296 N.C. App.—No. 2 Pages 159-305

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 11, 2025

MAILING ADDRESS: The Judicial Department
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THE COURT OF APPEALS
OF
NORTH CAROLINA

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COURT OF APPEALS

CASES REPORTED

FILED 15 OCTOBER 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Permanency planning order—right to appeal—reunification eliminated only as to mother—aggrieved party—A mother had a direct right to appeal from permanency planning orders regarding two of her children where, although the orders did not completely eliminate reunification as a permanent plan pursuant to N.C.G.S. § 7B-1001(a)(5) since they set reunification with the children's fathers as a concurrent plan, the mother was an aggrieved party because there was no reunification with her as a permanent plan; therefore, the orders had a direct and injurious effect on the mother. **In re Q.J.P., 175.**

Preservation of issues—waiver—constitutional argument—murder trial—In a first-degree murder prosecution, defendant failed to preserve for appellate review (and therefore waived) his constitutional argument regarding the exclusion of his own testimony at trial, where he failed to properly raise the argument before the trial court. **State v. Moore, 264.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Adjudication of abuse and neglect—evidence consisting solely of petition and testimony from verifier—no objection or cross-examination—In a case arising from an infant being brought to a hospital with near-fatal injuries to her head and spine, sustained while her parents were her sole caretakers, the district court's adjudication of the child as an abused and neglected juvenile (based upon numerous detailed findings of fact and conclusions of law) was affirmed where the evidence at the adjudication hearing consisted solely of the verified petition filed by department of social services (DSS)—received without objection by either parent—and "live witness" testimony from the DSS social worker who had verified the petition that the information contained therein was true—received without objection or cross-examination by either parent. In light of parents' decision to "stand mute," their general assertions on appeal that the adjudication evidence could not meet the applicable standard of proof—clear, cogent, and convincing evidence—were overruled, and the father's challenge to the evidence as merely conjecture and hearsay was not preserved for appellate review. **In re N.N., 159.**

Initial disposition—elimination of reunification efforts—no findings on aggravated circumstances—remand—The portion of the adjudication and initial disposition order directing that reunification efforts with the parents were not required was vacated because the district court failed to make any finding of an aggravated circumstance that would permit such a ruling as detailed in N.C.G.S. § 7B-901(c)—for example, chronic abuse of the juvenile, acts by the parents that increased the enormity or added to injurious consequences of the abuse, or that a parent committed a felony assault resulting in serious bodily injury to the juvenile. However, because sufficient evidence in the record would permit a finding of an aggravated circumstance (based on the infant having been brought to the hospital with near-fatal injuries to her head and spine, sustained while her parents were her sole caretakers), the matter was remanded with instructions for the district court to enter appropriate findings of fact addressing the issue of reunification efforts. **In re N.N., 159.**

Permanency planning—ceasing reunification efforts—lack of necessary findings—The trial court erred by entering permanency planning orders, one for each of three children, which excluded as a concurrent plan reunification with the children's mother without first making various findings required by N.C.G.S. § 7B-906.2(b) and (d). Two of the orders, which were lacking findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the children's health or safety (subsection (b)) and findings regarding whether the mother remained available to the court, the department of social services, and the guardian ad litem or acted in a manner inconsistent with the children's health or safety (subsection (d)) were vacated and remanded for entry of new orders with the required findings. On remand, the trial court was directed to resolve contradictory findings regarding the primary and secondary plans with regard to one child. The order pertaining to the third child lacked a finding pursuant to subsection (d) regarding the mother's availability and, therefore, was also remanded for additional findings. **In re Q.J.P., 175.**

CONSTITUTIONAL LAW

Effective assistance of counsel—juvenile adjudication—failure to advocate during adjudication hearing—pending felony child abuse charges against parents—In a case arising from an infant being brought to a hospital with near-fatal injuries to her head and spine, sustained while her parents were her sole caretakers, the parents did not receive ineffective assistance from their counsel—who did not

contest evidence offered by the department of social services during the adjudication portion of the hearing—where each parent faced two pending felony child abuse charges related to the juvenile's injuries and where, during the disposition portion of the hearing, each parent's attorney displayed a thorough understanding of the facts and legal issues pertinent to the matter as they cross-examined witnesses, lodged objections, and made arguments to the district court. Further, even if counsels' performance was arguably deficient, the parents could not show a reasonable probability of a different result at the adjudication phase but for counsels' representation in light of the evidence—the father having twice been seen roughly handling the infant while she was in the neonatal intensive care unit (NICU) after her premature birth, both parents having been asked to leave the NICU as a result of failure to follow its protocols, and the child having suffered multiple unexplained, near-fatal injuries requiring months of hospitalization while in the sole care of the parents. **In re N.N., 159.**

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Murder trial—testimony regarding prior incident with victim—no prejudice shown —After defendant's trial for his wife's murder by suffocation, during which defendant moved to exclude testimony about a prior incident when his mother-in-law saw defendant put his hands around his wife's neck, defendant failed to show on appeal that, even if the testimony had been inadmissible under Evidence Rules 403 and 404(b), he was prejudiced by its admission into evidence. Based on the overwhelming evidence of defendant's guilt apart from that testimony, there was no reasonable possibility that the outcome of defendant's trial would have been different had the jury not heard the challenged testimony. **State v. Moore, 264.**

Opinion testimony—lay witness—inferences permitted by facts—plain error shown—In a prosecution on charges including assault with a deadly weapon with intent to kill inflicting serious injury arising from a collision between defendant's truck and his neighbor's all-terrain vehicle, defendant demonstrated plain error and thus was entitled to a new trial where a law enforcement officer was permitted to testify, without objection, that he believed the collision was intentional rather than an accident—the critical disputed issue at trial—because the officer, who was not testifying as an expert in accident reconstruction, had not witnessed the collision and therefore was in no better position than the jury to determine what inferences could be drawn from the facts surrounding it. **State v. Hunt, 245.**

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Restraint—beyond that inherent in other crime—sufficiency of evidence—double jeopardy—In an appeal from convictions for first-degree murder and first-degree kidnapping arising from the death of defendant's wife, whose body was found tied down to a bed with trash bags covering her head, the Court of Appeals—after invoking Appellate Rule 2 to review defendant's waived constitutional argument—vacated the kidnapping conviction, holding that the trial court violated defendant's constitutional right against double jeopardy when it declined to dismiss the kidnapping charge at trial. Because the binding of her hands, feet, and arms prevented the wife from removing the bags that caused her death by suffocation, the State failed to introduce substantial evidence that the restraint of the wife—which served as the basis for the kidnapping charge—was independent and apart from that inherent in the commission of the murder. **State v. Moore, 264.**

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Probation revocation—absconding—failure to provide new address—failure to report in person—The trial court did not abuse its discretion by revoking defendant's probation where the State's evidence was sufficient to reasonably satisfy the trial court that defendant had violated probation by willfully absconding supervision. Defendant failed to report to multiple in-person appointments with his probation officer without justification, made his whereabouts unknown by failing to provide his new physical address or the name and address of the hotel he stayed in after moving out of his marital home due to a domestic violence protective order, and traveled to another city without providing notice. **State v. Tanner, 293.**

REAL PROPERTY

Grossly inadequate consideration—jury instructions—independent cause of action—rescission of deed—In a civil action brought by an illiterate plaintiff challenging her transfer of real property to defendant by means of a deed—that was drafted by defendant's attorney; was not read aloud to plaintiff before its signing; and, despite plaintiff's understanding that she would retain a life estate, gave defendant fee simple title to the property in exchange for satisfaction of a tax lien and payment of future ad valorem taxes—the trial court did not err or offend North Carolina's jurisprudence on unconscionability in instructing the jury on grossly inadequate consideration as an independent cause of action supporting rescission of the deed, using language that mirrored that found in N.C.P.I. - Civil 850.30. Likewise, defendant's arguments that the trial court abused its discretion in rejecting his request for modified jury instructions and erred in awarding rescission and denying his motions for summary judgment and for a directed verdict—all based on his position that grossly inadequate consideration is not an independent issue for submission to the jury, but only as an aspect of fraud—were overruled. **Lail v. Tuck, 185.**

SEARCH AND SEIZURE

Search of residence—wife's body found—inevitable discovery doctrine—standing to challenge search—In defendant's trial for his wife's murder, the trial court properly applied the inevitable discovery doctrine when denying defendant's motion to suppress evidence from a search of the marital residence, where law enforcement had discovered the wife's body tied down to the bed in their main bedroom. The doctrine prevents the exclusion of illegally obtained evidence that would have been inevitably discovered, not only by law enforcement, but also by civilians who could turn in the evidence to law enforcement; here, the State presented ample evidence that the wife's body would have been inevitably discovered by either her family or by the landlord, who had begun eviction proceedings. At any rate, defendant lacked standing to challenge the search because of evidence showing that he had permanently abandoned the residence. **State v. Moore, 264.**

Traffic stop—odor of marijuana—lawfulness of frisk—probable cause to search vehicle—In a prosecution for carrying a concealed weapon, the trial court properly denied defendant's motion to suppress a firearm found during a search of his vehicle based on findings of fact that were supported by competent evidence and which, in turn, supported the ultimate conclusions of law that investigating officers lawfully conducted a *Terry* frisk of defendant's person based on a reasonable suspicion that defendant was armed and dangerous and that they had probable cause to conduct a search of the car. Defendant did not immediately pull over in response to the officer's blue lights and sirens and eventually stopped in a known high-crime

area; the officer detected an odor of marijuana coming from defendant's open car window and discovered that defendant had prior convictions for drug offenses and for carrying a concealed weapon; after defendant was asked to step out of the car, he stopped answering questions, began speaking on his cell phone, and turned his body away from the officers; and officers found a "blunt" in defendant's pocket that they believed to contain marijuana. Defendant's arguments regarding the similarity between marijuana and legal hemp were grounded in policy and did not lessen the significance of the officers' observations that they smelled marijuana for purposes of establishing probable cause. **State v. Rowdy, 272.**

Warrant and supporting affidavit—identification of location to be searched—description of items to be seized—nexus between location and items—In a prosecution for larceny, the trial court did not err in denying defendant's motion to suppress evidence discovered during the search of his residence where the affidavit supporting the search warrant: (1) identified the location to be searched with reasonable certainty (in that it listed the correct street address and accurately described the white, single-wide trailer to be searched, even though attached photographs depicted a similar trailer nearby, because the erroneous nature of the photographs was discovered and the warrant was redacted prior to its filing and execution); (2) alleged facts establishing a nexus between the items stolen and the location to be searched (in that defendant was photographed by a trail camera removing the stolen items, the search location was the residence listed on defendant's driver's license, and a law enforcement officer averred that stolen items are often kept at a perpetrator's residence until they can be sold); and (3) sufficiently described the items to be seized (in that the objects sought, their brand, and, in one case, the model number, were noted) despite the fact that other, legally obtained items were also found and seized at the residence. **State v. Ellison, 227.**

Warrant and supporting affidavit—redaction without the addition of information—not procedurally defective—The warrant authorizing a search of defendant's residence was not procedurally defective where it was redacted prior to its filing or execution in order to remove photographs attached to the supporting affidavit which depicted a similar nearby residence (along with descriptions of the photographs) because the inaccuracy was: not the result of bad faith; detected before the warrant's execution; and corrected in line with guidance from, and in the discretion of, the issuing magistrate. Moreover, even with the redaction, the warrant was executed on the same day it was issued—and thus within the forty-eight hour window prescribed by N.C.G.S. § 15A-248—and, because the alteration was only removal of errant material rather than the addition of information, the requirements of N.C.G.S. § 15A-245(a) were not triggered. Accordingly, invalidating the warrant would elevate form over substance by applying a hypertechnical, rather than commonsense, interpretation of the pertinent statutes and constitutional provisions. **State v. Ellison, 227.**

SENTENCING

Presumption of regularity—improper considerations—defendant's decision to go to trial—no error shown—In an appeal from sentences for robbery with a dangerous weapon and possession of a firearm by a felon, where defendant had arrived late to trial after rejecting the State's plea offer, and where the trial court denied defendant's request at sentencing for concurrent rather than consecutive sentences, defendant could not overcome the presumption of regularity (afforded to sentences falling within the statutory range) by showing that the court improperly

considered his decision to exercise his constitutional right to a jury trial. In its pretrial comments, the court did not reference any plea offers or potential sentences, focusing instead on defendant's failure to timely appear and on setting bail at an amount that would ensure his attendance at trial. During sentencing, the court expressly stated that it was not punishing defendant for going to trial; further, in referencing its discretion to impose lesser sentences for defendants who accept responsibility for their crimes, the court merely made a truthful assertion about North Carolina sentencing law. Additionally, the court not only sentenced defendant within the presumptive range for his crimes, but it also suspended his sentence for the possession conviction. **State v. Mills, 256.**

Prior record level—out-of-state convictions—no evidence of substantial similarity—resentencing required—During defendant's sentencing after being convicted of multiple firearm and drug offenses, the State failed to present evidence that two out-of-state felony convictions were for offenses substantially similar to North Carolina offenses for purposes of calculating defendant's prior record level. Where defendant was erroneously classified as a prior record level V after his two out-of-state convictions were classified as G and F felonies without the requisite comparative analysis, the matter was remanded for resentencing. **State v. Sandefur, 287.**

UTILITIES

Jurisdiction—declaratory relief—determination of public utility status—parking and barge operations—justiciable controversy—In an action to determine the public utility status of parking and barge operations—which were not regulated as a public utility but were closely affiliated with ferry operations that were so regulated—the complaint filed by a village with the Utilities Commission was sufficient to invoke the Commission's jurisdiction regarding its regulatory authority over the parking and barge operations (owned by a parent company) through those operations' relationship to the ferry operations (owned by the parent company's wholly-owned subsidiary), because the Commission has powers of a court of general jurisdiction over matters pertaining to public utilities and their rates, services, and operations, including to enter a declaratory judgment to declare utility status. Here, where the parent company proposed selling its various transportation assets, the village raised a justiciable controversy with regard to the parties' respective rights and obligations arising from the provision of parking and barge services. However, the Commission did not have jurisdiction to consider the request by the village to designate the barge operations as a per se public utility, because the village's current use of the barge operations did not meet the statutory definition of "common carrier" that would require utility status. **State ex rel. Utils. Comm'n v. Bald Head Island Transp., Inc., 199.**

Regulatory authority—non-utility barge operations—no finding of effect on rates or services of regulated ferry operations—In an action to determine the public utility status of unregulated parking and barge operations, which were being proposed for sale by their owner (a parent company), the Utilities Commission erred by concluding that the barge operations were subject to its regulatory authority as an ancillary service to ferry operations (owned and operated by the parent company's wholly-owned subsidiary) that were regulated as a public utility. Despite the Commission's general findings regarding the importance of the barge operations to the island it serviced, there was no finding that the non-utility barge operations had an impact on the rates and services of the utility ferry operations; therefore, the

N.C. COURT OF APPEALS

2025 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	13 and 27
February	10 and 24
March	17
April	7 and 21
May	5 and 19
June	9
August	11 and 25
September	8 and 22
October	13 and 27
November	17
December	1

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

IN RE N.N.

[296 N.C. App. 159 (2024)]

IN THE MATTER OF N.N.

No. COA24-43

Filed 15 October 2024

1. Child Abuse, Dependency, and Neglect—adjudication of abuse and neglect—evidence consisting solely of petition and testimony from verifier—no objection or cross-examination

In a case arising from an infant being brought to a hospital with near-fatal injuries to her head and spine, sustained while her parents were her sole caretakers, the district court's adjudication of the child as an abused and neglected juvenile (based upon numerous detailed findings of fact and conclusions of law) was affirmed where the evidence at the adjudication hearing consisted solely of the verified petition filed by department of social services (DSS)—received without objection by either parent—and "live witness" testimony from the DSS social worker who had verified the petition that the information contained therein was true—received without objection or cross-examination by either parent. In light of parents' decision to "stand mute," their general assertions on appeal that the adjudication evidence could not meet the applicable standard of proof—clear, cogent, and convincing evidence—were overruled, and the father's challenge to the evidence as merely conjecture and hearsay was not preserved for appellate review.

2. Constitutional Law—effective assistance of counsel—juvenile adjudication—failure to advocate during adjudication hearing—pending felony child abuse charges against parents

In a case arising from an infant being brought to a hospital with near-fatal injuries to her head and spine, sustained while her parents were her sole caretakers, the parents did not receive ineffective assistance from their counsel—who did not contest evidence offered by the department of social services during the adjudication portion of the hearing—where each parent faced two pending felony child abuse charges related to the juvenile's injuries and where, during the disposition portion of the hearing, each parent's attorney displayed a thorough understanding of the facts and legal issues pertinent to the matter as they cross-examined witnesses, lodged objections, and made arguments to the district court. Further, even if counsels' performance was arguably deficient, the parents could not show a reasonable probability of a different result at the adjudication phase but for counsels' representation in light

of the evidence—the father having twice been seen roughly handling the infant while she was in the neonatal intensive care unit (NICU) after her premature birth, both parents having been asked to leave the NICU as a result of failure to follow its protocols, and the child having suffered multiple unexplained, near-fatal injuries requiring months of hospitalization while in the sole care of the parents.

3. Child Abuse, Dependency, and Neglect—initial disposition—elimination of reunification efforts—no findings on aggravated circumstances—remand

The portion of the adjudication and initial disposition order directing that reunification efforts with the parents were not required was vacated because the district court failed to make any finding of an aggravated circumstance that would permit such a ruling as detailed in N.C.G.S. § 7B-901(c)—for example, chronic abuse of the juvenile, acts by the parents that increased the enormity or added to injurious consequences of the abuse, or that a parent committed a felony assault resulting in serious bodily injury to the juvenile. However, because sufficient evidence in the record would permit a finding of an aggravated circumstance (based on the infant having been brought to the hospital with near-fatal injuries to her head and spine, sustained while her parents were her sole caretakers), the matter was remanded with instructions for the district court to enter appropriate findings of fact addressing the issue of reunification efforts.

Appeal by respondent-parents from order entered 27 October 2023 by Judge David E. Sipprell in District Court, Forsyth County. Heard in the Court of Appeals 6 September 2024.

Deputy County Attorney Theresa A. Boucher for petitioner-appellee Forsyth County Department of Social Services.

Michelle FormyDuval Lynch for the guardian ad litem.

Edward Eldred for respondent-appellant mother.

Marion K. Parsons for respondent-appellant father.

STROUD, Judge.

Respondent-parents appeal from an order entered 27 October 2023 in which the district court adjudicated their infant child an abused and neglected juvenile and relieved petitioner Forsyth County Department of Social Services of efforts to reunify respondent-parents with the child. We affirm the district court's adjudication but vacate the portion of the disposition which did not require continued reunification efforts and remand the matter for further proceedings as discussed herein.

I. Factual Background and Procedural History

Nan[1] was born in January 2023 at twenty-seven weeks gestation. Due to her extreme prematurity, Nan was immediately placed in the neonatal intensive care unit ("NICU") of the hospital, where she remained until mid-April 2023. On 28 April 2023, the Forsyth County Department of Social Services ("DSS") filed a petition, verified by DSS social worker Pamela Early, that alleged Nan was an abused and neglected juvenile. The petition alleged Nan was an abused juvenile in that respondent-parents ("Parents") had inflicted or allowed to be inflicted serious non-accidental physical injuries on Nan and created a substantial risk of future substantial non-accidental physical injuries to the child. As to neglect, the petition alleged that Parents did "not provide proper care, supervision, or discipline" for Nan.

The petition alleged DSS received a report on 18 March 2023 that hospital staff observed respondent-father ("Father") handling Nan roughly, specifically in picking her up "from behind her neck . . . without supporting her head." Hospital staff reported that each parent had been asked to leave the NICU for 24-hour periods—respondent-mother ("Mother") on 17 March and Father on the following day—due to the rough handling of Nan by Father and Parents "not following NICU protocols." Mother denied knowledge of Father handling Nan inappropriately. A safety plan was established to support Parents in safely handling Nan and a "virtual sitter" remote monitoring system was placed in the hospital room to observe Parents' interactions with Nan. When Early met with Father on 21 March 2023, he denied handling Nan roughly and stated that Parents had filed a complaint about a nurse "flicking" Nan. On 29 March 2023, DSS received another report, stating that Father had picked Nan up with one hand and had left her alone on a chair while he retrieved a blanket. Early met with Parents again and discussed how to safely pick up Nan. Parents again denied handling Nan in an unsafe way.

1. A pseudonym is used to protect the privacy of the juvenile and for ease of reading.

On 12 April 2023, Nan was discharged from the hospital into the sole care and custody of Parents. During a home visit on 17 April 2023, Early observed Nan sleeping and she appeared healthy and well. But only two days later, on 19 April 2023, DSS received another report stating that Parents brought Nan to a hospital emergency room ("ER"), reporting she had not been eating and was constipated. Upon arrival at the ER, Nan stopped breathing and had to be revived multiple times. Subsequent testing revealed that Nan had multiple injuries, including three skull fractures, bleeding on the brain and spine, other brain and spinal injuries, and retinal hemorrhages. In a child abuse consult on 26 April 2023, a physician determined that Nan's "injuries without any accidental explanation [were] highly concerning for abusive head trauma[,]" resulting in "a near-fatality event for [Nan]." Nan remained hospitalized for three months.

At a Child and Family Team meeting on 27 April 2023, Parents denied they had caused Nan's injuries and reported they had no knowledge of any incident or accident that would explain them. DSS filed the abuse and neglect petition the following day and sought nonsecure custody of Nan. On 5 May 2023, the district court entered an order placing Nan in DSS's custody. When Nan was discharged on 17 July 2023, she was placed in a licensed foster home.

At the adjudication and initial disposition hearing held on 23 October 2023, counsel for Parents informed the district court that their clients would be "standing mute" as to the allegations in the juvenile petition. Early was called, sworn, and then testified to the truth and accuracy of the allegations in the juvenile petition, which was admitted into evidence without objection by Parents. DSS offered no additional adjudication evidence. Parents did not offer any evidence. The district court adjudicated Nan an abused and neglected juvenile and proceeded to disposition.

On disposition, the court heard testimony from two witnesses: Fialisa Pickard, the DSS foster care social worker assigned to Nan, and Sheila Connelly, the guardian *ad litem* ("GAL") for Nan. Pickard testified that her pre-hearing court report required two corrections: Mother was no longer employed in her previous job and Nan had a new physical therapy plan of care. Parents did not object to admission of the court report as amended. Pickard testified that Nan was "growing and thriving" in her foster care placement and receiving multiple therapies. Pickard also testified that Mother had denied knowing how Nan was injured because she was at work when the injuries occurred, and Father had offered no explanation for the injuries. Because Parents could not

explain Nan's severe injuries, Pickard did not recommend that reunification efforts continue.

Connelly noted one update to her court report—also regarding Mother's employment status—and then testified about Nan's improving condition and Parents' appropriate conduct during visits with Nan. However, because Parents could not explain the severe injuries suffered by Nan, Connelly did not support continuing reunification efforts.

