's decomposed body, and maggots were clearly visible in some. However, the photographs were used appropriately as evidence to help the State develop and illustrate testimony regarding the extensive search and efforts required to find Bennett's body and to discover Defendant's actions to conceal it, as well as the breakthrough resulting from the information Greene provided regarding re-burial of the body. Defendant's actions subsequent to the murder, specifically his carefully executed plan to conceal the body, were relevant to the elements of premeditation and deliberation, making the difference between first- and second-degree murder. The photographs presented at trial depicted the culmination of the investigation to locate Bennett's body and provided evidence of premeditation and deliberation. *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526. Therefore, this case is distinguishable from *Hennis* because we cannot say such photographs "added nothing" to the State's case. Also, there are no facts suggesting the State presented the photos

in such a prejudicial manner as in *Hennis*, such as how the photographs in that case were displayed unusually large and directly over the defendant's head, keeping the defendant in the jury's view the entire time. Accordingly, Defendant's argument fails, and we find no plain error in the trial court's admission of the photographs.

D. The State's Closing Arguments

Defendant argues the trial court erred by failing to sustain objections to the Prosecutor's statements when he mentioned the punishment for second-degree murder, mentioned Defendant did not have to testify, and discussed the law regarding provocation. Defendant further argues the trial court erred by failing to intervene *ex mero motu* when the Prosecutor commented on Defendant's failure to plead guilty.

As for the three statements to which Defendant objected, the issue is preserved, and we review the trial court's rulings for abuse of discretion. *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003). Specifically, we determine whether "the remarks were improper," then whether "the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* at 101, 588 S.E.2d at 364.

Defendant did not object to the Prosecutor's comment regarding his failure to plead guilty. When a defendant fails to object to a Prosecutor's closing argument at trial, "this Court must determine if the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*," and specifically whether the trial court should have intervened by "(1) preclud[ing] other similar remarks from the offending attorney; and/or (2) instruct[ing] the jury to disregard the improper comments already made." *Id.*, 357 N.C. at 101, 588 S.E.2d at 364 (quotation marks omitted).

1. Mentioning the Punishment for Second-Degree Murder

[3] Defendant contends the prosecutor appealed directly to the jurors' emotions by mentioning the punishment for second-degree murder as opposed to the punishment for first-degree murder. We note the trial court sustained Defendant's objection to the Prosecutor's mention of the punishment for second-degree murder. During closing argument, the Prosecutor stated:

> [Defendant's counsel] talked about punishment. The punishment is life without parole, first degree murder. What he's going to tell you, your decision is not to be based on what the punishment is or isn't. Saying what the

> punishment is simply impresses upon you the seriousness of your duty, and there's nobody that needs to impress that upon you. You already know that. You have already showed us that.
>
> *You know, if I wanted to really upset you, I could tell you the punishment for second-degree murder, minimum punishment for second-degree murder for this defendant, 93 months.*
>
> [DEFENDANT'S COUNSEL]: Objection.
>
> THE COURT: *Sustained.*

(Emphasis added.) However, following the ruling, the trial court did not give a curative instruction.

A trial court's instructions can cure erroneous statements by a prosecutor. *State v. Buckner*, 342 N.C. 198, 238, 464 S.E.2d 414, 437 (1995). Nevertheless, "it is not error for the trial court to fail to give a curative jury instruction after sustaining an objection, when defendant does not request such an instruction." *State v. Williams*, 350 N.C. 1, 24, 510 S.E.2d 626, 642 (1999). General instructions given at the outset of a trial may be "sufficient to cure any prejudicial effect suffered by [a] defendant regarding evidence to which an objection was raised and sustained." *State v. Gordon*, 248 N.C. App. 403, 412, 789 S.E.2d 659, 666 (2016).

Here, the trial court sustained Defendant's objection. Towards the beginning of the trial, the trial court instructed the jury, "When the Court sustains an objection to a question, you must disregard the question and the answer, if one is being given." The trial court additionally instructed the jury during the jury charge, "The jury should not acquit or convict a defendant based on the severity or lack of severity of punishment that will be imposed for the offense." Given the trial court's instructions, and even presuming the Prosecutor's statement was improper, we conclude the statement did not ultimately prejudice the outcome of Defendant's trial. *Walters*, 357 N.C. at 101, 588 S.E.2d at 364.

2. Mentioning Defendant Did Not Have to Testify

[4] Defendant argues he was prejudiced by the Prosecutor mentioning Defendant did not have to testify because a prosecutor may not comment on a defendant's right not to testify. At trial, the Prosecutor stated in his closing argument:

> The Judge will tell you [Defendant] does not have to testify, and the fact that he does not testify cannot be used

> against him and I want you to make sure you don't use it against him. But that doesn't mean he can't call other witnesses -- any witness.
>
> [DEFENDANT'S COUNSEL]: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> [THE STATE]: Judge, I can argue where are the witnesses.
>
> THE COURT: Well, overruled. Overruled.
>
> [THE STATE]: Where are the witnesses? Where is any witness?

A criminal defendant's privilege against self-incrimination is enshrined in our Constitution and law. N.C. Const. art. I, § 23; N.C. Gen. Stat. § 8-54. Our Supreme Court has held "any direct reference to defendant's failure to testify is error and requires curative measures be taken by the trial court." *State v. Reid*, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1993). Specifically, the State

> may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State. However, a prosecution's argument which clearly suggests that a defendant has failed to testify is error. . . .
>
> When the State directly comments on a defendant's failure to testify, the improper comment is not cured by subsequent inclusion in the jury charge of an instruction on a defendant's right not to testify.

Id., at 555–56, 434 S.E.2d at 196–97.

Whether a new trial is appropriate depends on the appellate court's determining whether "[c]omment on an accused's failure to testify . . . is harmless beyond a reasonable doubt." *Id.* at 557, 434 S.E.2d at 198. In applying *Reid*, this Court has focused on whether there was doubt as to the guilt of the defendant. *State v. Riley*, 128 N.C. App. 265, 270, 495 S.E.2d 181, 185 (1998). For example, in *Riley*, this Court concluded the prosecutor's statements during voir dire ("if you want that evidence in, you're going to put the defendant on the stand. . . . You have to let the defendant testify to it") constituted error meriting a new trial because there was conflicting evidence at trial about who fired the gunshots. *Id.* at 269, 495 S.E.2d at 184.

Here, the facts are distinguishable from *Reid*. In *Reid*, the prosecutor stated in his closing argument, "Now defendant hasn't taken the stand in this case-" to which the defendant objected, and the trial court *overruled* the objection. *Id.* at 554, 434 S.E.2d at 196. Here, the trial court *sustained* Defendant's objection to the Prosecutor's mention of Defendant's failure to testify but overruled it to allow the Prosecutor to make an argument regarding Defendant's lack of witnesses. There is no doubt the Prosecutor's statement was improper. However, there also is no doubt regarding the identity of the perpetrator because Defendant, through counsel, admitted to having killed Bennett. In view of the trial court's sustaining Defendant's objection, the evidence of Defendant's motive for planning to kill Bennett, his confession, his use of the .22 caliber handgun, and his acts subsequent to the killing, we hold the Prosecutor's remark pertaining to Defendant's decision whether or not to testify is harmless beyond a reasonable doubt. *Reid*, 334 N.C. at 554, 434 S.E.2d at 196.

3. Statement of Law Regarding Provocation

[5] At trial, the Prosecutor sought instructions regarding "mere words" not rising to the level of legal provocation from a case called *State v. Simonovich*, 202 N.C. App. 49, 54, 688 S.E.2d 67, 71 (2010). The trial court denied the State's request. Nevertheless, the Prosecutor proceeded to explain *Simonovich* in his closing argument. Defendant objected, and the trial court overruled the objection. The Prosecutor explained to the jury, "*State versus Simonovich*, Court of Appeals, 2010. Provocation must be more than mere words as language, however abusive, neither excuses, nor mitigates killing. I'm not talking about cursing, flailing. We're talking about absolutely goading somebody into doing it."

Simonovich is inapposite here because it relates to provocation in the context of *voluntary manslaughter*, which is not at issue in this case. *Id.* at 54, 688 S.E.2d at 71. The relevant law regarding provocation in the context of first- versus second-degree murder is as follows:

> "The fact that defendant was angry or emotional will not negate the element of deliberation during a killing unless there was anger or emotion strong enough to disturb defendant's ability to reason. Evidence that the defendant and the victim argued, without more, is insufficient to show that the defendant's anger was strong enough to disturb his ability to reason."

Geddie, 345 N.C. at 94, 478 S.E.2d at 156 (citations, quotation marks, and brackets omitted).

A misstatement of law by a prosecutor may be "cured by proper instructions given by the trial court when it charge[s] the jury." *State v. Barden*, 356 N.C. 316, 366, 572 S.E.2d 108, 140 (2002). Here, although citing law relevant to voluntary manslaughter rather than first- or second-degree murder, the Prosecutor's explanation of the law is not very different from the correct law regarding provocation (*Simonovich*'s "mere words" versus *Geddie*'s arguing, "without more" not being enough to mitigate first-degree murder). Moreover, the trial court properly instructed the jury it could not find Defendant guilty of first-degree murder if Defendant was under the influence of a violent passion. When instructing the jury on the law relevant to what the State must prove regarding malice, the trial court explained the State must prove:

> [D]efendant acted with deliberation, which means that the defendant acted while the defendant was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried out.

This explanation is the proper statement of law regarding the required state of mind for premeditation and deliberation, and we conclude it cured any misstatement of the law by the Prosecutor. *Barden*, 356 N.C. at 366, 572 S.E.2d at 140.

4. Mentioning the Defendant Failed to Plead Guilty

[6] Defendant argues he was prejudiced by the Prosecutor mentioning Defendant admitted to killing Bennett through counsel but failed to plead guilty because a prosecutor may not comment on a defendant's failure to plead guilty or his exercise of the right to be tried by a jury. In his closing argument, the Prosecutor stated,

> The judge is going to tell you about first-degree murder. [Defendant's counsel] was kind enough to admit what his client could not deny, deny what his client could not admit, to being guilty of this. Killing another human being intentionally with malice, malice equals hatred or ill will or infliction of a wound with a deadly weapon to cause a death.
>
> I believe [Defendant's counsel] said that his client acted with malice and killed Kristen Bennett.

Defendant argues this statement constitutes an improper comment on Defendant's failure to plead guilty.

"A criminal defendant has a constitutional right to plead not guilty and be tried by a jury. Reference by the State to a defendant's failure to plead guilty violates his constitutional right to a jury trial." *State v. Degraffenried*, 262 N.C. App. 308, 310, 821 S.E.2d 887, 889 (2018) (brackets omitted). This Court's job is to determine "whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 311, 821 S.E.2d at 889.

Here, the Prosecutor was building an argument regarding premeditation and deliberation, noting Defendant admitted to killing Bennett but not to what was the largest point of dispute at trial—the requisite intent for first-degree murder. For example, the Prosecutor continued: "[D]efendant, of course, caused the victim's death. . . . Okay. Premeditation and deliberation, this is what [Defendant's counsel] did not stipulate to. Because this makes his client guilty of first-degree murder. So we're going to break this down into common sense." We conclude the Prosecutor's comment was directed at what was and was not at issue for the jurors to decide rather than an improper statement regarding Defendant's failure to plead guilty. In any event, the Prosecutor's comment was not so grossly improper that the trial court failed to intervene *ex mero motu* because it was much more clearly a reference to what the jurors were already well aware of (Defendant's admission, through counsel, regarding the killing) than a targeted attack on Defendant's failure to plead guilty.

III. <u>Conclusion</u>

For the foregoing reasons, we hold substantial evidence supported Defendant's jury conviction for first-degree murder based on premeditation and deliberation, and thus, we do not address the sufficiency of the evidence with regard to the theory of lying in wait. We further hold the admission of numerous and graphic photographs did not constitute plain error in a case focused on Defendant's acts subsequent to the murder as they related to premeditation and deliberation. Finally, we hold the alleged improper statements in the Prosecutor's closing argument did not prejudice Defendant. Consequently, we hold Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges ZACHARY and FLOOD concur.

STATE OF NORTH CAROLINA
v.
DESJAUN MONTRE CLAWSON, OMAR SIRREE JACKSON, AND
DAMARCUS JEREMALE WIGGINS

No. COA22-787

Filed 7 November 2023

1. Criminal Law—joinder—multiple defendants—trafficking and conspiracy charges—lack of conflicting defenses

The trial court did not err by granting the State's motion to join the cases of three defendants, who were each charged with the same drug-related trafficking and conspiracy offenses after law enforcement apprehended them in an apartment in which illegal substances and drug paraphernalia were found. There were no confessions, affirmative defenses such as alibi, or conflicting defenses that would have deprived defendants of a fair trial.

2. Evidence—defendant as driver of vehicle—hearsay analysis—personal observation—explanation for subsequent surveillance

There was no error in a drug prosecution by the admission of testimony from detectives regarding their identification of defendant as the driver of a particular vehicle on multiple occasions and their knowledge of previous complaints made about the vehicle. The statements were not hearsay because they were either based on direct knowledge and/or were offered not to prove the truth of the matter asserted but, rather, to explain the reason why law enforcement subsequently targeted that vehicle for surveillance.

3. Drugs—trafficking offenses—possession—constructive—other incriminating circumstances

In a drug trafficking prosecution arising from a search by law enforcement of two apartments, the State presented substantial evidence from which a jury could conclude that two defendants each had constructive possession of the heroin and fentanyl mixture and the cocaine base that were each discovered in both apartments, even though defendants were apprehended in just one of the apartments. Although neither defendant had exclusive possession of the premises in which the substances were found, the State presented other incriminating circumstances of constructive possession, including that each defendant had a large amount of money on their person and that both apartments contained the same illegal substances and similar drug-related items.

4. Conspiracy—criminal conspiracy—to traffic drugs—evidence of agreement—hotel room rental application

In a drug prosecution of three defendants arising from a search by law enforcement of two apartments (all three defendants were apprehended in one apartment, while both apartments contained illegal substances and drug paraphernalia), the State presented substantial evidence from which a jury could conclude that each defendant agreed to participate in a conspiracy to traffic in opium or heroin and in a conspiracy to traffic in cocaine. In addition to the illegal substances found in both apartments, there was sufficient evidence of other incriminating circumstances to prove defendants' constructive possession of the drugs in the unoccupied apartment, and, in the apartment where defendants were found, there was a key and a rental agreement for the other apartment; the rental agreement was signed by one of the defendants and dated the same day the search warrants were executed.

Appeal by Defendants from judgments entered 31 August 2021 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 3 October 2023.

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

Grace, Tisdale & Clifton, P.A., by Michael A. Grace and Christopher R. Clifton, for Defendant Desjaun Montre Clawson; Anne Bleyman for Defendant Omar Sirree Jackson; and Gammon, Howard & Zeszotarski, PLLC, by Joseph E. Zeszotarski, Jr., for Defendant Demarcus Jeremale Wiggins.

COLLINS, Judge.

Desjaun Montre Clawson, Damarcus Jeremale Wiggins, and Omar Sirree Jackson (collectively, "Defendants") appeal from the trial court's judgments entered upon guilty verdicts of various drug-related offenses. Defendants argue that the trial court erred by allowing the State's motion to join Defendants' cases for trial. Wiggins argues that the trial court erred by admitting certain testimony at trial. Clawson and Wiggins each argue that the trial court erred by denying their motions to dismiss trafficking in opium or heroin and trafficking in cocaine charges. Finally, Defendants each argue that the trial court erred by denying their motions to dismiss conspiracy to traffic in opium or heroin and conspiracy to traffic in cocaine charges. We find no error.

I. Background

The evidence at trial tended to show the following: On 18 October 2018, Detective Matthew Rinehardt with the Haywood County Sheriff's Department received an anonymous phone call alleging that there was drug activity at the Olive View Apartments. The apartment building was formerly a motel which had been converted into efficiency apartments. Rinehardt was familiar with the apartments because there had been numerous complaints concerning "narcotics, people with warrants, things like that."

Rinehardt relayed this information to Detective Jordan Reagan, and Reagan went to the apartments and "put eyes on to start watching and seeing if there was any activity moving, any vehicles coming and going, or anything that we could act on." Reagan parked his unmarked patrol vehicle about one-tenth of a mile away from the apartments and used binoculars to observe the property. While conducting surveillance, Reagan observed a black Dodge Charger parked in front of the apartments. The Charger had a silver "swoop that follows the contour of the body." Reagan was familiar with the vehicle as it had been the subject of previous complaints and was being watched for "possibly being involved in narcotics[.]" Rinehardt had seen Wiggins operating the vehicle on multiple occasions.

Reagan also observed traffic in and out of the last two apartments, Rooms 14 and 15. Several vehicles would pull up, "[s]ometimes just one person would get out" and "[t]he driver would stay in the vehicle[,]" and "[t]he person would meet with people at the apartments, stay for a minute or go inside the apartment and leave[.]" On two occasions, Reagan witnessed "two black males come out of Apartment 14 and walk into 15, stay for a couple minutes, [and] come back out." One of the black males had a "tall, skinnier-type build with dreads, and the other black male was short and heavier set, short hair and had a bright pair of pants."

Reagan called officers from the criminal suppression unit for assistance. Several officers began conducting traffic stops of vehicles exiting the apartments based on information from Reagan, including "occupants of the vehicle, description of the vehicle, make, model, color, and the direction of travel." At some point, Reagan observed a female leave Room 14, get into the black Charger, and drive out of the parking lot. An officer conducted a traffic stop of the vehicle near the Dollar General, and Reagan arrived on the scene for backup. Upon searching the vehicle, the officer discovered a mirror with a white powdery residue and a needle.

Based upon the information gathered, search warrants were issued for Rooms 14 and 15, and separate teams of law enforcement conducted the searches simultaneously. Room 15 was unoccupied, but the bed was "askew as if someone had been in it[.]" Rinehardt requested a K-9 search of the room, and the K-9 alerted to the dresser. In the top drawer of the dresser, a Bojangles bag was found containing 58.4 grams of a gray chalky substance, 27.2 grams of a tan rock substance, 37.2 grams of a white powdery substance, and two digital scales, which "are used to take quantities of drug and break them down into a smaller quantity." The substances found in the Bojangles bag were chemically analyzed; the gray chalky substance was determined to be a heroin and fentanyl mixture, the tan rock substance was determined to be cocaine base, and the white powdery substance was determined to be cocaine hydrochloride.[1]

Room 14 was occupied by Clawson, Jackson, Wiggins, and Craig Hambrick, and they were sitting in the living area smoking a joint. The officers detained the four men and patted them down for weapons. Rinehardt patted Wiggins down and found $2,175 in his front pants pocket. The cash was not consistently folded or in a single stack, but rather was "in a wad" and "kind of all jumbled up in his pocket." Another officer patted Clawson down and found a total of $5,330 on his person.

Plastic bags containing 3.3 grams of a gray chalky substance and .9 grams of a tan rock substance were found on the floor of Room 14. The substances were chemically analyzed; the gray chalky substance was determined to be a heroin and fentanyl mixture and the tan rock substance was determined to be cocaine base. A document appearing to be a rental application for the Olive View Apartments was found in the kitchenette area. Jackson's name and driver's license number appeared at the top of the document, and "a signature that appeared to be consistent with the name Omar Jackson" appeared at the bottom of the document. The rental application was dated 18 October 2018, the same day the search warrants were executed. A key to Room 15 was found next to the rental application.