In the adjudication portion of the order entered 27 October 2023, the district court made sixteen findings of fact in agreement with the allegations in the juvenile petition summarized above. The court then adjudicated Nan an abused and neglected juvenile.

In the disposition part of the order, the court made forty-five findings of fact, including that Nan's "constellation of injuries without any accidental explanation is highly concerning for abusive head trauma," resulting in "a near-fatality for [Nan]" in which "she likely would have died without lifesaving resuscitation[.]" The court also found that Parents had pending felony child abuse charges arising from Nan's injuries. The court found that at supervised visits with Nan during her April to July 2023 hospitalization, Father was twice seen to leave Nan "unattended" on a hospital bed, which concerned DSS due to Nan's prior unexplained injuries. The court found that DSS and the GAL recommended reunification efforts not be continued unless Parents could offer information about how Nan was injured. The court then found and concluded that under North Carolina General Statute Section 7B-901, "aggravated circumstances exist" in that Nan "suffered chronic physical abuse and that the severe near[-]life[-]ending injuries inflicted on the 3[-]month[-]old child which increased the enormity and added to the injurious consequences of her abuse and neglect" show "that reunification efforts shall not be required."

On 27 October 2023, Mother filed notice of appeal. Father filed notice of appeal on 27 November 2023.

II. Father's Petition for Writ of Certiorari

On 22 February 2024, Father filed a petition for writ of certiorari in this Court, seeking review of the adjudication and disposition order. Father acknowledges that his notice of appeal was filed and served on 27 November 2023, 31 days after entry of the district court's order; Father filed the petition based on his belief that the notice of appeal was not timely filed. While Rule of Appellate Procedure 3 provides a *thirty-day* period for such filings, N.C. R. App. P. 3(c), Appellate Rule

27(a) provides that when a deadline under the Rules falls on "a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions," the deadline is extended "until the end of the next day which is not a Saturday, Sunday, or a legal holiday when then courthouse is closed for transactions." N.C. R. App. P. 27(a). The adjudication and disposition order was entered on 27 October 2023, and the thirtieth day thereafter was 26 November 2023, a Sunday. By operation of Rule 27(a), the deadline for Father's notice of appeal was extended to the end of Monday, 27 November 2023—the date it was filed. Because Father's notice of appeal was timely filed, his petition for writ of certiorari is dismissed as moot, and we turn to the merits of Parents' arguments.

III. Analysis

On appeal, Parents present three arguments: whether (1) the evidence supported the district court's findings of fact, conclusions of law, and adjudication of Nan as an abused and neglected juvenile; (2) they received ineffective assistance of counsel during the adjudication part; and (3) the cessation of reunification efforts was improper given the evidence offered at disposition.

A. Sufficiency of Evidence to Support Nan's Adjudication

[1] Parents challenge the evidence and findings of fact relied on by the district court to adjudicate Nan an abused and neglected juvenile, but their appellate arguments take different approaches. The order on appeal includes 16 single-spaced pages of detailed findings of fact, and neither Mother nor Father challenge any specific finding of fact as unsupported by the evidence. Instead, Mother argues that the "findings of fact are not supported by clear, cogent, and convincing evidence where the only evidence was the verified petition and the verifier's testimony that the information in the petition was true." Father maintains that "[t]he only 'evidence' provided by DSS during the adjudicatory proceedings was conjecture, hearsay, and double hearsay" and asserts that the court adjudicated Nan "solely on the basis of the [p]etition." We are not persuaded by either argument.

1. Standard of Review and Statutory Definitions

We review a district

> court's adjudication to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. Where no exception is taken to a finding of fact by the [district] court, the finding is presumed to be supported by competent

> evidence and is binding on appeal. Conclusions of law made by the trial court are reviewable de novo on appeal.

In re K.S., 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (citations and quotation marks omitted). In undertaking this review, we are mindful that "it is well-established that a district court has the responsibility to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re A.R.A.*, 373 N.C. 190, 196, 835 S.E.2d 417, 422 (2019) (citation, quotation marks, and brackets omitted).

In abuse, neglect, and dependency proceedings, the petitioner has the burden of proving the petition's allegations. N.C. Gen. Stat. § 7B-805 (2023). Thus, in this case, DSS had to "fully convince" the district court of the truth of the petition's allegations necessary to support the adjudication of Nan as an abused and neglected juvenile. *See In re J.N.*, 381 N.C. 131, 136, 871 S.E.2d 495, 499 (2022).

"An abused juvenile is defined, in pertinent part, as one whose parent, guardian, custodian, or caretaker inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means." *In re K.L.*, 272 N.C. App. 30, 39, 845 S.E.2d 182, 190 (2020) (quoting N.C. Gen. Stat. § 7B-101(1)) (quotation marks and brackets omitted). "This Court has previously upheld adjudications of abuse where a child sustains non-accidental injuries, even where the injuries were unexplained, where clear and convincing evidence supported the inference that the respondent-parents inflicted the child's injuries or allowed them to be inflicted." *Id.* (citation, quotation marks, and brackets omitted).

A juvenile is neglected if her parents "[do] not provide proper care, supervision, or discipline[or c]reate[ ] or allow[ ] to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2023).

> Traditionally, there must be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline in order to adjudicate a juvenile neglected. In neglect cases involving newborns, the decision of the [district] court must [often] be predictive in nature, as the [district] court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.

In re K.S., 380 N.C. at 64-65, 868 S.E.2d at 4 (citations, quotation marks, and brackets omitted).

2. Mother's Argument

As to Mother's position that " '[t]en words and a petition' is not clear and convincing evidence," our Supreme Court addressed a similar argument in a recent appeal arising from a termination of parental rights proceeding. *See In re Z.G.J.*, 378 N.C. 500, 862 S.E.2d 180 (2021). In that case,

> [d]uring the adjudication phase, [an Iredell County DSS social worker] was the only witness, and she testified that she would adopt the allegations in the termination petition as her testimony. There were no objections to entering the petition into the record, and respondent's counsel declined to cross-examine [the social worker]. At the conclusion of the adjudicatory phase, the [district] court rendered its decision that grounds existed to terminate respondent's parental rights.

Id. at 503-04, 862 S.E.2d at 184. Specifically, at the hearing, the social worker identified herself and then testified that 1) she had verified the petition, 2) its contents were "true and accurate," and 3) she "[w]ould . . . adopt those contents as [her] testimony today." *Id.* at 506-07, 862 S.E.2d at 186. Here, counsel for Mother and Father specifically stated they had no objection to the trial court receiving the verified petition as evidence after the social worker's testimony and both declined their opportunity to cross-examine the social worker.

In *In re Z.G.J.*, the mother argued "that DSS's proffer of evidence amounted to submitting the allegations from its verified petition as its only adjudication evidence," noting cases in which this Court had "reversed juvenile orders that were based solely on documentary evidence[.]" *Id.* at 507, 862 S.E.2d at 186 (citations omitted). The Supreme Court distinguished those earlier Court of Appeals cases from the matter before it, noting "the salient difference": "live witness testimony" from a social worker who "orally reaffirmed, under oath, all of the allegations from the termination petition." *Id.* at 507-08, 862 S.E.2d at 187. In holding that the district court's reliance on the social worker's brief oral testimony was not error, the Supreme Court emphasized that the "[r]espondent was given the opportunity to cross-examine [the social worker] with respect to any of the[ ] allegations, and she declined to do so." *Id.* at 508, 862 S.E.2d at 187.

Mother argues that *In re Z.G.J.* does not control in this matter for two reasons. She first attempts to distinguish the testimony here from that in *In re Z.G.J.* because "Early did not *adopt* the petition's allegations as her testimony[, but] merely testified the information in the

petition was true." (Emphasis added.) Second, Mother maintains that "the respondent in [*In re*] *Z.G.J.* did not challenge the sufficiency of the evidence to support the findings, so the Supreme Court did not hold the evidence in [that case] clearly and convincingly supported the [district] court's findings." Neither position is availing.

As to the first, nothing in the Supreme Court's opinion suggests that a witness who has testified to the truth and accuracy of the contents of a juvenile petition admitted into evidence also must agree that she "adopts" the contents for a district court to properly rely on the contents of the petition as evidence. As just noted, the Court in *In re Z.G.J.* focused on the importance of having a "live witness" testify to the truth of the contents of the petition and be available for cross-examination by the respondent or questioning by the district court. *Id.* at 507, 862 S.E.2d at 187. Here, Parents had the opportunity to object to admission of the petition and to Early's testimony and both declined to cross-examine her. Parents could have attempted to impeach Early's credibility or disputed the factual assertions in the petition. But like the respondent in *In re Z.G.J.*, they elected not to do so. *See id.*

As to the second purported distinction offered by Mother—that the sufficiency of the evidence was not argued by the respondent and thus not addressed by the Court in *In re Z.G.J.*—Mother has not identified any specific findings of fact in the adjudication order she challenges as unsupported. Rather, she makes only a general assertion that "[n]o reasonable trier of fact could conclude that [the] evidence [in this matter] meets the higher standard of proof required[,]" that is, "clear, cogent and convincing evidence," *In re K.S.*, 380 N.C. at 64, 868 S.E.2d at 4, that "fully convince[s]" the district court, *In re J.N.*, 381 N.C. at 136, 871 S.E.2d at 499.

The pertinent evidence in the juvenile petition included the facts as summarized above in this opinion. Specifically, Father was observed handling Nan roughly twice while she was in the NICU and in a medically fragile state, once after being specifically instructed on that topic and entering into a safety plan; Parents were each asked to leave the NICU due to their failure to adhere to protocols; one week after Nan was discharged from the NICU into Parents' sole care, they brought Nan to an ER where she stopped breathing and had to be revived multiple times; Nan was discovered to have three skull fractures, bleeding on the brain and spine, other brain and spinal injuries, and retinal hemorrhages; a physician described the injuries as "abusive head trauma" resulting in "a near-fatality event for [Nan]"; and Parents acknowledged that they were Nan's sole caregivers when she was injured but

could not explain how her injuries occurred. That evidence was sufficient to support the essential findings of fact which in turn support the court's adjudication.

3. Father's Arguments

Father also contends that the evidence offered in the adjudication portion of the hearing was insufficient to support the allegations in the petition. Specifically, he asserts that 1) "[t]he only 'evidence' provided by DSS during the adjudicatory proceedings was conjecture, hearsay, [and] double hearsay"; 2) "DSS failed to provide evidence in support of the allegations . . . [or] expert witnesses to support the medical speculation" in the petition; and 3) Parents' inability to explain Nan's injuries cannot, standing alone, support the "court's conclusion that [they] are responsible for the juvenile's injuries."

To the extent that Father's first argument concerns the admissibility of Early's testimony or the petition at the hearing, Father did not preserve that contention for our review by making a timely objection to either. *See* N.C. R. App. P. 10. Instead, Father's counsel specifically stated he had no objection to the trial court's acceptance of the petition as evidence, based upon Early's testimony, and declined the opportunity to cross-examine Early. If Father suggests that the evidence was not clear and convincing and thus was insufficient to support the adjudication of Nan as an abused and neglected juvenile, we reject that argument for the same reason we rejected Mother's similar argument: he has not identified any specific findings of fact he contends are not supported by the evidence. Likewise, his second argument fails because, as just explained, the contents of the petition as "orally reaffirmed, under oath" by Early constituted evidence upon which the district court was entitled to rely. *In re Z.G.J.*, 378 N.C. at 508, 862 S.E.2d at 187.

His third argument also lacks merit as it mischaracterizes both the evidence adduced at the adjudication hearing and the district court's resulting findings and conclusions. The district court did not find or conclude that Parents caused Nan's injuries; instead, the court found Nan suffered severe, life-threatening injuries while in the sole care of Parents and they each denied having caused or having knowledge of the cause of Nan's injuries.

Moreover, the district court did not adjudicate Nan an abused and neglected juvenile *solely* based on its findings that Parents could or would not explain Nan's injuries. Rather, the court also found that Father had twice previously handled Nan "roughly or inappropriately"; Nan appeared "to be in good health" during a DSS visit to the home on

17 April 2023, and yet when Parents brought Nan to the ER two days later, she had multiple skull fractures, bleeding on the brain, and other injuries, and needed to be resuscitated several times; and Parents acknowledged that they "were the only people providing care to" Nan during the period when she sustained her injuries. As Father concedes, a child's unexplained, non-accidental injuries can sustain an abuse adjudication "where clear and convincing evidence support[s] the inference that the respondent-parents inflicted the child's injuries or allowed them to be inflicted." *In re K.L.*, 272 N.C. App. at 39, 845 S.E.2d at 190 (citation, quotation marks, and brackets omitted). The additional evidence here supported the district court's inference that Parents were responsible for causing, or allowing, Nan's severe injuries, and in turn, its adjudication.

B. Ineffective Assistance of Counsel

[2] Parents next argue that they received ineffective assistance of counsel during the adjudication portion of the 23 October 2023 hearing. We disagree.

Parents have a statutory right to counsel in an abuse, neglect, or dependency case, N.C. Gen. Stat. § 7B-602(a) (2023), which encompasses the right to the effective assistance of counsel. *In re T.N.C.*, 375 N.C. 849, 854, 851 S.E.2d 29, 32 (2020) ("Counsel necessarily must provide effective assistance, as the alternative would render any statutory right to counsel potentially meaningless." (citation omitted)). To prevail on a claim of ineffective assistance of counsel, a parent must show "counsel's performance was deficient or fell below an objective standard of reasonableness" that denies the parent a fair hearing. *In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005). Thus, to prevail, a parent must demonstrate prejudice—a "reasonable probability" that counsel's deficient performance led to a "different result in the proceedings." *In re C.B.*, 245 N.C. App. 197, 213, 783 S.E.2d 206, 217 (2016) (citation and quotation marks omitted).

Mother emphasizes that, during adjudication, her "attorney did not ask any questions, did not raise any objections, did not present any evidence, did not move to dismiss, and did not make any argument." Father contends that his counsel "said and did nothing at adjudication to advocate for . . . Father," such that, "but for his errors, the [district c]ourt would have had to dismiss DSS'[s] case at the end of DSS'[s] evidence."

"It is well established that attorneys have a responsibility to advocate on the behalf of their clients." *In re S.N.W.*, 204 N.C. App. 556, 560, 698 S.E.2d 76, 79 (2010) (citation omitted). However, "[c]ounsel's failure to advocate for [a respondent-parent] is not necessarily an indication of

ineffective assistance of counsel." *In re C.D.H.*, 265 N.C. App. 609, 613, 829 S.E.2d 690, 693 (2019). In some cases, such a choice by counsel may be the result of strategy or because "resourceful preparation reveal[ed] nothing positive to be said for" the respondent-parent in a particular hearing. *Id.* (citation and quotation marks omitted). "There is a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for a party to bear." *In re L.N.H.*, 382 N.C. 536, 541-42, 879 S.E.2d 138, 143 (2022) (citations, quotations marks, and brackets omitted).

We note that at the time of the October 2023 hearing, Parents each had two pending felony child abuse charges arising from Nan's injuries, a circumstance which may have contributed to their decisions to "stand mute" during the hearing and to their attorneys' choice not to contest the evidence offered by DSS during the adjudication portion of the hearing. Although counsel for Parents did not contest the evidence offered by DSS or present any evidence or arguments on Parents' behalf at *adjudication*, they actively participated on their clients' behalf during the dispositional phase of the hearing. On disposition, counsel displayed a thorough understanding of the facts and legal issues pertinent to the matter as they cross-examined witnesses, lodged objections, and made arguments to the court.[2]

Our review of the entire hearing transcript suggests that counsel for Parents adopted a strategy to not contest the adjudication of Nan as an abused and neglected juvenile, and to instead focus their efforts on persuading the district court to continue reunification efforts in the disposition phase. For example, in her closing argument to the court on disposition, counsel for Mother began by urging the court "to not cease reunification efforts immediately," noting that Mother "was at work when [Nan] was injured" and thus "does not know what happened to" the child. Counsel for Father stated that he could offer no explanation for Nan's injuries—although he noted that they occurred at a "very stressful time for both parents"—but also urged the court not to make

2. This circumstance distinguishes the performance of counsel here from that in *In re T.D.*, No. COA15-1393, 248 N.C. App. 366, 790 S.E.2d 752 (2016) (unpublished), a case cited by Mother. In that case, after emphasizing that the respondent-parent's counsel "made absolutely no contribution to the proceedings and in no way advocated on her behalf at the hearing" in "either the adjudication or the disposition stage of the hearing," this Court remanded to the district court for a determination of whether counsel's performance was deficient and if so whether it prejudiced the respondent-parent. *Id.*, slip op. at 5-6.

the statutory findings which would permit DSS to cease reunification efforts. Based on the advocacy displayed by counsel during the disposition phase, it does not appear that the performance of counsel for Parents "was deficient or fell below an objective standard of reasonableness[.]" *In re J.A.A.*, 175 N.C. App. at 74, 623 S.E.2d at 50; *see also In re L.N.H.*, 382 N.C. at 541-42, 879 S.E.2d at 143; *In re C.D.H.*, 265 N.C. App. at 613, 829 S.E.2d at 693.

In addition, even if we were to assume the silence of Parents' counsel at adjudication was deficient performance, Parents cannot demonstrate that they were deprived of a "fair hearing" or that but for counsel's performance, there would have been a "different result in the proceedings." *In re C.B.*, 245 N.C. App. at 213, 783 S.E.2d at 217 (citations and quotation marks omitted). As previously discussed, adjudications may be upheld where a juvenile suffers "non-accidental injuries, even where the injuries were unexplained, where clear and convincing evidence supported the inference that the parents inflicted the child's injuries or allowed them to be inflicted." *In re K.L.*, 272 N.C. App. at 39, 845 S.E.2d at 190 (citation, quotation marks, and brackets omitted). In *In re L.Z.A.*, this Court upheld the abuse adjudication of an infant who sustained brain injuries and a skull fracture a medical expert believed resulted from "non-accidental trauma" while in the sole care of the parents who could not explain the injuries. 249 N.C. App. 628, 637, 792 S.E.2d 160, 168 (2016); *see also In re Y.Y.E.T.*, 205 N.C. App. 120, 127, 695 S.E.2d 517, 522 (2010) (upholding termination of parental rights where an infant suffered unexplained injuries while in the parents' sole care).

Given that Father had twice been seen to handle Nan roughly, Parents had been asked to leave the NICU for failure to follow its protocols, and while in the sole care of Parents, Nan suffered multiple unexplained, non-accidental injuries that were nearly fatal and required her hospitalization for several months, we conclude that there is not a "reasonable probability" that any different performance by Parents' counsel would have led to a "different result in the [adjudication] proceeding[ ]." *In re C.B.*, 245 N.C. App. at 213, 783 S.E.2d at 217. Accordingly, Parents' ineffective assistance of counsel arguments are overruled.

C. Reunification Efforts

[3] Finally, Parents contend that the district court erred and abused its discretion by not requiring DSS continue reunification efforts at the initial disposition hearing. With this argument, we agree.

Where an order ceases efforts to reunify a juvenile with her parents, we must "determine whether the [district] court made appropriate

findings, whether the findings are based upon credible evidence, whether the findings of fact support the [district] court's conclusions, and whether the [district] court abused its discretion with respect to disposition." *In re C.M.*, 273 N.C. App. 427, 429, 848 S.E.2d 749, 751 (2020).

At an initial disposition hearing, if a district court "places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification . . . *shall not be required* if the court makes written findings of fact," *inter alia*, "that aggravated circumstances exist." N.C. Gen. Stat. § 7B-901(c)(1) (2023) (emphasis added). The two statutorily specified aggravated circumstances found by the district court here were that Parents "committed . . . or allowed" 1) "[c]hronic physical . . . abuse" and 2) "[a]ny other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect." N.C. Gen. Stat. § 7B-901(c)(1)(b), (f). Our Supreme Court has held that a district "court's mere declaration that there are aggravating circumstances that exist, without explaining what those circumstances are, is not sufficient to constitute a valid finding for purposes of N.C.G.S. § 7B-901(c)." *In re L.N.H.*, 382 N.C. at 547, 879 S.E.2d at 146 (citation and quotation marks omitted).

Parents first emphasize that no evidence before the court suggested, and no dispositional findings were made, that they committed or allowed "chronic" abuse of Nan—that is, abuse which was repeated or sustained over time. *See* N.C. Gen. Stat. § 7B-901(c)(1)(b). In *In re B.L.M.-S.*, 294 N.C. App. 44, 50, 901 S.E.2d 687, 692 (2024), this Court noted that "[t]he term chronic, although not defined in section 7B, is commonly defined as 'lasting a long time or recurring often[.]' " This Court affirmed a dispositional order in which the district court concluded that reunification efforts were not required due to a finding of chronic abuse where the findings of fact included that the two-month-old juvenile had unexplained, non-accidental injuries including two rib fractures at different stages of healing, indicating that the *injuries were inflicted at different times*, and the father admitted that, out of frustration, he had squeezed the juvenile and shaken him *on more than one occasion* and also had tossed the child into the air and "fumbled or dropped" him. *Id.* at 49, 901 S.E.2d at 691. These findings supported "the court's conclusion that [the] respondent-father committed or encouraged and/or allowed the chronic physical abuse of the juvenile." *Id.* at 50, 901 S.E.2d at 692 (quotations marks and ellipses omitted).

Here, in contrast, the district court's dispositional findings of fact—regarding Nan's unexplained, near-fatal, non-accidental injuries sustained while in the sole care of Parents, resulting in the need for

follow-up care from speech therapy, physical therapy, occupational therapy, neurosurgery, neurology, pediatric surgery, and other pediatric professionals—demonstrate serious abuse and suggest significant concerns about Parents' ability to provide safe and appropriate care for Nan. But there are no findings indicating recurring acts of physical abuse or abuse lasting over a long period of time and thus are not *chronic* abuse. N.C. Gen. Stat. § 7B-901(c)(1)(b). Rather, the findings show a single, albeit severe, incident of physical abuse while Nan was in the sole care of Parents sometime between 17 April 2023, when Early visited the home and found Nan "sleeping but appearing to be in good health" and 19 April 2023, when Nan presented at the ER and "stopped breathing and required CPR multiple times." Nan had "multiple skull fractures and bleeding on the brain" but nothing in the record suggests that Nan had healing fractures caused earlier or injuries sustained on multiple occasions as in *In re B.L.M.-S. See In re B.L.M.-S.*, 294 N.C. App. at 48-49, 901 S.E.2d at 691. Although the hospital had concerns regarding Parents' handling of Nan when she was in the NICU, the findings do not indicate any injury to Nan during that time and Nan was discharged from the hospital into the care of Parents. None of the findings of fact describe ongoing or repeated abuse. Thus, the findings of fact do not support the trial court's conclusion that "aggravated circumstances exist based upon the abuse and neglect of this infant child by her parents" under North Carolina General Statute Section 7B-901(c)(1)(b) was properly found. *See* N.C. Gen. Stat. § 7B-901(c).