The following items were also found in Room 14: multiple Bojangles bags, boxes, and cups throughout the room; a rolled-up dollar bill on the futon; a lighter and tin foil on the floor near the futon; a hide-a-can in the kitchenette area, which "has the actual identical weight, label, and look of a soda can, but if you twist the top, the top actually breaks off . . . [a]nd then there is a hollow portion on the inside where things can be

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1. Cocaine base is "sometimes called crack cocaine[,]" whereas cocaine hydrochloride is "a salt form" and is "more powdery, and it will dissolve more readily in water than cocaine base will."

hidden"; two razor blades with a white powdery residue in the kitchenette area; a large plastic bag containing smaller plastic bags in the kitchenette area; a Pyrex dish containing a butter knife, tongs, and "crystal substance and residue in the bottom" in the kitchenette area; a safe with the word "dope" written on it containing Narcan kits[2] in the bedroom; and a black Coach bag containing Wiggins' identification card in the bedroom.

Defendants were indicted for trafficking in opium or heroin, conspiracy to traffic in opium or heroin, trafficking in cocaine, and conspiracy to traffic in cocaine.[3] The matter came on for trial on 23 August 2021. The State moved to join Defendants' cases for trial, and the trial court allowed the State's motion over Defendants' objections.[4] At the close of the State's evidence, Defendants moved to dismiss the charges for insufficient evidence. The trial court denied the motions.

The jury returned guilty verdicts on all charges against Clawson; the trial court consolidated the convictions and sentenced him to 225 to 282 months of imprisonment. The jury returned guilty verdicts on all charges against Wiggins. The trial court consolidated Wiggins' convictions for trafficking in opium or heroin and conspiracy to traffic in opium or heroin and sentenced him to 225 to 282 months of imprisonment; the trial court consolidated Wiggins' convictions for trafficking in cocaine and conspiracy to traffic in cocaine into a separate judgment and sentenced him to a consecutive term of 35 to 51 months of imprisonment. The jury returned not guilty verdicts on the trafficking charges and guilty verdicts on the conspiracy charges against Jackson; the trial court consolidated the convictions and sentenced him to 225 to 282 months of imprisonment. Defendants appealed.

II. Discussion

A. State's Motion for Joinder

[1] Defendants first argue that the trial court erred by allowing the State's motion to join Defendants' cases for trial.

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2. A Narcan kit is "either given nasally or through an injection to reverse the effects of an overdose on heroin or opiates[.]"

3. Jackson was also indicted for two counts of maintaining a dwelling for the purpose of keeping or selling controlled substances, but the State dismissed these charges prior to trial.

4. Hambrick was also indicted for trafficking in opium or heroin, conspiracy to traffic in opium or heroin, trafficking in cocaine, and conspiracy to traffic in cocaine. The State initially included Hambrick in its motion for joinder. However, Hambrick was tried separately from Defendants and is not a party to this appeal.

Under N.C. Gen. Stat. § 15A-926(b)(2)(a), charges against two or more defendants may be joined for trial where "each of the defendants is charged with accountability for each offense[.]" N.C. Gen. Stat. § 15A-926(b)(2)(a) (2021). However, section 15A-927(c)(2)(a) requires the trial court to deny a motion for joinder "[i]f before trial . . . it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants[.]" *Id.* § 15A-927(c)(2)(a) (2021). "Even though the defendants in a joint trial may offer antagonistic or conflicting defenses, that fact alone does not necessarily warrant severance. The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *State v. Lowery*, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986) (quotation marks and citations omitted).

"Whether defendants should be tried jointly or separately pursuant to these provisions is a matter addressed to the sound discretion of the trial judge." *State v. Rasor*, 319 N.C. 577, 581, 356 S.E.2d 328, 331 (1987) (citation omitted). "Absent a showing that defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed on appeal." *Id.* (citation omitted).

Here, Defendants were indicted for trafficking in opium or heroin, conspiracy to traffic in opium or heroin, trafficking in cocaine, and conspiracy to traffic in cocaine stemming from the same incident on 18 October 2018. There were "no statements or confessions which [the State] intend[ed] to offer at this trial," and there were "no affirmative defenses such as alibi or other matters which might impact the ability of the defendants to be joined at this trial." Because there were no antagonistic or conflicting defenses that would deprive Defendants of a fair trial, the trial court did not err by allowing the State's motion to join Defendants' cases.

B. Admission of Certain Evidence and Testimony

[2] Wiggins argues that the trial court erred by admitting testimony that law enforcement had seen him operating the black Charger on multiple occasions, that the vehicle had been the subject of previous complaints, and that the vehicle was being watched for possibly being involved in narcotics.[5]

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5. Within Clawson's argument that the trial court erred by denying his motion to dismiss, he asserts that the trial court erred by admitting "evidence of [the] monies found in Clawson's pocket at the time of the bust" and by admitting testimony regarding the anonymous phone call. However, Clawson failed to cite any supporting authority for these assertions and any argument is thus deemed abandoned. N.C. R. App. P. 28(b)(6).

"The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *State v. Gayles*, 233 N.C. App. 173, 176, 756 S.E.2d 46, 48 (2014). An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. *Id.*

Hearsay is a statement other than one made by the declarant while testifying at trial that is offered in evidence to prove the truth of the matter asserted. N.C. Gen. Stat. § 8C-1, Rule 801. "Out-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (citation omitted). "Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *Id.*

Here, Rinehardt testified as follows:

> [RINEHARDT]: The black Dodge Charger was known to me. We had gotten previous complaints on it, and I had --
>
> . . . .
>
> [RINEHARDT]: And I had been following it and conducting surveillance on the Olive View Apartments prior to this date.
>
> [THE STATE]: Okay. Were you familiar with this vehicle?
>
> [RINEHARDT]: I was.
>
> . . . .
>
> [THE STATE]: And do you have personal knowledge of who the operator of that vehicle was at a relevant time to this investigation?
>
> [RINEHARDT]: I do.
>
> [THE STATE]: And how do you have that knowledge?
>
> [RINEHARDT]: I observed Mr. Wiggins driving the black Dodge Charger.
>
> [THE STATE]: Okay. And was that here in our community?
>
> [RINEHARDT]: Yes, sir.
>
> [THE STATE]: And was that on one time or more than one time?

[RINEHARDT]: More than one time.

Rinehardt testified that he had personal knowledge of the black Charger and that he had seen Wiggins operating the vehicle on multiple occasions. As these statements were based on Rinehardt's personal knowledge, they were not hearsay. Furthermore, his statement that "[w]e had gotten previous complaints on it" was not offered for the truth of the matter asserted, but instead was offered to explain his subsequent surveillance of the Charger; accordingly, it was not hearsay. *See id.*

Furthermore, Reagan testified as follows:

> [THE STATE]: . . . Do you recognize the building or any vehicles depicted in State's Exhibit 2?
>
> [REAGAN]: Yes, sir. This is the Olive View Apartments, and that's the black Dodge Charger sitting in front of it.
>
> . . . .
>
> [THE STATE]: Were you familiar with that vehicle?
>
> [REAGAN]: Yes, sir.
>
> [THE STATE]: How were you familiar with that vehicle?
>
> [REAGAN]: Just from other officers advising me of that vehicle and who had been riding around in it.
>
> [THE STATE]: I understand. So officers generally share information with each other?
>
> [REAGAN]: Yes, sir.
>
> [THE STATE]: That was a vehicle that was being watched?
>
> [REAGAN]: Yes, sir.
>
> [THE STATE]: By your agency?
>
> [REAGAN]: Yes, sir.
>
> . . . .
>
> [THE STATE]: Why were y'all watching that vehicle?
>
> [REAGAN]: For possibly being involved in narcotics --

Reagan's statements were not hearsay because they were offered to explain his subsequent conduct. *See id.* After Reagan observed the black Charger and traffic in and out of Rooms 14 and 15, he "contacted Sergeant Mark Mease . . . on [the] criminal suppression unit with

Haywood County . . . , advised him of what [he] had been watching and observing, and they came and set up in marked patrol cars and started conducting traffic stops on vehicles leaving this area." As these statements were offered to explain Reagan's subsequent conduct, they were not hearsay.

Accordingly, as the challenged statements were not hearsay, the trial court did not err by admitting the testimony.

C. Motion to Dismiss

Defendants each argue that the trial court erred by denying their motion to dismiss at the close of the State's evidence. Specifically, Clawson and Wiggins argue that the trial court erred by denying their motions to dismiss the charges of trafficking in opium or heroin and trafficking in cocaine, and Defendants each argue that the trial court erred by denying their motion to dismiss the charges of conspiracy to traffic in opium or heroin and conspiracy to traffic in cocaine.

We review a trial court's denial of a motion to dismiss de novo. *State v. Chavis*, 278 N.C. App. 482, 485, 863 S.E.2d 225, 228 (2021). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (quotation marks and citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Rivera*, 216 N.C. App. 566, 568, 716 S.E.2d 859, 860 (2011) (quotation marks and citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Chekanow*, 370 N.C. at 492, 809 S.E.2d at 549-50 (quotation marks and citation omitted). Any contradictions or discrepancies in the evidence are for the jury to decide. *State v. Wynn*, 276 N.C. App. 411, 416, 856 S.E.2d 919, 923 (2021).

1. Trafficking in Opium or Heroin and Trafficking in Cocaine

[3] Clawson and Wiggins were convicted of trafficking in opium or heroin and trafficking in cocaine.

Under North Carolina law, "[a]ny person who sells, manufactures, delivers, transports, or possesses four grams or more of opium, . . . including heroin, or any mixture containing such substance, shall be guilty of

a felony which felony shall be known as 'trafficking in opium, opiate, opioid, or heroin[.]' " N.C. Gen. Stat. § 90-95(h)(4) (2021). Furthermore, "[a]ny person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine . . . shall be guilty of a felony, which felony shall be known as 'trafficking in cocaine[.]' " N.C. Gen. Stat. § 90-95(h)(3) (2021).

Possession of a controlled substance may be either actual or constructive. *State v. Nettles*, 170 N.C. App. 100, 103, 612 S.E.2d 172, 174 (2005). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Ferguson*, 204 N.C. App. 451, 459, 694 S.E.2d 470, 477 (2010) (quotation marks and citations omitted). "Constructive possession occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the substance." *State v. Acolatse*, 158 N.C. App. 485, 488, 581 S.E.2d 807, 810 (2003) (quotation marks and citation omitted).

"Constructive possession depends on the totality of the circumstances in each case." *State v. Taylor*, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010) (citation omitted). "Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation omitted). When determining whether other incriminating circumstances exist to support a finding of constructive possession, we consider, among other things: (1) "the defendant's ownership and occupation of the property"; (2) "the defendant's proximity to the contraband"; (3) "indicia of the defendant's control over the place where the contraband is found"; (4) "the defendant's suspicious behavior at or near the time of the contraband's discovery"; and (5) "other evidence found in the defendant's possession that links the defendant to the contraband." *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552 (citations omitted).

Because neither Clawson nor Wiggins had exclusive possession of Room 15 where the substances were found, the State was required to show other incriminating circumstances sufficient for the jury to find that each defendant constructively possessed the contraband. *Miller*, 363 N.C. at 99, 678 S.E.2d at 594.

a. Room 15

A Bojangles bag containing 58.4 grams of a gray chalky substance, 27.2 grams of a tan rock substance, 37.2 grams of a white powdery

substance, and two digital scales were found in the top drawer of a dresser in Room 15. The substances were chemically analyzed; the gray chalky substance was determined to be a heroin and fentanyl mixture, the tan rock substance was determined to be cocaine base, and the white powdery substance was determined to be cocaine hydrochloride.

b. Room 14

Clawson, Jackson, Wiggins, and Hambrick occupied Room 14. Bojangles bags, boxes, and cups were found throughout the room. Plastic bags containing 3.3 grams of a gray chalky substance and .9 grams of a tan rock substance were found on the floor. The substances were chemically analyzed; the gray chalky substance was determined to be a heroin and fentanyl mixture and the tan rock substance was determined to be cocaine base.

c. Clawson's Person

After Clawson was detained, an officer conducted a pat down and found $5,330 on his person.

d. Wiggins' Person

Rinehardt conducted a pat down of Wiggins and found $2,175 in his front pants pocket. The cash was not consistently folded or in a single stack, but rather was "in a wad" and "kind of all jumbled up in his pocket." Furthermore, a black Coach bag containing Wiggins' identification card was found in the bedroom of Room 14.

The Bojangles bags found in both Rooms 14 and 15; the gray chalky substance that was determined to be a heroin and fentanyl mixture found in both Rooms 14 and 15; the tan rock substance that was determined to be cocaine base found in both Rooms 14 and 15; and the large amount of cash found on Clawson's person was sufficient evidence of other incriminating circumstances from which the jury could find that Clawson constructively possessed the contraband found in Room 15. Likewise, the Bojangles bags found in both Rooms 14 and 15; the gray chalky substance that was determined to be a heroin and fentanyl mixture found in both Rooms 14 and 15; the tan rock substance that was determined to be cocaine base found in both Rooms 14 and 15; and the large amount of cash found on Wiggins' person was sufficient evidence of other incriminating circumstances from which the jury could find that Wiggins constructively possessed the contraband found in Room 15.

Accordingly, the trial court did not err by denying Clawson's and Wiggins' motions to dismiss the trafficking in opium or heroin and trafficking in cocaine charges.

2. Conspiracy to Traffic in Opium or Heroin and Conspiracy to Traffic in Cocaine

[4] Defendants were convicted of conspiracy to traffic in opium or heroin and conspiracy to traffic in cocaine.

"A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Winkler*, 368 N.C. 572, 575, 780 S.E.2d 824, 826-27 (2015) (quotation marks and citation omitted). "This evidence may be circumstantial or inferred from the defendant's behavior." *State v. Shelly*, 176 N.C. App. 575, 586, 627 S.E.2d 287, 296 (2006) (citation omitted). "The crime of conspiracy does not require an overt act for its completion; the agreement itself is the crime." *Id.* "Proof of a conspiracy is generally established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Jenkins*, 167 N.C. App. 696, 700, 606 S.E.2d 430, 433 (2005) (quotation marks, brackets, and citation omitted).

To convict Defendants of conspiracy to traffic in opium or heroin, the State was required to prove that Defendants entered into an agreement to possess four grams or more of opium, including heroin, or any mixture containing such substance. N.C. Gen. Stat. § 90-95(h)(4). Furthermore, to convict Defendants of conspiracy to traffic in cocaine, the State was required to prove that Defendants entered into an agreement to possess 28 grams or more of cocaine. N.C. Gen. Stat. § 90-95(h)(3).

In addition to the above evidence of Clawson's and Wiggins' constructive possession of the contraband found in Room 15, a document appearing to be a rental application for the Olive View Apartments was found in the kitchenette area of Room 14. Jackson's name and driver's license number appeared at the top of the document, and "a signature that appeared to be consistent with the name Omar Jackson" appeared at the bottom of the document. The rental application was dated 18 October 2018, the same day the search warrants were executed. A key to Room 15 was found next to the rental application. This evidence, when taken collectively, was sufficient to establish that Defendants entered into an agreement to traffic in opium or heroin and to traffic in cocaine.

Accordingly, the trial court did not err by denying Defendants' motions to dismiss the conspiracy to traffic in opium or heroin and conspiracy to traffic in cocaine charges.

III. Conclusion

The trial court did not err by allowing the State's motion to join Defendants' cases for trial. Furthermore, the trial court did not err by admitting certain testimony at trial. Finally, the trial court did not err by denying Defendants' motions to dismiss. Accordingly, we find no error.

NO ERROR.

Judges GRIFFIN and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
MANUEL HARPER

No. COA23-206

Filed 7 November 2023

Sentencing—double jeopardy—convictions for offense and lesser-included offense—judgment arrested—resentencing not required

Where defendant was convicted of driving while impaired (DWI), felony hit and run, felony serious injury by vehicle, and habitual felon status, the trial court erred by failing to arrest judgment on defendant's conviction for DWI, because it is a lesser-included offense of felony serious injury by vehicle. Accordingly, the appellate court arrested judgment on the DWI conviction; however, the matter did not need to be remanded for resentencing because the trial court had consolidated defendant's convictions for DWI, felony hit and run, and habitual felon status together and sentenced defendant in the presumptive range, then sentenced defendant in the presumptive range for his felony serious injury by vehicle and habitual felon status convictions, and then ordered both sentences to run concurrently.

Appeal by defendant from judgment entered 9 February 2022 by Judge Cy A. Grant in Pitt County Superior Court. Heard in the Court of Appeals 4 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew E. Buckner, for the State.

Law Office of Sandra Payne Hagood, by Sandra Payne Hagood, for the defendant-appellant.

TYSON, Judge.

Manuel Harper ("Defendant") appeals from judgment entered after a jury convicted him of one count of driving while impaired ("DWI"), one count of felony failure to stop with injury, and one count of felony serious injury by vehicle. Defendant also pled guilty to attaining habitual felon status. Our review discerns no error.

I. Background

Deborah Sheppard ("Sheppard") was driving her 2016 Nissan from her son's birthday party at her mother's house in Snow Hill back to Greenville at 9:00 p.m. on 15 August 2020. Her best friend's daughter was a passenger inside the vehicle. Sheppard was traveling on US Highway 13 when she saw a Buick vehicle traveling in the opposite direction cross over into her lane of travel. The vehicle in front of Sheppard swerved out of the way and missed the oncoming Buick. Sheppard was unable to avoid the collision.

The Buick impacted her Nissan on the front driver's side. All airbags deployed inside her car. The damage from the collision to her vehicle was "very impactful." Sheppard could not open the driver's side front door.

Sheppard looked over to the Buick and observed a black male wearing a white t-shirt seated in the driver's seat. The driver was the only person present inside the Buick. Sheppard watched the Buick's driver turn on the overhead light inside the vehicle, exit, and walk away from the scene of the collision.

Logan Latham ("Latham") was driving behind Sheppard's vehicle and witnessed the collision. Latham pulled onto the side of the highway, called 911, and went to check on the occupants of both the Nissan and Buick. Latham observed the Nissan was damaged on the driver's side. The occupants had exited the Nissan on the passenger's side.

Latham went to check on the Buick. Latham observed a black male wearing a white t-shirt and gym shorts inside of the vehicle. The driver appeared to Latham to be "intoxicated and out of it." The Buick's driver turned on his vehicle's interior light, looked around, and attempted to re-start the car. The driver exited the Buick and began walking towards Greenville. Latham testified the Buick's driver appeared unbalanced as he walked away from the accident.

North Carolina Highway Patrol troopers responded to the call reporting the collision at approximately 9:03 p.m. Sergeant Phillip Briggs was traveling away from Greenville towards the scene of the collision on US Highway 13. Sergeant Briggs was advised a black male wearing a white t-shirt was walking away from the scene of the collision. Sergeant Briggs observed a man matching the description walking along the shoulder of US Highway 13 towards Greenville.

Sergeant Briggs turned his vehicle around, pulled behind the man, and activated his blue lights. When Sergeant Briggs activated his blue lights, the man looked backed at them, reached into his pocket, pulled out a cigarette and lit it. Sergeant Briggs exited the vehicle, approached the man, and began to question him. The man pulled a pack of cigarettes and a black and chrome key from inside his pockets.

Sergeant Briggs noticed the man had a slight abrasion on the right side of his forehead, had glassy eyes, was unstable on his feet, and had slurred speech. Sergeant Briggs smelled alcohol mixed with cigarette smoke on the man's breath. Sergeant Briggs asked the man to accompany him back to the scene of the collision, and the man agreed.

Trooper Joshua Proctor also responded to the scene of the collision. Trooper Proctor observed several vehicles on the shoulder of the roadway and a couple of vehicles involved in the collision located partially in the roadway. Trooper Proctor spoke with Sheppard and Latham. Sergeant Briggs arrived on the scene of the collision and removed Defendant from his car. Sheppard was transported to Vidant Hospital where she was treated for her seat belt injury, extreme soreness, difficulty walking, and knots in her right leg.