Parents next contend that the evidence did not show, nor did the court make findings explaining how their conduct "increased the enormity or added to the injurious consequences of the abuse [or] neglect" of Nan, suggesting that the district court "conflated 'consequences of acts' with 'acts.' " *See In re L.N.H.*, 382 N.C. at 547, 879 S.E.2d at 146; *see also* N.C. Gen. Stat. § 7B-901(c)(1)(f). The required finding under North Carolina General Statute Section 7B-901(c)(1)(f) to sustain the finding of an aggravated circumstance—"conduct [that] increased the enormity or added to the injurious consequences"—requires that "the evidence in aggravation involve something *in addition to the facts that* [*give*] *rise to the initial adjudication of abuse* and/or neglect." *Id.* at 547-48, 879 S.E.2d at 146 (emphasis added) (quotation marks omitted). For that reason, in *In re L.N.H.*, the Supreme Court rejected a department of social services argument "that [the] respondent-mother's conduct in burning [the juvenile's] feet and leaving her on the porch increased the enormity and added to the injurious consequences of burning [the juvenile's] feet and leaving her on the porch," even though the juvenile's "injuries were severe enough to require hospitalization for two days and continued medical treatment for several weeks[.]" *Id.* at 547, 879 S.E.2d at 146.

Likewise, here the evidence and findings of fact regarding Nan's serious condition and near-fatal injuries upon her arrival at the ER on 19 April 2023, along with her subsequent three-month hospitalization and ongoing medical and therapy needs, all arise from the same facts that support the abuse and neglect adjudications—her serious, life-threatening condition and injuries upon her arrival at the ER on 19 April 2023. Nothing in the record indicates that Parents' "conduct increased the enormity or added to the injurious consequences" of Nan's abuse "in addition to the facts that [gave] rise to the initial adjudication of abuse and/or neglect." *Id.* at 547-48, 879 S.E.2d at 146.

We vacate the portion of the adjudication and initial disposition order directing that reunification efforts with Parents are not required. However, as in *In re L.N.H.*, we note that "there *is* sufficient evidence in the record to support a determination . . . that reunification efforts were not required pursuant to N.C.G.S. § 7B-901(c)(3)(iii), which allows the cessation of reunification efforts in an initial dispositional order in the event that the parent has committed a felony assault resulting in serious bodily injury to the child." *Id.* at 548, 879 S.E.2d at 147 (emphasis in original) (quotation marks and brackets omitted) (discussing the fact that the "respondent-mother was arrested and charged with felony child abuse inflicting serious injury" in connection with the juvenile's injuries, which along with "ample evidence that tends, if believed, to show that [the] respondent-mother's actions . . . involved the commission of a felonious assault upon the child that resulted in serious bodily injury[,]" would permit "the findings necessary to permit the cessation of reunification efforts"). As noted above, Parents were each charged with felony child abuse in connection with Nan's injuries. "As a result, we . . . remand to the [district] court with instructions to enter appropriate findings addressing the issue of whether efforts to reunify [Parents] with [Nan] should be ceased pursuant to N.C.G.S. § 7B-901(c)." *Id.* (citation omitted).

IV. Conclusion

For the reasons discussed herein, we hold that the district court did not err in adjudicating Nan an abused and neglected juvenile. We also reject Parents' ineffective assistance of counsel arguments. But we vacate the district court's dispositional direction that reunification efforts with Parents are not required and remand this matter to the district court for the entry of an order with appropriate findings of fact on that issue.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges FLOOD and STADING concur.

IN RE Q.J.P.

[296 N.C. App. 175 (2024)]

IN THE MATTER OF Q.J.P., M.P., K.L.

No. COA23-721

Filed 15 October 2024

1. **Appeal and Error—permanency planning order—right to appeal—reunification eliminated only as to mother—aggrieved party**

   A mother had a direct right to appeal from permanency planning orders regarding two of her children where, although the orders did not completely eliminate reunification as a permanent plan pursuant to N.C.G.S. § 7B-1001(a)(5) since they set reunification with the children's fathers as a concurrent plan, the mother was an aggrieved party because there was no reunification with her as a permanent plan; therefore, the orders had a direct and injurious effect on the mother.

2. **Child Abuse, Dependency, and Neglect—permanency planning—ceasing reunification efforts—lack of necessary findings**

   The trial court erred by entering permanency planning orders, one for each of three children, which excluded as a concurrent plan reunification with the children's mother without first making various findings required by N.C.G.S. § 7B-906.2(b) and (d). Two of the orders, which were lacking findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the children's health or safety (subsection (b)) and findings regarding whether the mother remained available to the court, the department of social services, and the guardian ad litem or acted in a manner inconsistent with the children's health or safety (subsection (d)) were vacated and remanded for entry of new orders with the required findings. On remand, the trial court was directed to resolve contradictory findings regarding the primary and secondary plans with regard to one child. The order pertaining to the third child lacked a finding pursuant to subsection (d) regarding the mother's availability and, therefore, was also remanded for additional findings.

Appeal by respondent-mother from orders entered 13 February 2023 by Judge Susan M. Dotson-Smith in District Court, Buncombe County. Heard in the Court of Appeals 6 September 2024.

Jack Densmore, Esq., for petitioner-appellee Buncombe County Department of Health and Human Services.

IN RE Q.J.P.

[296 N.C. App. 175 (2024)]

Parry Law, PLLC, by Neil A. Riemann, for the guardian ad litem.

Robinson & Lawing, LLP, by Christopher M. Watford, for respondent-appellant mother.

STROUD, Judge.

In this appeal from initial permanency planning orders concerning three of her minor children, respondent-mother contends that the district court violated statutory mandates set forth in the Juvenile Code by failing to make the necessary written findings in support of the concurrent plans the court established for the juveniles—plans which did not include their reunification with respondent-mother. We agree, and as explained below, the controlling statutes and caselaw require us to remand all three permanency planning orders to the district court for entry of the missing required written findings.

I. Factual Background and Procedural History

At the time of the permanency planning hearing which resulted in the orders from which this appeal is taken, Mother had three children, Quincy, Mary, and Keith,[1] who were born in 2017, 2019, and 2020, respectively. Each of these juveniles has a different father, none of whom is a party to this appeal. However, Mother's relationship with Keith's father played a role in the filing of the petitions which led to this appeal, as discussed in greater detail below.

The Buncombe County Department of Health and Human Services ("DHHS") became involved with the family in January 2020, prior to Keith's birth, due to reports of domestic violence between Mother and Keith's father, and juvenile petitions were filed with respect to Quincy and Mary on 9 March 2020. Quincy and Mary were placed in the non-secure custody of DHHS.

Shortly after Keith was born in August 2020, DHHS received another report of domestic violence between Mother and Keith's father. On 2 September 2020, Mother and DHHS entered into a safety plan wherein Mother agreed that her mother would supervise any contact between Keith and herself and that Mother would have no contact with Keith's father in the presence of any of the three children. Several weeks later,

1. Stipulated pseudonyms are used to protect the identity of the juveniles pursuant to Rules 3.1 and 42 of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 3.1; *see also* N.C. R. App. P. 42.

the maternal grandmother moved into Mother's home, and DHHS dismissed the prior juvenile petitions for Quincy and Mary and allowed all three children to reside in Mother's home with the grandmother as the juveniles' temporary safety provider. Mother was directed to "ensure the children have no contact with [Keith's] father[.]"

On 17 November 2020, DHHS received a report alleging that Keith's father (1) was living in Mother's home with the children in violation of the safety plan, (2) had "got[ten] mad and busted a television" in the presence of the children, and (3) had punched Mother, giving her a black eye. Three days later, on 20 November 2020, DHHS received information that law enforcement had conducted a traffic stop on Mother's vehicle just after midnight on that date, with Mother driving and Keith's father, Mary, and Keith also present in the vehicle. DHHS assumed custody of the children and filed new juvenile petitions alleging that each was a neglected juvenile. On 20 August 2021, the district court entered orders adjudicating each child as neglected, based in part on stipulations of Mother, and also entered dispositions in each matter.

Following ten days of hearings between December 2021 and August 2022, the district court entered an initial permanency planning order for each of the children on 13 February 2023. The court ordered that Quincy and Mary remain in the custody of DHHS and set their primary plans of care as guardianship with the secondary plan as reunification with their fathers. However, we also note that the order for Mary includes contradictory findings of fact regarding Mary's permanent plan. In finding of fact 23, the court states that the primary plan for Mary is "*adoption*, with a secondary permanency plan of reunification with" her father. (Emphasis added). Yet in finding of fact 46, the court found that DHHS should "make reasonable efforts to finalize the primary permanency plan of *guardianship*[ ] and the secondary permanency plan of reunification with" Mary's father. (Emphasis added). In finding of fact 47, the court found that "guardianship is not [an] appropriate plan at this time" and that "adoption is an appropriate plan." "[T]he primary plan of adoption" is also mentioned in finding of fact 55.

Nonetheless, in the portion of the order containing conclusions of law, after ordering that Mary remain in the custody of DHHS, the court set Mary's primary permanent plan as guardianship with a secondary plan of reunification with her father and ordered DHHS to "make reasonable efforts to implement the primary permanency plan of guardianship[ ] and the secondary permanency plan of reunification with" Mary's father. In any event, on the key point for our resolution of this appeal—that reunification with Mother was not included as a permanent plan for Mary—the order was consistent and clear.

In its order for Keith, the district court found that reunification with either Mother or his father would be inconsistent with Keith's health and safety, and thus set his primary plan as adoption and his secondary plan as guardianship.

On 9 March 2023, Mother filed a notice to preserve right of appeal pursuant to North Carolina General Statute Sections 7B-1001(a)(5) and (8). Mother subsequently filed a notice of appeal from the initial permanency planning orders on 15 May 2023 and an amended notice of appeal from the orders on 16 May 2023.

II. Analysis

Mother contends that the district court's initial permanency planning orders for the children violated North Carolina General Statute Section 7B-906.2(b) by eliminating reunification with Mother as a concurrent permanent plan without making written findings as required under the statute. We agree.

A. Standards of Review

> This Court reviews an order that ceases reunification efforts to determine whether the [district] court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the [district] court's conclusions, and whether the [district] court abused its discretion with respect to disposition. The [district] court's findings of fact are conclusive on appeal if supported by any competent evidence. This is true even where some evidence supports contrary findings. Unchallenged findings are deemed to be supported by sufficient evidence and are [also] binding on appeal.

In re P.T.W., 250 N.C. App. 589, 594, 794 S.E.2d 843, 848 (2016) (emphasis in original) (citations and quotation marks omitted).

"We consider matters of statutory interpretation *de novo*." *In re M.S.*, 247 N.C. App. 89, 91, 785 S.E.2d 590, 592 (2016) (citation and quotation marks omitted). Likewise, an alleged violation of a statutory mandate presents a question of law that is considered *de novo*, under which standard we consider the issue anew and without deference to the decision below. *See In re A.M.*, 220 N.C. App. 136, 137, 724 S.E.2d 651, 653 (2012).

B. Grounds for Appellate Review

[1] As an initial matter, we must address the argument by the guardian *ad litem* ("GAL") and DHHS that Mother's appeal from the permanency

planning orders for Quincy and Mary is not properly before this Court. Chapter 7B of the Juvenile Code—which governs abuse, neglect, and dependency matters—directs the district court to hold permanency planning hearings for juveniles who have been removed from their parents' custody. *See* N.C. Gen. Stat. § 7B-906.1(a) (2023). At each such hearing, "the court shall adopt one or more . . . permanent plans the court finds is in the juvenile's best interest[.]" N.C. Gen. Stat. § 7B-906.2(a) (2023) (setting forth six options including, *inter alia*, reunification, adoption, and guardianship). More specifically, "the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall be a primary or secondary plan unless the court" makes specific written findings "the permanent plan is or has been achieved[.]" N.C. Gen. Stat. § 7B-906.2(b).

Chapter 7B also specifies what abuse/neglect/dependency "orders may be appealed directly to the Court of Appeals." N.C. Gen. Stat. § 7B-1001 (2023). Pertinent to this matter, a direct appeal to this Court is permitted from a permanency planning order that

> eliminat[es] reunification, as defined by G.S. 7B-101(18c), as a permanent plan by either of the following:
>
> a. A parent who is a party and:
>
> 1. Has preserved the right to appeal the order in writing within 30 days after entry and service of the order.
>
> 2. A termination of parental rights petition or motion has not been filed within 65 days of entry and service of the order.
>
> 3. A notice of appeal of the order eliminating reunification is filed within 30 days after the expiration of the 65 days.
>
> b. A party who is a guardian or custodian with whom reunification is not a permanent plan.

N.C. Gen. Stat. § 7B-1001(a)(5).

It is undisputed that Mother is "[a] parent who is a party" and that she "preserved [her] right to appeal the [permanency planning] order" in a timely fashion. N.C. Gen. Stat. § 7B-1001(a)(5)(a). But the GAL and DHHS submit that, because the initial permanency planning orders set reunification with Quincy's and Mary's fathers—although not with Mother—as secondary plans for those children, Mother has no right of appeal because the orders for those children did not "eliminat[e]

reunification, as defined by G.S. 7B-101(18c), as a permanent plan." N.C. Gen. Stat. § 7B-1001(a)(5). We are not persuaded by this suggested reading of the relevant statutes.

North Carolina General Statute Section 7B-101(18c) defines "[r]eturn home or reunification" as the "[p]lacement of the juvenile in the home of either parent or placement of the juvenile in the home of a guardian or custodian from whose home the child was removed by court order." N.C. Gen. Stat. § 7B-101(18c) (2023). We note that North Carolina General Statute Section 7B-1001(a)(5) incorporates the definition of "reunification" in Section 7B-1001(a)(5) and identifies the parties who have a right of direct appeal to this Court from a permanency planning order eliminating reunification as either "[a] parent" or "a guardian or custodian with whom reunification is not a permanent plan." N.C. Gen. Stat. § 7B-1001(a)(5)(a), (b). Moreover, while the placement of the clause "from whose home the child was removed by court order" suggests it explicitly applies to "a guardian or custodian," we are unconvinced by the implication underlying appellees' argument, to wit, that a *parent* "from whose home the child was removed by court order," N.C. Gen. Stat. § 7B-101(18c), lacks a similar right of direct appeal from an order eliminating reunification with that parent from a child's permanent plans.[2] That reading would require us to presume that the General Assembly intended to provide a *greater right of appeal* to a guardian or custodian of a child from whose home the child was removed than to a similarly situated parent.

Such a result appears unreasonable and indeed to verge on the absurd. *See In re J.N.S.*, 207 N.C. App. 670, 677, 704 S.E.2d 511, 516 (2010) ("In construing statutes[,] courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results." (citation and quotation marks omitted)). As emphasized by our Supreme Court, "[t]he Juvenile Code strikes a balance *between the constitutional rights of a parent and the best interests of a child*[.]" *In re R.R.N.*, 368 N.C. 167, 169, 775 S.E.2d 656, 659 (2015) (emphasis added) (citing N.C. Gen. Stat. § 7B-100(3) (stating that one purpose of the Code is "[t]o provide for services for the protection of juveniles by means that respect both the

2. This case does not require this Court to resolve whether a parent who did *not* have physical custody of a child when that child was removed from the home of the other parent or from the home of another guardian or custodian would have a right of direct appeal under the applicable statutes, and accordingly, we do not reach that question.

right to family autonomy and the juveniles' needs for safety, continuity, and permanence")). To bar Mother's timely appeal from an order eliminating her reunification with the children removed from her home as a permanent plan—where a guardian's or custodian's appeal would be permitted in an identical circumstance—simply because reunification with the children's fathers in separate households remained as concurrent permanent plans appears to us counter to such a balance.

Our holding here is further supported by North Carolina General Statute Section 7B-1002, which provides that, among the "[p]roper parties for appeal" "from an order permitted under G.S. 7B-1001," is "[a] parent . . . who is a nonprevailing party." N.C. Gen. Stat. § 7B-1002(4) (2023). A foundational concept in our appellate jurisprudence is that the right to appeal belongs to a nonprevailing or "aggrieved" party. *See In re Halifax Paper Co.*, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963) (defining a "person aggrieved" as a party "adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights" (citation and quotation marks omitted)). In the context of the Juvenile Code, this Court has indicated that a parent is an aggrieved party if his or her rights have been "directly and injuriously affected" by a district court's action. *In re C.A.D.*, 247 N.C. App. 552, 563, 786 S.E.2d 745, 752 (2016) (citation omitted). By eliminating reunification with her as a permanent plan for Quincy and Mary, the orders here have a direct and injurious effect on Mother.

In sum, we hold that Mother's appeal of the permanency planning order as to Quincy and Mary is properly before this Court.

C. Required Written Findings

[2] Mother's substantive contention is that the permanency planning orders for Quincy, Mary, and Keith must be reversed because each lacks findings required under the Juvenile Code. Specifically, she notes that the orders concerning Quincy and Mary lack written findings mandated in subsections (b) and (d) of North Carolina General Statute Section 7B-906.2, while the order concerning Keith lacks a written finding under subsection (d). These arguments have merit, although as discussed herein, remand for the necessary findings, rather than reversal of the orders is the appropriate remedy.

As noted above, the district court was required to "adopt concurrent permanent plans," with "[r]eunification . . . a primary or secondary plan unless . . . the court [made] written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b). "In determining that

efforts would be unsuccessful or contrary to the juvenile's well-being, the court must make written findings 'demonstrat[ing] lack of success' as to each" of four matters provided in subsection 7B-906.2(d). *In re J.M.*, 271 N.C. App. 186, 198, 843 S.E.2d 668, 676 (2020) (quoting N.C. Gen. Stat. § 7B-906.2(b)). Those matters are:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d). As explained above, reunification with Mother was not a concurrent plan for any of the three juveniles, and accordingly, written findings on these four matters were required. *See id.*

In the permanency planning orders concerning Quincy and Mary, the district court made no written findings that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety," N.C. Gen. Stat. § 7B-906.2(b), and no written findings regarding Mother's availability to the court, DHHS, and the GAL or "[w]hether [she] is acting in a manner inconsistent with the health or safety of" Quincy and Mary, N.C. Gen. Stat. § 7B-906.2(d)(3), (4). These omissions are indistinguishable from those presented in the order reviewed by this Court in *In re J.M.*, where the district court also made no written finding pursuant to North Carolina General Statute Section 7B-906.2(b) and made written findings on only two of the four matters set forth in North Carolina General Statute Section 7B-906.2(d). *See In re J.M.*, 271 N.C. App. at 198, 843 S.E.2d at 676. Accordingly, "[b]ecause 'the [district] court failed to make the requisite findings required to cease reunification efforts' under Section 7B-906.2(d), we vacate the [district] court's order[s as to Quincy and Mary] and remand for it to make those findings." *Id.* (quoting *In re D.A.*, 258 N.C. App. 247, 254, 811 S.E.2d 729, 734 (2018)).

The permanency planning order concerning Keith differs from those concerning his half-siblings. The district court therein *did* make a written finding "that reunification at this time would be inconsistent with the minor child's health and safety and need for a safe, permanent home within a reasonable period of time." *See* N.C. Gen. Stat. § 7B-906.2(b).

However, it made no written finding of fact regarding Mother's availability "to the court, the department, and the guardian ad litem for the juvenile[.]" N.C. Gen. Stat. § 7B-906.2(d)(3).

Our Supreme Court has recently considered a case presenting a similar circumstance, explicitly distinguishing it from *In re D.A.* and *In re J.M. See In re L.R.L.B.*, 377 N.C. 311, 324-45, 857 S.E.2d 105, 117 (2021). In that appeal from a termination of parental rights order, our Supreme Court noted that a previous "permanency planning order [did] not include sufficient written findings as to [the mother's availability under North Carolina General Statute Section 7B-906.2(d)(3)]—but [did] include findings on the ultimate issue—which must be addressed as a preface to the elimination of reunification from the permanent plan[.]" *Id.* at 325, 857 S.E.2d at 117. Specifically, our Supreme Court opined:

> Unlike the specific finding that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety" which is required by N.C.G.S. § 7B-906.2(b) before eliminating reunification from the permanent plan, no particular finding under N.C.G.S. § 7B-906.2(d)(3) is required to support the [district] court's decision. N.C.G.S. § 7B-906.2(d) merely requires the [district] court to make "written findings as to each of the" issues enumerated in N.C.G.S. § 7B-906.2(d)(1)-(4), and to consider whether the issues "demonstrate the [parent's] degree of success or failure toward reunification[.]" N.C.G.S. § 7B-906.2(d). A finding that the parent has remained available to the [district] court and other parties under N.C.G.S. § 7B-906.2(d)(3) does not preclude the [district] court from eliminating reunification from the permanent plan based on the other factors in N.C.G.S. § 7B-906.2(d).

Id. at 325-26, 857 S.E.2d at 117-18.

Although this appeal arises from a permanency planning order and Keith's case has not progressed to a termination of parental rights, we see no reason to depart from the reasoning in *In re L.R.L.B.* or its guidance that "the appropriate remedy for the [district] court's error . . . is to remand this matter to the [district] court for the entry of additional findings in contemplation of N.C.G.S. § 7B-906.2(d)(3)." *Id.* at 326, 857 S.E.2d at 118 (citations omitted). Further, upon remand,

> [i]f the [district] court's additional findings under . . . § 7B-906.2(d)(3) do not alter its finding under . . .

> § 7B-906.2(b) that further reunification efforts 'are clearly futile or inconsistent with the juvenile's need for a safe, permanent home within a reasonable period of time[,]' then the [district] court may simply amend its permanency planning order to include the additional findings[.]

Id. at 327, 857 S.E.2d at 118.

III. Conclusion

The initial permanency planning orders regarding Quincy and Mary are vacated and remanded for the entry of findings pursuant to North Carolina General Statute Sections 7B-906.2(b) and 7B-906.2(d)(3) and (4). On remand, the district court should also reconcile the contradictory findings in Mary's order as noted above so the resulting order will clearly identify the appropriate primary and secondary plans as required by North Carolina General Statute Section 7B-906.2(b). The initial permanency planning order regarding Keith is remanded for entry of a finding pursuant to North Carolina General Statute Section 7B-906.2(d)(3).

18 JA 334 AND 20 JA 94: VACATED AND REMANDED.

18 JA 333: REMANDED.

Judges FLOOD and STADING concur.