Trooper Proctor spoke with Defendant. Trooper Proctor also smelled a strong odor of alcohol emitting from Defendant's breath, his eyes were very red and glassy, and he displayed a dark-in-color mark across his chest.

Sergeant Briggs went to the Buick involved in the accident. A wallet with a photo identification card therein was found on the center console of the Buick. Sergeant Briggs confirmed the North Carolina photo identification card contained Defendant's name. Defendant confirmed to Sergeant Briggs that wallet belonged to him. Defendant also confirmed his name to Trooper Proctor.

Trooper Proctor conducted a horizontal gaze nystagmus test. Defendant exhibited six out of six clues of impairment. Defendant told Sergeant Briggs he had consumed a 40-ounce beer. Trooper Proctor

asked Defendant to submit to a portable breath test, Defendant submitted, with both tests positive for alcohol.

Trooper Proctor placed Defendant under arrest for impaired driving. Defendant was transported to Pitt County Detention Center, where he complained of chest pain, and was then taken to Vidant Hospital. Trooper Proctor attempted to obtain a blood sample from Defendant, but he refused. Trooper Proctor then obtained a search warrant for Defendant's blood and returned to Vidant Hospital where Defendant's blood was drawn. Defendant's blood sample contained 0.17 grams of alcohol per hundred (100) milliliters.

Defendant was indicted for one count of DWI, one count of felony hit and run, two counts of felony serious injury by motor vehicle, one count of operating a vehicle without insurance, and having attained habitual felon status. Defendant was also charged with operating a vehicle with a fictitious or altered registration card or tag and driving with a revoked license.

Defendant's trial began on 7 February 2022. At the close of the State's evidence Defendant's counsel moved to dismiss all charges. The trial court dismissed one count of felony serious injury by motor vehicle, operating a vehicle without insurance, operating a vehicle with a fictitious or altered registration, driving with a revoked license, and reckless driving.

Defendant was convicted of DWI, felony hit and run, and one count of felony serious injury by vehicle. Defendant pleaded guilty to having attained habitual felon status. Defendant was sentenced as a prior record level V with 14 prior record level points.

The trial court consolidated Defendant's convictions for DWI, felony hit and run, and attaining the status of a habitual felon and sentenced him to an active term of 89 to 119 months. Defendant was also sentenced to an active term of 101 to 134 months for his felony serious injury by vehicle conviction and attaining habitual felon status. The trial court ordered both sentences to run concurrently. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issue

Defendant argues the trial court erred by entering judgments against him for convictions of felony serious injury by vehicle and for DWI.

IV. Standard of Review

This Court reviews double jeopardy issues *de novo*. *State v. Hagans*, 188 N.C. App. 799, 804, 656 S.E.2d 704, 707 (2008).

V. Double Jeopardy

Defendant argues error in the judgments against him for felony serious injury by vehicle and for DWI. Defendant asserts the trial court should have arrested judgment on the DWI conviction because DWI is a lesser-included offense of felony serious injury by vehicle. *See* N.C. Gen. Stat. § 20-141.4(a3) (2021).

During the sentencing phase of Defendant's trial, the State informed the trial court:

> [THE STATE]: The DWI merges with the felony by operation of law because it's an element of the felony serious injury by vehicle. So there will not [be] a separate judgment for the impaired driving conviction.
>
> THE COURT: There would be?
>
> [THE STATE]: There is not because it merges with the greater felony offense/ [sic] And that's what the statute and case law says, Judge.

"Both the fifth amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution prohibit multiple punishments for the *same* offense absent clear legislative intent to the contrary." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987) (citation omitted).

In *Etheridge*, our Supreme Court articulated the test to determine whether double jeopardy attaches in a single prosecution as "whether each statute requires proof of a fact which the others do not." *Id.* (citing *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed 306 (1932); *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982)). The Supreme Court held:

> By definition, all the essential elements of a lesser included offense are also elements of the greater offense. Invariably then, a lesser included offense requires no proof beyond that required for the greater offense, and the two crimes are considered identical for double jeopardy purposes. If neither crime constitutes a lesser included offense of the other, the convictions will fail to support a plea of double jeopardy.

Etheridge, 319 N.C. at 50, 352 S.E.2d at 683 (citation omitted).

As the State correctly noted at trial, DWI is a lesser included offense of felony serious injury by vehicle. *See State v. Mumford*, 364 N.C. 394, 401, 699 S.E.2d 911, 916 (2010) ("In the present case defendant was found guilty of the greater offense of felony serious injury by vehicle but acquitted of the lesser offense of driving while impaired."). The State on appeal does not argue the charge of DWI is not a lesser included of felony serious injury by vehicle. The State argues Defendant was not prejudiced by the violation because Defendant's convictions were consolidated into two separate judgments. Arresting judgment on the DWI conviction would not alter or reduce the total time Defendant is required to serve, because the trial court ordered his sentences to run concurrently.

Defendant was sentenced as a habitual felon in the presumptive ranges of 101 to 134 months for his Class C conviction for felony serious injury by vehicle and to 89 to 119 months for his combined DWI and Class D conviction for felony hit and run. "When the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing[.]" *State v. Hardy*, 242 N.C. App. 146, 160, 774 S.E.2d 410, 420 (2015) (citation omitted). This Court normally remands after arresting judgment if we were "unable to determine what weight, if any, the trial court gave to each of the separate convictions[.]" *State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127-28 (1990).

In *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) our Supreme Court remanded a defendant's convictions for resentencing when one, but not all, of the convictions consolidated for judgment had been vacated, holding:

> Since it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.

Id.

In *Cromartie*, this Court had arrested judgment due to potential collateral consequences, but did not remand for resentencing because the defendant received the lowest possible *sentencing in the mitigated range*. *State v. Cromartie*, 257 N.C. App. 790, 797, 810 S.E.2d 766, 772 (2018). "[W]e do not remand for resentencing where Defendant has

already received the lowest possible sentence because remanding when one of the convictions of a consolidated sentence is in error is based on the premise that multiple offenses probably influenced the defendant's sentence." *Id.* (citation omitted).

Unlike in *Wortham* and *Cromartie*, Defendant's convictions were consolidated into two distinct concurrent judgments with presumptive range sentences. While Defendant was sentenced in the presumptive range for his consolidated DWI and felony hit and run judgment, he was also sentenced in a separate judgment in the presumptive range for his felony serious injury by vehicle to a longer sentence of 101 to 134 months.

Defendant is serving this longer concurrent sentence. As the State argued at trial, the DWI conviction is properly arrested, but it is unnecessary to remand for resentencing. The properly-arrested DWI conviction was consolidated with the felony hit and run conviction, and that judgment specified the shorter of the two concurrent sentences.

VI. Conclusion

The trial court erred by failing to arrest judgment on Defendant's conviction for DWI, as it is a lesser-included offense within the conviction for serious injury by vehicle. We arrest judgment on Defendant's conviction for DWI in 20 CRS 05490. *See generally State v. Fields*, 374 N.C. 629, 636, 843 S.E.2d 186, 191 (2020) (discussing when this Court should arrest judgment rather than vacate a judgment).

However, the presence of Defendant's separate conviction for felony serious injury by vehicle and judgment for a longer concurrent presumptive sentence does not require remand for resentencing. Defendant's conviction for felony hit and run, and his judgment and sentence for felony serious injury by vehicle, remain undisturbed, as does Defendant's guilty plea to attaining habitual felon status. *It is so ordered.*

JUDGMENT ARRESTED: 20CRS05490.

NO PREJUDICIAL ERROR: 21CRS05491 AND 21CRS192.

Judges HAMPSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
LAKETTA HUSSAIN, Defendant

No. COA22-1024

Filed 7 November 2023

1. Obstruction of Justice—altering court documents—lack of evidence—conviction vacated

In a case involving forgery, residential mortgage fraud, and related offenses regarding a home loan application, the trial court erred by denying defendant's motion to dismiss the charge of altering court documents where, as the State conceded, no evidence was presented that defendant altered an official court document, as required by N.C.G.S. § 14-221.2, since the Florida child support order that she had submitted with her loan application as documentation of her income was a copy that she had altered, while the official order remained unaltered. The conviction was vacated and, where the offense had been consolidated with other convictions and defendant did not receive the lowest possible sentence in the presumptive range, the matter was remanded for resentencing.

2. False Pretense—obtaining property by false pretenses—home loan—elements—actual deception

In defendant's trial for forgery, residential mortgage fraud, and related offenses regarding a home loan application and subsequent mortgage modification requests, the State presented substantial evidence of each element of the offense of obtaining property by false pretenses to send the charge to the jury, including that the credit union was actually deceived by altered paystubs and a child support order which defendant submitted—first, to illustrate her income for a loan and, later, to show loss of income to receive forbearance of her mortgage payments. There was no merit to defendant's argument that, because the credit union had flagged the documents as suspicious, it was not actually deceived, since defendant's loan was contingent upon verification of her income, and the loan was granted only after the credit union received the flawed and altered documentation.

3. Damages and Remedies—restitution—fraud and false pretense—evidence of monetary loss—proximate cause

In a case involving forgery, residential mortgage fraud, and obtaining property by false pretenses regarding a home loan

application, the trial court did not err in ordering defendant to pay restitution to a credit union in the amount of $25,061.46, where there was sufficient evidence that defendant's wrongdoing—by submitting false documentation in order to obtain a loan and, later, forbearance of mortgage payments—was a direct and proximate cause of the credit union's monetary loss in issuing the original loan and granting subsequent forbearance requests.

4. Damages and Remedies—restitution—mortgage fraud case—ability to pay

In a case involving forgery, residential mortgage fraud, and obtaining property by false pretenses regarding a home loan application, the trial court did not err in ordering defendant to pay restitution to a credit union in the amount of $25,061.46, where, despite defendant's argument that the trial court failed to take into consideration defendant's ability to pay, the record reflected that the court was aware of defendant's marital status, childcare obligations, and employment status and that the court extended the length of defendant's probation to allow her more time to pay back the amount of restitution.

5. Probation and Parole—extended term imposed—based on restitution award

Where the trial court properly imposed a restitution award against defendant after her conviction of forgery, fraud, and obtaining property by false pretenses—based on her submission of false documents to a credit union in order to obtain a home loan and, later, to receive forbearance of mortgage payments—the trial court's imposition of an extended term of probation pursuant to N.C.G.S. § 15A-1343.2(d) was proper.

Appeal by Defendant from judgments entered 2 March 2022 by Judge Jason C. Disbrow in Brunswick Country Superior Court. Heard in the Court of Appeals 6 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Hilary R. Ventura, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for Defendant.

GRIFFIN, Judge.

Defendant Laketta Hussain appeals from judgments entered after a jury found her guilty of three counts of forgery, four counts of uttering forged paper, altering court documents, residential mortgage fraud, and obtaining property by false pretense. Defendant argues the trial court erred in: denying her motion to dismiss the charges of altering court documents and obtaining property by false pretense; ordering restitution; and imposing an extended term of probation. We hold the trial court erred in denying Defendant's motion to dismiss the charge of altering court documents. We otherwise affirm the trial court's denial of Defendant's motion to dismiss the charge of obtaining property by false pretenses; ordering restitution; and imposing an extended term of probation.

I. Factual and Procedural Background

In 2016, Defendant applied for a home loan through State Employees Credit Union. On 19 August 2016, Defendant's loan was approved, contingent on SECU receiving documentation verifying Defendant's income. Defendant provided pay stubs from her full-time employer, New Hanover County Department of Social Services, and her alleged part-time employer, Fundays. Defendant also provided a Florida court order illustrating her income derived from child support payments. On 4 October 2016, the loan was finalized. SECU issued payment of the funds on 1 November 2016 with Defendant's first payment becoming due on 1 December 2016.

On 9 December 2016, Defendant requested forbearance for her first mortgage payment stating she lost her part-time job at Fundays and was no longer receiving child support payments. Defendant provided documentation of her continued full-time employment with DSS and forbearance was approved for a four-month period. In April 2017, Defendant applied for an additional four-month forbearance, submitting similar documentation, which was also granted.

On 2 August 2017, Defendant applied for a third forbearance, submitting purported paystubs from her employment with DSS and her husband's part-time employment with Sands Beach Wear. SECU financial services officer, G. Davis, suspected the documents submitted with Defendant's third forbearance application were fraudulent. Per company policy, Davis notified A. Bailey, a SECU fraud and security investigator. Bailey reviewed all documentation provided by Defendant. Upon investigation, it was determined there were numerous inconsistencies in the documentation provided to obtain the original loan and subsequent forbearances. Specifically, Bailey found Defendant's husband was employed by Fundays, not Defendant, and that Defendant had altered the dates on the paystubs from DSS and Sands Beach Wear. Further

Bailey discovered the Florida child support order had been altered to include Defendant's name as the parent who was receiving income when the child listed on the order did not belong to Defendant and was not in her care. The third application for forbearance was denied and SECU foreclosed on Defendant's home.

At the close of her investigation, Bailey contacted Brunswick County Sheriff's Office and filed a police report. On 1 March 2021, Defendant was indicted and charged with: three counts of common law forgery; four counts of common law uttering forged paper; altering court documents; residential mortgage fraud; and obtaining property by false pretense. Defendant's case came on for jury trial on 28 February 2022 in Brunswick County Superior Court before the Honorable Jason C. Disbrow. On 2 March 2022, the jury returned a verdict finding Defendant guilty on all charges.

The trial court consolidated the charges and sentenced Defendant to 6 to 17 months' imprisonment, suspended for 30 months' supervised probation. The trial court then extended the probationary term to 60 months in order to give Defendant additional time to make restitution as Defendant was ordered to pay $25,061.46. Defendant gave timely notice of appeal.[1]

II. Analysis

Defendant argues the trial court erred in: (A) denying her motion to dismiss the charges of altering court documents and obtaining property by false pretense; (B) ordering restitution; and (C) imposing an extended term of probation.

A. Motion to Dismiss

Defendant argues the trial court erred in denying her motion to dismiss the charges of altering court documents and obtaining property by false pretense as the State failed to introduce substantial evidence of the essential elements of the charged offenses.

In ruling on a motion to dismiss, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser included offense therein, and (2) of the defendant's being the perpetrator of such offense[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations

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1. Defendant filed a petition for writ of certiorari requesting this Court grant appellate review if Defendant's right to appeal was lost by failure to give timely notice of appeal. We hold Defendant gave timely notice of appeal pursuant to N.C. R. App. P. 4 and therefore dismiss Defendant's petition.

omitted). *See State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (internal marks and citations omitted)). All evidence, competent or incompetent, must be considered with any contradictions or conflicts being resolved in favor of the State. *See State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) (internal marks and citations omitted). On appeal, we review "the trial court's denial of a motion to dismiss *de novo*." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citations omitted).

1. Altering Court Documents

[1] Defendant argues, and the State concedes, the trial court erred in denying her motion to dismiss the charge of altering court documents as the State failed to introduce evidence that Defendant altered the official Florida child support order as is required to obtain a conviction under N.C. Gen. Stat. § 14-221.2.

Under North Carolina General Statute, section 14-221.2, a defendant is guilty of altering court documents where she intentionally, materially alters an official case record without lawful authority. *See* N.C. Gen. Stat. § 14-221.2 (2021). As the State is required to prove each essential element of section 14-221.2 in order to obtain a conviction of altering court documents, the State has failed to meet its burden where it does not introduce substantial evidence of the defendant having altered *official* court records. S*ee id.*; *see also Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455. Moreover, when a conviction is entered despite the State having failed to meet its burden, the conviction has been entered in error. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

Here, Defendant was charged with altering official court documents upon making changes to a Florida court's child support order. However, Defendant argues the State failed to introduce any evidence concerning the official case record. Specifically, Defendant contends the State neglected to introduce any evidence as to the contents of the official file, any documents from the file, or any witness who had personally seen the file.

The evidence at trial suggested only that Defendant altered a copy of an order illustrating income derived from child support and provided the altered copy to SECU as verification of income while the official order remained unaltered. The State concedes there was error as there was insufficient evidence of Defendant having altered official court records—an essential element of the crime of altering court documents. Nonetheless, the State argues this Court need not remand the matter to

the trial court for resentencing as removing the vacated charge would not have changed the trial court's judgment.

However, "[w]hen the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing[,]" but only where this Court is "unable to determine what weight, if any, the trial court gave to each of the separate convictions[.]" *State v. Cromartie*, 257 N.C. App. 790, 797, 810 S.E.2d 766, 772 (2018) (internal marks and citations omitted). Further, "we do not remand for resentencing where [the] [d]efendant has already received the lowest possible sentence because remanding when one of the convictions of a consolidated sentence is in error is based on the premise that multiple offense[s] probably influenced the defendant's sentence." *Id.*

Here, in sentencing Defendant, the trial court stated:

> THE COURT: All right. Consolidate for purposes of judgment—based on the unanimous verdict of jury of her peers, consolidate 18 CrS 865 [(altering court documents; uttering forged paper)], 18 CrS 866 [(residential mortgage fraud; obtaining property by false pretense)], and 18 CrS 867 [(two counts of common law forgery)] into one Class H judgment, Level I. Six months minimum to 17 months maximum in the Department of Adult Correction. That sentence is suspended.

This statement gives no indication as to what weight, if any, the trial court gave to each of the separate convictions. Further, Defendant did not receive the lowest possible sentence as she was sentenced at the top of the presumptive range. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2021) (showing the top of the presumptive range for a Class H felony, with prior record level I, as 6-17 months' imprisonment).

Because we are unable to determine what weight, if any, the trial court gave to each of Defendant's convictions, and because Defendant was sentenced at the top of the presumptive range of sentences rather than the lowest, we must remand to the trial court for resentencing. Thus, we are only vacating Defendant's conviction of altering court documents and remand to the trial court for resentencing. We recognize the judgment may remain the same and leave that to the discretion of the trial court.

2. Obtaining Property by False Pretense

[2] Defendant argues the trial court erred in denying her motion to dismiss the charge of obtaining property by false pretense as the State

failed to introduce evidence that SECU was, in fact, deceived by the altered documents. Defendant specifically cites to issues concerning the paystubs from New Hanover County, Sands Beach Wear, and Fundays; and the Florida child support order in support of her contention.

In order to be convicted of obtaining property by false pretense pursuant to N.C. Gen. Stat. § 14-100, the State must prove, beyond a reasonable doubt, the defendant made "(1) a false representation of a past or subsisting fact or a future fulfillment or event, (2) which [was] calculated and intended to deceive, (3) which [did] in fact deceive, and (4) by which the defendant obtain[ed] or attempt[ed] to obtain anything of value from another person." *State v. Compton*, 90 N.C. App. 101, 103, 367 S.E.2d 353, 354 (1988) (citations omitted).

As to the paystubs from New Hanover County and Sands Beach Wear, Defendant argues Bailey became involved only after the paystubs were flagged. Further, Defendant notes Bailey believed the paystubs were not genuine and SECU denied her third mortgage modification request and foreclosed on her home. This, Defendant argues, is evidence which affirmatively shows SECU was not deceived by the paystubs. Similarly, as to the Fundays paystub, Defendant argues the State only presented evidence that SECU contacted Fundays to confirm whether Defendant was employed there which, in itself, suggested SECU believed the paystub may not have been genuine, and therefore, was not deceived. Additionally, Defendant argues, regarding the Florida child support order, there was no evidence as to how SECU considered the order, if at all, in their mortgage origination process and the mere presence of the order in the file cannot prove SECU was deceived by the order.

Although Bailey only became involved when Defendant's paystubs were flagged after her third forbearance application, SECU was still deceived, as Defendant's first two forbearance applications were granted based on Defendant's claims that she lost her alleged part-time job at Fundays and was no longer receiving child support payments as indicated in the falsified Florida court order. Further, Bailey testified:

> A: When we originate a mortgage, we can call the employer using an independent source, such as Google or the white pages or phone book, to find the company's phone number. We can call and confirm verbally if a member is employed by that employer.
>
> Q: So this would be the report done by whoever verbally confirmed her employment at Fundays?

> A: Yes.

This testimony suggests calling Defendant's alleged employer, Fundays, was common practice and not done solely upon suspicion of fraud. Similarly, Davis testified as to SECU's consideration of the child support order noting:

> A: To my recollection the first one was because she was no longer receiving child support, and so she needed that assistance. Because that was a large part of her income. That. And her second job was no longer in play.

This evidence suggests SECU considered Defendant's loss of the child support income in granting both the loan and the subsequent forbearance requests.

Further, our Courts, in considering the sufficiency of bills of indictment, have repeatedly recognized an indictment need not specifically allege the victim was deceived by the false pretense where the facts in the indictment are sufficient to suggest the victim surrendered something of value as a result of the false pretense. *See State v. Hinson*, 17 N.C. App. 25, 27, 193 S.E.2d 415, 416 (1972). Notably, our Supreme Court in *State v. Cronin* stated, "[i]f the false pretense caused the victim to give up his property, it logically follows that the property was given up because the victim was in fact deceived by the false pretense." 299 N.C. 229, 238, 262 S.E.2d 277, 283 (1980). Although our Courts have only applied this concept when considering the sufficiency of bills of indictment, the same can be applied in cases, such as the instant case, where the defendant challenges the sufficiency of the evidence introduced at trial. Moreover, we hold that where the State presents substantial evidence which tends to show the victim gave up his property to the defendant in reliance on the false pretense, it logically follows that the property was surrendered because the victim was deceived by the false pretense.

Because the State introduced substantial evidence which tended to show SECU was, in fact, deceived by Defendant as Defendant's home loan was contingent upon verification of her income, and only upon receiving flawed and altered documentation of income did SECU issue the loan, the trial court did not err in denying Defendant's motion to dismiss the charge of obtaining property by false pretense.

B. Restitution

Defendant contends the trial court erred in ordering she pay $25,061.46 in restitution as (1) the record did not contain evidence tending to show Defendant's alleged misconduct caused SECU's monetary

loss, and (2) the court failed to consider Defendant's ability to pay the restitution.

We review the trial court's imposition of restitution *de novo*—determining whether there is competent evidence to support the trial court's restitution award. *See State v. Clagon*, 279 N.C. App. 425, 435, 865 S.E.2d 343, 349 (2021). However, we review issues concerning whether the trial court "properly considered a defendant's ability to pay when awarding restitution" for abuse of discretion. *State v. Hillard*, 258 N.C. App. 94, 98, 811 S.E.2d 702, 705 (2018) (internal marks and citations omitted). Further, a trial court's restitution award "will be overturned only when the trial court did not consider any evidence of [the] defendant's financial condition." *State v. Crew*, 281 N.C. App. 437, 444, 868 S.E.2d 351, 356 (2022) (citing *Hillard*, 258 N.C. App. at 98, 811 S.E.2d at 705 (internal marks, citations, and emphasis omitted)).

1. Defendant's Alleged Misconduct and SECU's Monetary Loss

[3] Defendant argues the trial court erred in ordering her to pay restitution as the record was void of evidence tending to show her alleged misconduct caused SECU's monetary loss. Specifically, Defendant contends there is insufficient evidence in the record to show her submission of false documentation in the mortgage lending process was the proximate cause of SECU's monetary loss, noting "there is no evidence in the record that SECU would not have issued the mortgage" absent the submission of the documents.

Our North Carolina General Statutes, section 15A-1340.34, authorizes the trial court to order a defendant to "make restitution to the victim or the victim's estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(b), (c) (2021). Our Court has defined proximate cause as a cause,

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

State v. Pierce, 216 N.C. App. 377, 381, 718 S.E.2d 648, 652 (2011) (citation omitted). Thus, we recognize the trial court's restitution award must be supported by competent evidence in the record which tends to

suggest Defendant both directly and proximately caused SECU's injuries. *See id.*; *see also* N.C. Gen. Stat. § 15A-1340.34(b), (c) (2021).

Here, Defendant was undoubtedly the proximate cause of SECU's monetary loss. SECU required all applicants, including Defendant, to sign a document verifying they provided information accurately and to the best of their ability. While Defendant did sign the document, she did so after submitting falsified documents in the original loan application and continued to do so throughout the forbearance process. Evidence at trial tended to show Defendant submitted a paystub from Fundays claiming it was her part-time employer while it was actually her husband's. Further, Defendant provided a copy of a Florida child support order which was altered to include her name as the recipient of child support payments when the child listed neither belonged to her nor was in her care. Defendant also altered the dates on both her husband's paystubs from Sands Beach Wear and her paystubs from DSS. Both Graves and Bailey provided testimony at trial suggesting SECU relied upon these falsified documents in issuing the original loan and subsequent forbearances, and that the submission of such documents is what led to SECU issuing and extending Defendant's forbearance.

Because the record is replete with competent evidence suggesting Defendant was the proximate cause of SECU's monetary loss, the trial court did not err in imposing restitution.

2. Defendant's Ability to Pay Restitution

[4] Defendant argues the trial court erred in ordering her to pay restitution as the court failed to consider whether Defendant was able to pay restitution. Specifically, Defendant notes the record reflects the trial court "entirely failed to consider [Defendant's] ability to make restitution" as the court did not make any inquiries about Defendant's income, expenses, or ability to pay SECU.

Our General Statutes require the trial court, in determining the amount of restitution to be made by a defendant, to "take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution[.]" N.C. Gen. Stat. § 15A-1340.36(a) (2021). The trial court is not required to make findings of fact or conclusions of law regarding a defendant's ability to pay, nor is the court required to modify the amount of restitution owed on such basis. *See id.*; *see also State v. Tate*, 187 N.C. App. 593, 598–99, 653 S.E.2d 892, 897 (2007).

Here, the record reflects the trial court was aware of, among other things: Defendant's marital status; Defendant's past and present employment statuses; and Defendant having three children. Further, Defendant did not present any evidence suggesting she was, in any way, unable to pay the restitution amount, but instead stated: "[Defendant] is satisfied with a probationary sentence that the State is recommending." Moreover, the trial court, in ordering Defendant make restitution, extended the length of Defendant's probation so as to allow her more time to pay back the amount, thereby indicating the trial court's consideration of Defendant's ability to pay.

Because the trial court was undoubtably aware of circumstances affecting Defendant's ability to pay restitution, and further considered those circumstances in extending Defendant's probation to allow her more time to make restitution, the trial court did not err.

C. Extended Term of Probation

[5] Defendant argues the trial court erred in imposing an extended term of probation as the extended term was improperly based on the "erroneous restitution award."

Our General Statutes allow for the extension of an original period of a defendant's probation where it is necessary to complete a program of restitution. *See* N.C. Gen. Stat. § 15A-1343.2(d) (2021).

Here, Defendant argues the trial court erred in extending her probationary period only because the restitution award, in itself, was erroneous. However, as we noted above, the trial court's restitution order was not erroneous as the court both recognized and considered Defendant's ability to pay restitution. *See Supra* II.B.2. Because the restitution order was not made in error, the trial court did not err in extending Defendant's probationary period to allow her to make restitution.

III. Conclusion

For the aforementioned reasons, we hold the trial court erred in denying Defendant's motion to dismiss the charge of altering court documents but did not err in denying Defendant's motion to dismiss the charge obtaining property by false pretense; ordering restitution; or imposing an extended term of probation. Therefore, we vacate the charge of altering court documents and remand for resentencing.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges WOOD and STADING concur.

STATE OF NORTH CAROLINA
v.
RICHARD JAMES KING

No. COA23-322

Filed 7 November 2023

1. Drugs—trafficking by possession—constructive possession—knowingly possess—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of trafficking in methamphetamine by possession, where the State presented substantial evidence that defendant knowingly, constructively possessed two packages of methamphetamine that were hidden inside the taillights of a car. Specifically, the evidence showed that defendant regularly used that car and was driving it when law enforcement arrested him for a different drug crime; upon searching the vehicle, law enforcement found a duffel bag belonging to defendant and containing thousands of dollars and a set of digital scales; and, in a phone call he made from jail, defendant instructed another individual on where to find the hidden packages of methamphetamine and how to retrieve them.

2. Drugs—trafficking by transportation—elements—knowingly transporting drugs—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of trafficking in methamphetamine by transportation, where the State presented substantial evidence that defendant knowingly transported two packages of methamphetamine that were hidden inside the taillights of a car that he was driving when law enforcement arrested him (for a different drug crime). The fact that the packages were not discovered until days after defendant's arrest did not support a finding that he lacked knowledge of their existence. To the contrary, the evidence showed that defendant made a phone call from jail in which he described the hidden location of the packages to another individual and instructed that individual on how to properly extract them from the car.

3. Drugs—maintaining a vehicle—for keeping or using controlled substance—sufficiency of the evidence

The trial court properly denied defendant's motion to dismiss a charge of maintaining a vehicle for unlawfully keeping and/or using a controlled substance where sufficient evidence showed that, based on a totality of the circumstances, defendant maintained the

car he was driving when law enforcement arrested him (for a different drug crime) for the purpose of keeping controlled substances, including two packages of methamphetamine that were hidden in the car's taillights. Factors supporting the "maintaining" element included: upon arrest, defendant admitted to possessing marijuana located in the center console of the car; a duffel bag belonging to defendant and containing thousands of dollars and a set of digital scales was found inside the trunk of the car; although the two packages of methamphetamine were not discovered until a few days after defendant's arrest, evidence showed that the bags were already hidden inside the car when defendant was driving it; and defendant made a phone call from jail in which he described the hidden location of the packages to another individual and instructed that individual on how to properly extract them from the car.

4. Conspiracy—to commit trafficking in methamphetamine—sufficiency of the evidence

The trial court properly denied defendant's motion to dismiss a charge of conspiracy to commit trafficking in methamphetamine where the State presented sufficient evidence to submit the charge to the jury. According to the evidence, law enforcement saw defendant repeatedly enter and leave a motel room along with three other individuals, each of whom were later found with methamphetamine in their possession; one of the three individuals was a known drug dealer who was seen taking a large box out of a car that was parked outside the motel and bringing the box to the motel room; law enforcement found defendant driving the car where the drug dealer had retrieved the large box; at the time of his arrest, defendant had thousands of dollars and a set of digital scales in his possession; and, days later, two hidden packages of methamphetamine were retrieved from the car that defendant was driving.

Appeal by defendant from judgment entered 26 August 2022 by Judge Steve R. Warren in Haywood County Superior Court. Heard in the Court of Appeals 18 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Ronnie K. Clark, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David S. Hallen, for the defendant-appellant.

TYSON, Judge.

Richard James King ("Defendant") appeals from judgments entered after a jury convicted him of: conspiracy to commit trafficking in methamphetamine by possessing 28 grams or more, but less than 200 grams; one count of trafficking methamphetamine by possessing 400 grams or more; one count of trafficking methamphetamine by transporting 400 grams or more; and, one count of maintaining a vehicle for a controlled substance. Our review shows no error.

I. Background

Haywood County Sheriff's Detectives Micah Phillips and Jordan Reagan ("Detectives") were called to jail to speak with an inmate, Thomas Andrew Clark, on 30 April 2021. Clark agreed to provide information about the drug trade in Haywood County. Detective Phillips knew Clark to be a low-level drug dealer. Clark was in jail awaiting trial. Clark spoke with the Detectives around 12:30 p.m.

The Detectives drove to the America's Best Value Inn in Canton around 2:00 p.m. based upon Clark's information. Detective Phillips observed James Welch's vehicle parked in the Inn's parking lot. Welch was known to both Detectives to be involved in drug dealing in Haywood County.

The Detectives observed Welch exit room 213 at the Inn, retrieve a large box out of the trunk of a Pontiac sedan, and return to the room. Detective Phillips estimated Welch spent approximately twenty seconds reaching inside the trunk of the Pontiac. Ten minutes later the Detectives observed Defendant, Welch, and Welch's daughter, Ashley Maggard, leave room 213 and enter the parking lot. Defendant returned to room 213. Welch and Maggard entered a red vehicle and left the property.

Sheriff's Sergeant Craig Campbell effected a stop of the red vehicle. A short time later officers with a canine arrived to assist with the vehicle's stop. Maggard told the officers a marijuana pipe was inside her purse. Welch was asked to step out of the vehicle. He complied, and the officers conducted a pat down, and conducted a search of the vehicle.

The officers located 2.5 to 2.8 grams of methamphetamine within Maggard's pants. The officers also located a bag of methamphetamine in Welch's pants and a bag of methamphetamine inside his underwear.

Detectives Phillips and Reagan continued to monitor the motel. Defendant and Samantha Rich left room 213, entered the Pontiac, and left the property. Rich was also known to Detective Phillips, due to her involvement in the Haywood County drug trade.

The Detectives followed Defendant as he drove into the parking lot of a Dairy Queen restaurant. The Detectives activated their blue lights

and conducted a stop of the Pontiac. Detective Phillips had confirmed prior to the surveillance that Defendant's driver's license was revoked. Rich immediately exited the Pontiac and began walking away. Detective Reagan stayed with Defendant, while Detective Phillips went to ensure Rich did not destroy any evidence.

Defendant admitted to possessing marijuana located in the center console of the Pontiac. The Detectives located a Marlboro cigarette package containing marijuana inside the center console. The Detectives also located a duffel bag inside the vehicle containing $3,900 in currency, a set of digital scales, and men's clothing. Deputy Hayden Green arrived with his canine and conducted a canine sniff test around the Pontiac. The canine alerted to the presence of narcotics, but the officers were unable to locate any additional contraband.

Defendant was arrested for conspiracy to traffic methamphetamine and was incarcerated at the jail. A search warrant was executed for room 213 at the Inn on 30 April 2021. No contraband or currency was found inside the room, but a methamphetamine pipe and portable air conditioner were found inside of Welch's truck located in the parking lot.

Defendant called Rebecca McMahan from the jail's telephone on 3 May 2021. Defendant asked McMahan about the Pontiac and told her to bring her toolbox. Defendant contacted McMahan the next day and suggested McMahan go to a carwash or someplace covered because it was raining. Defendant told McMahan "[t]here's two. There's one big and one small." Defendant instructed McMahan to open the trunk and remove the passenger side taillight. Law enforcement monitored these conversations.

McMahan picked up the Pontiac from the Sheriff's impound lot, and she drove the car to her friend's house located in Candler. Once there, she removed the taillight and found a magnetic box. McMahan placed the magnetic box underneath the passenger side of her vehicle. The same evening, Detective Phillips contacted McMahan, pretending to be an associate of Defendant, but McMahan denied having any knowledge of the package during the conversation. Detective Phillips went to McMahan's house and presented her with the information he knew and asked her to cooperate with the investigation. McMahan agreed to cooperate. She told Detective Phillips she had located only the magnetic box and gave it to him. She took Detective Phillips to the Pontiac parked in Candler and allowed him to search the Pontiac.

Detective Phillips opened the magnetic box and discovered a large bag of methamphetamine inside, which he estimated to weigh approximately 50 grams. Detective Phillips removed both taillights from the

Pontiac and was able to see a second package stuck in the center of the void between the taillights. The package contained a large quantity of methamphetamine and some needles. Defendant was charged with trafficking in methamphetamine by possession of more than 400 grams and trafficking in methamphetamine by transporting more than 400 grams.

Defendant contacted Tina Hill, his cousin, from jail and told her he was charged with trafficking because of his phone calls made from jail. Defendant also told Hill he was "trying to tell [McMahan] where it was at." Defendant contacted McMahan a few months later from jail and asserted Welch had placed the two packages into the back of the Pontiac.

Defendant was indicted and tried for conspiracy to commit trafficking in methamphetamine by possessing 28 grams or more, but less than 200 grams; one count of trafficking methamphetamine by possessing 400 grams or more; one count of trafficking methamphetamine by transporting 400 grams or more; and, one count of maintaining a vehicle for unlawfully keeping and/or using controlled substances. At the close of the State's evidence, Defendant moved to dismiss all charges. The trial court denied Defendant's motion. Defendant presented evidence and testified on his own behalf. The jury returned guilty verdicts on all charges.

Defendant was sentenced as a prior record level V with 14 prior record level points to 225 to 282 months for trafficking methamphetamine by possessing 400 grams or more, 225 to 282 months for trafficking methamphetamine by transporting 400 grams or more, 70 to 93 months for conspiracy to traffic methamphetamine, and 7 to 18 months for maintaining a vehicle for unlawfully keeping and/or using controlled substances. All sentences were ordered to run consecutively. Defendant appeals.

II. Jurisdiction

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

III. Issues

Defendant argues the trial court erred by denying his motion to dismiss for conspiracy to commit trafficking in methamphetamine by possessing 28 grams or more, but less than 200 grams; one count of trafficking methamphetamine by possessing 400 grams or more; one count of trafficking methamphetamine by transporting 400 grams or more; and, one count of maintaining a vehicle for unlawfully keeping and/or using controlled substances.

IV. Defendant's Motion to Dismiss

A. Standard of Review

"When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 222 (1994) (citation omitted).

"[A]ll evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *State v. Fisher*, 228 N.C. App. 463, 471, 745 S.E.2d 894, 900 (2013) (citation omitted). "Whether the evidence presented at trial is substantial evidence is a question of law for the court." *Id.* (citation omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *Id.* (citation omitted).

"[I]t is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Poole*, 24 N.C. App. 381, 384, 210 S.E.2d 529, 530 (1975) (citation omitted). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citation omitted).

"Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* at 597, 573 S.E.2d at 869 (citation omitted). This Court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

B. Trafficking by Possession

[1] Defendant argues the trial court erred by denying his motion to dismiss the charge of trafficking methamphetamine by possession. Defendant asserts he did not "knowingly possess[ ] methamphetamine." The essential elements of trafficking by possession are: "(1) knowingly possessed [a controlled substance], and (2) that the amount transported was greater than [the statutory threshold amount]." *State v. Christian*, 288 N.C. App. 50, 53, 884 S.E.2d 492, 497, *disc. rev. denied*, 385 N.C. 315, 891 S.E.2d 267 (2023). The " 'knowing possession' element of the offense of trafficking by possession may be established by showing either: (1) the defendant had actual possession; (2) the defendant had constructive

possession; or, (3) the defendant acted in concert with another to commit the crime." *Id.* at 53-54, 884 S.E.2d at 497 (citation omitted).

The State's evidence asserted Defendant constructively possessed methamphetamine. "Constructive possession [of methamphetamine] occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the controlled substance." *State v. Alston*, 193 N.C. App. 712, 715, 668 S.E.2d 383, 386 (2008), *aff'd*, 363 N.C. 367, 677 S.E.2d 455 (2009). Constructive possession can be shown with evidence tending to show a defendant has "exclusive possession of the property in which the drugs are located." *State v. Lakey*, 183 N.C. App. 652, 656, 645 S.E.2d 159, 161 (2007) (citation omitted). Constructive possession can also be shown with evidence tending to show a defendant's "nonexclusive possession of the property where the drugs are located" if there is also other incriminating evidence "connecting the defendant to the drugs." *Id.* (citation omitted).