LAIL v. TUCK

[296 N.C. App. 185 (2024)]

LISA W. LAIL, PLAINTIFF
v.
WILLIAM EDWARD TUCK, JR., DEFENDANT

No. COA24-179

Filed 15 October 2024

Real Property—grossly inadequate consideration—jury instructions—independent cause of action—rescission of deed

In a civil action brought by an illiterate plaintiff challenging her transfer of real property to defendant by means of a deed—that was drafted by defendant's attorney; was not read aloud to plaintiff before its signing; and, despite plaintiff's understanding that she would retain a life estate, gave defendant fee simple title to the property in exchange for satisfaction of a tax lien and payment of future ad valorem taxes—the trial court did not err or offend North Carolina's jurisprudence on unconscionability in instructing the jury on grossly inadequate consideration as an independent cause of action supporting rescission of the deed, using language that mirrored that found in N.C.P.I. - Civil 850.30. Likewise, defendant's arguments that the trial court abused its discretion in rejecting his request for modified jury instructions and erred in awarding rescission and denying his motions for summary judgment and for a directed verdict—all based on his position that grossly inadequate consideration is not an independent issue for submission to the jury, but only as an aspect of fraud—were overruled.

Chief Judge DILLON dissenting.

Appeal by defendant from judgment entered 8 June 2023 by Judge J. Thomas Davis in Catawba County Superior Court. Heard in the Court of Appeals 11 September 2024.

Davis, Harman & Wright, PLLC, by R. Daniel Gibson, for the plaintiff-appellee.

Pope McMillan, P.A., by Christian Kiechel, for the defendant-appellant.

TYSON, Judge.

William E. Tuck, Jr. ("Defendant") appeals from a jury's verdict in favor of Lisa W. Lail ("Plaintiff"). We find no error.

I. Background

Plaintiff and Defendant both worked at Cutrite Furniture thirty years ago. Plaintiff and Defendant were involved in a romantic relationship, but did not see each other thereafter for thirty years. Plaintiff is illiterate, but she can sign her name and copy letters of the alphabet. Plaintiff was involved in an automobile vehicular accident in 2010 and suffered a broken femur and damaged hip in the accident. Plaintiff has been unable to work since the accident and receives $800 monthly in Social Security Disability payments.

Plaintiff received a $37,348.79 settlement from the accident. Plaintiff used $30,348.79 of the proceeds to purchase her home located at 2623 Keisler Dairy Road (the "Property") in Conover. Plaintiff used the remaining balance of the settlement funds to purchase a replacement car and to make repairs to the home.

For three years Plaintiff's daughter's boyfriend helped her budget her money to pay the *ad valorem* taxes on the Property. Plaintiff's car broke down and she bought furniture on credit to help establish credit sufficient to finance the purchase of a replacement car. Plaintiff fell behind on *ad valorem* taxes on the Property in 2014.

Plaintiff entered into a payment plan with Catawba County to pay $75 per month to address her tax arrearages, but she was unable to complete the plan. Catawba County began threatening Plaintiff with foreclosure of the tax lien on the Property. Plaintiff sought help to avoid foreclosure of the Property. Plaintiff was offered $60,000 for the Property by Larry Ardnt, but she refused and sought $75,000.

Plaintiff and Defendant became re-acquainted in 2019. Plaintiff testified she asked Defendant to read her mail to her. Plaintiff testified she offered to sign the Property to Defendant, if he would pay the back and all future *ad valorem* taxes on the Property and to preserve a life estate to allow her to continue to live on the Property.

Defendant hired an attorney to draft a deed. Plaintiff testified Defendant told her "if [she] brought anybody [to the closing] or told anybody the deal was off." Plaintiff testified she asked to see the lawyer Defendant had hired to prepare the deed, but was told he was unavailable to meet with her by his staff. Plaintiff's daughter testified Plaintiff asked a secretary in the attorney's office to read the draft deed to her, but she refused. Plaintiff was not advised to retain the services of an attorney to represent or review her concerns.

Plaintiff signed the deed without reading it, having it read to her, or having its contents or legal significance explained to her. Plaintiff was not provided a copy of the deed. The deed granted Defendant a fee simple absolute estate in the Property, and it did not reserve the agreed-upon life estate for Plaintiff. Plaintiff testified after the deed was signed Defendant took her to dinner and dropped her off at the Property. The deed was recorded on 25 February 2020 in Book 3556, Pages 559-60 in the Catawba County Register.

Defendant testified he was not aware Plaintiff was illiterate until she began stating she had retained a life estate in the Property. He denied ever reading Plaintiff's mail to her. Defendant testified he was allowing her to remain on the Property until April of 2020. After that period Defendant told Plaintiff he owned the Property, and she needed to vacate and leave her home. Defendant changed the locks in September 2020 and ordered Plaintiff to vacate the Property.

Plaintiff filed a complaint challenging the transfer of the Property on 1 September 2020. Defendant filed a motion to dismiss, affirmative defenses, an answer, and counterclaims for breach of contract, fraud, unjust enrichment, and recovery for occupation and trespass on 30 October 2020.

Defendant filed a Rule 12(b)(6) motion to dismiss Plaintiff claims, which was allowed in part and denied in part by order on 9 August 2021. The trial court dismissed Plaintiff's claims for constructive fraud, trespass, and unfair and deceptive trade practices, but it allowed Plaintiff's claims for fraud and for reformation of the deed due to fraud to proceed. Plaintiff filed an amended complaint on 22 January 2022 to add claims seeking rescission and cancellation of the deed.

Evidence at trial tended to show the tax value of the Property was $112,000 and Defendant's *ad valorem* payments totaled $2,327.89. The jury found for Defendant on fraud, but deadlocked on whether Defendant had paid grossly "inadequate consideration under the circumstances." A second jury found Defendant's consideration was grossly inadequate under the circumstances. The trial court cancelled the deed from Plaintiff to Defendant recorded on 25 February 2020 in the Catawba County Register. Plaintiff was ordered to pay Defendant $5,608.96 to recover his costs, plus $1,163.76 in prejudgment interest. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

Defendant argues the trial court erred by: (1) submitting the issue of grossly inadequate consideration to the jury as a separate issue from fraud; (2) granting Plaintiff the remedy of rescission based upon the jury's finding of grossly inadequate consideration; and, (3) failing to enter a directed verdict in favor of Defendant.

IV. Grossly Inadequate Consideration

Defendant argues the trial court erred by submitting the issue of grossly inadequate consideration to the jury as a separate issue from fraud.

A. Standard of Review

When reviewing a trial court's ruling on requested jury instructions, this Court is "required to consider and review [the] jury instructions in their entirety." *Davis v. Balser*, 155 N.C. App. 431, 433, 574 S.E.2d 177, 179 (2002) (citation omitted). The burden of proof is upon the party assigning error to demonstrate the jury instruction misled the jury or otherwise affected the verdict. *Id.* (citation omitted). This Court will hold a jury instruction as valid if the instruction "present[ed] the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed." *Id.* (citation omitted).

B. Analysis

Defendant argues grossly inadequate consideration or intrinsic fraud is not an independent cause of action in North Carolina and cannot result in the rescission of a deed. Defendant asserts North Carolina Pattern Jury Instruction – Civil 850.30, does not allow an independent cause of action. The instruction reads:

> The (state number) issue reads:
>
> Was the [price paid] [consideration given] to (name grantor) for [executing] [delivering] (identify deed) grossly inadequate under the circumstances?
>
> On this issue the burden of proof is on the plaintiff. This means the plaintiff must prove, by the greater weight of the evidence, that the [price paid] [consideration given] to (name grantor) for [executing] [delivering] (identify deed) was grossly inadequate under the circumstances. To be grossly inadequate, the [price paid] [consideration given] must be so disproportionate to the value of what (name grantor) has given up by the conveyance that, under the

> same or similar circumstances, it would shock the conscience of a reasonable person.
>
> Finally, as to the (state number) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the [price paid] [consideration given] to (name grantor) for [executing] [delivering] (identify deed) was grossly inadequate under the circumstances, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.
>
> If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

N.C.P.I. – Civil 850.30.

1. Grossly Inadequate Consideration as Independent Action

Defendant asserts this pattern jury instruction, coupled with an accompanying footnote, which states: "[a] shockingly insufficient consideration will support a finding of grossly inadequate consideration (i.e., intrinsic fraud) without other evidence" does not allow grossly inadequate consideration to be an independent cause of action. *Id.* (citing *Wall v. Ruffin*, 261 N.C. 720, 723, 136 S.E.2d 116, 118 (1964); *Garris v. Scott*, 246 N.C. 568, 575, 99 S.E.2d 750, 755 (1957); *Carland v. Allison*, 221 N.C. 120, 122, 19 S.E.2d 245, 246 (1942)).

Defendant argues the cases cited in the N.C.P.I. footnote only allow the jury the option to consider grossly inadequate consideration as an element of fraud, but do not require the jury to find fraud. Defendant's argument is misplaced.

Nearly one hundred and twenty years ago, our Supreme Court allowed a jury charge:

> If the award is so grossly and palpably inadequate, that is, so grossly and palpably small and out of all proportion to the amount of actual damage, as to shock the moral sense and conscience and to cause reasonable persons to say he got it for nothing, then the jury may consider this as evidence tending to show fraud and corruption or strong bias and partiality[.]

Perry v. Ins. Co., 137 N.C. 402, 407, 49 S.E. 889, 890 (1905) (internal quotation marks omitted).

Our Supreme Court, in *Wall*, held:

> The controlling principle established by our decisions is that inadequacy of consideration is a circumstance to be considered by the jury in connection with other relevant circumstances on an issue of fraud, but inadequacy of consideration *standing alone* will not justify setting aside a deed on the ground of fraud. *However, if the inadequacy of consideration is so gross that it shows practically nothing was paid, it is sufficient to be submitted to the jury without other evidence.*

Wall, 261 N.C. at 723, 136 S.E.2d at 118 (citations omitted) (emphasis supplied).

Leonard v. Power Co. reaffirmed its prior holding from *Perry*:

> The settled rule, which is applicable not only to awards, but to other transactions, is that mere inadequacy alone is not sufficient to set aside the award, but if the inadequacy be so gross and palpable as to shock the moral sense, it is sufficient evidence to be submitted to the jury on the issues relating to fraud and corruption or partiality and bias.

Leonard v. Power Co., 155 N.C. 10, 16, 70 S.E. 1061, 1064 (1911) (citing *Perry*, 137 N.C. at 406, 49 S.E. at 890).

In *Leonard*, our Supreme Court found no error where an agent of the defendant who was trying to acquire an easement from the plaintiff testified: "he read the blue paper to her" while the plaintiff testified the paper read to her did not have the word "towers" in it. *Id.* at 15, 70 S.E. at 1063. The trial court further found:

> There was evidence tending to prove that the agent of the defendant went to see her three times to procure her signature; that at first she refused to grant any easement to the defendant; that she was told that the defendant wanted to put up one or two poles on the land, across the six acres, and that the line of poles would not go near the big field; that the blue paper was drawn by the defendant, and the land described so indefinitely that one might be misled as to whether it conferred a right as to the six acres or the whole tract; that at that time the line had been run and staked on the land, and the defendant's agent knew this and did not inform the plaintiff of the fact, and that

> the agent gave the plaintiff the yellow paper, representing it to be a copy of the blue paper.

Id.

Our Supreme Court held: "In addition to this, the inadequacy of consideration was so gross that it afforded sufficient evidence of fraud to justify submitting the question to the jury, in the absence of other evidence." *Id.* The next year, our Supreme Court again examined the inadequacy of consideration, and held:

> The rule amounts to this: The owner of tangible property or of a claim for damages may give it away or may sell it for less than its value, and the contract is valid in the absence of fraud, undue influence, or oppression; but if the contract is attacked as fraudulent, the inadequacy of consideration is evidence of fraud, and if gross, is alone sufficient to carry the case to the jury on the issue of fraud.

Knight v. Vincennes Bridge Co., 172 N.C. 393, 398, 90 S.E. 412, 414 (1916). *Knight* and *Perry* were again cited and re-affirmed in *Hill v. Star Ins. Co.*, 200 N.C. 502, 509-10, 157 S.E. 599, 603 (1931).

Here the jury heard far more evidence than the gross "inadequacy of consideration standing alone." *Wall*, 261 N.C. at 723, 136 S.E.2d at 118. The jury in the first trial was also instructed on Plaintiff's burden to "prove by the greater weight of the evidence that the consideration given to the plaintiff for executing a deed" was "grossly inadequate under the circumstances." The admitted evidence tended to show: (1) the prior and current relationship of the parties; (2) Plaintiff's illiteracy and inability to read; (3) her assertion of a retained life estate; (4) Defendant's secretive instructions; and, (5) the circumstances surrounding her execution of the deed without it being read to her, not being advised to seek her own counsel, Defendant's attorney's failure to make himself available for her questions, allowing unlicensed staff to slough off her questions, and the failure to provide her a copy of what she had signed. N.C. Rev. R. Prof. Conduct 1.7 (2024). *See generally Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 604, 617 S.E.2d 40, 46-47 (2005) ("In North Carolina, our courts have previously recognized the common interest or joint client doctrine, noting that as a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged *inter sese*." (internal quotation omitted)), *aff'd*, 360 N.C. 356, 625 S.E.2d 779 (2006). Defendant's argument and reliance on *Wall* is overruled. 261 N.C. at 723, 136 S.E.2d at 118.

2. Unconscionability

Defendant further argues the law on unconscionability does not allow "grossly inadequate consideration" to be submitted to the jury as an independent issue. "A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability." *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 102, 655 S.E.2d 362, 370 (2008) (citation omitted). Demonstrating substantive unconscionability involves "harsh, one-sided, and oppressive contract terms." *Id.* at 103, 655 S.E.2d at 370 (citation omitted).

Demonstrating procedural unconscionability "involves bargaining naughtiness in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power." *Id.* at 102–03, 655 S.E.2d at 370 (internal quotation marks omitted) (citation omitted).

While a showing of both procedural and substantive unconscionability are required, "a finding [of unconscionability] may be appropriate when a contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa." *Id.* at 103, 655 S.E.2d at 370.

Plaintiff's evidence, if believed by the jury, tended to satisfy both the procedural and substantive unconscionability of Defendant's and his attorney's and his staff's conduct surrounding the transaction and the execution of the deed. Since Plaintiff's evidence tended to support and show both prongs of procedural and substantive unconscionability, a jury's finding and conclusion of grossly inadequate consideration is consistent with North Carolina's law on unconscionability. Defendant's argument is without merit. *Id.*

3. Erroneous Instruction

Defendant argues the instruction on grossly inadequate consideration was administered in error. Defendant asserts error in the requirement where, if the jury found grossly inadequate consideration had taken place, the jury find in favor of Plaintiff. The instruction provided by the trial court read:

> Was the consideration given to the plaintiff for executing a deed to the defendant for the 2623 Keisler Dairy Road, Conover, real estate grossly inadequate under the circumstances?
>
> While mere inadequacy of consideration alone, ordinarily, is not sufficient to invalidate a deed, the consideration

paid is an important and material fact in a trial involving fraud in procuring the execution of a deed. Evidence in respect to inadequate consideration may be considered by the jury in connection with other facts and circumstances offered in evidence.

Consideration is something such as an act, a forbearance, or a return promise bargained for and received by a promisor from a promise. What constitutes valuable consideration depends upon the context of a particular case.

On this issue the burden of proof is on the plaintiff. This means the plaintiff must prove, by the greater weight of the evidence, that the consideration given to the plaintiff for executing a deed to the defendant for the 2623 Keisler Dairy Road, Conover, real estate was grossly inadequate under the circumstances. To be grossly inadequate, the consideration must be so disproportionate to the value of what the plaintiff has given up by the conveyance that, under the same or similar circumstances, it would shock the conscience of a reasonable person.

You may consider any evidence you believe is relevant to consideration paid and value of property, the condition of the property, the value of outstanding taxes to the parties in this case, Ms. Lail's willingness to voluntarily sell the property, expressions relating to timing, motivations of Ms. Lail, lack of offer to purchase the property, and other evidence you consider relevant to the value of the property.

Finally, as to the second issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the consideration given to the plaintiff for executing a deed to the defendant for the 2623 Keisler Dairy Road, Conover real estate was grossly inadequate under the circumstances, it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

This jury instruction virtually mirrors N.C.P.I. – Civil 850.30 and is wholly consistent with our Supreme Court's holding in *Wall* as analyzed above. *Wall*, 261 N.C. at 723, 136 S.E.2d at 118 (citations omitted).

"[T]he preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 178 (2006) (citations omitted). Defendant's argument is overruled.

4. Modifications to the Jury Instructions

Defendant argues the trial court should have accepted his proposed modifications to the jury instructions, which would have instructed the jury to consider grossly inadequate consideration only as an aspect of actual fraud. Jury instructions are adequate "if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Chalmers v. Womack*, 269 N.C. 433, 436, 152 S.E.2d 505, 507 (1967).

The jury instructions conformed to the North Carolina Pattern Jury Instructions and were sufficiently comprehensive for the jury to resolve all factual issues raised by the competent and properly admitted evidence of intrinsic fraud. Defendant failed to show the trial court abused its discretion in instructing the jury using N.C.P.I. – Civil 850.30. Defendant's arguments are overruled.

V. Rescission, Directed Verdict, and Summary Judgment

Defendant argues the trial court erred in awarding rescission and denying his motions for summary judgment and for a directed verdict. He again asserts intrinsic fraud is not an independent issue for submission to a jury. As analyzed and held above, intrinsic fraud, as evidenced by the party's relationship and understandings, the surrounding circumstances, and the grossly inadequate consideration, is a separate and distinct action from intentional fraud, as outlined in N.C.P.I. – Civil 850.30. Upon properly admitted evidence, this issue may be independently submitted to a jury. *Wall*, 261 N.C. at 723, 136 S.E.2d at 118. Defendant's arguments are overruled.

VI. Conclusion

The trial court did not abuse its discretion in instructing the jury on grossly inadequate consideration, awarding rescission, or err by denying Defendant's motions for summary judgment and for a directed verdict. Defendant has failed to carry his burden to show any abuse of discretion in the trial court's use of N.C.P.I. – Civil 850.30, based upon the properly admitted evidence, or reversible error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judge WOOD concurs.

Chief Judge DILLON dissents by separate opinion.

DILLON, Chief Judge, dissenting.

The issue in this case is whether Defendant William Tuck procured fee simple title from Plaintiff Lisa Lail in her home by fraud, essentially by representing to Plaintiff that the deed Defendant had prepared for Plaintiff to execute reserved for her a life estate. Plaintiff introduced plenty of evidence from which a jury could find that Defendant, indeed, did defraud her. Specifically, she presented evidence that she was illiterate and that Defendant deceived her into executing a deed conveying the fee simple interest in her $75,000 home to Defendant for less than $10,000, by representing to Plaintiff that the deed specified that she was retaining a life estate, such that she could live in home for the rest of her life.

In the first trial, the jury answered "no" to the question whether Defendant procured the deed from Plaintiff by fraud. But they were hung on a question presented to them as to whether Defendant paid Plaintiff a "grossly inadequate consideration." The trial court ordered a new trial on that second issue. Defendant, though, moved for summary judgment, which was denied.

In the second trial, the jury was merely asked whether Defendant paid a grossly inadequate consideration, which they answered in the affirmative. Based on this jury finding, the trial court entered its order declaring the deed void *ab initio*, thereby re-vesting Plaintiff with fee simple title.

For the reasoning below, I conclude that the trial court should have entered judgment for Defendant prior to the second trial based on the jury's verdict in the first trial that he did not commit fraud. In any case, I do not believe that a mere finding by jury that a buyer paid consideration it deems grossly inadequate mandates that the transaction be set aside, where there was otherwise no finding that the transaction was fraudulent. Accordingly, I respectfully dissent.

I. Analysis

The basis of my dissent is that I do not believe a mere finding that a seller who has agreed to sell her real estate can avoid her contract

simply because the agreed-upon consideration is "way below" market; rather, it must *also* be found (based on this grossly inadequate consideration) that the buyer committed fraud.

Our Supreme Court has held that, generally, a contract is not valid unless supported by *some* amount of consideration. *Holt v. Holt*, 304 N.C. 137, 142 (1981) (stating that a "contract [ ] must be supported by consideration.").

Our Supreme Court has long held that *unless there is fraud*, the courts will not look at *the adequacy of* the consideration:

> So long as it is something of real value in the eye of the law, whether or not the consideration is adequate to the promise is generally immaterial in the absence of fraud. *The slightest consideration is sufficient to support the most onerous obligation*; the inadequacy, as has been well said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.

Young v. Bd. of Comm'rs of Johnston Cnty., 190 N.C. 52, 57 (1925) (emphasis added). *See also Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 666 (1968) (reiterating that unless there is fraud, courts "will not inquire into the adequacy of the consideration.").

A party can avoid a contract procured by fraud. However, "[t]he general rule is that fraud is not presumed, but *must be proved* by the party alleging it." *Garris v. Scott*, 246 N.C. 568, 575 (1957) (emphasis added).

Our Supreme Court has consistently held that the inadequacy of consideration is evidence which can be considered *with other evidence* to show fraud. *Wall v. Ruffin*, 261 N.C. 720, 723 (1964). That is, the issue of fraud will not go to the jury if the only evidence offered is the payment of inadequate consideration. However, "if the inadequacy of consideration is so gross that it shows practically nothing was paid, it is sufficient to be submitted to the jury without other evidence." *Id.*

Notwithstanding, the fact a jury finds a party paid grossly inadequate consideration does not *necessitate* a finding of fraud. Our Supreme Court has instructed,

> [t]he rule amounts to this: The owner of tangible property [ ] may give it away or may sell it for less than its value, and the contract is valid, in the absence of fraud, undue influence, or oppression; but, if the contract is attacked as

> fraudulent, the inadequacy of consideration is evidence of fraud, and, if gross, is alone sufficient *to carry the case to the jury on the issue of fraud*.

Knight v. Vincennes Bridge Co., 172 N.C. 393, 398 (1916). *See also Leonard v. Southern Power Co.*, 155 N.C. 10, 17 (1911) (stating a bargain to sell property for less than its value is enforceable where the seller "wishes to do so, and the transaction is honest."). Or more recently,

> when parties have dealt with *at arms length* and contracted, the Court cannot relieve one of them because the contract has proven to be a hard one. Whether or not consideration is adequate to the promise, is generally immaterial *in the absence of fraud*.

Weyerhaeuser Co. v. Carolina Power & Light Co., 257 N.C. 717, 722 (1962) (emphasis added).

It was not appropriate here for the trial court to declare the deed void where no jury has ever found that Defendant obtained the deed by fraud (where Defendant has denied that fraud occurred).

Again, I believe Plaintiff made a strong case that Defendant defrauded her into signing a deed without language that she was retaining a life estate. However, since Defendant denied the fraud, it was *her burden* to prove fraud *to a jury*. The first jury expressly found that Defendant did not defraud Plaintiff, answering "NO" on the following issue:

> "WAS THE EXECUTION OF A DEED BY THE PLAINTIFF FOR [her home] TO THE DEFENDANT PROCURED BY DEFENDANT'S FRAUD?"