Our Supreme Court has articulated factors of "other incriminating circumstances" to establish constructive possession:

> (1) the defendant's ownership and occupation of the property . . . ; (2) the defendant's proximity to the contraband; (3) indicia of the defendant's control over the place where the contraband is found; (4) the defendant's suspicious behavior at or near the time of the contraband's discovery; and (5) other evidence found in the defendant's possession that links the defendant to the contraband.

State v. Checkanow, 370 N.C. 488, 496, 809 S.E.2d 546, 552 (2018).

This Court has held a large amount of currency can be evidence tending to establish constructive possession. *Alston*, 193 N.C. App. at 716, 668 S.E.2d at 386 (citation omitted). Evidence of conduct by a defendant indicating his knowledge of the presence of a controlled substance is also sufficient for a jury to find constructive possession. *Id.*

Viewed in the light most favorable to the State, the evidence tends to show Defendant regularly used the Pontiac vehicle. He had prior access to and was driving the Pontiac the day he was pulled over, arrested, and the vehicle was impounded. Defendant's duffel bag containing $3,900 in currency and a set of digital scales were found inside the trunk. Defendant was aware of the location of the packages of methamphetamine, instructed McMahan, and attempted to have her remove the hidden packages from the vehicle. A jury could reasonably

conclude Defendant knowingly trafficked methamphetamine by possession. Defendant's argument is overruled.

C. Trafficking by Transportation

[2] Defendant argues the trial court erred when it denied his motion to dismiss the charge of knowingly trafficking methamphetamine by transportation. He denies knowingly transporting methamphetamine. The essential elements of trafficking methamphetamine by transportation are: "(1) knowingly . . . transported methamphetamine, and (2) that the amount possessed was greater than 28 grams." *Christian*, 288 N.C. App. at 57, 884 S.E.2d at 499 (citation omitted).

Transportation requires a "substantial movement" of contraband and can be defined as "real carrying about or [movement] from one place to another." *Id.* (citation omitted). Even very slight movement may be real or substantial enough, "depending upon the purpose of the movement and the characteristics of the areas from which and to which the contraband is moved." *State v. McRae*, 110 N.C. App. 643, 646, 430 S.E.2d 434, 436 (1993) (citation omitted). Merely witnessing a drug transaction in a vehicle stationary in a parking lot is not movement when the officers did not witness the vehicle in motion. *State v. Williams*, 177 N.C. App. 725, 729, 630 S.E.2d 216, 220 (2006).

Viewed in the light most favorable to the State, the evidence tends to show the Detectives observed Defendant driving the Pontiac from the America's Best Value Inn to the Dairy Queen parking lot, where he was arrested and the Pontiac was searched and impounded. Defendant called McMahan from jail, asked her about the Pontiac, and instructed her how to access the methamphetamine hidden within the vehicle. The fact that all the containers were not discovered until days later does not suggest a lack of knowledge given the hidden location of the packages and the Defendant's knowledge of the location of and extraction method for the packages. A jury could reasonably conclude Defendant knowingly trafficked methamphetamine by transportation. Defendant's argument is overruled.

D. Maintaining a Vehicle for Controlled Substances

[3] Defendant argues the trial court erred by denying his motion to dismiss the charge of maintaining a vehicle for unlawfully keeping and/or using controlled substances. He asserts he did not maintain the Pontiac for the purpose of unlawfully keeping and/or using controlled substances. He also argues he lacked exclusive access to the areas where the methamphetamine was found, and he did not knowingly possess

the methamphetamine. Defendant's arguments are without merit. As explained above, a jury could reasonably conclude Defendant knowingly possessed methamphetamine.

N.C. Gen. Stat. § 90-108(a)(7) prescribes a Class I felony for a person to intentionally and knowingly keep or maintain a vehicle, "which [is] resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article." N.C. Gen. Stat. § 90-108(a)(7) (2021).

In *State v. Mitchell*, our Supreme Court held the State had presented insufficient evidence of maintaining a vehicle, despite the fact "the defendant had two bags of marijuana while in his car, that his car contained a marijuana cigarette the following day, and that his home contained marijuana and drug paraphernalia[.]" *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 31 (1994).

Similarly, in *State v. Lane*, this Court held the State had presented insufficient evidence of maintaining a vehicle for unlawfully keeping and/or using controlled substances where the defendant possessed eight Ziploc bags of cocaine only once inside of the vehicle. The statute does not prohibit the mere temporary possession of [controlled substances] within a vehicle. *State v. Lane*, 163 N.C. App. 495, 500, 594 S.E.2d 107, 111 (2004) (citing *Mitchell*, 336 N.C. at 32-33, 442 S.E.2d at 30).

Upon arrest, Defendant admitted to possessing marijuana located in the center console of the Pontiac which was recovered by the Detectives. The Detectives also located a duffel bag inside the vehicle containing $3,900 in currency and a set of digital scales. The State presented other evidence tending to show both bags of methamphetamine were present inside the vehicle on 30 April 2021 and on 4 May 2021. Whether sufficient evidence was presented of the "keeping or maintaining" element depends upon a totality of the circumstances, and no single factor is determinative. *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30.

The State presented evidence of other factors, including Defendant's knowledge and actions to access and dispose of the methamphetamine within the Pontiac, which indicated Defendant kept the vehicle for the purpose of keeping controlled substances. The trial court did not err in denying Defendant's motion to dismiss for maintaining a vehicle for the unlawful keeping and/or using of controlled substances. N.C. Gen. Stat. § 90-108(a)(7). Defendant's argument is overruled.

E. Conspiracy to Commit Trafficking in Methamphetamine

[4] Defendant argues the trial court erred by denying his motion to dismiss the conspiracy to commit trafficking in methamphetamine. "[C]riminal conspiracy is an agreement between two or more persons to do an unlawful act . . . [and] no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *State v. Bindyke*, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975).

"The State need not prove an express agreement;" rather, "evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citation omitted). Direct or circumstantial evidence may be used to establish the existence of a conspiracy, although it is generally "established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Worthington*, 84 N.C. App. 150, 162, 352 S.E.2d 695, 703 (1987) (citation omitted). "Mere passive cognizance of the crime or acquiescence in the conduct of others will not suffice to establish a conspiracy. The conspirator must share in the purpose of committing [the] felony." *State v. Merrill*, 138 N.C. App. 215, 221, 530 S.E.2d 608, 612 (2000) (citation and internal quotation marks omitted).

Viewing the evidence in the light most favorable to the State on a motion to dismiss, sufficient evidence tended to show and supported submitting the conspiracy charge to the jury. The alleged co-conspirators, Welch, Maggard, and Rich were all found with methamphetamine after leaving the motel. Defendant had $3,900 in currency and a set of digital scales with his clothing in the vehicle at the time of his arrest. The trial court did not err in denying Defendant's motion to dismiss the charge of conspiracy to traffic methamphetamine. Defendant's argument is overruled.

V. Conclusion

The State's evidence, taken as a whole, is sufficient for a reasonable jury to find and conclude Defendant is guilty of conspiracy to commit trafficking in methamphetamine by possessing 28 grams or more, but less than 200 grams; one count of trafficking methamphetamine by possessing 400 grams or more; one count of trafficking methamphetamine by transporting 400 grams or more; and, one count of maintaining a vehicle for keeping and/or using a controlled substance.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges DILLON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
ANTON M. LEBEDEV, Defendant

No. COA23-249

Filed 7 November 2023

Criminal Law—expungement—eligibility—multiple unrelated charges—guilty plea to lesser-included offenses

The district court did not err by denying defendant's petition to expunge multiple unrelated speeding misdemeanors pursuant to N.C.G.S. § 15A-146 where, for each charge, defendant had pleaded guilty to lesser-included offenses. Contrary to defendant's argument on appeal, pleading guilty to a lesser-included offense does not equate to a "dismissal" of the original charge for purposes of the expungement statute; further, because this argument was meritless, the superior court did not abuse its discretion by denying defendant's petition for a writ of certiorari.

Appeal by *pro se* defendant from orders entered 7 December 2022 by Judge C. Todd Roper in Orange County District Court and from order entered 18 January 2023 by Judge R. Allen Baddour Jr. in Orange County Superior Court. Heard in the Court of Appeals 20 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. O'Brien and Assistant Attorney General Reginaldo Enrique Williams, for the State-appellee.

Law Offices of Anton M. Lebedev, by Anton M. Lebedev, for pro se defendant-appellant.

GORE, Judge.

Defendant Anton Mikhailovich Lebedev appeals pursuant to this Court's 20 March 2023 Order allowing his petition for writ of certiorari for the purpose of reviewing: (1) the three orders entered 7 December 2022 by the Orange County District Court denying his "Petition and Order of Expunction Under G.S. 15A-146(a) OR G.S. 15A-146(a1)" and (2) the order entered 18 January 2023 in Orange County Superior Court denying his petition for writ of certiorari.

Defendant argues the district court erred by denying his petition to expunge multiple unrelated traffic misdemeanors pursuant to N.C. Gen. Stat. § 15A-146. Additionally, defendant asserts the superior court abused its discretion by summarily denying his petition for writ of certiorari and declining to permit review of the district court's orders.

Upon review, we affirm. Defendant is not eligible for expunction under section 15A-146; he cites no authority supporting his view that pleading to a lesser included offense somehow equates to a "dismissal." Moreover, considering defendant's argument is meritless, the superior court could not have abused its discretion in denying his petition for writ of certiorari.

I.

On 29 April 2009, defendant was charged with speeding (66 mph in a 45 mph zone). Defendant, on 15 July 2009, ultimately pled responsible to a lesser included charge: speeding (54 mph in a 45 mph zone).

On 16 March 2010, defendant was charged with speeding (64 mph in a 35 mph zone). On 2 August 2010, defendant pled responsible to the lesser included charge of exceeding a safe speed.

On 29 April 2011, defendant was charged with speeding (52 mph in a 35 mph zone). Defendant again pled responsible to a lesser included charge—improper equipment (speedometer)—on 17 August 2011.

On 24 November 2022, defendant filed three separate expungement petitions, each one seeking expunction as to one of the above traffic charges. The district court denied all three, finding that they did not show defendant was charged with "multiple offenses," as required by the statute.

On 15 December 2022, defendant petitioned the superior court for a writ of certiorari to review the expungement denials. The superior court denied the writ on 18 January 2023.

II.

Considering the district court's orders denying expungement relief, our resolution of the instant appeal hinges upon the statutory interpretation of N.C. Gen. Stat. § 15A-146. "Questions of statutory interpretation are questions of law," which this Court reviews de novo. *State v. Lamp*, 383 N.C. 562, 569, 881 S.E.2d 62, 67 (2022). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation omitted).

We review the superior court's decision to grant or deny a petition for writ of certiorari for an abuse of discretion. *See State v. Ricks*, 378 N.C. 737, 740, 862 S.E.2d 835, 838 (2021). "The test for abuse of discretion requires the reviewing court to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992) (cleaned up).

III.

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013) (citation omitted).

> [W]hen the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. In these situations, the history of the legislation may be considered in connection with the object, purpose and language of the statute in order to arrive at its true meaning. However, [w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.

Applewood Props., LLC v. New S. Props., LLC, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013) (alterations in original) (citation omitted).

North Carolina General Statutes section 15A-146(a1) provides, in pertinent part, that "[i]f a person is charged with multiple offenses and any charges are *dismissed*, then that person or the district attorney may petition to have each of the *dismissed* charges expunged." N.C. Gen. Stat. § 15A-146(a1) (2022) (emphasis added). And, within Chapter 15A, the legislature provided several ways a criminal charge may be

dismissed. *See*, *e.g.*, § 15A-931 (permitting a prosecutor to voluntarily dismiss criminal charges).

In this case, defendant was charged with three unrelated misdemeanor speeding charges between 2009-2011. It is undisputed that the State did not formally dismiss any charges, as defined under Chapter 15A. *Cf.* § 15A-931(a) ("[T]he prosecutor may dismiss any charges stated in a criminal pleading . . . ."). While defendant correctly notes Chapter 15A does not statutorily define "dismissal," he reads ambiguity into the statute where there is none. In keeping with our well-established principles of statutory interpretation, we conclude that the term "dismissal" is an unambiguous word that "has a definite and well known sense in the law." *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 19, 803 S.E.2d 142, 148 (2017) (quotation marks and citation omitted). The plain meaning of "dismissal" is the "[t]ermination of an action, claim, or charge without further hearing . . . esp., a judge's decision to stop a court case through the entry of an order or judgment that imposes no civil or criminal liability on the defendant with respect to that case." *Dismissal*, Black's Law Dictionary (11th ed. 2019). "In the event that the General Assembly uses an unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning." *Fid. Bank*, 370 N.C. at 19, 803 S.E.2d at 149.

As such, by its plain language, defendant is not entitled to expunction under section 15A-146. Nevertheless, defendant insists he qualifies for relief because, in his view, "the legislature nonetheless intended defendants to be able to petition to expunge misdemeanor charges that did not ultimately result in a conviction." Any conclusion otherwise, defendant continues, would "lead to the absurd result of forbidding the expungement of charges after the State abandoned its prosecution of the same."

While defendant's interpretation of section 15A-146 is certainly imaginative, it incorrectly conflates the concept of pleading down to a lesser included offense with that of an actual dismissal. Moreover, defendant's broad interpretation of section 15A-146 drastically exceeds the scope of the plain language used by the legislature as it appears in the statute. *See Dickson*, 366 N.C. at 344, 737 S.E.2d at 371 (quotation marks and citation omitted) ("We presume that the General Assembly 'carefully chose each word used' in drafting the legislation.").

As this Court has already noted, amending a charging document to instead charge a lesser included offense does not equate to a dismissal, as contemplated by Chapter 15A. *See State v. Goodson*, 101

N.C. App. 665, 668-69, 401 S.E.2d 118, 121 (1991) (holding that because "[t]he record clearly shows that the State's request for a dismissal on the charge of first degree murder was predicated on its request for a charge of second degree murder[,] . . . [t]he court's dismissal of the charge of first degree murder was not a final dismissal of the criminal proceeding . . ." within the meaning of section 15A-931(a)."). And, consistent with our precedent, "dismissal" results in "no civil or criminal liability on the defendant with respect to that case." *Dismissal*, Black's Law Dictionary (11th ed. 2019). Applying these principles here, defendant pled down to lesser included crimes, and he still retained liability as to the charges he pled responsible for. *See* § 20-141 (2023) (specifying penalties associated with various traffic violations). The State did not dismiss the original misdemeanor charges, and defendant did not evade criminal liability. Both the plain language of section 15A-146 and this Court's precedent preclude defendant's arguments to the contrary. *See State v. Hooper*, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) ("Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.").

Accordingly, we affirm the district court's orders on grounds that each petition for expunction only listed one charge to be expunged, not multiple, and that section 15A-146(a1) plainly does not provide defendant with relief.

Considering defendant's expunction argument is without merit, the superior court could not have abused its discretion by denying his petition for writ of certiorari. Further, defendant cites no authority to support his contention that the superior court erred when it "summarily denied the petition without even requesting the State to respond." Upon review of defendant's petition and in the appropriate exercise of its discretion, the superior court permissibly declined to issue the writ based on defendant's failure to show "merit, or that probable error was committed" below. *In re Snelgrove*, 208 N.C. 670, 672, 182 S.E. 335, 336 (1935).

IV.

For the foregoing reasons, we affirm the superior court's order.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
MARIO WILSON, DEFENDANT

No. COA21-34

Filed 7 November 2023

1. Identification of Defendants—first-degree murder—witness testimony—evidentiary impossibility—sufficiency of evidence

In a prosecution for first-degree murder and other charges arising from an incident in which a hooded gunman entered a house and shot multiple people, killing two, the trial court properly denied defendant's motion to dismiss where the State presented sufficient evidence to allow a jury to conclude that the sole witness who identified defendant as the shooter was physically located where she could make that identification. Although defendant argued that the identification was an evidentiary impossibility, the testimony was not inherently incredible as being in conflict with physical facts or laws of nature, and any contradictions in the evidence or issues with the witness's credibility were for the jury to resolve.

2. Jury—selection—Batson challenge—third step of inquiry—insufficient findings

In defendant's first-degree murder trial, the trial court erred by overruling defendant's *Batson* challenge—regarding the State's exercise of peremptory challenges to excuse two African-American female prospective jurors—without meeting the procedural requirements of *State v. Hobbs*, 374 N.C. 345 (2020). Where the trial court's determination that defendant had not established a prima facie case of racial discrimination during jury selection was made only after hearing the State's race-neutral reasons for its challenges, the court, by effectively engaging in steps two and three of the *Batson* inquiry, was required to make findings of fact explaining how it weighed various factors regarding purposeful discrimination, including a comparative juror analysis between those who were excused and those alleged to have been similarly situated. The matter was remanded for the trial court to conduct a full analysis of defendant's arguments that the State engaged in purposeful discrimination.

Judge DILLON concurring by separate opinion.

Judge STADING concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 5 March 2020 by Judge Todd Pomeroy in Cleveland County Superior Court. Heard in the Court of Appeals 5 October 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

Marilyn G. Ozer for defendant-appellant.

MURPHY, Judge.

This appeal arises out of Defendant Mario Wilson's convictions of two counts of first-degree murder, one count of attempted first-degree murder, one count of attempted robbery with a dangerous weapon, and one count of conspiracy to commit robbery with a dangerous weapon. On appeal, Defendant argues (A) the trial court erred in denying his motion to dismiss all charges based on sufficiency of the evidence to support his being the perpetrator and (B) the trial court made inadequate *Batson* findings in light of *State v. Hobbs*. 374 N.C. 345 (2020).

As explained more fully below, viewing the evidence in the light most favorable to the State, the trial court correctly denied Defendant's motion to dismiss the charges. His specific arguments, which concern the alleged physical impossibility of witness testimony, do not actually establish the evidence at issue was impossible. However, because we agree that the trial court's *Batson* findings were procedurally inadequate under *Hobbs*, we reverse and remand for further proceedings consistent with the procedure set forth by our Supreme Court.

BACKGROUND[1]

In early October of 2016, two friends—Stevie Murray and Miranda Woods—reunited via the internet. At some point after reuniting, Woods asked whether she and her partner, a drug dealer named Jerrod Shippy, could come to Murray's house to weigh and package drugs. Murray agreed; and, when Woods and Shippy arrived at Murray's house, they were introduced to Aubre Sucato and Morris Abraham, a couple who frequently spent the night at Murray's house.

At various points throughout the evening of 26 October 2016, Murray, Woods, Shippy, Sucato, and Abraham began spending time at Murray's

1. As the details of the crimes with which Defendant was charged are material only to the arguments concerning his motion to dismiss, we present the evidence of those events in the light most favorable to the State. *State v. Irwin*, 304 N.C. 93, 98 (1981).

house, drinking alcohol and taking drugs until the early morning hours of 27 October 2016. Murray's three-year-old son, Liam, and ten-month-old baby were in the house, the former of whom was watching television in the living room where some of the adults were spending time. Abraham left just as Shippy arrived, and the two exchanged a moment of hostility. Shippy was armed with a handgun.

Later in the evening, the four remaining in the house—Murray, Woods, Shippy, and Sucato—went to sleep. Sucato went to one of the bedrooms, Woods fell asleep in another bedroom, and Murray and Shippy remained in the living room with Liam. While in bed, between 6:00 a.m. and 7:00 a.m., Sucato received three calls from Abraham in which Abraham expressed a desire to rob Shippy of his drugs. During the second call, Sucato got up and passed the phone to Murray, to whom Abraham also expressed that he wanted to rob Shippy. Both Sucato and Murray told Abraham not to rob Shippy because there were children in the house. During these calls, Defendant—Abraham's brother and former sexual partner of Murray—was audible in the background.

Twenty minutes after the third call, a man in a large hoodie wielding a handgun entered the house at the living room where Murray, Shippy, and Liam were resting. The hooded gunman fired at least 18 shots at Shippy after Shippy fired one shot at the hooded gunman. Shippy was left permanently paralyzed from the wounds he sustained in the gunfire, and two of the hooded gunman's shots connected with Liam's head, killing the toddler almost instantly.

Murray, awakened by the shots, began screaming and fled to the room where Sucato was sleeping, waking Sucato. Sucato then went to the living room, where she recognized Defendant as the hooded gunman. Sucato asked where Abraham was, and the hooded gunman replied that Abraham was not there.

After this exchange, Woods stopped in a hallway between the room she had been staying in and the living room to observe what was happening. Upon seeing her, the hooded gunman placed the barrel of his gun inches from her face and fired, killing her instantly.

Defendant's trial began on 17 February 2020. At trial, the State exercised two peremptory challenges to excuse African-American[2] female prospective jurors after another was removed for cause at the State's request. Defendant raised a *Batson* objection after the State's

2. For consistency with the Record, we use the term "African-American" in this opinion, though we use it interchangeably with the term "black" referenced in our caselaw.

exercise of its peremptory challenges, alleging that the State had vetted African-American female jurors more aggressively than similarly situated white jurors. Without ruling on whether Defendant had made a prima facie case of discrimination through these allegations, the trial court asked the State for its input, at which point the State responded that it had exercised peremptory challenges against the two jurors for knowing a witness and not paying attention, respectively. The trial court then stated it did not "believe [there had] been a prima facie case for a *Batson* challenge."

At trial, the State presented a variety of evidence of the events that took place on 26 October 2016, including, in relevant part, testimony from responding officers, Murray, Shippy, and Sucato, as well as expert testimony from a forensic pathologist. The forensic pathologist testified that the shot that killed Woods was fired no more than six inches from her face, and likely no more than two to three inches, and one of the responding officers testified that a shell casing near the location where Woods died was found "in the threshold of the bedroom[.]" Of the evidence presented, only Sucato's testimony expressly identified Defendant as the hooded gunman.

Defendant moved to dismiss all charges against him for insufficiency of the evidence at the close of the State's evidence, at the close of all evidence, and after sentencing. The trial court denied each of these motions.

Defendant was found guilty on all charges on 5 March 2020 and appealed in open court. Between 13 December 2021 and 6 April 2023, we held this case in abeyance pending our Supreme Court's resolution of *State v. Campbell*, 384 N.C. 126 (2023).

ANALYSIS

On appeal, Defendant argues that (A) the trial court erred in denying his motion to dismiss the charges and (B) the trial court's response to his *Batson* objection was procedurally inadequate.

A. Motion to Dismiss

[1] Defendant offers several bases for his argument that the trial court erred in denying his motion to dismiss for insufficient evidence,[3] all of

3. All of Defendant's arguments relate to his being the perpetrator of the crimes alleged and not to whether sufficient evidence of the elements of the crimes themselves had been satisfied. *See State v. Winkler*, 368 N.C. 572, 574 (2015) (emphasis added) (remarking that, when ruling on a motion to dismiss, "the trial court need determine only whether

which pertain to the alleged physical impossibility of the testimony of Aubrey Sucato, the only witness identifying Defendant as the hooded gunman. As a result of these deficiencies, Defendant contends, the denial of his motion to dismiss amounted to a denial of his right to due process. Reviewing the matter de novo, *see State v. Bagley*, 183 N.C. App. 514, 523 (2007), we disagree.

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417 (1998). As to his argument concerning impossibility, however, Defendant appears to misunderstand when the concept of evidentiary impossibility applies. Our Supreme Court has long held that "evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury." *State v. Cox*, 289 N.C. 414, 422-23 (1976) (quoting *Jones v. Schaffer*, 252 N.C. 368, 378 (1960)). However, it remains the case that "[t]he credibility of a witness's identification testimony is a matter for the jury's determination, and only in rare instances will credibility be a matter for the court's determination." *State v. Green*, 296 N.C. 183, 188 (1978) (citation omitted).

North Carolina appellate courts have reserved the application of the principle of evidentiary impossibility for cases where there is no "reasonable possibility" of the evidence being reconcilable with basic physical facts or laws of nature, *see State v. Miller*, 270 N.C. 726, 732 (1967), such that the evidence is "inherently incredible[.]" *State v. Coffey*, 326 N.C. 268, 283 (1990). However, all cases applying this standard have done so on an ad hoc basis without further clarification as to the specific principles animating the distinction between impossible evidence and evidentiary conflicts susceptible to resolution by a jury. *See Miller*, 270 N.C. at 732; *Cox*, 289 N.C. at 423; *State v. Wilson*, 293 N.C. 47, 52 (1977); *State v. Sneed*, 327 N.C. 266, 273 (1990). As such, we turn to the existing caselaw to determine more precisely when evidence is deemed inherently incredible.

Inherent incredibility, in the criminal context, has most often related to the positioning of a witness and the surrounding environment *vis-à-vis* the witness's physical ability to perceive the subject of the testimony at issue. *Compare Miller*, 270 N.C. at 732 (finding witness

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there is substantial evidence of each essential element of the crime *and* that the defendant is the perpetrator").

testimony to be impossible evidence where the witness purported to identify the defendant, a stranger, as the perpetrator at a distance of 286 feet before any crime had been committed), *with Cox*, 289 N.C. at 423 (holding "there [was] a reasonable possibility of observation sufficient to permit subsequent identification" where a witness observed the defendant at multiple points for prolonged periods of time despite the defendant often wearing a mask throughout the duration), *and Coffey*, 326 N.C. at 283 ("[T]he defendant argues that the evidence at trial was insufficient to support his conviction because the testimony of all of the witnesses who purported to identify him as the man with the victim was inherently incredible. He contends this is so because of the extended period between the time when the witnesses observed him at the scene of the crime and their identification of him at trial and because the witnesses were very young and some of them viewed him at a distance. We do not agree."). In this way, the inquiry is typically closer to one of competency[4] than one of credibility *per se*, the latter of which remains solely for the jury. *See State v. Bowman*, 232 N.C. 374, 376 (1950) ("The defendant insists [the evidence] was incredible in character, and that the trial court ought to have nonsuited the action on the ground that the witnesses giving it were unworthy of belief. This argument misconceives the office of the statutory motion for a judgment of nonsuit in a criminal action. In ruling on such motion, the court does not pass upon the credibility of the witnesses for the prosecution, or take into account any evidence contradicting them offered by the defense."); *see also State v. Green*, 295 N.C. 244, 248-49 (1978) (rejecting a purported evidentiary impossibility argument where the basis for the argument related to the mental capacity and honesty of the witness). And, while some criminal cases have involved questions of evidentiary impossibility that did not relate to a witness's ability to perceive the subject of testimony, our research, even including unpublished cases,[5] reveals no such case where such an argument has actually succeeded

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4. Despite this similarity, evidentiary impossibility remains an issue of sufficiency and not of admissibility. *See Sneed*, 327 N.C. at 272 ("*Miller* was not, strictly speaking, a case involving the admissibility of evidence. Instead, *Miller* concerned the question of whether the State's evidence was sufficient to withstand a motion to dismiss (at that time denominated a motion for nonsuit).").

5. While we remain observant of the rule that "unpublished opinion[s] establish[] no precedent and [are] not binding authority," *Long v. Harris*, 137 N.C. App. 461, 470 (2000), we nonetheless find the above-cited cases useful as illustrations, in part, of the general patterns of reasoning employed to distinguish between impossible evidence and evidentiary conflicts susceptible to resolution by a jury. In light of the scarcity of caselaw on the topic of evidentiary impossibility generally, we mention these cases for this illustrative purpose and not for the purpose of attempting to alter or expand their precedential weight.

on appeal. *State v. Scriven*, COA12-1188, 226 N.C. App. 433, 2013 WL 1314774, *2 (unpublished) (rejecting an evidentiary impossibility argument where the victim's testimony allegedly conflicted with physical evidence presented by the State); *State v. Green*, COA02-1357, 160 N.C. App. 415, 2003 WL 22145857, *3-4 (unpublished) (rejecting an evidentiary impossibility argument where the defendant contended the evidence suggested a police officer moved out of the way of Defendant's vehicle and fired two shots with superhuman speed); *see also State v. Windsor*, COA09-713, 206 N.C. App. 332, 2010 WL 3001945, *4 (unpublished) ("However unlikely it may seem that an adult woman could be asphyxiated by an adult man's taping a plastic bag over her head, we do not view it as a physical impossibility."), *disc. rev. denied*, 364 N.C. 607 (2010).

Bearing this background in mind, we find it clear that, at least in a criminal context,[6] evidence is only inherently incredible where the alleged impossibility *fundamentally* undermines the reliability of the evidence as opposed to creating conflicts at the margins.[7] For this

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6. We note that the precursors to the notion of evidentiary impossibility in our jurisdiction were civil suits where contributory negligence was at issue, many of which applied the concept to discrepancies between details. *See, e.g.*, *Atkins v. White Transp. Co.*, 224 N.C. 688, 691 (1944) (reasoning from the rate of speed at which the plaintiff was driving and his proximity to a nearby bus that it was impossible for him to avoid a collision); *Jones*, 252 N.C. at 377-78 (1960) (performing similar calculations to determine which party, if any, was negligent in a multi-vehicle wreck at an intersection); *Powers v. S. Sternberg & Co.*, 213 N.C. 41, 41 (1938) (determining that a driver was contributorily negligent based on the force with which he rammed into another vehicle and the scale of the ensuing destruction). However, we further note that this type of analysis has never been employed in a criminal matter since evidentiary impossibility was first applied in a criminal context in *State v. Miller*. *See generally Miller*, 270 N.C. 726. This is perhaps attributable to the inherent tension between these types of arguments and the long-held principle that "[c]ontradictions and discrepancies in the [evidence in criminal cases] are to be resolved by the jury," *State v. Simpson*, 244 N.C. 325, 331 (1956), as well as the understanding in our caselaw that summary judgment on the issue of contributory negligence, by contrast, necessarily requires a judicial determination of an issue ordinarily reserved for the finder of fact. *Cone v. Watson*, 224 N.C. App. 241, 245 (2012) ("The existence of contributory negligence is ordinarily a question for the jury[.]"). In light of this divide between doctrinal norms, these civil cases predating our established evidentiary impossibility jurisprudence, while helpful to contextualize the doctrine, do not directly inform our analysis of its application in criminal cases.

7. This is, in part, why a significant subset of criminal cases in which evidentiary impossibility is at issue reference the doctrine as pertaining exclusively to witness identification of the defendant. *See, e.g.*, *State v. Turner*, 305 N.C. 356, 363 (1982) (marks omitted) ("According to *Miller*, the test to be employed to determine whether the identification evidence is inherently incredible is whether there is a reasonable possibility of observation sufficient to permit subsequent identification. Where such a possibility exists, the credibility of the witness' identification and the weight given his testimony is for the jury to decide."); *State v. Hoff*, 224 N.C. App. 155, 161 (2012) (citing *Miller* as applicable only

reason, and in keeping with the language of the *Cox* standard itself, a defendant must establish that the comparison point against which he argues evidence is inherently incredible does, in fact, amount to a "physical fact[] or law[] of nature . . . ."[8] *Cox*, 289 N.C. at 422-23. A conclusory allegation of physical impossibility, even together with some conflict in the evidence, is not sufficient to reverse a trial court's denial of a defendant's motion to dismiss on appeal absent a showing of what physical fact or law of nature was established and how that rendered the evidence at issue impossible. *E.g.*, *Bowman*, 232 N.C. at 376 (rejecting a defendant's evidentiary impossibility argument where the alleged conflict was a matter of credibility, not physical impossibility); *Green*, 295 N.C. at 248-49 (rejecting a purported evidentiary impossibility argument where the basis for the argument was the mental capacity and honesty of the witness rather than a conflict with physical facts or laws of

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to witness identification of a defendant), *disc. rev. denied*, 367 N.C. 211 (2013); *State v. Jackson*, 215 N.C. App. 339, 346-47 (2011) (same). While we do not hold that evidentiary impossibility in criminal cases can *only* apply in cases where a witness's ability to perceive the subject of testimony is physically impossible, we observe from the existing caselaw that only the rarest of criminal cases would see it apply outside that context.

8. The only case seemingly contesting this notion is *State v. Gamble*, in which we remarked that "[t]he witness's credibility is a matter for the court when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with the State's own evidence[,]" omitting mention of physical impossibility entirely. *State v. Gamble*, 243 N.C. App. 414, 423 (2015) (marks omitted). However, for two reasons, the language in *Gamble* does not alter our reading of the governing standards with respect to evidentiary impossibility.

First, the language in *Gamble*, despite appearing to deviate from the governing standard set out in *Cox* and *Miller*, was actually a truncated quotation to *Wilson*, the full relevant language of which reads as follows: "While ordinarily the credibility of witnesses and the weight to be given their testimony is exclusively a matter for the jury, this rule does not apply when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with *the physical conditions established by* the State's own evidence." *Wilson*, 293 N.C. at 51 (emphasis added). The standard established by our Supreme Court has therefore remained unchanged.

Second, and more importantly, *Gamble* did not actually purport to change the applicable standard in evidentiary impossibility cases. Despite the omission of critical language in *Wilson*, the use of the truncated quote in *Gamble* was immediately followed by a reiteration of the principle that evidentiary conflicts are to be resolved by the finder of fact and a rejection of the defendant's evidentiary impossibility argument. *See Gamble*, 243 N.C. App. at 423 ("No such conflict exists here. Any issue concerning Detective Russell's credibility, or the weight to be given to his testimony, was a matter for the jury. The trial court therefore did not err, much less commit plain error, in admitting this testimony."). Accordingly, there is no actual conflict between *Gamble* and the foundational principle that evidentiary impossibility arguments must be grounded in "physical facts or laws of nature . . . ." *Cox*, 289 N.C. at 422.

nature); *supra* at footnote 7 and accompanying citations. To hold otherwise would undermine the bedrock principle that "[c]ontradictions and discrepancies, even in the State's evidence, are for the jury to resolve . . . ." *Cox*, 289 N.C. at 423 (citing *State v. Mabry*, 269 N.C. 293, 296 (1967)); *see also Wilson*, 293 N.C. at 51 ("[O]rdinarily the credibility of witnesses and the weight to be given their testimony is exclusively a matter for the jury[.]").

Turning to the case at hand, we think only some of Defendant's arguments, if true, would render Sucato's testimony inherently incredible. Defendant makes three specific arguments: first, Sucato's testimony conflicts with other witness testimony; second, Sucato's testimony is internally inconsistent; and, third, Sucato's testimony that the hooded gunman shot Miranda Woods while standing in the living room places her at a vantage point that conflicts with the State's other evidence. Of these, only the last, if true, would amount to evidentiary impossibility.

The first alleged conflict—conflict between Sucato's testimony and that of other witnesses—does not, even if true, render Sucato's testimony impossible. The specific conflict alleged by Defendant in connection with this argument is that neither Murray nor Shippy saw Sucato despite the fact that, if all of their testimony were to be believed, they would have necessarily crossed paths. However, conflict between witness testimony does not necessarily amount to "conflict with indisputable physical facts or laws of nature[,]" and this specific conflict in testimony amounts only to a discrepancy between individuals' recollection and perspectives. *Cox*, 289 N.C. at 422. Defendant points us to no physical fact or law of nature that Murray or Shippy's testimony established that Sucato's testimony, in turn, violated. Defendant has therefore not established that Sucato's testimony was inherently incredible on this basis, and any associated contradictions and discrepancies in the evidence were for the jury to resolve. *Id.* at 423.

The second alleged conflict—internal inconsistency in Sucato's testimony—also does not, if true, render Sucato's testimony impossible. With respect to this issue, the specific conflict alleged is that Sucato claims to have been able to identify Defendant as the hooded gunman despite having not looked at his face or being able to identify key details about Defendant's appearance from memory. However, this argument is also not predicated on impossibility; rather, it relates to the witness's credibility in light of her inability to recall previously observed details of Defendant's appearance. As Defendant has not argued that this testimony is actually in conflict with a physical fact or law of nature,

Defendant cannot establish on this basis that the evidence was inherently incredible and, by extension, impossible.[9]

This brings us back to the third alleged conflict—discrepancy between the vantage point at which Sucato claims to have been standing when she observed Defendant and the location where the State's other evidence would have placed Defendant. This argument is divided into two further sub-arguments that Sucato's testimony "places [Defendant] at a distance from [] Woods which is incompatible with [Woods's] autopsy" and that Sucato's testimony "places [Defendant] in the living room when he fired the gun, while the shell casing was located in the back bedroom requiring the shooter to have been standing next to the bedroom at the end of the hallway[.]" Unlike the other alleged conflicts, Defendant relies on the structure of the house, pathologist testimony, photographic evidence, and ballistics evidence to support the proposition that Sucato was in a location where her observing Defendant

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9. We note that this argument, unlike the other arguments in this section of Defendant's brief, does not explicitly reference evidentiary impossibility as the basis for the allegation that the trial court erred. To the extent Defendant intended this argument as a freestanding argument that his identification was unsupported by substantial evidence, we still disagree. *State v. Stallings*, which Defendant primarily relies upon for the argument that Sucato's testimony was too internally inconsistent to qualify as substantial evidence, concerned the testimony of a witness who identified a suspect as the defendant using only general characteristics:

> [The witness] testified that defendant was a regular customer. She never positively identified [the] defendant as the robber, however. She testified that [the] defendant's eyes were blue, but failed to identify them as the same distinctive eyes. Ms. King did not match [the] defendant's voice with the robber's. She stated that the robber had an unusual walk, and that [the] defendant had a "similar walk."
>
> . . . .
>
> [The witness's testimony] alone did not suffice to carry the issue of defendant's identity to the jury. Although she testified that she clearly remembered the robber's voice, walk and eyes, she never positively identified defendant by these characteristics despite extensive examination and opportunity. Taking her evidence in the light most favorable to the State, the most that can be inferred is that defendant and the robber walked similarly and had blue eyes. Such limited and equivocal evidence, standing alone, will not withstand a timely motion to dismiss.

State v. Stallings, 77 N.C. App. 189, 190 (1985), *disc. rev. denied*, 315 N.C. 596 (1986). Here, *Stallings* is inapposite because, while Sucato testified she only recognized the shooter as Defendant by his voice, build, and walk, this testimony was further contextualized by a prior phone conversation about robbing Shippy in which Defendant was audible and a verbal exchange between the hooded gunman and Sucato that implied a familiarity with Abraham, Defendant's brother. Even as a standalone argument, then, the trial court did not err on this basis.

would have been physically impossible. As these arguments are based on "physical facts[,]" *Cox*, 289 N.C. at 422, they may, if true, support a conclusion that Sucato's testimony constituted impossible evidence.

Notwithstanding the requisite foundation of physical impossibility, this argument does not withstand scrutiny. With respect to the shooting of Woods, Defendant contends that Sucato could not have been standing between the hooded gunman and the front door—a location where she testified she was standing at the time she spoke to him—when Woods was shot. He argues this is the case because the physical evidence, supported by pathologist testimony, placed the hooded gunman no more than a few feet, if not inches, from the victim when the shot was fired, rendering Sucato's testimony inherently incredible by virtue of the positioning discrepancy. However, Defendant's interpretation of the testimony only creates a discrepancy under the assumption that the hooded gunman remained in a fixed location in the living room between the time he spoke to Sucato and the time he shot Woods. Sucato's testimony contains no such statement, and Defendant points us to no portion of Sucato's testimony inconsistent with Defendant having moved toward Woods before he shot her.