The jury's answer on this issue should have ended the matter.[1] In my mind, the question presented to the first jury regarding whether there

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1. Our Supreme Court has explained that fraud can "be broken into two categories, actual or constructive." *Terry v. Terry*, 302 N.C. 77, 82 (1981). Actual fraud involves a falsely represented or concealed material fact. *Id.* at 83. Constructive fraud involves a situation where a party gains some advantage in a transaction by abusing "a confidential or fiduciary relationship." *Id.*

Here, Plaintiff did not ask for separate instructions on whether there was "actual" or "constructive" fraud, but rather whether there was fraud at all. It appears to me from the record that the issue in this matter concerned only "actual fraud." Plaintiff did not seem to base her case on a contention that Defendant took advantage of a special relationship to talk her into agreeing to sell him her home without a life estate reserved for a low amount, which would be constructive fraud. Rather, she seems to base her case on her contention that Defendant lied to her about what was in the deed, that it contained language reserving for herself a life estate, which would be actual fraud.

was grossly inadequate consideration paid was surplusage. But there was no reason for Defendant to appeal on that issue, as the jury did not answer the question and Defendant won on the fraud issue anyway. Further, the second jury was never asked whether Defendant committed fraud.

The majority suggests that the payment of grossly inadequate consideration is equivalent to a cause of action called "intrinsic fraud." The majority cites the pattern jury instruction on grossly inadequate consideration. I have no issue with this pattern jury instruction in general. However, I do not believe, *standing alone*, the instruction resolves anything. Rather, the instruction is appropriate when a jury is being asked to determine whether there was fraud and where there was no *other* evidence offered. Consistent with our Supreme Court jurisprudence cited above, in such a case where no *other* evidence showing fraud is offered, it would not be appropriate for the jury to answer the fraud question unless they first found that the consideration paid was grossly inadequate.

In any event, I could not find a North Carolina case where there was a recognized cause of action called "intrinsic fraud" based on the payment of grossly inadequate consideration. Rather, "intrinsic fraud" in our case law generally describes a way to attack *a prior judgmen*t where the judgment was based on fraudulent evidence. *See*, *e.g.*, *Smith v. Smith*, 334 N.C. 81, 86 (1993). And the cases I found where finding of fraud based on evidence of grossly inadequate consideration was sustained on appeal, the jury in each case was expressly asked to determine whether there was fraud, not merely whether they thought the consideration paid was grossly inadequate.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; VILLAGE OF BALD HEAD ISLAND, COMPLAINANT; PUBLIC STAFF-NORTH CAROLINA UTILITIES, INTERVENOR; BALD HEAD ISLAND CLUB, INTERVENOR; BALD HEAD ASSOCIATION, INTERVENOR

v.

BALD HEAD ISLAND TRANSPORTATION, INC., RESPONDENT; BALD HEAD ISLAND LIMITED, LLC, RESPONDENT; AND SHARPVUE CAPITAL, LLC, INTERVENOR

No. COA23-424

Filed 15 October 2024

1. Utilities—jurisdiction—declaratory relief—determination of public utility status—parking and barge operations—justiciable controversy

In an action to determine the public utility status of parking and barge operations—which were not regulated as a public utility but were closely affiliated with ferry operations that were so regulated—the complaint filed by a village with the Utilities Commission was sufficient to invoke the Commission's jurisdiction regarding its regulatory authority over the parking and barge operations (owned by a parent company) through those operations' relationship to the ferry operations (owned by the parent company's wholly-owned subsidiary), because the Commission has powers of a court of general jurisdiction over matters pertaining to public utilities and their rates, services, and operations, including to enter a declaratory judgment to declare utility status. Here, where the parent company proposed selling its various transportation assets, the village raised a justiciable controversy with regard to the parties' respective rights and obligations arising from the provision of parking and barge services. However, the Commission did not have jurisdiction to consider the request by the village to designate the barge operations as a per se public utility, because the village's current use of the barge operations did not meet the statutory definition of "common carrier" that would require utility status.

2. Utilities—regulatory authority—non-utility parking operations—ancillary to regulated ferry operations

In an action to determine the public utility status of unregulated parking and barge operations, which were being proposed for sale by their owner (a parent company), the Utilities Commission did not err by concluding that the parking operations were subject to its regulatory authority based on those operations' effect on the rates and services of ferry operations (owned and operated by the

parent company's wholly-owned subsidiary) that were regulated as a public utility. Competent, material, and substantial evidence supported the Commission's findings regarding the interdependence of the ferry and parking operations, which, in turn, supported the Commission's conclusions. The Commission's order was modified, however, to clarify that the Commission's regulatory authority over the parking operations was limited by statute to the impact those operations had on the rates and services of the ferry operations and did not extend further.

3. Utilities—regulatory authority—non-utility barge operations—no finding of effect on rates or services of regulated ferry operations

In an action to determine the public utility status of unregulated parking and barge operations, which were being proposed for sale by their owner (a parent company), the Utilities Commission erred by concluding that the barge operations were subject to its regulatory authority as an ancillary service to ferry operations (owned and operated by the parent company's wholly-owned subsidiary) that were regulated as a public utility. Despite the Commission's general findings regarding the importance of the barge operations to the island it serviced, there was no finding that the non-utility barge operations had an impact on the rates and services of the utility ferry operations; therefore, the Commission had no jurisdiction to prevent the parent company from divesting itself of the barge operations without the Commission's approval.

Chief Judge DILLON concurring in part and dissenting in part.

Appeal by Respondents from order entered 30 December 2022 by the North Carolina Utilities Commission. Heard in the Court of Appeals 29 November 2023.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Amanda S. Hawkins, Marcus W. Trathen, and Jo Anne Sanford, for complainant-appellee.

Fox Rothschild LLP, by Kip D. Nelson, M. Gray Styers, Jr., and Bradley M. Risinger, for respondents-appellants.

Maynard Nexsen PC, by David P. Ferrell, for intervenor-appellant.

MURPHY, Judge.

The Commission may exercise all powers of a court of general jurisdiction over matters pertaining to public utilities and their rates, services, and operations. Therefore, so long as the Commission's jurisdiction is properly invoked by a justiciable controversy, the Commission is empowered to enter a declaratory judgment determining the public utility status of unregulated entities.

The Village's request for determination of BHIL's public utility status, by and through its Parking and Barge Operations' relationships to the regulated utility BHIT's Ferry Operations, was sufficient to confer jurisdiction upon the Commission, as the Village alleged an actual, genuine controversy existed concerning the parties' respective rights and obligations under the Public Utilities Act due to the Village's current use of the Parking, Barge, and Ferry Operations. However, the Village's request was insufficient to confer the Commission's jurisdiction to determine its unreached contention that BHIL operates its Barge Operations as a per se utility transporting persons or household goods for compensation, as the Village's alleged use of the Barge Operations is limited to transporting municipal materials and equipment.

The Commission may not extend its regulatory authority or jurisdiction over any industry or enterprise not subject to its jurisdiction under the Public Utilities Act. The Commission erred in concluding that BHIL's non-utility Parking and Barge Operations are ipso facto subject to its regulatory authority as services ancillary to BHIT's utility Ferry Operations, as any ancillary service per se must be furnished by a public utility.

The Commission properly concluded that it may exercise regulatory authority over BHIL's sale of its Parking Operations because the effect created by utilizing the parent company BHIL's unregulated Parking Operations to service its wholly-owned subsidiary company BHIT's regulated utility Ferry Operations on the utility ferry's rates and services subjects BHIL to treatment as a public utility on these facts. We affirm the Commission's order as modified within this opinion as to the Parking Operations and uphold its provision that BHIL shall not sell, assign, pledge, or transfer the Parking Operations without Commission approval.

The record contains no evidence that the relationship between BHIL as parent and owner of the non-utility Barge Operations and BHIT as wholly-owned subsidiary and owner of the utility Ferry Operations affects the rates and services of the regulated utility ferry, and the Commission has no authority to regulate BHIL's sale of its non-utility Barge Operations and assets. We reverse the Commission's order as to

the Barge Operations without remand, as the Village has no legal interest in its unreached contention that BHIL through its Barge Operations is per se a public utility.

BACKGROUND

This case is before us on appeal from an order of the State of North Carolina Utilities Commission ("Commission") determining that the Southport parking lot facilities ("Parking Operations") and freight barge business ("Barge Operations") owned and operated by Respondent Bald Head Island Limited, LLC, ("BHIL") are subject to its regulatory authority through the Operations' relationships to the ferry and tram services ("Ferry Operations") owned and operated by BHIL's wholly-owned subsidiary, Respondent Bald Head Island Transportation, LLC, ("BHIT"), a regulated public utility. Before turning to the procedural background of the case before us, we discuss the relevant underlying factual circumstances.

A. The Parties

Petitioner Village of Bald Head Island ("Village") is a municipality coterminous with Bald Head Island ("Island"). The Island is accessible only by boat, and the Village heavily regulates the use of private automobiles on the Island. Pursuant to N.C.G.S. § 62-3(a)(4), Respondent BHIT is a public utility that owns and operates a passenger ferry service to and from the Island and a tram service on the Island. The ferry and tram operate together, and purchase of a ferry ticket includes tram service on the Island. The parties do not dispute that BHIT has been subject to regulation by the Commission since 1995, when it received a common carrier certificate to operate the ferry and tram services as a public utility.

BHIT currently operates its ferry service between a mainland terminal located in Southport ("Deep Point Terminal") and a terminal located on the Island ("Island Terminal"). BHIT relocated its Ferry Operations' mainland terminal from Indigo Plantation to the Deep Point Terminal in 2009. BHIL owns and operates the Deep Point Terminal facilities and the Island Terminal facilities and leases both terminal buildings to the regulated utility BHIT. BHIL is the parent company of BHIT, its wholly-owned subsidiary.

In addition to the terminal facilities, BHIL owns and operates parking lot facilities, which are located adjacent to the Deep Point Terminal facilities. BHIL charges a fee to park in its Southport parking facilities for more than two hours and offers an annual parking pass to passengers of BHIT's ferry and members of the general public. BHIL's Parking Operations currently provide the only public parking near the ferry.

BHIL also owns a tugboat and freight barge, which it operates between the same terminal facilities as BHIT's passenger ferry. BHIL provides the public with use of its freight barge to transport cargo vehicles carrying materials and supplies between the Deep Point Terminal and the Island Terminal. The Barge Operations are currently the exclusive public means of transporting goods to and from the Island. BHIL requires that all items be transported inside of a vehicle and charges a fee dependent upon the size of the space that the boarding vehicle will occupy on the barge deck. A total number of twelve people may travel inside the cab of their vehicles on the barge at one time, and BHIL charges no additional fee for vehicle passengers. BHIT maintains and services BHIL's Barge Operations at the Deep Point Terminal. The tugboat and barge are subject only to safety inspection and regulation by the United States Coast Guard.

Although BHIL's Parking and Barge Operations have each serviced the Island for nearly thirty years, the common carrier certificate issued to BHIT in 1995 made no reference to either operation, and neither the barge nor the parking facilities have previously been regulated by the Commission.

B. The Order

On 16 February 2022, Petitioner Village filed a *Complaint and Request for Determination of Public Utility Status* with the Commission. In its complaint, the Village alleged that "BHIL [had] expressed its intention to divest itself of the ferry and related transportation assets, including the [Deep Point Terminal], ferries, Barge [Operations], on-island tram, and Mainland Parking [Operations][,]" and that the Village itself, amongst others, had emerged as a "potential purchaser[] of the assets[.]" The Village claimed that BHIL had solicited bids from several private entities with expressed willingness "to sell the assets in piece parts at a higher total valuation"; and the Village expressed concern that, if BHIL were permitted to engage in the unregulated sale of its assets, a private purchaser of the Parking and Barge Operations could operate as an "unregulated monopolist" with the power to "control and dictate[] rates, terms and conditions for indispensable services to captive ferry passengers who must have parking if they are to ride the ferry and [to] Islanders who have no alternative to the Barge for transporting household goods to the Island."

The Village alleged that "in the absence of action by the Commission, assets that are critical, indispensable components of BHIT's transportation utility operations may be sold to third parties outside of the

Commission's authority and control based upon the potential that each system sold individually would summon a higher total valuation." To prevent this issue from arising, the Village requested that the Commission investigate and determine the public utility status of BHIL and its Barge and Parking Operations. The Village further requested that the Commission enter an order determining (1) that the Parking Operations are subject to its regulatory authority as an essential component of BHIT's public utility ferry service and (2) that the Barge Operations are subject to its regulatory authority as a common carrier service. In the alternative, the Village requested that the Commission determine that BHIL's ownership and operation of the Parking and Barge Operations subject it to treatment as a public utility and, therefore, regulation by the Commission. The Commission opened a docket on the Village's complaint and ordered BHIL and BHIT (collectively, "Respondents") to file an answer.

On 15 March 2022, Bald Head Island Club ("BHI Club") petitioned the Commission to intervene and become a party to the docket. On 18 March 2022, the Commission granted BHI Club's petition to intervene. On 30 March 2022, Respondents filed a response, answer, and motion to dismiss the Village's complaint, alleging that the complaint did not confer jurisdiction on the Commission; the complaint impermissibly sought an advisory declaration with no justiciable issue; the Commission had no statutory authority to assert jurisdiction over BHIL's Parking and Barge Operations; the ferry rates were established without any inclusion of the Parking and Barge Operations; the issues raised were not ripe for decision; and the Barge Operations are not a common carrier as a matter of law. The Village filed its reply on 22 April 2022.

On 17 May 2022, SharpVue Capital, LLC, BHIL, and BHIT entered into an asset purchase agreement whereby SharpVue would acquire, in pertinent part, BHIL's Parking and Barge Operations and BHIT's Ferry Operations. On 17 June 2022, the Commission entered an *Order Scheduling Hearing and Establishing Procedures* in the present case. On 8 July 2022, the Village petitioned the Commission to join SharpVue as a necessary party to the proceeding. On 13 July 2022, Bald Head Island Association ("Association") petitioned to intervene and become a party to the docket as well. On 20 July 2022, the Commission granted the Association's petition to intervene, and, on 1 August 2022, the Commission granted the Village's petition to join SharpVue Capital.

On 16 August 2022, the Commission denied Respondents' motion to dismiss the Village's complaint. On 10 October 2022, the Commission presided over a hearing in the matter; and, on 30 December 2022, the

Commission entered an order determining that BHIL's Parking and Barge Operations are subject to its regulatory authority and cannot be sold without prior Commission approval.

Specifically, the Commission concluded that the Parking and Barge Operations are "integral component[s] of the ferry service and the overall transportation system operations that serve the Island[]" and, pursuant to N.C.G.S. §§ 62-2(b) and 62-3(27), are each subject to its regulatory authority as ancillary services or facilities of the regulated utility, BHIT. *See* N.C.G.S. § 62-2(b) (2023) (empowering Commission to regulate public utilities and their rates, operations, and services in accordance with N.C.G.S. § 62-1, *et seq.*, the "Public Utilities Act"), N.C.G.S. § 62-3(27) (2023) (defining "service" as "any service furnished by a public utility, including any commodity furnished as a part of such service and any ancillary service or facility used in connection with such service"). The Commission further concluded that BHIL's Parking Operations were subject to its regulatory authority pursuant to N.C.G.S. § 62-3(23)(c) because they are owned and operated by BHIT's parent company and "impact the rates or services of the regulated utility, BHIT." *See* N.C.G.S. § 62-3(23)(c) (2023) (including within the definition of "public utility" "all persons affiliated through stock ownership with a public utility doing business in this State as a parent or subsidiary corporation to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility"). The Commission therefore concluded that "[t]he sale or transfer of the Parking and Barge Operations without prior Commission approval is prohibited by N.C.G.S. § 62-111(a)."

Ultimately, these conclusions led the Commission to order that the Parking and Barge Operations "are subject to the Commission's jurisdiction and regulatory authority;" that the parties are not required to file a general rate case at this time; that the Parking and Barge Operations may continue to operate with their current rates, services, and operations pending further order by the Commission; and "[t]hat BHIL shall not sell, assign, pledge, or transfer the Parking or Barge Operations without prior Commission approval." Respondents appealed.

ANALYSIS

We review a decision by the Utilities Commission pursuant to N.C.G.S. § 62-94:

> [We] may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or [we] may reverse or modify the decision if the substantial rights of the appellants have

> been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions.
>
> (2) In excess of statutory authority or jurisdiction of the Commission.
>
> (3) Made upon unlawful proceedings.
>
> (4) Affected by other errors of law.
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted.
>
> (6) Arbitrary or capricious.

N.C.G.S. § 62-94(b) (2023). "Upon any appeal, the rates fixed or any rule, finding, determination, or order made by the Commission under this Chapter is prima facie just and reasonable." N.C.G.S. § 62-94(e) (2023). We may reverse the Commission's decision only upon "strict application of the six criteria enumerated in N.C.G.S. § 62-94(b)":

> Read contextually, therefore, the requirements that substantial rights have been prejudiced, that error must be prejudicial and that actions of the Commission are presumed just clearly indicate that judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria which circumscribe judicial review.

State ex rel. Utils. Comm'n v. Bird Oil Co., 302 N.C. 14, 20 (1981) (emphasis and marks omitted). Respondents, as appellants, bear the burden of demonstrating on appeal that the Commission erred and that this error was prejudicial to their substantial rights. *See id.* at 25.

We review the Commission's findings of fact to determine whether they are supported by "competent, material, and substantial evidence[.]" *State ex rel. Utils. Comm'n v. Cooper*, 368 N.C. 216, 223 (2015). Unchallenged findings of fact are deemed supported by such evidence and are consequently binding on appeal. *Id.* We review the Commission's conclusions of law to determine if they are supported by its findings of fact. *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 352 (1987); *see also Coble v. Coble*, 300 N.C. 708, 714 (1980) ("Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken . . . in logical sequence . . . .").

On appeal, Respondents contend that the Commission's unlawful expansion of its jurisdiction to assert broad authority over BHIL's non-utility businesses substantially prejudiced their rights; that the Commission's findings of fact were unsupported by competent, material, and substantial evidence; and that the Commission erred as a matter of law in concluding that it could exercise authority over BHIL's Parking and Barge Operations because of their relationships to BHIT's Ferry Operations, even though only BHIT provides a regulated utility service.

A. Commission's Jurisdiction Over Village's Complaint

[1] As a preliminary matter, we address Respondents' argument that, even if we determine that the Commission properly concluded it may exercise its regulatory authority over the Parking and Barge Operations, its jurisdiction to hear this matter was not properly invoked by the Village's complaint.

By its plain language and designation as "Complaints against public utilities[,]" N.C.G.S. § 62-73 governs when a complaint may be properly brought *against a public utility*. N.C.G.S. § 62-73 provides that

> [c]omplaints may be made by the Commission on its own motion or by any person having an interest, either direct or as a representative of any persons having a direct interest in the subject matter of such complaint by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation or rate heretofore established or fixed by or for any public utility in violation of any provision of law or of any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable. Upon good cause shown and in compliance with the rules of the Commission, the Commission shall also allow any such person authorized to file a complaint, to intervene in any pending proceeding. The Commission, by rule, may prescribe the form of complaints filed under this section, and may in its discretion order two or more complaints dealing with the same subject matter to be joined in one hearing. Unless the Commission shall determine, upon consideration of the complaint or otherwise, and after notice to the complainant and opportunity to be heard, that no reasonable ground exists for an investigation of such complaint, the Commission shall fix a time and place for hearing, after reasonable notice to the complainant and the utility

> complained of, which notice shall be not less than 10 days before the time set for such hearing.

N.C.G.S. § 62-73 (2023).

Respondents contend that, pursuant to N.C.G.S. § 62-73, the Village's complaint against BHIL and BHIT was insufficient to confer subject matter jurisdiction upon the Commission because it contained "no allegations that the current ferry service, rules, regulations, or rate structure . . . are unjust or unreasonable" and no allegations "setting forth any act or thing done or omitted to be done by the regulated ferry." Respondents therefore allege that the Commission's purported exercise of jurisdiction over the matter was "illusory." Even if Respondents' argument is taken as true, the Village's failure to invoke the Commission's *complaint* jurisdiction over this matter does not ipso facto divest the Commission of *all* jurisdiction over this matter.

1. Commission's Power to Declare Utility Status

"The question whether or not a particular company or service is a public utility is a judicial one which must be determined as such by a court of competent jurisdiction." *State ex rel. Utils. Comm'n v. N.C. Waste Awareness and Reduction Network*, 255 N.C. App. 613, 615-16 (2017), *aff'd*, 371 N.C. 108 (2018) (quoting *State ex rel. N.C. Utils. Comm'n v. New Hope Rd. Water Co.*, 248 N.C. 27, 30 (1958)). Pursuant to N.C.G.S. § 62-60,

> [f]or the purpose of conducting hearings, making decisions and issuing orders, and in formal investigations where a record is made of testimony under oath, the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law. The commissioners and members of the Commission's staff designated and assigned as examiners shall have full power to administer oaths and to hear and take evidence. The Commission shall render its decisions upon questions of law and of fact in the same manner as a court of record. A majority of the commissioners shall constitute a quorum, and any order or decision of a majority of the commissioners shall constitute the order or decision of the Commission, except as otherwise provided in this Chapter.

N.C.G.S. § 62-60 (2023). Under N.C.G.S. § 1-253, the "Declaratory Judgment Act,"

> [c]ourts of record within their respective jurisdiction shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

N.C.G.S. § 1-253 (2023). When read together, N.C.G.S. §§ 62-60 and 1-253 empower the Commission to "declare rights, status, and other legal relations" as to subjects over which it has been given jurisdiction by law. *Id.*; *see* N.C.G.S. § 62-60 (2023).

The Public Utilities Act grants the Commission regulatory jurisdiction over "public utilities generally[]" and "their rates, services and operations[.]" N.C.G.S. § 62-2(b) (2023). Therefore, the Commission may exercise all powers and jurisdiction of a court of general jurisdiction—including the power to enter a declaratory judgment—over matters pertaining to public utilities and their rates, services, and operations. Here, the Village specifically requested an "investigation and determination of utility status" and "a declaratory judgment pursuant to [N.C.G.S.] § 1-253." The declaration of whether BHIL and its Parking and Barge Operations are public utilities is a matter subject to the Commission's jurisdiction, so long as that jurisdiction is properly invoked by a justiciable controversy. *See N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 447 (1974) ("[A]n action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute.").

2. Justiciability

Although "[i]t is not necessary for one party to have an actual right of action against another for an actual controversy to exist which would support declaratory relief[,]" "it is necessary that . . . litigation appears to be unavoidable." *Id.* "The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty concerning rights, status and other legal relations . . . ." *Id.* at 446. Therefore, "any claims, assertions, challenges, records, or adverse interests" which "cast[] doubt, insecurity, and uncertainty upon the [petitioner's] rights or status . . . establish a condition of justiciability." *Id.* at 451.