Similarly, with respect to the ballistics evidence, Defendant points to photographic evidence and expert testimony indicating the shell casing from the bullet that killed Woods was found in a bedroom in the hallway, a location where it could not have landed if Defendant had been in the living room when he shot Woods. As with Defendant's previous argument, though, nothing in Sucato's testimony indicates Defendant did not move before shooting Woods. Moreover, despite Defendant characterizing the shell casing as having been "a few feet inside the bedroom[,]" the uncontradicted evidence was that the shell casing was found "in the threshold of the bedroom," a location consistent with Sucato's ability to observe Woods and the hooded gunman.

Consequently, the trial court did not err in denying Defendant's motion to dismiss on this basis.

B. *Batson* Objection

[2] Defendant also argues the trial court made inadequate *Batson* findings in light of *State v. Hobbs*. 374 N.C. 345 (2020). Under *Batson v. Kentucky*,

> a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such

> a case, the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.
>
> . . . .
>
> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging [jurors of the excluded class].

Batson v. Kentucky, 476 U.S. 79, 96, 97 (1986) (marks and citations omitted); *see also Powers v. Ohio*, 499 U.S. 400, 409-410 (1991) (applying the principles of *Batson* even where the stricken juror's race did not match the defendant's), *cert. denied*, 558 U.S. 851 (2009). Put differently, a *Batson* analysis consists of a three-step process: "First, the defendant must make a prima facie showing that the [S]tate exercised a race-based peremptory challenge." *State v. Taylor*, 362 N.C. 514, 527 (2008). Second, "[i]f the defendant makes the requisite showing, the burden shifts to the [S]tate to offer a facially valid, race-neutral explanation for the peremptory challenge." *Id.* "Finally, the trial court must decide whether the defendant has proved purposeful discrimination." *Id.*

In *State v. Hobbs*, our Supreme Court held that a trial court is required to consider on the record factors weighing for and against findings of discrimination in order to sufficiently respond to a *Batson* challenge where the trial court moved to *Batson*'s second step without ruling on the defendant's prima facie case. *Hobbs*, 374 N.C. at 360 ("On remand, considering the evidence in its totality, the trial court must consider whether the primary reason given by the State for challenging [the stricken juror] was pretextual. This determination must be made in light of all the circumstances, including how [the stricken juror's] responses during voir dire compare to any similarly situated white juror, the history of the use of peremptory challenges in jury selection in that county, and the fact that, at the time that the State challenged [the stricken juror], the State had used eight of its eleven peremptory challenges against

black potential jurors."). Moreover, it reiterated the principle that, "[w]here the State has provided reasons for its peremptory challenges, thus moving to *Batson*'s second step, and the trial court has ruled on them, completing *Batson*'s third step, the question of whether a defendant initially established a prima facie case of discrimination becomes moot." *Id.* at 354 (citing *State v. Robinson*, 330 N.C. 1, 17 (1991)). Thus, the overall effect of *Hobbs* was to clarify the procedural requirements for a trial court responding to a *Batson* objection not only in cases where the trial court actually finds a prima facie case has been shown, but also in cases where the trial court proceeds to the second and third steps of *Batson*, thereby mooting the first step.

These principles were further elaborated upon in *State v. Campbell*, 384 N.C. 126 (2023), in which our Supreme Court further clarified under what circumstances a trial court's analysis of the first step of *Batson* becomes moot. In that case, the trial court sought, purportedly during the first step of *Batson*, race-neutral reasons from the State for its peremptory challenges to two African-American jurors. *Id.* at 127. The trial court denied the defendant's *Batson* challenge on the basis that there had been no prima facie showing. *Id.* However, despite the trial court having already ruled on the *Batson* objection and the State cautioning the trial court that offering race-neutral reasons at that stage in the proceedings "could be viewed as a stipulation that there was a prima facie showing," the trial court "ordered the State to proceed as to stating a racially-neutral basis for the exercise of the peremptory challenges." *Id.* at 128. After hearing the State's race-neutral reasons, the trial court stated that it "continue[d] to find[] . . . that there ha[d] not been a prima facie showing as to purposeful discrimination." *Id.* at 130.

Ultimately, our Supreme Court reasoned that, because the trial court had already announced its ruling as to the first step of *Batson*, its own analysis on appeal was limited to whether the trial court had clearly erred in determining the defendant failed to establish a prima facie case. *Id.* at 136; *see also State v. Augustine*, 359 N.C. 709, 715 (2005) (marks and citations omitted) ("The trial court's [*Batson*] ruling is accorded deference on review and will not be disturbed unless it is clearly erroneous."), *cert. denied*, 548 U.S. 925 (2006). However, it further remarked that "[t]he State appropriately objected to the trial court's attempt to move beyond step one[,]" clarifying that the reservation of its analysis to the first step of *Batson* was based on the fact that "the trial court clearly ruled there had been no prima facie showing *before* the State articulated its reasons[.]" *Id.* (marks omitted) (emphasis added) (quoting *State v. Hoffman*, 348 N.C. 548, 552 (1998)).

Here, the full exchange between the trial court, the State, and Defendant following Defendant's *Batson* objection reads as follows:

> THE COURT: All right. So what is the objection?
>
> [DEFENDANT'S COUNSEL]: Your Honor, this is a *Batson*. So far, what I've seen is the State, I believe, has used two peremptory challenges and both were African-Americans that she struck, especially the first juror, [Juror No. 9].
>
> THE COURT: Right, who knew one of the relatives of the defendant. They went to high school.
>
> [DEFENDANT'S COUNSEL]: Yes, they did, but the State passed on others who knew some members. And Juror No. 4, although it was for cause, she was also an African-American female. Now, she has struck [Juror No. 9] who is an African-American female. [Juror No. 10], other than—she did not know any of the family members. And all I heard was that she had issues with the child care, which [Juror No. 11] also had issues with child care, and she passed on her.
>
> THE COURT: Okay. Does the State want to be heard?
>
> [THE STATE]: Your Honor, I am not sure that the Court can consider Juror No. 4 because it was for cause and there was no objection. I really liked [Juror No. 9], but, of course, I'm concerned that she points out someone who's sitting on the front row. She points out [Defendant's family member] as someone that she knows. I'm not going to keep anybody that knows—unless I absolutely have to—that knows a member of the defendant's family. There's too strong of a feeling there.
>
> In my past experience, even if it is tangential—we went to the high school; tie to the family—I do not keep that. In all honesty, I probably would have stricken Juror No. 4 because her daughter dated [Defendant's family member's] son and she knew two of [Defendant's] relatives. Just to be honest with the Court, that would have been the reason there.
>
> The reason that I attempted to strike [Juror No. 10] is when she came up and sat down, she immediately began to yawn. She's yawned several times throughout the brief

> period of time I talked to her. That concerns me. I have had jurors fall asleep and not listen to the evidence before.
>
> And when I asked her about paying the fine, she said "I have the baby and I don't have time to come up here and mess with anything like an open container." So I do have real concerns about her commitment to paying attention, to being awake and alert, and to how serious this proceeding is. Those are my reasons for striking her.
>
> THE COURT: Yes, sir, anything else?
>
> [DEFENDANT'S COUNSEL]: I understand knowing someone in the family. However, knowing the family of—[Defendant's family member], his family is well known in the community. And you will strike a lot of African-Americans just because the family is African-American, which although it may not be systematic in its nature although it does sound race neutral. But and [sic] another thing I would like to point out is there are several people on the jury that has said they know [the prosecutor] and she passed on them.
>
> THE COURT: All right. I don't believe there's been a prima facie case for a *Batson* challenge. The Court is going to deny that challenge[.] [A]nything else we need to address[?]
>
> [THE STATE]: Not from the State.
>
> THE COURT: For the record, the juror in question is a black female. Juror No. 6 was left on the jury and he is a black African-American male. The State has not targeted race as a component of its questioning. The Court did note the demeanor of Juror No. 10 during questioning and certainly was concerned about her.

Unlike in *Campbell*, the trial court in this case immediately sought the State's input upon hearing Defendant's argument under *Batson*'s first step, issuing no preliminary ruling on whether Defendant had made a prima facie case. And, although the trial court's ruling nominally concerned whether Defendant had established a prima facie case, the fact that it issued the ruling after hearing the State's race-neutral reasons made the ruling, in substance, a ruling on the third step of *Batson*. *Hobbs*, 374 N.C. at 355 ("The facts of this case are governed by the rule as stated by this Court in *Robinson* because the trial court here did consider the prosecution's race-neutral reasons for excusing jurors [],

ultimately concluding that there was no racial discrimination."). Thus, under the clear command of *Hobbs*, "[w]here the State has provided reasons for its peremptory challenges, thus moving to *Batson*'s second step, and the trial court has ruled on them, completing *Batson*'s third step, the question of whether a defendant initially established a prima facie case of discrimination becomes moot." *Id.* at 354 (citing *Robinson*, 330 N.C. at 17).

As the trial court issued its ruling after soliciting input from the State, it was required, pursuant to *Hobbs*, to engage in a full analysis of Defendant's arguments that the State employed its peremptory strikes in a racially discriminatory manner. *Id.* at 355, 356 (marks and citations omitted) ("[W]hether a defendant has established a prima facie case of discrimination in a Batson challenge becomes moot after the State has provided purportedly race-neutral reasons for its peremptory challenges and those reasons are considered by the trial court. . . . A defendant may rely on all relevant circumstances to support a claim of racial discrimination in jury selection. It follows, then, that when a defendant presents evidence raising an inference of discrimination, a trial court, and a reviewing appellate court, must consider that evidence in determining whether the defendant has proved purposeful discrimination in the State's use of a peremptory challenge."). Evidence on which a defendant may rely in arguing the State discriminated on the basis of race includes, but is not limited to, the following:

> • statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
>
> • evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
>
> • side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
>
> • a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
>
> • relevant history of the State's peremptory strikes in past cases; or
>
> • other relevant circumstances that bear upon the issue of racial discrimination.

Id.

Here, Defendant has only argued at trial, and only argues on appeal, that the State's use of peremptory challenges was discriminatory for the following reasons: (1) both of the State's peremptory challenges at that point had been used on African-American prospective jurors; (2) the State used a peremptory strike to excuse Juror No. 9 for knowing Defendant's relative, but did not use strikes on similarly situated white jurors who knew individuals connected with the case; (3) the State moved to strike for cause Juror No. 4, another African-American prospective juror, for childcare-related reasons but did not make a similar motion with respect to Juror No. 11, a white juror who also had childcare-related concerns; and (4) the State did not move to strike for cause, or exercise a peremptory challenge against, any juror who knew the prosecutor.[10]

At trial, the entirety of the trial court's analysis of these arguments was as follows:

> For the record, the juror in question is a black female. Juror No. 6 was left on the jury and he is a black African-American male. The State has not targeted race as a component of its questioning. The Court did note the demeanor of Juror No. 10 during questioning and certainly was concerned about her.

Under *Hobbs*, these findings are inadequate. "[T]he trial court did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges," nor did it conduct a comparative analysis between the stricken African-American jurors and the other jurors alleged to have been similarly situated. *Hobbs*, 374 N.C. at 358. Indeed, many of Defendant's arguments went completely unaddressed.

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10. At trial, Defendant also remarked of the family member known to Juror No. 9 that "his family is well known in the community. And you will strike a lot of African-Americans just because the family is African-American, which although it may not be systematic in its nature although it does sound race neutral." We note that the wording of this argument makes his point somewhat unclear; and, although Defendant also mentions this argument on appeal, he does not elaborate beyond what was said at trial.

To the extent Defendant argues for the expansion of *Batson* to cases where the State exercises strikes in a manner that incidentally, rather than purposefully, results in disproportionate exercises of peremptory strikes by race, the requisite showing in *Batson* cases remains "purposeful discrimination." *Campbell*, 384 N.C. at 135 (2023). Thus, this argument will not factor further into our analysis, as it is predicated on the incorrect legal standard.

Ordinarily, where a Defendant appeals a trial court's ruling on a *Batson* objection, we conduct a comparable analysis to that of the trial court in order to determine whether the ruling at issue was clearly erroneous. *Id.* at 356 ("[W]hen a defendant presents evidence raising an inference of discrimination, a trial court, and a reviewing appellate court, must consider that evidence in determining whether the defendant has proved purposeful discrimination in the State's use of a peremptory challenge."); *see also Augustine*, 359 N.C. at 715 (marks and citations omitted) ("The trial court's [*Batson*] ruling is accorded deference on review and will not be disturbed unless it is clearly erroneous."). However, here, Defendant has not sought our review of the trial court's substantive ruling; rather, he argues only that "the trial court [] failed to conduct a comparative juror analysis as required by *Hobbs*" and that "this case must be remanded to the trial court for further proceedings[.]" Accordingly, we reverse and remand to the trial court for further proceedings consistent with those set out in *Hobbs*. *Hobbs*, 374 N.C. at 360 ("The trial court is instructed to conduct a *Batson* hearing consistent with this opinion, to make findings of fact and conclusions of law, and to certify its order to this Court within sixty days of the filing date of this opinion[.]").

CONCLUSION

We are unpersuaded by Defendant's argument that the trial court erred in failing to dismiss the charges against him. However, we reverse and remand for a new *Batson* hearing in light of the trial court's procession to *Batson*'s third step and subsequent failure to conduct an analysis satisfactory under the procedural requirements established in *State v. Hobbs*.

In the event that the trial court conducts an adequate *Batson* hearing and determines no purposeful discrimination occurred, Defendant's conviction will remain undisturbed as no error will have occurred at trial. However, in the event the trial court rules in Defendant's favor on his *Batson* challenge, Defendant shall receive a new trial. *State v. Alexander*, 274 N.C. App. 31, 47 (2020). Pursuant to Rule 32(b) of our Rules of Appellate Procedure, we direct that the mandate of this Court will issue to the trial court in five business days following the filing of this Opinion. N.C. R. App. P. 32(b) (2023).

NO ERROR IN PART; REVERSED AND REMANDED IN PART.

Judge DILLON concurs.

Judge STADING concurs in part and dissents in part.

DILLON, Judge, concurring.

I concur in the majority. I write separately regarding Defendant's *Batson* challenge. The trial court stated that it had determined that there had not been a *prima facie* showing of discrimination during jury selection, thereby implying that it had not moved beyond step one of the *Batson* analysis. And, based on the Record before us, I would hold that the trial court would not be in error for so determining.

Certainly, the State may be heard during step one. For instance, assume a defendant points to the fact that the State excused a number of black jurors to make out its *prima facie* case during step one. In such a case, the State could point out that it had also objected to several white potential jurors and had not otherwise objected to other black jurors without ever moving to step two. But, even if the State on its own mentions "step-two" evidence, showing race-neutral reasons why it excused certain black jurors, the trial court could ignore this step-two evidence and make a ruling on whether a *prima facie* showing had been made.

But, here, it appears the trial court did consider at least some of the State's step-two evidence. For instance, the trial court mentioned how one juror was inattentive as a race-neutral reason for this juror being excused. Therefore, it appears from the Record that the trial court moved beyond step one. Based on our current jurisprudence, we must hold that the trial court must conduct a full *Batson* inquiry.

STADING, Judge, concurring in part and dissenting in part.

I concur with the majority's decision that the trial court did not err in denying defendant's motion to dismiss. However, I respectfully dissent from the majority's holding that the trial court failed to meet necessary procedural requirements imposed by *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (2020).

Defendant argues, and the majority agrees, that the question of whether defendant established a prima facie case of discrimination became moot when the State volunteered its reasoning for challenging the prospective jurors. The majority opinion turns on *Hobbs*, in which the trial court first determined that the defendant "had not made out a prima facie case of discrimination." *Id.* at 348, 841 S.E.2d at 496. "However, [then] the trial court asked the State, for purposes of the record, to explain the State's use of peremptory challenges. . . ." *Id.*

On appeal, the North Carolina Supreme Court held that "[w]here the State has provided reasons for its peremptory challenges, thus moving to *Batson*'s second step, *and the trial court has ruled on them*, completing *Batson*'s third step, the question of whether a defendant initially established a prima facie case of discrimination becomes moot." *Id.* at 345, 354, 841 S.E.2d at 499 (citation omitted) (emphasis added). In holding the inquiry of a prima facie showing of discrimination moot, the *Hobbs* opinion cited *Hernandez v. New York*: "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges *and the trial court has ruled on the ultimate question of intentional discrimination*, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Id.* at 354, 841 S.E.2d at 500 (citing *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866 (1991) (emphasis added)).

The majority also maintains that an application of *State v. Campbell* to this case supports the proposition that the first step of the trial court's *Batson* analysis was moot. 384 N.C. 126, 884 S.E.2d 674 (2023). In that case, the defendant argued to the North Carolina Supreme Court that our Court erred in affirming the trial court's determination that he failed to make a prima facie showing of discrimination under *Batson*. *Id.* at 135, 884 S.E.2d at 682. At trial, the prosecutor in *Campbell* was careful to remind the trial court to rule on the first step of the *Batson* analysis before offering an argument in furtherance of the second step. *Id.* at 128, 884 S.E.2d at 677. The trial court then ruled that the defendant failed to establish a prima face case. *Id.* at 128, 884 S.E.2d at 678. Nonetheless, the trial court ordered "the State to proceed as to stating a racially-neutral basis for the exercise of the peremptory challenges." *Id.* Ultimately, the Court held that "[t]he State appropriately objected to the trial court's attempt to move beyond step one" and precluded a consideration of the step two response at a step one analysis. *Id.* at 136, 884 S.E.2d at 682. However, the Court did not speak to whether the State's response to step two would have precluded the trial court judge from issuing a ruling on step one of the *Batson* analysis.

In the matter presently before us, after concluding the State's response compelled the trial court to proceed to the third *Batson* step, the majority deemed the trial court's findings inadequate to conduct a comparative-juror analysis. While the record may lack substance to survive the third *Batson* step, such an inquiry presumes that step one is moot. However, in the instant case, a determination of the first *Batson* step is not moot. Thus, engagement in a step three analysis is premature since the trial court determined that defendant did not meet his burden at step one. *State v. Hoffman*, 348 N.C. 548, 554, 500 S.E.2d 718, 722–23

(1998) ("We do not proceed to step two of the *Batson* analysis when the trial court has not done so.").

The record shows that it was not the trial court, but the State, that proceeded to step two of the *Batson* inquiry. *See id.* Once defendant raised the *Batson* challenge and stated his grounds, the trial court invited the State to respond. The State prematurely sought to address the second prong of the *Batson* inquiry—an act which was beyond the control of the trial court. Existing case law does not impute the actions of the parties or their counsel to the trial court in conducting a legal analysis under *Batson*. Unless the trial court itself improperly proceeds beyond the initial inquiry in its analysis—as was done in *Hobbs*—precedent does not dictate that the trial court forfeits the ability to redirect the proceedings back to an earlier analytical step. *Batson* provides trial courts broad latitude in assessing discriminatory inferences as such judges "experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination. . . ." *Batson v. Kentucky*, 476 U.S. 79, 97, 106 S. Ct. 1712, 1723 (1986). A holding to the contrary takes the power of prescribing when the first step of a *Batson* inquiry ends out of the hands of the trial court judge and into the power of a party—the State in this case—effectively allowing it to control the direction of the proceedings.

Our precedent establishes that a trial judge may invite the State to comment before issuing a ruling on the preliminary step of a *Batson* analysis—which is what the trial judge did here. *See State v. Smith*, 351 N.C. 251, 262, 524 S.E.2d 28, 37 (2000) ("[T]he trial court concluded that defendant had not made a prima facie showing that the peremptory challenge was exercised on the basis of race, but the trial court permitted the State to make any comments for the record that it chose to make."). Unlike *Hobbs*, in this case, the trial court judge did not ask the State for the reasons underlying its peremptory challenges because the judge had not yet made a ruling on them. *See Hobbs*, 374 N.C. at 348, 841 S.E.2d at 496; *Smith*, 351 N.C. at 262, 524 S.E.2d at 37 ("[O]ur review is limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing, even if the State offers reasons for its exercise of the peremptory challenges."). Once the State provided comment, the trial court permitted defendant to respond. *Cf. Hoffman*, 348 N.C. at 554, 500 S.E.2d at 723 (noting that, as to a *Batson* first-step inquiry, "although the State was given an opportunity to articulate its reasons for its peremptory challenges, defendant was not given an opportunity to respond. Defendant must be accorded this opportunity. . . ."). Defendant then remarked that his family was "well known in the community" and

mentioned the prosecutor's passing on potential jurors who knew the prosecutor. Following defendant's response, the trial court directed the proceedings back to step one and ruled "I don't believe there's been a prima facie case for a *Batson* challenge. The Court is going to deny that challenge. . . ."

After hearing the State's comments and defendant's response, the trial court concluded that defendant failed to meet the prima facie case necessary for a *Batson* challenge. Moreover, a review of the record shows that the trial court already made this determination on step one of the analysis prior to offering any commentary on juror demeanor. Discerning no error, I find that the trial court's *Batson* ruling falls within the parameters of the great deference afforded to trial judges. *See, e.g.*, *State v. Floyd*, 343 N.C. 101, 104, 468 S.E.2d 46, 48, *cert. denied*, 519 U.S. 896, 117 S. Ct. 241, 136 L.Ed.2d 170 (1996) ("[T]he trial court's ruling . . . must be accorded great deference by a reviewing court."); *Hoffman*, 348 N.C. at 554, 500 S.E.2d at 722–23. Accordingly, I concur with the majority's decision that the trial court did not err in denying the defendant's motion to dismiss. But I respectfully dissent from the majority's holding that the trial court's step one *Batson* determination was moot.

STEVEN URVAN, II, Plaintiff
v.
CASSANDRA LYNN ARNOLD, Defendant

No. COA22-957

Filed 7 November 2023

1. Appeal and Error—preservation of issues—custody standard—different theory argued on appeal

In a custody dispute, the child's father failed to preserve for appellate review the issue of whether the trial court erred by determining custody based on the best interests of the child rather than the substantial change of circumstances standard, where he argued exclusively before the trial court that best interests would determine the outcome. Even assuming the argument was properly preserved, it had no merit because the appealed-from order was an initial custody determination for which best interests was the appropriate standard.

2. Child Custody and Support—custody—final decision-making authority—effect of parties' inability to communicate

In a custody dispute, the trial court did not err by granting the child's mother (who was the primary custodial parent) final decision-making authority regarding major decisions affecting the parties' child in the event the parties could not reach a mutual decision, where the court's award was supported by findings of fact detailing the parties' past contentious communications and the negative effect that such communications would have on the child.

Appeal by Plaintiff from order entered 11 April 2022 by Judge Jena P. Culler in Mecklenburg County District Court. Heard in the Court of Appeals 3 October 2023.

Connell & Gelb PLLC, by Michelle D. Connell, for Plaintiff-Appellant.

Plumides, Romano & Johnson, PC, by Michael Romano, for Defendant-Appellee.

COLLINS, Judge.

Plaintiff Steven Urvan II appeals from the trial court's order awarding Defendant Cassandra Arnold primary physical custody of their minor child and final decision-making authority regarding major decisions affecting their minor child. Plaintiff argues that the trial court erred by determining child custody based on the best interests of the child rather than using a substantial change of circumstances standard, and that the trial court abused its discretion by awarding Defendant final decision-making authority. Plaintiff failed to preserve for appellate review his argument that the trial court erred by using the best interests of the child standard. Even assuming arguendo that this issue is properly before us, the trial court did not err by determining child custody based on the best interests of the child. Furthermore, the trial court did not err by granting Defendant final decision-making authority because the findings of fact support the trial court's decision. Accordingly, we dismiss in part and affirm in part.

I. Background

Plaintiff and Defendant met in Georgia and began a romantic relationship in 2010. The parties began living together in Cornelius,

North Carolina, in 2011. Defendant gave birth to their son, Sean,[1] on 5 November 2018 in Charlotte, North Carolina. While Defendant was pregnant with Sean, she spent a lot of time in Georgia with her parents and traveled between Georgia and North Carolina. After Defendant gave birth, she continued to travel between North Carolina and Georgia with Sean. Defendant and Sean moved to Georgia on 10 January 2019.

That same day, Plaintiff filed suit in Mecklenburg County District Court seeking temporary and permanent legal and physical custody of Sean.[2] Plaintiff subsequently filed a motion for temporary parenting arrangement. The trial court granted Plaintiff's motion and scheduled a hearing for 10 June 2019. Defendant filed an answer and counterclaims for child custody and temporary and permanent child support.

The parties completed an Administrative Office of the Courts form AOC-CV-220, Memorandum of Judgment/Order ("Memorandum"). Handwritten in the space provided for the terms and conditions of the agreement is the following:

> The parties have one (1) minor son, namely [Sean], born November 5, 2018. The parties have resolved temporary legal and physical custody. The parties attach hereto and incorporate herein Exhibit "A" as their agreement on temporary legal and physical custody.

Exhibit A was a print out of an email which provided for "Temporary Joint Legal Custody" and "Graduated Temporary Physical Custody," and set forth a weekly and holiday custody schedule. The Memorandum also provided, "A formal judgment/order reflecting the above terms will be prepared by and submitted no later than _________ for signature by a judge[.]" The date "June 24, 2019" is handwritten in the blank space. The Memorandum was file stamped by the Clerk of Court on 10 June 2019. However, the record does not contain a "formal judgment/order . . . sign[ed] by a judge[.]"

Plaintiff filed a motion for contempt and a show cause order on 13 December 2021, alleging that Defendant had failed to abide by certain terms of the Memorandum. The trial court held a hearing on the parties' claims for custody and Plaintiff's contempt motion on 24 and 25 March 2022. By written order entered 11 April 2022, the trial court concluded,

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1. We use a pseudonym to protect the minor child's identity.

2. The parties filed various other motions that were decided by the trial court, none of which are relevant to the issues on appeal.

in relevant part, that "it is in the best interest of the child to live primarily with [Defendant] during the school year beginning in August 2022 and to have time with [Plaintiff]" and that "[i]t is in the best interest of the child that the primary custodial parent has the final decision making authority regarding major decisions affecting the child in the event a mutual decision cannot be reached between the parties." Plaintiff appealed.

II. Discussion

A. Child Custody Determination

[1] Plaintiff first argues that the trial court erred by determining child custody based on the best interests of the child rather than using a substantial change of circumstances standard because the parties' Memorandum was a permanent custody order. Plaintiff's argument is unpreserved and otherwise lacks merit.

"[T]o 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). It is well settled that "the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Accordingly, where an appellant presents a different theory on appeal than was argued in the trial court, the appellate argument is not properly preserved for our review. *Angarita v. Edwards*, 278 N.C. App. 621, 625, 863 S.E.2d 796, 800, *appeal dismissed*, 379 N.C. 159, 863 S.E.2d 601 (2021).

Here, Plaintiff argued exclusively in the trial court that child custody should be determined based on the best interests of the child. In an initial discussion with the trial court, Plaintiff indicated that the trial court should determine the best interests of the child:

> [PLAINTIFF]: You're certainly able to make rulings about summer and school. I mean, it happens all the time.
>
> [DEFENDANT]: Yeah.
>
> [PLAINTIFF]: But something is going to happen in the summer (inaudible) school and so especially –
>
> THE COURT: Yeah.
>
> [PLAINTIFF]: -- since it's a small window, *I think it would essentially be finding now that this is in the best interest.* [emphasis added]

> [DEFENDANT]: Yeah, I would agree with that.

During closing arguments, Plaintiff again argued that the best interests of the child standard applied:

> [PLAINTIFF]: . . . You know, but I -- I do think that little [Sean] is a very lucky child. He has two parents that clearly love him very much. Both parents clearly want to provide for him and want him to grow up to be well-developed and well-loved and I don't think there's any question from anyone that these two parents love their child.
>
> The hard part, of course, is that *when you're making a decision about custody, you're making a decision about best interest* . . . . [emphasis added]
>
> . . . .
>
> So we would be asking for primary custody during the school year with substantial visitation to [Defendant] both during the breaks and during the summer . . . .

At no point did Plaintiff argue in the trial court that child custody should be determined using the substantial change of circumstances standard. To the contrary, it is abundantly clear from the record and transcript that Plaintiff advocated that it was in the best interests of the child for Plaintiff to be given primary custody. Accordingly, Plaintiff's argument that the trial court erred by determining child custody based on the best interests of the child rather than the substantial change of circumstances standard is not preserved for appeal and is dismissed.

Even assuming arguendo that this issue is properly before us, Plaintiff's argument is without merit.

A custody agreement is a contract that "remains modifiable by traditional contract principles unless a party submits it to the court for approval or if a court order specifically incorporates the [custody] agreement." *Peters v. Pennington*, 210 N.C. App. 1, 14, 707 S.E.2d 724, 734 (2011) (citation omitted). A trial court's "initial custody determination requires a custody award to such person 'as will best promote the interest and welfare of the child.' " *Senner v. Senner*, 161 N.C. App. 78, 80, 587 S.E.2d 675, 676 (2003) (quoting N.C. Gen. Stat. § 50-13.2). "Subsequent modification of a custody order requires a 'showing of changed circumstances[.]' " *Id.* (quoting N.C. Gen. Stat. § 50-13.7).

Here, the parties executed the Memorandum resolving temporary legal and physical custody and filed it with the Clerk of Court. However,

there is no record evidence that the Memorandum was presented to or approved by the trial court, or that the Memorandum was specifically incorporated into a court order. Accordingly, the Memorandum was not the trial court's initial custody determination, *see Peters*, 210 N.C. App. at 14, 707 S.E.2d at 734 (holding that a separation agreement which included child custody provisions was not incorporated or approved by the trial court, and therefore the trial court was not required to find changed circumstances in its child custody order), and the trial court's order entered 11 April 2022 was an initial custody determination requiring the trial court to determine child custody based on the best interests of the child. *See Senner*, 161 N.C. App. at 80, 587 S.E.2d at 676. The trial court thus did not err by determining child custody based on the best interests of the child.[3]

B. Final Decision-Making Authority

[2] Plaintiff next argues that the trial court erred by "giving the primary custodial parent final decision-making authority where the findings of fact did not establish the 'actual effect' the parties' communications had on the minor child." (capitalization altered).

Legal custody generally refers "to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Diehl v. Diehl*, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27 (2006) (citations omitted). "Our trial courts have wide latitude in distributing decision-making authority between the parties based on the specifics of a case." *Peters*, 210 N.C. App. at 17, 707 S.E.2d at 736 (citation omitted). "This grant of latitude refers to a trial court's discretion to distribute certain decision-making authority that would normally fall within the ambit of joint legal custody to one party rather than another based upon the specifics of the case." *Diehl*, 177 N.C. App. at 647, 630 S.E.2d at 28 (citations omitted). "While we review a trial court's deviation from pure joint legal custody for abuse of discretion, a trial court's findings of fact must support the court's exercise of this discretion." *Eddington v. Lamb*, 260 N.C. App. 526, 535, 818 S.E.2d 350, 357 (2018) (quotation marks and citations omitted). "Accordingly, this Court must determine whether, based on the findings of fact below, the

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3. Furthermore, even if the Memorandum were considered an initial custody determination by the trial court, the Memorandum was temporary based on its plain and unequivocal language and did not convert to a permanent order based on the passage of time primarily during the COVID-19 pandemic. *See Miller v. Miller*, 201 N.C. App. 577, 580-81, 686 S.E.2d 909, 912 (2009) (holding that a period of 30 months did not convert a temporary custody order to a permanent custody order because "the child custody matter did not lie dormant after the . . . consent order was entered").

trial court made specific findings of fact to warrant a division of joint legal authority." *Hall v. Hall*, 188 N.C. App. 527, 535, 655 S.E.2d 901, 906 (2008).

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

> 20. The parties have difficulty communicating effectively with each other. At exchanges interaction between the two can be curt and rude. That is not in the best interest of the child. The way the parties communicate is problematic not just at exchanges. The court has in evidence multiple communications between the parties in the form of emails. Of the emails offered into evidence, [Plaintiff's] way of talking to [Defendant] is condescending and demanding. . . . It honestly comes across like he is talking to a child he is disciplining. The court has other examples of communications between the parties in the form of emails. . . . The court has concern about [Plaintiff's] comments that he will tell the child that [Defendant] is to blame for him not getting to do what he wants. It is not healthy or in the best interest of the child for the child to be put in the middle and have either parent tell him it is the other's fault he can't get his way.
>
> 21. In Defendant's Exhibit 9 [Plaintiff] says to [Defendant] in an email, "You have been the sole and exclusive cause of every single "traumatic" situation my son has been through. You provoke conflict, you cause scenes, you act badly in virtually every situation. You are an unhealthy mix of unintelligent, unworldly, and uneducated, but aggressive and extremely belligerent and I consider you to be dangerous to my son's health and well-being. Your life would be so much better if you would stop trying to provoke fights with me." In another message he describes where she lives as a hillbilly town that lacks decent medical facilities.
>
> 22. [Plaintiff] testified a few times when asked about such toned emails, that it was not his finest moment. There are a lot of examples of [Plaintiff] not acting in his finest moments in the way he talks to [Defendant]. Based on testimony, the court is confident that [Defendant] has also communicated with [Plaintiff] in a derogatory manner at times.
>
> . . . .

> 24. [Defendant] points out that [Plaintiff] has not provided her with information about all of the nannies he has utilized either. [Plaintiff] has used nannies and he cannot give an exact answer as to how many. He has used part time nannies and two full time nannies. [Plaintiff] sees a preschool and a nanny as two different things; one being education and one being childcare. After an incident where [Plaintiff] accused [Defendant] of being rude, aggressive and demanding with one of the nannies, he instructed [Defendant] that she is not to have direct contact with his people. There is a subtle difference in viewing one as child care and the other as education and instruction, but the basic issue is that both parties are entitled to have information about where the child is and who the child is with.
>
> . . . .
>
> 30. The court finds, considering all the evidence, that it is in the best interest of the child to live primarily with [Defendant] during the school year beginning in August 2022 and to have time with [Plaintiff] as set forth herein. Before August 2022, it is best for the parties to continue to each have significant time, simplify the schedule to week on week off to give [Plaintiff] an extra day and to have exchange times and methods more well defined.
>
> 31. It is in the best interest of the minor child to have a method of resolving conflict when mutual decisions for major issues affecting the child cannot be reached. It is in the best interest of the child that the primary custodial parent has the final decision making authority regarding major decisions affecting the child in the event a mutual decision cannot be reached between the parties.

Based on these findings of fact, the trial court awarded Defendant, as the primary custodial parent, final decision-making authority regarding major decisions affecting the child "[i]n the event a mutual decision cannot be reached after meaningful good faith discussion between the parties[.]" As required by *Diehl*, the trial court found that it is in the best interests of the child for Defendant to have final decision-making authority in the event that a mutual decision cannot be reached between the parties and found facts as to why Defendant should have such authority. As required by *Hall*, the trial court found facts detailing past disagreements by the parties which illustrate their inability to communicate and the effect their contentious communications will have on the child,

including that "[Plaintiff] will tell the child that [Defendant] is to blame for him not getting to do what he wants" and that the child will "be put in the middle and have either parent tell him it is the other's fault he can't get his way."

Accordingly, the trial court did not err by awarding Defendant final decision-making authority regarding major decisions affecting the child "[i]n the event a mutual decision cannot be reached after meaningful good faith discussion between the parties[.]"

III. Conclusion

Plaintiff failed to preserve for appellate review his argument that the trial court erred by using the best interests of the child standard. Even assuming arguendo that this issue is properly before us, the trial court did not err by determining child custody based on the best interests of the child. Furthermore, the trial court did not err by granting Defendant final decision-making authority because the findings of fact support the trial court's decision. Accordingly, we dismiss in part and affirm in part.

DISMISSED IN PART; AFFIRMED IN PART.

Judges GRIFFIN and THOMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 7 November 2023)

ALBERT v. CITY OF RALEIGH No. 23-241	Wake (21CVS11380)	Affirmed
BULLIARD v. HIGHLAND GATE HOMEOWNERS ASS'N, INC. No. 23-452	Buncombe (21CVS4057)	Affirmed
FRANKLIN v. PALMER No. 23-481	Macon (22CVD521)	Reversed and Remanded
HEDGEPETH v. SMOKY MOUNTAIN COUNTRY CLUB No. 23-222	Swain (22CVS272)	Dismissed
IN RE A.F.G.T. No. 23-317	Surry (21JT6)	Affirmed
IN RE A.R. No. 23-98	Wake (22JA47) (22JA48)	Affirmed
IN RE A.W. No. 23-37	Jones (21JA5)	Affirmed
IN RE APPEAL OF SHANNON No. 23-289	Property Tax Commission (20PTC0328)	Affirmed
IN RE B.L.G. No. 23-354	Surry (22JT122)	Affirmed
IN RE D.J.W. No. 22-1013	McDowell (21JA57) (21JA58)	Affirmed
IN RE E.P. No. 22-873	Durham (20J136)	Affirmed in part and vacated in part.
IN RE E.W. No. 23-74	Durham (18JT141) (18JT142) (18JT143)	Affirmed
IN RE FORECLOSURE OF HEDGEPETH No. 23-226	Swain (22SP33)	Affirmed

Case	County	Disposition
IN RE FORECLOSURE OF SORRELL No. 23-183	Wake (14SP3203)	Affirmed
IN RE J.P.E. No. 23-161	Guilford (17JT292-296) (19JT468-469)	Affirmed
IN RE K.C. No. 22-775	Johnston (20JA127) (21JA75)	Affirmed in Part; Remanded in Part
IN RE K.P.W. No. 23-205	Wilkes (18JT108)	Vacated
IN RE N.M.C. No. 23-173	Guilford (19JT119)	Affirmed.
LOWDER v. LOWDER No. 23-105	Stanly (19CVD63)	Other - Dismissed in part; reversed in part and remanded
SAM'S COM. PROPS., LLC v. TOWN OF MOORESVILLE No. 22-1006	Iredell (21CVS2693)	Reversed and Remanded
SANDERFORD v. DARK No. 23-142	Chatham (20CVS341)	Affirmed
STATE v. ALEX No. 23-133	Mecklenburg (20CRS14501) (20CRS206326-27) (20CRS206329)	No Error
STATE v. BROWN No. 23-150	Bertie (19CRS349) (19CRS50008)	No Error
STATE v. HALL No. 23-234	Montgomery (21CRS50211)	No Error
STATE v. MARTIN No. 22-501	Randolph (19CRS52131)	No Error
STATE v. McLEOD No. 23-174	Johnston (21CRS1337) (21CRS52858) (21CRS52861)	Affirmed
STATE v. POWELL No. 22-1065	Brunswick (20CRS52520)	Dismissed

STATE v. SCOTT No. 22-1066	Wake (20CRS214316)	No Error
STATE v. SLUSS No. 22-895	Wake (20CRS866)	No Error.
STATE v. SMITH No. 23-413	Anson (19CRS51024)	No Error
STATE v. WOODRING No. 23-293	Watauga (21CRS50745-46)	No Error
UNION CNTY. BD. OF EDUC. v. RET. SYS. DIV. No. 23-167	Union (21CVS2842)	Dismissed

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