"[W]hen a litigant seeks relief under the declaratory judgment statute, he must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties to the action with regard to their respective rights and duties in the premises." *Id.* at 447. The Village requested that the Commission determine the public utility status of BHIL and alleged that

> [a] dispute has arisen between and among the parties concerning the regulatory nature of the parking and barge assets which are essential to, and a component of, the regulated public utility ferry service provided by BHIT. This dispute takes on particular importance now because BHIL has publicly stated both its intention to seek third party, private buyers of the transportation assets and its willingness to sell the assets comprising the transportation system in parts. Given those present efforts to dispose of these critical assets, it is important that the Commission resolve questions concerning the regulated nature of services being provided to the public with the parking and barge assets to ensure that the public interest in utility service is protected.

The Village further alleged:

> A real and present controversy exists over the nature of the Parking Facilities and Barge assets, whether they are subject to the jurisdiction of the Commission, and, accordingly, whether they are integral components of the ferry utility operation or whether they can be sold, transferred, or otherwise monetized as monopoly service assets outside the control and jurisdiction of the Commission.

In *State ex rel. Utils. Comm'n v. Cube Yadkin Generation LLC*, 279 N.C. App. 217, 221 (2021), we held that the petitioner Cube failed to invoke the Commission's jurisdiction over its request for a judgment declaring that the operations described in its proposed business plan would not cause it to be a public utility because they would fall under a statutory exemption for landlord/tenant relationships. In its request, Cube alleged that it had devised a business plan whereby it would purchase and redevelop an area of land, lease that land to commercial tenants, and supply those tenants with electricity from its nearby hydroelectric generation facilities. *Id.* at 218-19. However, at the time of its request, Cube had no present ownership interest in the land, had not entered into any leasing contracts with tenants, and had not entered into

any contract to acquire the land. *Id.* at 221. We held that "Cube ha[d] no present interest in the resolution of its question" and "[was] not in a realized adversarial position to [the intervenor] Duke[,]" but merely "owns and operates four hydroelectric facilities which *could* be used to provide electric energy in ways that *would* provoke an adversarial relationship with Duke." *Id.* We reasoned that "the controversy that Cube has asked our Courts and the Commission to decide simply does not yet exist[]" as Cube "has no legal duties that demand it conduct acts in compliance which would unavoidably lead to litigation with Duke." *Id.* at 221-22.

"[T]he object of a declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated." *Perry v. Bank of America, N.A.*, 251 N.C. App. 776, 779 (2017). In *Perry*, the petitioners sought a declaration of whether they were "legally obligated to pay [Bank of America] balances on lines of credit which they contend are the result of fraud[]" "without having to wait for the bank to foreclose on their home when they refuse to pay." *Id.* at 779-80, 781. We held that "[t]his [was] an actual, genuine controversy concerning the parties' respective legal rights and obligations under the contracts governing the lines of credit." *Id.* at 780.

At the time that the Village filed its request for determination of BHIL's utility status, BHIL had not entered into any contract to sell its Parking and Barge Operations. As in *Cube*, that BHIL *could* enter into such a contract with a private purchaser, who *could* monetize those assets as an unregulated monopoly, does not create a present controversy between the Village and Respondents. Nevertheless, the Village's allegations as to Respondents' *current* operations and their relationship to the Village are sufficient to show a real, existing controversy between the parties.

The Village alleged that BHIT's Ferry Operations and BHIL's Parking Operations "are inextricably related and in fact exist in tandem" presently "as one de facto regulated service[]" because "[t]he ability to operate the ferry in service to the public, which is the essence of its regulated status under Chapter 62, is dependent upon the ability [of] the public to park at the ferry terminal under reasonable terms and conditions." BHIT's ferry is currently the exclusive public "means to transport Village personnel who provide essential municipal services[]" to the Island, and "[t]here is no reasonable substitute parking service" to BHIL's Parking Operations that is available to ferry travelers—including Village personnel—at this time. The Village further alleged that BHIL's Barge Operations are currently its "only [public] means to transport and provide essential municipal . . . materials and equipment . . . ."

"[A]s the Island's municipal government and regular user of the ferry, parking and Barge for its employees and operations," the Village alleged that it "has a direct and substantial interest in ensuring the ongoing and continued availability of" these services "on reasonable terms and conditions." As a consumer who contends that it is necessarily dependent upon the Parking and Barge Operations "for its employees and operations," the Village has an interest in determining whether the Commission may exercise its authority over these operations by and through their relationships to the regulated utility Ferry Operations to "promote adequate, reliable and economical utility service." N.C.G.S. § 62-2(a)(3) (2023).

The Village sought a declaration that BHIL is subject to the Commission's regulatory authority as the operator of services integral to BHIT's regulated utility Ferry Operations. This interest is adversarial to Respondents' interest in continuing to own and operate their assets without constraint, including their ability to freely alienate those assets if they so choose. As in *Perry*, the Village's petition contains an actual, genuine controversy concerning the parties' respective rights and obligations pursuant to the Public Utilities Act, and this controversy establishes a condition of justiciability sufficient to confer jurisdiction upon the Commission for the purpose of declaratory relief.

"It is not required for purposes of jurisdiction that [the Village] shall allege or show that [its] rights have been invaded or violated by [BHIL or BHIT], or that [Respondents] have incurred liability to [it], prior to the commencement of the action." *Carolina Power & Light Co. v. Iseley*, 203 N.C. 811, 820 (1933). The Village has "allege[d] in its complaint . . . that a real controversy, arising out of [the parties'] opposing contentions as to their respective legal rights and liabilities . . . under a statute . . . exists between or among the parties," and that an order declaring the utility status of BHIL and its Parking and Barge Operations "will make certain that which is uncertain and secure that which is insecure." *Id.*

In addition to seeking a determination that the Barge Operations are subject to Commission jurisdiction through their relationship to the regulated utility Ferry Operations, the Village sought a determination that BHIL is subject to the Commission's regulatory authority through its Barge Operations as a per se public utility pursuant to N.C.G.S. §§ 62-3(6) and 62-3(23)(a)(4). However, the Village's allegations that the Barge Operations are currently its "only [public] means to transport and provide essential municipal . . . materials and equipment[,]" even if true, are not sufficient to establish justiciability of this issue. The Village must

have a present interest in the Barge Operations' purported per se utility function under N.C.G.S. §§ 62-3(6) and 62-3(23)(a)(4); that is, the Village must have a present interest in continued use of the Barge Operations for its utility purpose of "[t]ransporting *persons or household goods* . . . for the public for compensation[.]" N.C.G.S. § 62-3(23)(a)(4) (2023) (emphasis added). By its own allegations, the Village's current use of the Barge Operations—to transport "essential municipal . . . materials and equipment[]"—would *not* establish a condition of justiciability under N.C.G.S. § 62-3(23)(a)(4), as municipal materials and equipment are de facto neither "persons" nor "household goods." *Id.*

For the reasons explained above, the Commission had jurisdiction over the Village's complaint to determine whether BHIL is subject to Commission regulation through its Parking or Barge Operations' relationship to BHIT's Ferry Operations, but not to determine whether BHIL, through its Barge Operations, is per se a public utility.

"Nothing in [the Public Utilities Act] shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission." N.C.G.S. § 62-2(b) (2023). Therefore, "[t]he dispositive issue on appeal is whether the Commission correctly determined that [BHIL] was operating[,]" and to what extent it was operating, as a public utility through its Parking and Barge Operations such that the Commission could prohibit BHIL from selling, assigning, pledging, or transferring the Parking or Barge Operations without prior Commission approval. *N.C. Waste Awareness and Reduction Network*, 255 N.C. App. at 615.

B. Commission's Regulatory Authority

The parties do not dispute that, under N.C.G.S. § 62-3(23)(a)(4), BHIT is a public utility subject to Commission jurisdiction and regulatory authority through its Ferry Operations:

> a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:
>
> . . . .
>
> 4. Transporting persons or household goods by motor vehicles or any other form of transportation for the public for compensation[] . . . .

N.C.G.S. § 62-3(23)(a)(4) (2023). However, Respondents challenge the Commission's conclusion that BHIL is also subject to its jurisdiction and regulatory authority through its Parking and Barge Operations.

The Commission acknowledged in its order that it "has no jurisdiction over BHIL or its certain operations unless those operations fall within the meaning of the Public Utilities Act." However, the Commission ultimately concluded that BHIL, through both its Parking Operations and its Barge Operations, is subject to its regulatory authority over "public utilities generally[]" and "their rates, services and operations[,]" N.C.G.S. § 62-2(b) (2023), within the statutory meaning of "service":

> As used in this Chapter, unless the context otherwise requires, the term:
>
> . . . .
>
> (27) "Service" means any service furnished by a public utility, including any commodity furnished as a part of such service and any ancillary service or facility used in connection with such service.

N.C.G.S. § 62-3(27) (2023).

The Commission further concluded that, pursuant to N.C.G.S. § 62-3(23)(c), BHIL is subject to its regulatory authority as the parent company of BHIT through only its Parking Operations, because these Parking Operations have an effect on BHIT's utility ferry's rates or service:

> The term "public utility" shall include all persons affiliated through stock ownership with a public utility doing business in this State as a parent corporation or subsidiary corporation to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility.

N.C.G.S. § 62-3(23)(c) (2023).

The Commission relied upon different factual circumstances and legal reasoning in concluding that the Parking and Barge Operations are subject to its regulatory authority, and we address these conclusions separately.

1. Parking Operations

[2] The Commission first determined that BHIL's Parking Operations are subject to its regulatory authority over "any service furnished by a public utility, including . . . any ancillary service or facility used in

connection with [a public utility] service[]" because they are necessary, and therefore ancillary, to BHIT's ferry service. N.C.G.S. § 62-3(27) (2023). Standing alone, however, this finding is insufficient to support the Commission's conclusion that it may exercise regulatory authority over the Parking Operations. N.C.G.S. § 62-3(27) explicitly provides that, even if BHIL's Parking Operations or parking facilities operate in service of the regulated utility BHIT, they themselves must be "*furnished by a public utility*" to be subject to the Commission's jurisdiction and authority. *Id.* (emphasis added).

In determining whether the unregulated Parking Operations are ancillary to the regulated utility Ferry Operations, the Commission "[found] persuasive, though not directly on point," our Supreme Court's reasoning in *State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co.*, 307 N.C. 541 (1983). In *Southern Bell*, our Supreme Court held that the Commission may consider revenue that Southern Bell, a regulated public utility providing telephone service, received from its unregulated advertising directory operations ("yellow pages") for the single purpose of ratemaking determinations. *Id.* at 544. Our Supreme Court reasoned that

> [a]lthough Southern Bell is technically correct in its contention that actual transmission of messages across telephone lines is not dependent on the existence of the yellow pages, such an interpretation of the public utility function is far too narrow. Southern Bell's utility function is to provide adequate service to its subscribers. To suggest that the mere transmission of messages across telephone lines is adequate telephone service is ludicrous.

Id.

In the present case, the Commission relied upon similar reasoning, finding that

> the Parking Operations are necessary to the Ferry Operations. Indeed, by these unique circumstances, the Ferry is almost entirely dependent upon the Parking Operations, and the Parking Operations are almost entirely dependent on the Ferry Operations. To this end, the Commission notes and credits the testimony of Club witness Sawyer, who asserts that it "would practically be impossible for people to use the BHI ferry or for the ferry to operate without the parking facilities at the Deep Point ferry landing." And that—and the integral nature of the Parking Operations—is due in large part to the unique

> nature of Bald Head Island, as a largely automobile-free refuge, as well as how these adjoining services were planned from the outset to serve the other.

We note that *Southern Bell* raised no issue, and therefore made no determination, as to whether the yellow pages were subject to the Commission's regulatory authority generally. Our Supreme Court noted only

> that the yellow pages have never been and are not now regulated by the Utilities Commission. However, the fact that a specific activity *of a utility* is not regulated does not mean that the expenses and revenues from that activity cannot be included in determining the rate structure of the utility.

Id. (emphasis added). Nevertheless, we recognize that, historically, our Supreme Court has upheld a finding of the Commission—when supported by competent, material, and substantial evidence—that *a public utility's* otherwise unregulated activities are nevertheless "an integral part of [its] providing adequate [utility] service." *Id.* at 545-46.

In *Southern Bell*, however, the same regulated public utility telephone company operated the unregulated yellow pages. Here, be as it may that Respondents are parent and wholly-owned subsidiary, they are two separate entities and are treated as such unless and until the Commission finds that BHIL, as parent company of BHIT, has an effect on the rates or service of the utility Ferry Operations.

Then, and only then, may the Commission conclude that BHIL is subject to its regulatory authority as a public utility within the meaning of N.C.G.S. § 62-3(23)(c) *to no more than* the extent of its affiliation's effect on BHIT's regulated utility Ferry Operations' rates or service.[1]

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1. We note that our Supreme Court has held that the Commission may exercise jurisdiction over complaints arising from inadequate public utility services that are provided by non-utility entities on behalf of a public utility. *See, e.g.*, *State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co.*, 326 N.C. 522, 529 (1990) ("While Southern Bell, the regulated public utility, is the entity which is required by tariff to publish the telephone directory, it has contracted with BAPCO to take over this duty and publish the directory. As noted earlier, BAPCO contends that it is not subject to the complaint jurisdiction of the Commission because BAPCO is not a 'public utility' as defined by the statute. We have already concluded that publishing the directory, which must include proper telephone listings in both the white pages and the yellow pages, is a utility function which comes under the jurisdiction of the Commission. Since publishing the directory with correct listings is a public utility function, and since BAPCO is performing this function for Southern Bell, the Commission

N.C.G.S. § 62-3(23)(c) (2023); *see generally State ex rel. Utils. Comm'n v. Edmisten*, 299 N.C. 432, 438 (1980) (emphasis added) ("*To the degree, then, that the* record in the instant case reveals facts which support an inference that [the wholly-owned subsidiary utility company]'s *relationship* with [its wholly-owned sister utility company] and [parent company] . . . *affects [the subsidiary utility company]'s service* to its North Carolina customers, *the circumstances of that relationship are material* and must be scrutinized closely by the Commission in the course of its rate making proceedings. The doctrine of corporate entity should not stand as a shield to such an inquiry.").

Here, the record before us contains competent, material, and substantial evidence to support the Commission's finding that "the operations of BHIL, BHIT's parent corporation, impact the rates or service of the regulated utility, BHIT[]" such that the circumstances of that relationship subject the sale of BHIL's Parking Operations to the Commission's regulatory oversight. *Cf. id.* (holding that, when the record reveals the relationship between wholly-owned subsidiary utility company and parent company affects utility service, the Commission must scrutinize that relationship closely for ratemaking purposes).

Ultimately, the Commission concluded that it

> has jurisdiction and regulatory authority over the Parking Operations, as currently owned and operated by the Ferry Operations parent corporation, that have an effect on the rates or service of BHIT within the meaning of N.C.G.S. § 62-3(23)(c).

The Commission recognized

> that parking, taken by itself, is not inherently a monopoly service and that, theoretically, a competitive alternative might later emerge to serve the public. When and if it does so, the Commission's calculus might change. But that recognition does not alter the fact that, at present, by either planning or evolution the Ferry Operations have become interdependent upon the Parking Operations and that there are no existing practicable alternatives to that

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has jurisdiction over BAPCO to handle any complaints which arise from BAPCO's performance of this function without regard to whether BAPCO itself is a public utility."). However, our Supreme Court did not reach, and therefore declined to address, the issue of whether BAPCO, a non-utility entity, was subject to the Commission's jurisdiction more broadly as an alter ego or agent of the utility entity, Southern Bell. *Id.*

> service. The Commission also recognizes that there are a number of impediments to the likely development of such a competitive alternative in the near term—not the least of which is that BHIT and BHIL intended the Transportation Facility to be an all-encompassing, and quite convenient, "ferry base" or that BHIT, BHIL, and the Town of Southport each direct ferry customers solely to use of the Parking Facilities. The practical realities of competing with a property owner who purchased the property in Southport long ago, and the natural disadvantages for future competitors—e.g., any competitive parking would be off-site, necessitating a shuttle service to and from the terminal, and at additional expense to the owner, and would be less convenient and therefore less desirable to potential passengers—make it unlikely that any near-term competition will arise in the market. Respondents witness Paul concedes that any entity that might "come in to create a secondary parking lot operation and shuttle" service nearby, even were that entity to "buy the property . . . across the street would be taking a big chance on the fact that there is enough unit demand to support that, especially given that right now, other than a handful of times during the year, the unit demand is not there."

With respect to the impact of BHIL's Parking Operations on the service of BHIT's Ferry Operations, the Commission reasoned that

> BHIT's new Transportation Facility was planned from the outset to include BHIL's Parking Operations and provide such parking to ferry passengers as was necessary to adequately serve those customers. And there is no doubt these Parking Facilities were provided—in this case by BHIL—in part to alleviate specific Ferry customer concerns. There is also little doubt that the affiliation between parent and subsidiary allows BHIT to provide more convenient access to parking for the benefit of its customers. As stated above, were the Parking Operations to cease operation tomorrow, the public's use of the Ferry service would be significantly impaired.

Respondents admit that, when moving BHIT's Ferry Operations to the Deep Point Terminal—and, in fact, when constructing the terminal—one purpose "was to better accommodate travelers to and from the Island and provide opportunities for expansion of additional

non-regulated business activities around the Parking Facilities and the Deep Point terminal in general." The record is replete with evidence that no public, practicable alternative parking facility or service is available to ferry riders. By Respondents' own admission, "most" ferry riders utilize BHIL's Parking Operations prior to boarding the ferry and "no other regular bus service from another public parking lot to and from the Deep Point Terminal [is] operating at this time."

The Commission further reasoned that,

> [o]n this record, it is apparent to the Commission that use of the Parking Facilities is derivative of Ferry use and vice versa—essentially every person who parks in the BHIL-owned parking lots rides the BHIT-owned ferry; conversely, essentially every ferry passenger parks in the BHIL-owned lots. It is equally apparent to the Commission that were the Parking Operations to cease operation tomorrow (or were BHIL to prohibit public parking in its lots), the public's use of the Ferry would be significantly impaired. As a result, a significant number of persons would choose not to travel to the Island. It is easy to conclude on this record that ferry ridership is dependent upon, and would noticeably decline but for the operation of, the Parking Facilities.
>
> Based on the findings and consideration of the entire record, the Commission finds and concludes that the Parking Facilities provide the only reasonable means of public parking for ferry passengers and the only reasonable access to the Deep Point Terminal, there is no existing alternative or reasonably substitutable parking facility or service available to the public at this time, and, as a result, the Parking Facilities are necessary to the operation of the Ferry Operations.

To echo one ferry rider's sentiment in the record, "[y]ou can't use the ferry service without parking your car." Respondents' stated intent in constructing the Deep Point Terminal and relocating BHIT's Ferry Operations to the terminal, the geographical location of the Deep Point Terminal, expert testimony as to market conditions, and ferry rider testimony as to the practical implications of the relationship between the Parking and Ferry Operations provide competent, material, and substantial evidence to support the Commission's finding that BHIL's Parking Operations, which operate as a de facto monopoly in service of BHIL's

subsidiary, have an effect on the adequacy and practicability of BHIT's regulated Ferry Operations' service.

Although the Commission need only find that BHIL's Parking Operations impact the rates *or* service of BHIT's Ferry Operations to support its conclusion that BHIL may be treated as a public utility pursuant to N.C.G.S. § 62-3(23)(c), it further reasoned with respect to the Parking Operations' impact on rates that

> generally the easier BHIL has made it for customers to access the Ferry Operations has meant more riders on the Ferry; more riders mean more revenues. All else being equal, more riders and more revenues translates over time to lower rates for those ferry customers.
>
> The affiliation also strongly suggests to the Commission that BHIL has been subsidizing the Ferry Operations because BHIL views the Parking and Ferry Operations as connected. The Parking Operations have provided substantial positive cash flow and strong positive financial net income. In contrast, the Ferry has consistently shown annual financial losses. Yet BHIT has not filed a general rate case since 2010. Some witnesses opined that it has not done so because, if properly included, the overall rate of return on BHIL's transportation-related businesses—its combined Parking and Barge Operations and BHIT's Ferry Operations—would be nevertheless above what a public utility would be entitled to earn were the system to come under Commission review. As discussed more fully below, the Commission leaves to a future proceeding how to properly account for or quantify the effect the affiliation has on BHIT's rates.
>
> Finally, the Commission notes that BHIL's affiliation has already had a direct effect upon BHIT's rates. The parties agreed to a regulatory outcome in the last rate case where BHIL's affiliation with the Ferry Operations not only directly—and quantifiably—affected the rates that BHIT was permitted to charge for its Ferry services but also controlled the rates that BHIL could charge for its Parking Operations. Respondents witness Paul agreed that the imputation of the approximately $525,000[.00] of revenue from the Parking Operations was in part "a product of the fact that the intervenors in the rate case had requested

> and were advocating that the Commission regulate the parking operations[.]" Although not binding upon the parties in future proceedings, BHIL's affiliation with BHIT, its intervention in the 2010 Rate Case, and this imputation directly affected the rates that BHIT has charged for Ferry service since 2010.

The record contains expert testimony that BHIT's "ferry is consistently showing significant annual financial losses[.]" During the 2010 rate case, BHIT stated that it "has operated at a loss every year since 1999." By contrast, it has referred in investor presentations to the Parking Operations as "extremely" and "very profitable[.]" One expert testified that

> it is [] unassailable that the existing ferry rates are currently directly "affected" by parking revenues. In fact, it appears that it has long been the practice by [BHIL] of using the "extremely profitable" [P]arking [O]perations to support the regulated [Ferry] [O]perations. As explained in the direct testimony of [another expert witness], which is being submitted along with my own testimony, the [F]erry [O]perations have been losing money, while the [P]arking and [B]arge Operations have been highly profitable. [BHIL] has been using the parking's cash to balance the economics of the transportation enterprise as a whole; and this financial strategy unquestionably impacts the rates and operations of the ferry service.

For example, the settlement reached in BHIT's 2010 rate case imputed, by Respondents' stipulation, $523,097.00 of revenues from the Parking Operations to the Ferry Operations for the purpose of the rate case.[2]

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2. Respondents contend that, because the settlement reached in the 2010 rate case "establish[ed] no binding precedent for future cases" and was "said not to be binding in future cases as a reason for or against imputation of parking revenues or any other regulatory treatment of parking operations[,]" it may not be considered for the purposes of this case. We disagree. The Commission acknowledged that, while the settlement may not *control* the outcome as precedent binding the Commission's decision in this case, it may nevertheless be considered as persuasive evidence of past treatment. Much like an unpublished opinion has no precedential value but "may be used as persuasive authority at the appellate level if the case is properly submitted and discussed and there is no published case on point[,]" *Groseclose v. Groseclose*, 291 N.C. App. 409, 424 n.1 (2023) (quoting *Zurosky v. Shaffer*, 236 N.C. App. 219, 233-34 (2014)), the 2010 rate case—which was properly submitted and discussed in this case in the absence of any binding determination of the Parking and Barge Operations' regulatory statuses—may be used as persuasive authority.

The expert testimony, financial statements, and 2010 rate case settlement contained in the record provide competent, material, and substantial evidence to support the Commission's finding that BHIL's Parking Operations, which operate at a significant annual financial profit, have an effect on the rates of BHIT's Ferry Operations, such that the Ferry Operations may—and do—operate at a significant annual financial loss because they are subsidized—as reflected in the record—by BHIT's parent.

We agree with Respondents' assertion that, standing alone, a parking lot does not fall within any category of public utility as defined in N.C.G.S. § 62-3(23)(a). However, the record before us contains competent, material, and substantial evidence of the effect created by utilizing the parent company's unregulated Parking Operations to service the subsidiary company's regulated utility Ferry Operations on the regulated utility's rates and service. This evidence supports the Commission's finding of fact that "the [Parking] [O]perations of BHIL, BHIT's parent corporation, impact the rates or service of the regulated utility, BHIT." The Commission's findings of fact, in turn, support its conclusion that BHIL's Parking Operations are subject to its regulatory authority within the confines of N.C.G.S. § 62-3(23)(c).

We hold that the Commission did not err in concluding on the record before us that the relationship between parent BHIL, through its Parking Operations, and wholly-owned subsidiary BHIT, through its Ferry Operations, affects the utility rates and service of the regulated utility such that BHIL may be subject to the Commission's regulatory authority within the narrow confines of N.C.G.S. § 62-3(23)(c). We cannot affirm the Commission's sweeping determination that "the Parking Operations are subject to the Commission's jurisdiction and regulatory authority[]" without emphasizing that this authority extends only insofar as BHIL may be considered a "public utility[,]" within the meaning of N.C.G.S. § 62-3(23)(c) because of, *and only to the extent of*, the effect that the parent company BHIL has on its subsidiary company BHIT's utility rates and service. To hold otherwise would create dangerous precedent and allow for unbridled Commission authority over the otherwise free market principles of our economic system and lower the value of real estate through restrictions on the alienability of land. Such global authority over non-utility business activities and entities would be in dereliction of the limited statutory confines established by our General Assembly. Pursuant to N.C.G.S. § 62-3(23)(d2), "[i]f any person conducting a public utility shall also conduct any enterprise not a public utility, such enterprise is not subject to the provisions of this Chapter." N.C.G.S. § 62-3(23)(d2) (2023). BHIL may be regulated as merely to the extent

that its Parking Operations' impact on the rates or service of BHIT's *Ferry* Operations; however, any enterprise conducted by BHIL which is not within this limited scope is beyond the bounds of N.C.G.S. § 62-3(23) and *is not subject* to the Public Utilities Act or to *any* regulation by the Commission.[3]

Based on the specific factual circumstances before us, we hold that BHIL's Parking Operations are subject to Commission regulation to the extent described within this opinion. We affirm the Commission's order as modified in this opinion as to the Parking Operations and uphold its provision "[t]hat BHIL shall not sell, assign, pledge, or transfer the Parking [] Operations without prior Commission approval[]" pursuant to the potential impact that divesting the Parking Operations may have on the rates and services of the regulated utility Ferry Operations.

2. Barge Operations

[3] For the reasons discussed above, *see supra Part B.1*, the Commission must conclude that BHIL is a public utility through its Barge Operations before it may exercise jurisdiction over the Barge Operations. The Village alleged that BHIL, through its Barge Operations, is a public utility subject to the Commission's jurisdiction and regulatory authority either because the Barge Operations are, in and of themselves, a public utility pursuant to N.C.G.S. §§ 62-3(6) and 62-3(23)(a)(4) or because the Barge Operations are owned by BHIT's parent corporation and have an effect on the rates or service of BHIT's Ferry Operations. The Commission concluded *only* that the Barge Operations are "ancillary to the Ferry Operations [and] necessary to the very existence of the Island as a destination to which the public might wish to travel." The Commission made no finding that BHIL, as BHIT's parent corporation, has an effect on the rates or service of BHIT's Ferry Operations through its Barge Operations such that it may be treated as a public utility under N.C.G.S. § 62-3(23)(c).

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3. Here, the integral nature of the Parking and Ferry Operations that subjects BHIL to Commission jurisdiction within the confines of N.C.G.S. § 62-3(23)(c) is necessarily predicated on the two operations acting as a single enterprise. *See Southern Bell*, 307 N.C. at 545 (holding that yellow pages did not fall within statutory exemption under (d2) because they were "not a separate enterprise from the transmission of telephone messages[]" but "a very useful and beneficial component in providing telephone service to the public[]"). However, we reference this statute to emphasize that our holding is limited to the regulatory status of BHIL through its Parking Operations' impact on BHIT's Ferry Operations, and may not be expanded to its Barge Operations, nor to any future operations, which are not a public utility.

The Commission further declined to determine "whether the Barge Operations are a common carrier service which transports persons or household goods within the meaning of N.C.G.S. §§ 62-3(6) and (23)(a)(4)."[4]

Even assuming, *arguendo*, that the Commission properly concluded that the Barge Operations are ancillary to the Ferry Operations, it made no finding that the Barge Operations are a service *furnished by a public utility* as necessary under N.C.G.S. § 62-3(27). The Commission's findings of fact are insufficient to support its conclusion that the Barge Operations are subject to its regulatory authority as an ancillary service to BHIT's Ferry Operations. The Commission makes general findings of the Barge's importance to the Island as a whole; however, that the Barge Operations provide a convenience to the Island has no bearing on its affiliation with BHIT's Ferry Operations. Furthermore, the record is devoid of any competent, material, and substantial evidence to support a finding that the Barge Operations have an impact on the rates or service of the Ferry Operations.

We hold that the Commission erred in concluding that BHIL's Barge Operations are subject to its regulatory authority as a service ancillary to BHIT's Ferry Operations, and that the Commission had no jurisdiction to order, pursuant to that conclusion, that BHIL may not sell, assign, pledge, or transfer the Barge Operations without its approval. We reverse the Commission's order as it pertains to the Barge Operations.

CONCLUSION

The Village's complaint conferred jurisdiction upon the Commission to enter a judgment declaring the utility status of BHIL and its Parking and Barge Operations through their relationships with BHIT and its Ferry Operations. The Commission properly concluded that it may regulate the sale of BHIL's Parking Operations because BHIL, as parent, utilizes the unregulated Parking Operations to service its wholly-owned subsidiary's regulated Ferry Operations, and this relationship has an effect on the rates and service of the regulated ferry utility. The Commission erred in concluding that BHIL's non-utility Barge Operations are ancillary to BHIT's utility Ferry Operations and in concluding that it may regulate the sale of these non-utility assets and operations. We affirm the Commission's order as to the Parking Operations as modified within

4. We do not remand to the Commission for consideration of the Village's unreached contention, as the Village's complaint was insufficient to establish justiciability of this issue. *See supra Part A.2*.

this opinion to clarify the statutory limitations of the Commission's jurisdiction over BHIL and its Parking Operations, and we reverse the Commission's order as to the Barge Operations.

AFFIRMED AS MODIFIED IN PART; REVERSED IN PART.

Judge GORE concurs.

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

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

This matter involves the Ferry Operation, the Parking Operation, and the Barge Operation servicing residents and visitors of Bald Head Island. The parties all concede that the Ferry Operation is a public utility.

I concur in the majority's holding that, based on the Commission's findings and Supreme Court jurisprudence, the Commission has jurisdiction to regulate the Parking Operation. Our General Assembly has identified various activities as public utility functions, including the transportation of passengers for compensation. That body also included within the Commission's regulatory authority "any ancillary service" used in connection with such statutorily enumerated public utility function. N.C.G.S. § 62-3(27). Our Supreme Court has held the Commission's jurisdiction extends beyond the functions expressed in Chapter 62:

> [T]he emphasis should be placed on the *public utility function* rather than a literal reading of the statutory definition of "public utility," and the statutory definition should not be read so narrowly as to preclude Commission jurisdiction over a function which is required to provide adequate service to the subscribers.

Commission v. Southern Bell, 326 N.C. 522, 528 (1990).

By way of example, the printing of a "yellow page directory" is not expressly included within the statutory definition of a public utility. However, providing telephone lines for communication is expressly included. N.C.G.S. § 62-3(23). And our Supreme Court has held that since the directory service by a phone company is an integral part of the company's function of providing adequate telephone communication lines, the directory function is part of the public utility function and,

therefore, subject to the Commission's jurisdiction. *See State ex. rel. Utils. Comm'n v. Southern Bell*, 307 N.C. 541 (1983).

In the same way, based on the facts as found by the Commission concerning Bald Head Island, the parking lot is an integral part in providing ferry transportation service to passengers traveling to and from the Island.

> Regarding the Barge Operations, I dissent. The Commission concluded that
>
> > the Barge Operations, as currently and operated by the Ferry Operations parent corporation, are at the least an ancillary service to the Ferry Operations and are thus subject to the Commission's jurisprudence and regulatory authority. Based on this determination, the Commission further concludes that it is unnecessary to reach the alternate grounds argued by [the Village] in support of the Commission's regulatory jurisdiction – that is, whether the Barge Operations are a common carrier service which transports persons or household goods within the meaning of N.C.G.S. § 62-3(6) and (23)(a)(4).

While the Barge Operation may be integral in allowing residents of the Island enjoy *their homes* on the Island, I agree with the majority that the Barge Operation is not ancillary to the Ferry Operation, in that the Barge Operation is not integral in providing residents ferry transportation to the Island. However, it may be that the Barge Operation, to the extent it provides transportation of household goods or passengers for compensation, is itself a public utility, subject to regulation by the Commission for those activities. My vote is to vacate, rather than reverse, that portion of the order and remand for the Commission's consideration of this issue.

STATE OF NORTH CAROLINA
v.
JOHNNY WAYNE ELLISON, DEFENDANT

No. COA24-30

Filed 15 October 2024

1. Search and Seizure—warrant and supporting affidavit—identification of location to be searched—description of items to be seized—nexus between location and items

In a prosecution for larceny, the trial court did not err in denying defendant's motion to suppress evidence discovered during the search of his residence where the affidavit supporting the search warrant: (1) identified the location to be searched with reasonable certainty (in that it listed the correct street address and accurately described the white, single-wide trailer to be searched, even though attached photographs depicted a similar trailer nearby, because the erroneous nature of the photographs was discovered and the warrant was redacted prior to its filing and execution); (2) alleged facts establishing a nexus between the items stolen and the location to be searched (in that defendant was photographed by a trail camera removing the stolen items, the search location was the residence listed on defendant's driver's license, and a law enforcement officer averred that stolen items are often kept at a perpetrator's residence until they can be sold); and (3) sufficiently described the items to be seized (in that the objects sought, their brand, and, in one case, the model number, were noted) despite the fact that other, legally obtained items were also found and seized at the residence.

2. Search and Seizure—warrant and supporting affidavit—redaction without the addition of information—not procedurally defective

The warrant authorizing a search of defendant's residence was not procedurally defective where it was redacted prior to its filing or execution in order to remove photographs attached to the supporting affidavit which depicted a similar nearby residence (along with descriptions of the photographs) because the inaccuracy was: not the result of bad faith; detected before the warrant's execution; and corrected in line with guidance from, and in the discretion of, the issuing magistrate. Moreover, even with the redaction, the warrant was executed on the same day it was issued—and thus within the forty-eight hour window prescribed by N.C.G.S. § 15A-248—and,

because the alteration was only removal of errant material rather than the addition of information, the requirements of N.C.G.S. § 15A-245(a) were not triggered. Accordingly, invalidating the warrant would elevate form over substance by applying a hypertechnical, rather than commonsense, interpretation of the pertinent statutes and constitutional provisions.

Appeal by Defendant from judgment entered 13 June 2023 by Judge R. Gregory Horne in Watauga County Superior Court. Heard in the Court of Appeals 27 August 2024.

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

Yoder Law PLLC, by Jason Christopher Yoder, for Defendant.

GRIFFIN, Judge.

Defendant Johnny Wayne Ellison appeals from a judgment entered upon a guilty plea made after the trial court denied Defendant's motion to suppress evidence. Defendant challenges both the procedure used to obtain the search warrant and the substance of the underlying affidavit and warrant. We hold the trial court did not err by denying Defendant's motion to suppress.

I. Factual and Procedural Background

On 8 December 2022, the Watauga County Sheriff's Department received a report of a break-in. The caller noted that two Stihl chainsaws and a red wagon were stolen during the break-in. A trail camera on the property recorded two men, one of which was wearing a Tractor Supply Company hat, wheeling the chainsaws through the woods in the wagon. Watauga County officers were able to identify Defendant as the individual wearing the hat because of their prior experience with him. The following day, Detective Lukas Smith, the lead investigator assigned to the break-in, applied for a warrant to search Defendant's residence.

The warrant specified 303 Tanner Road as the address to be searched and described the premises as:

> Residence, curtilage, vehicles, and any outbuilding located at 303 Tanner Rd. Boone NC (see pictures of map and photos of residence). Residence is a single wide with white siding and logs piled in the driveway.

The warrant also included an aerial photograph of a property and a ground-level photograph of a white single-wide mobile home with a pile of logs in front of the building. The address in the warrant was taken from a North Carolina Department of Motor Vehicles document which reported Defendant's address. Detective Rebecca Russel took the ground-level photograph while investigating a different larceny reported the same day as the break-in.

The same day, Detective Smith attempted to go to 303 Tanner Road to execute the search warrant. He utilized Detective Russel's photograph and the aerial photograph to navigate to the white mobile home but realized upon arrival that he was actually at 310 Tanner Road. After realizing the residence shown in the photographs attached to the warrant actually depicted 310 Tanner Road, not 303, Detective Smith called the magistrate's office for further direction. Magistrate John Green directed him to return to the magistrate's office where they would amend the warrant as it had not been filed in the Clerk of Court's office yet. Detective Smith did so and, upon arrival at the office, he and Magistrate Green crossed out and initialed the ground-level photograph, the aerial photograph, and the portion of the property description referencing the pile of logs. Detective Smith then handed the warrant over to other officers for execution.

While executing the search warrant at the correct address, Officers found and seized four chainsaws, two of which were Stihl brand. Defendant allegedly made incriminating statements about the chainsaws to Detective Rollins while law enforcement executed the warrant. On 12 December 2022, Detective Smith conducted an interview with Defendant, during which Defendant admitted to stealing the chainsaws.

On 3 January 2023, a Watauga County grand jury indicted Defendant for breaking and entering and larceny. On 12 June 2023, Defendant moved to suppress evidence obtained from the search authorized by the amended warrant. Defendant's motion came on for hearing in Watauga County Superior Court on 13 June 2023 before the Honorable Gregory Horne. The court received testimony from Detective Smith before making oral findings and denying Defendant's motion. Defendant then pled guilty to breaking and entering, larceny, and attaining habitual felon status while preserving his right to appeal from the trial court's order denying his motion to suppress. Defendant timely appeals.

II. Analysis

Defendant argues the trial court erred by denying his motion to suppress evidence obtained from the search of his property pursuant to the

amended warrant. Defendant presents arguments challenging both the substance of the warrant and the underlying affidavit as well as the procedural process leading up to the search. We hold the trial court properly denied Defendant's motion to suppress.

A. Standard of Review

We review a trial court's denial of a motion to suppress to determine "whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Thorpe*, 253 N.C. App. 210, 212, 799 S.E.2d 67, 70 (2017) (citation and internal marks omitted). Where a defendant does not challenge findings of fact, "they are deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citing *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984)).

In contrast, we review the trial court's conclusions of law de novo. *See State v. Richardson*, 385 N.C. 101, 179, 891 S.E.2d 132, 192 (2023) ("[W]hether those findings of fact in turn support the trial court's conclusions of law, which are reviewed de novo." (citation and internal marks omitted)). We review " 'an alleged error in statutory interpretation . . . de novo.' " *State v. Downey*, 249 N.C. App. 415, 420, 791 S.E.2d 257, 261 (2016) (citing *State v. Skipper*, 214 N.C. App. 556, 557, 715 S.E.2d 271, 272 (2011)); *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006). "Under a de novo review, the Court considers the matter anew and freely substitutes its own judgment for that of the lower [court]." *Morris v. Rodeberg*, 385 N.C. 405, 409, 895 S.E.2d 328, 331 (2023) (citation and internal marks omitted).

B. Substantive Issues

[1] Defendant argues the warrant and underlying affidavit authorizing the search of Defendant's home were substantively defective for three reasons: (1) "[t]he search warrant failed to identify the property with reasonable certainty[;]" (2) "[t]he affidavit was insufficient to establish probable cause to search [Defendant's home] because the sole piece of evidence that [Defendant] lived at the address was a DMV record of unknown origin and there was no evidence to corroborate that he currently lived at [that address][;]" and (3) "[t]he description of the property to be seized was insufficiently described in the warrant."

The trial court made numerous findings of fact and conclusions of law addressing Defendant's arguments about the substance of the warrant:

That Detective Smith completed a search warrant application and went before Magistrate Green on December 9, 2022, swore out that warrant, and Magistrate Green issued the warrant on the 9th day of December 2022 at 1:42 p.m. That as part of the investigation, a separate detective had gone out to the scene and taken a photograph of the residence that she believed at the time to be 303 Tanner Road. That the search warrant listed 303 Tanner Road, Boone North Carolina 28607 as the residence to be seized. It indicated, well the facts indicate that based upon a DMV search of [Defendant's] driver's license, that that is the address listed as his residence, again, 303 Tanner Road, Boone. The photograph that Detective Russell took was attached to the search warrant. Having heard testimony and having found probable cause to support a search of the residence, Magistrate Green assigned and issued the warrant.

. . . .

With regard to the steel[1], I read that exact same provision before you read that, Mr. Farb with regard to the television set. And the difference that I see, there's case law out there that indicates that particularly drugs are contraband, so that's a non-issue with regard to that. There's no serial number attached to drugs, we all understand that. But with regard to stolen property, there is some flexibility with regard to that.

First of all, law enforcement doesn't have any prior knowledge of the items. Victims may or may not have any identifying information to include serial numbers on such items, and our case law does recognize that. I would distinguish Mr. Farb's provision there in that he says a color television. There's no brand listed, for example, a Vizio 52-inch television. I believe that that would be a different situation and our case law would be flexible enough to allow that description. In this case the detective listed the information that the victim had provided, that is, two steel chain saws. He did include the brand, type. I don't know what

1. To clarify, the chainsaws at issue are Stihl brand which sounds like steel when spoken.

the 015 is, but he did provide that as well, a steel 015 chain saw in one instance, and then the American wagon.

So the [c]ourt would find based upon its understanding of the case law, that that was sufficient to list the property. In this case it's correct that there were additional items that were seized. However, the evidence is that it was returned to [Defendant] upon determining that those items did not belong to the victim.

The second issue, or the third issue, I guess, that the [c]ourt found that is relevant was the connection of the residence that was to be searched to the probable cause in the case. Again, going back to Mr. Farb's book, I'm looking at page 479, indicates direct observation is not the only way to connect a place with a crime and evidence to be seized. For example, assuming that the information is timely, [c]ourt cases recognize the proceeds from a burglary, breaking or entering or a robbery will likely be found in one, a suspect's home or other place where the suspect is residing or from which the suspect may sell the proceeds, et cetera, and cites a couple of cases with regard to that.

In this case we have a trail camera that captured still images. That the images clearly showed folks that were known to law enforcement, one being Mr. Watson who was not a defendant in this case, but then also [Defendant]. . . . That the camera showed that within a relevant time, the last known secure date, that [Defendant] was on the property and was in physical possession of items that were reported as stolen by the victim. That the residence was within a relatively short period, a relatively short distance of what's believed to be [Defendant's] home. In this case the estimate is a mile and a half. That they upon leaving the property, were on foot pulling the wagon.

And looking at the four corners of the warrant, the probable cause expressed there, I don't disagree that certainly additional information would be relevant, but the [c]ourt is charged not with determining what additional evidence would be appropriate. The [c]ourt is charged with looking at the four corners and determining whether or not that presented the Magistrate at that time with reasonable cause to believe that items of stolen property may be

> found, that these items of stolen property may be found on the property. The [c]ourt would find that there was sufficient evidence before the Magistrate at that time.
>
> This [c]ourt finds evidence that the Magistrate had probable cause grounds to issue the search warrant for 303 Tanner Road for the items identified as stolen property. That the subsequent amendment did not add any additional information to the warrant, it simply redacted items, and as such these redactions did not actually invalidate the warrant. And that there was sufficient probable cause under our existing law to connect the defendant's residence to these matters to warrant issuance of the search warrant of the residence as issued by Magistrate Green.
>
> The [c]ourt therefore would find that there has been no statutory Constitutional violation of [D]efendant's rights with regard to the search warrant and would respectfully deny the motion to suppress.

1. Identification of Real Property

Defendant contends "the search warrant failed to identify the property with reasonable certainty as required by" law. We disagree.

"Both the Fourth Amendment to the Constitution of the United States and article I, section 20 of the North Carolina Constitution protect private citizens against unreasonable searches and seizures." *State v. Johnson*, 378 N.C. 236, 244, 861 S.E.2d 474, 483 (2021) (citing *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012)); *see also State v. Miller*, 282 N.C. 633, 638, 194 S.E.2d 353, 356 (1973) ("There is no variance between Fourth Amendment requirements and the law of this State in regard to search warrants." (citation omitted)). A valid search warrant "must contain a designation sufficient to establish with reasonable certainty the premises, vehicles, or persons to be searched." N.C. Gen. Stat. § 15A-246(4) (2021). A search warrant is not ipso facto invalid because "the address described in the search warrant [] differ[s] from the address of the residence actually searched." *State v. Moore*, 152 N.C. App. 156, 160, 566 S.E.2d 713, 715–16 (2002) (citing *State v. Walsh*, 19 N.C. App. 420, 423, 199 S.E.2d 38, 40–41 (1973)); *see also U.S. v. Palmer*, 667 F.2d 1118, 1120 (4th. Cir. 1981) (holding a search warrant which described the premises to be searched as "Carl's Carpet Mart" to be sufficient despite the actual search having been executed at "Miller-Arrington," a business sharing a wall with the carpet mart); *State v. Woods*, 26 N.C. App. 584, 587, 216 S.E.2d 492, 494 (1975) (holding "[an] Aqua and White mobile home owned by James

Luther Bateman about 60 yards beyond Joe Kays Camp Ground the first dirt road to the left off RPR 1215 the first house trailer on the right" to be sufficient despite there being another aqua and white mobile home in the vicinity). While an executing officer's previous knowledge of the premise to be searched is relevant to our analysis, *State v. Cloninger*, 37 N.C. App. 22, 26, 245 S.E.2d 192, 195 (1978), it is not dispositive.

Here, the search warrant's description was sufficient to establish with reasonable certainty the premise to be searched. Initially, the search warrant described the premises to be searched as "[r]esidence, curtilage, vehicles, and any outbuilding located at 303 Tanner Rd. Boone NC (see pictures of map and photo of residence). Residence is a single wide with white siding and logs piled in driveway." The warrant also included ground and aerial photographs of 310 Tanner Road. While the part of the description referring to the logs was inaccurate due to its placement alongside the photographs, the warrant did in fact correctly list the address to be searched—303 Tanner Road. Moreover, it was not unreasonable that officers would conflate the two residences as the premises are located in rural Watauga County. Like the mobile homes in *Woods*, 303 Tanner Road and 310 Tanner Road are within the same vicinity, and both have white mobile homes on the property. Here, however, Detective Smith immediately knew he was at the wrong address upon arrival because of the address numbering conventions in Watauga County[2] and quickly attempted to remedy the discrepancy by returning to the magistrate's office.

As the description here included the correct address, which provides reasonable certainty, Defendant's contention is without merit and the trial court did not err by concluding the search warrant was valid.

2. Probable Cause to Search 303 Tanner Road

Defendant contends "[t]he affidavit was insufficient to establish probable cause to search 303 Tanner Road because the sole piece of evidence that [Defendant] lived at the address was a DMV record of unknown origin and there was no evidence to corroborate that [Defendant] currently lived at the residence." We disagree.

Section 15A-244 provides that an application for a warrant must contain "[a] statement that there is probable cause to believe that items

2. In Watauga County, even-numbered addresses are assigned to properties on the right side of the street while odd-numbered addresses are assigned to properties on the left. Thus, 310 Tanner Road is on the right side of the street while 303 Tanner Road is on the left.

subject to seizure under [N.C. Gen. Stat. §] 15A-242 may be found in or upon a designated or described place[,]" and that the application must also have "[a]llegations of fact supporting the statement." N.C. Gen. Stat. § 15A-244(2)–(3) (2021). Said statements "must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe the items are in the places . . . to be searched[.]" N.C. Gen. Stat. § 15A-244(3). A magistrate's duty when faced with a search warrant application is well established:

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis [] for concluding" that probable cause existed.

State v. Benters, 367 N.C. 660, 664, 766 S.E.2d 593, 598 (2014) (cleaned up). A finding of "[p]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* at 664–65, 766 S.E.2d at 598 (citation and internal marks omitted). To that end, "a magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant," and we give great deference to the "magistrate's determination of probable cause[.]" *Id.* at 665, 766 S.E.2d at 598 (citation and internal marks omitted).

"An affidavit 'must establish a nexus between the objects sought and the place to be searched.' " *State v. Eddings*, 280 N.C. App. 204, 210, 866 S.E.2d 499, 504 (2021) (citing *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990)). We utilize a totality of the circumstances inquiry when determining whether a nexus exists. *Id.* at 210–11, 866 S.E.2d at 504 (citation and internal marks omitted). Additionally, when a search warrant is directed at a private residence, "probable cause 'means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and those objects will aid in the apprehension or conviction of the offender.' " *State v. Bailey*, 374 N.C. 332, 335, 841 S.E.2d 277, 280 (2020) (citing *State v. Campbell*, 282 N.C. 125, 128–29, 191 S.E.2d 752, 755 (1972)).

Here, Detective Smith swore to the following facts:

> [Defendant] lives in very close proximity to the address of the reported larceny and can be seen on video footage

> carrying a chainsaw away from the scene and is pulling an American Red Flyer Wagon loaded with another chainsaw and a bucket of small items, all taken from the address. [Defendant]'s address in the DMV is 303 Tanner Road Boone, NC 28607, the premise to be searched.
>
> . . . .
>
> Given the short timeframe that has elapsed it is probable that the chainsaws and wagon reported and listed above are likely at the nearby home of [Defendant] located at 303 Tanner Rd. In your affiants training and experience items are kept until suspects can sell them for cash or trade them for things of value.

Giving due deference to the magistrate's determination, we hold this information sufficient to support the trial court's conclusion of law that the chainsaws could be found at Defendant's residence. Detective Smith gleaned Defendant's address from his driver's license, which Defendant had recently provided to another Watauga County Sheriff's Deputy during a traffic stop. Notably, Defendant was wearing the same Tractor Supply Company hat during the traffic stop that he was wearing when captured by the trail camera.

Based on the address shown on Defendant's driver's license, Detective Smith testified Defendant's residence was only within a mile to a mile-and-a-half of the reported breaking and entering. The same facts also implicate Defendant's residence because, as Detective Smith affirmed, stolen goods are often "kept until suspects can sell them for cash or trade them for things of value." Considering Defendant was captured on camera transporting the stolen goods via a child's wagon, while wearing the same hat that he was wearing during a recent traffic stop at which he presented his driver's license with 303 Tanner Road listed as his address, it was reasonable for the magistrate to conclude the fruits of the crime were held at his residence a short distance away.

Thus, as the trial court's findings of fact support its conclusion of law that there was sufficient evidence before the magistrate to support a finding of probable cause that the chainsaws could be found at Defendant's residence, Defendant's contention is without merit.

3. Description of Property

Defendant next contends "[t]he description of the property to be seized was insufficiently described in the warrant." We disagree.

A search warrant "must contain . . . [a] description or a designation of the items constituting the object of the search and authorized to be seized." N.C. Gen. Stat. § 15A-246(5) (2021). A description is sufficient "when it enables the officer executing the warrant reasonably to ascertain and identify the items to be seized." *State v. Kornegay*, 313 N.C. 1, 16, 326 S.E.2d 881, 893 (1985) (citing *United States v. Wuagneux*, 683 F.2d 1343, 1348 (11th Cir. 1982)). The description particularity depends on the nature of the items to be seized. *Id.* at 16, 326 S.E.2d at 893–94 (citation omitted). To that point, a warrant's description of property is sufficient if it is "as specific as the circumstances and nature of the activity that is under investigation." *Id.* at 16, 326 S.E.2d at 894 (citation omitted).

Generic descriptions of contraband, such as illegal narcotics or gambling equipment, are sufficient given the nature of the objects. *See generally State v. Conrad*, 81 N.C. App. 327, 331, 344 S.E.2d 568, 571 (1986) (analyzing a warrant's description which specified "drugs" and "stolen goods"). Stolen property on the other hand, being "generally [] innocuous except for the extrinsic circumstance" of being stolen, requires a more definite description. *Id.* at 330, 344 S.E.2d at 571. But, "where the circumstances have made an accurate description impossible, the courts have occasionally relaxed the more stringent specificity requirements regarding stolen goods." *Id.* at 331, 344 S.E.2d at 571.

Here, the warrant described the chainsaws, among other property for which Defendant does not contest the description, as: (1) One STIHL Chainsaw; (2) One STHL 015; and (3) One American Red Flyer Wagon. These descriptions were drafted based upon the only information provided to law enforcement by the victims of the larceny. While the descriptions could be more specific, they are nonetheless sufficient as they indicate the objects sought, the brand of the items, and, in one instance, the model number. Thus, as the circumstances here made a more precise description impossible, given the victim's inability to provide more information, we hold the trial court did not err in concluding, as a matter of law, the description to be sufficient.

While Defendant is correct that additional, legally obtained chainsaws were seized, this is not dispositive of the description's sufficiency. The circumstances required law enforcement to seize and investigate the innocuous chainsaws to determine which chainsaws were the fruits of Defendant's crime. *See State v. Louchheim*, 36 N.C. App. 271, 278–79, 244 S.E.2d 195, 201 (1978) ("And we find, further, that the circumstances required that the officers executing the search warrant inspect certain

innocuous records and documents in order to locate and seize the ones which tended to show the suspected criminal activity.").

Accordingly, Defendant's argument is without merit.

C. Procedural Issues

[2] Defendant argues the warrant authorizing the search of Defendant's home was procedurally defective for four reasons. Initially, Defendant contends the redaction process used after the failed execution of the warrant at 310 Tanner Road was done without statutory authority and therefore requires suppression of the evidence obtained from the search. Defendant also contends, in the alternative, that if the warrant could be amended, it was nonetheless defective because: (1) the warrant "failed to comply with N.C. Gen. Stat. § 15A-246(1) because it was not signed with the time and date of issuance[;]" (2) "the amendments in this case were made pursuant to additional information never taken under oath[;]" and (3) "the magistrate violated N.C. Gen. Stat. § 15A-245(a) because he failed to record or summarize the additional information he received from Officer Smith[.]"

With respect to the procedural issues raised by Defendant, the trial court orally made extensive conclusions of law:

> Again, [D]efendant has timely objected to that, arguing that there is no basis in the law to allow amendment, and that any changes in essence voided or invalidated the warrant.
>
> The [c]ourt has made research with regard to this issue. I found no case law directly on point. It is correct, the statutory provisions in 15A do not address amendment or redactions to any search warrant. So the [c]ourt must look to the statutory framework and exercise its reasoning to make a determination as to the validity. It appears to the [c]ourt that there was nothing added to the search warrant.
>
> It is clear to the [c]ourt based upon other case law that indicates that they're bound by the four corners of the search warrant, that any additional information that was considered by the judicial official in determining whether or not to execute the warrant must be either, number one, placed under oath and subject to recording, or is written into the record by the judicial official that is receiving that information. Obviously it must be sworn to. In this case

there's no evidence that anything was added to the search warrant, save the initials that were put on there; instead there were redactions from the search warrant.

15A-246 does indicate that in addition to the signature, the judicial official must place a time and date of issuance above his signature. It appears to the [c]ourt that that is important, relevant to 15A-248 in that 15A-248 requires that a search warrant must be executed within 48 hours from the time of issuance. Any warrant not executed within that time limit is void and must be marked not executed and returned without unnecessary delay to the clerk of the issuing court.

So in this case Magistrate Green had affixed the time of 1:42. It is correct based upon the redactions that I see and the testimony that I have received, that no additional time was updated. It appears to the [c]ourt, or the [c]ourt would find that it was within an hour of the initial issuance that these redactions and initials were placed onto the search warrant. But it is clear that the [c]ourt and the law enforcement officer would be bound by that 48–hour rule, and that 48–hour time frame would relate back to 1:42 p.m. The evidence before the [c]ourt is that the search warrant was executed well within that 48–hour period, so that is not an issue.

With regard to this matter then, the [c]ourt would find that there is no question that in noticing that although the listed address was correct, the photograph was incorrect. That Detective Smith opted instead of simply proceeding to the listed address after realizing his error, he called the Magistrate judge and returned to the Magistrate's office in order to correct his mistake by way of redaction. That the judicial official met with him, allowed the redaction and initialed those portions. Again, the [c]ourt notes that nothing was added to the search warrant. There were simply redactions from the search warrant to clarify the incorrect photograph that was initially attached.

The [c]ourt would find that while likely not – the [c]ourt would find that while best practice likely would lead the Magistrate to have signed and affixed a new time to the warrant, the [c]ourt will find based upon the [c]ourt's

> viewing of 15A and those requirements, and case law in general reflecting that it was within the judicial official's discretion at that time to authorize the redaction, and by his initials authorized that the search warrant as redacted remained valid.
>
> . . . .
>
> This [c]ourt finds evidence that the Magistrate had probable cause grounds to issue the search warrant for 303 Tanner Road for the items identified as stolen property. That the subsequent amendment did not add any additional information to the warrant, it simply redacted items, and as such these redactions did not actually invalidate the warrant. And that there was sufficient probable cause under our existing law to connect [D]efendant's residence to these matters to warrant issuance of the search warrant of the residence as issued by Magistrate Green.
>
> The [c]ourt therefore would find that there has been no statutory Constitutional violation of [D]efendant's rights with regard to the search warrant and would respectfully deny the motion to suppress.

1. Redactions

With respect to Defendant's contention that the redaction process invalidated the warrant, we disagree. Defendant is correct that chapter 15A does not address a process for amending warrants. Nonetheless, the underlying affidavit was substantively sufficient to support the magistrate's finding of probable cause and therefore sufficient to support the warrant's issuance. Moreover, the trial court correctly found that no information was added to the warrant—only redacted from it. Defendant argues this constitutes an "amended" warrant. This is just one way to frame the issue. Another way, as the State argues, is to frame the issue as a redacted warrant, for which we have case law to guide our analysis. Regardless of the way in which the issue is framed, we are confronted with the inclusion of inaccurate pictures in a warrant which, upon discovery, led to the swearing officer, in conjunction with the magistrate, making a good-faith attempt to correct the inaccurate information therein.

We are guided by two principles in our analysis that counsel us to look at the substance of the issue rather than how a party chooses to frame it. First, that " 'courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner.' "

State v. Brody, 251 N.C. App. 812, 820, 796 S.E.2d 384, 390 (2017) (citing *State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 429, 434–35 (1991)). To that end, we remain cognizant of the Court's duty to refrain from elevating form over substance. *See, e.g.*, *State v. Newborn*, 384 N.C. 656, 657, 887 S.E.2d 868, 870 (2023) ("We follow our long-standing principle of substance over form when analyzing the sufficiency of an indictment."). We find these principles applicable to the case before us.

The State argues our holding in *State v. Jackson*, 220 N.C. App. 1, 727 S.E.2d 332 (2012), should guide our analysis. There, we addressed a situation where officers intentionally made false statements of material fact in an affidavit while applying for a search warrant. *Id.* at 15–16, 727 S.E.2d at 333–34. At the trial court, the defendant moved for and was summarily denied appropriate relief. *Id.* at 11, 727 S.E.2d at 331. On appeal, the defendant argued "the affidavit executed by Officer Harris contained false statements made in bad faith and that, in the event that the affidavit was redacted in such a manner as to remove these false statements, the affidavit did not suffice to support the required determination of probable cause." *Id.* at 13, 727 S.E.2d at 332. We determined which of the statements contained in the affidavit were false, removed those statements, and then analyzed whether the remaining information within the affidavit was sufficient to show probable cause. *Id.* at 15–20, 727 S.E.2d at 333–36. We concluded it was not. *Id.* at 20, 727 S.E.2d at 336.

Similarly, in *Franks v. Delaware*, the Supreme Court of the United States set forth law addressing circumstances where officers, like those in *Jackson*, intentionally make false statements in bad faith when swearing out an affidavit. 438 U.S. 154 (1978). The Court held that, to attack the validity of an affidavit, a defendant must make "allegations of deliberate falsehood or of reckless disregard for the truth," but "[a]llegations of negligence or innocent mistake are insufficient." *Id.* at 171–72. Also relevant here, the Court held that the probable cause requirement of the Fourth Amendment does not require "that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay[.]" *Id.* at 165.

Detective Smith did not include the pictures in bad faith or with reckless disregard for the truth, but rather included them because another Watauga County officer incorrectly thought she was taking a picture of the correct address. This is not akin to the intentional falsehoods made by law enforcement in *Jackson* and *Franks*. Rather, this is analogous to hearsay. Moreover, Detective Smith made a good faith attempt to remedy the warrant's inaccuracies prior to executing it on Defendant's

residence. We also reiterate that Detective Smith called and sought guidance from Magistrate Green prior to taking any action after discovering the discrepancy. Detective Smith then did as the magistrate directed. Thus, we cannot say his conduct rises to the level of the officers in *Jackson* and *Franks*. Being so, we also cannot conclude the slight aberration from the normal warrant application and execution process here violated Defendant's rights or rendered the warrant invalid, as, without the inclusion of the pictures, the warrant and underlying affidavit were sufficient. In so concluding, we do not elevate the form of the affidavit and warrant over the substance of the probable cause submitted to the magistrate. Accordingly, the trial court properly concluded the redaction was within the magistrate's discretion and Defendant's argument is without merit.

2. N.C. Gen. Stat. § 15A-246(1)

Defendant contends the warrant "failed to comply with N.C. Gen. Stat. § 15A-246(1) because it was not signed with the time and date of issuance." We disagree.

Section 15A-246(1) provides that "[a] search warrant must contain [t]he name and signature of the issuing official with the time and date of issuance above his signature[.]" N.C. Gen. Stat. § 15A-246(1) (2021). While the inclusion of the word "must" in a statute "ordinarily . . . [is] deemed to indicate a legislative intent to make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action, it is not necessarily so and the legislative intent is to be derived from a consideration of the entire statute." *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 662 (1978).[3] Section 15A-248 provides, in conjunction with section 15A-246(1), that "[a] search warrant must be executed within 48 hours from the time of issuance. Any warrant not executed within that time is void and must be marked 'not executed' and returned without unnecessary delay to the clerk of the issuing court." N.C. Gen. Stat. § 15A-248 (2021). "Statutes *in pari materia* are to be construed together, and it is a general rule that the courts must harmonize such statutes, if possible, and give effect to each[.]" *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E.2d 898, 904 (1956). Reading the two relevant statutes *in pari materia*, we conclude the purpose of section 15A-246(1) is to provide a record of the time of issuance

3. Defendant's appellate brief quotes the same language. However, Defendant's brief fails to include the limiting clause "it is not necessarily so and the legislative intent is to be derived from a consideration of the entire statute."

against which the forty-eight-hour time limit for execution contained in section 15A-248 may be measured against.

Here, the warrant was issued and executed within the statutorily prescribed forty-eight-hour window. Contradicting Defendant's argument is the fact that the warrant was dated on the day of issuance, which was the same day as the redaction and execution. Furthermore, as the warrant was signed by Magistrate Green at the time of the issuance, the forty-eight-hour time limit to execute the warrant would have related back to the initial issuance, not the time of the redaction. The trial court found as much. Moreover, both Detective Smith and Magistrate Green initialed the redactions, after having already signed the warrant approximately twenty minutes earlier, thus providing other evidence of the necessary signatures. *See State v. Brannon*, 25 N.C. App. 635, 636, 214 S.E.2d 213, 214–15 (1975) (holding a magistrate signing a warrant in the wrong place to be "a mere technical deviation"). The trial court also found, and we agree, that this argument is a non-issue as the warrant was executed within the initial forty-eight-hour period and did not prejudice Defendant.

Thus, Defendant's argument is without merit.

3. Additional Information

Defendant argues "the amendments in this case were made pursuant to additional information never taken under oath," and "the magistrate violated N.C. Gen. Stat. § 15A-245(a) because he failed to record or summarize the additional information he received from [Detective] Smith." We disagree.

Section 15A-245 provides "information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official." N.C. Gen. Stat. § 15A-245(a) (2021). When a magistrate determines there has been a sufficient showing of probable cause, and the requirements of Article 11 have been met, the magistrate is required to issue the warrant. N.C. Gen. Stat. § 15A-245(b).

To the extent that additional information was given to the magistrate, it was simply that the photographs depicted the wrong address, a fact not bearing on whether probable cause existed to issue the warrant in the first place. Moreover, the record and transcript reveal that the erroneous photographs, and the parts of the description referring to

the pile of logs and the photographs, were struck with a pen and initialed by both Detective Smith and Magistrate Green. Thus, there is competent evidence to support the trial court's finding of fact that "the subsequent amendment did not add any additional information to the warrant, it simply redacted items[.]" This finding, in turn, supports the trial court's conclusion of law that "these redactions did not actually invalidate the warrant." Logically, if additional information was not provided to Magistrate Green, then the requirements of section 15A-245(a) are not triggered. The same line of reasoning applies to the recording requirement in section 15A-245(a). Therefore, Magistrate Green was statutorily required to issue the warrant.

Accordingly, Defendant's contention is without merit.

III. Conclusion

We hold the trial court did not err by denying Defendant's motion to dismiss. As "[t]here is no variance between the Fourth Amendment requirements and the law of this State in regard to search warrants[,]" *Miller*, 282 N.C. at 638, 194 S.E.2d at 356 (1973) (citing *State v. Vestal*, 278 N.C. 561, 577, 180 S.E.2d 755, 766 (1971)), we hold the search conducted pursuant to the warrant did not violate Defendant's rights against unreasonable searches and seizures protected by the Fourth Amendment of the United States Constitution and article I, section 20 of the North Carolina Constitution.

AFFIRMED.

Judges HAMPSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
GRANT LEE HUNT

No. COA23-890

Filed 15 October 2024

Evidence—opinion testimony—lay witness—inferences permitted by facts—plain error shown

In a prosecution on charges including assault with a deadly weapon with intent to kill inflicting serious injury arising from a collision between defendant's truck and his neighbor's all-terrain vehicle, defendant demonstrated plain error and thus was entitled to a new trial where a law enforcement officer was permitted to testify, without objection, that he believed the collision was intentional rather than an accident—the critical disputed issue at trial—because the officer, who was not testifying as an expert in accident reconstruction, had not witnessed the collision and therefore was in no better position than the jury to determine what inferences could be drawn from the facts surrounding it.

Judge STADING dissenting.

Appeal by defendant from judgment entered 24 March 2023 by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 14 August 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas J. Campbell, for the State.

Daniel M. Blau for defendant-appellant.

THOMPSON, Judge.

Grant Lee Hunt (defendant) appeals from a judgment entered upon a jury's verdict finding him guilty of assault with a deadly weapon inflicting serious injury without intent to kill and injury to personal property. On appeal, defendant contends, *inter alia*, that the trial court committed plain error by allowing a lay witness to give an expert opinion about how the accident happened and defendant's intent at the time of the accident. After careful review, we vacate and remand for a new trial.

I. Factual Background and Procedural History

Defendant and Timothy Todd (Todd), the alleged victim in this case, have been neighbors since defendant purchased his home in 2018. Testimony proffered at trial established a great deal of animosity existed between defendant and Todd in the interim period, which we will not exhaustively chronicle. Pertinent to the present appeal, on 23 January 2019, defendant and his wife made a formal request to the Robeson County Sheriff's Department to conduct regular check-ins on their property due to alleged harassment and trespassing onto their property by Todd, including "coming onto the property at night with [a] [4-]wheeler and . . . throwing beer cans and bottles in [defendant's] yard[,] and watching [defendant's] property."

Two days later, on 25 January 2019, defendant was on his way home from work, "on the phone with the wife, driving[,] [a]nd at this point that's when I see an object. You know, just out of - - out of the corner of my eye . . . it just happened so fast . . . [i]t was instant . . . the impact." Defendant testified that he "didn't have time to recognize anything at that point[,]" referring to the collision, but when he exited his vehicle, defendant testified that he asked, "[w]here's that son of a b[****][,]" and he then realized "that there was an accident[,] [a]nd I s[aw] a 4-wheeler and [Todd]." Defendant further testified that he attempted to check on Todd but was instructed to leave the property by Todd's sister, which defendant did. Defendant maintained that he "did not go into [Todd's] driveway to hit th[e] 4-wheeler[.]"

According to Todd, he had no recollection of the accident; he testified at trial that he was "riding down the driveway . . . on the 4-wheeler . . . [to go to] the store to get gas" when the accident occurred, and that he realized he had been in an accident when he "woke up six weeks later." It is uncontested that Todd suffered a broken leg, ankle, jaw, and eye socket in the accident.

A law enforcement officer who responded to the scene of the accident testified that he first noticed "a 4-wheeler or ATV that was off the roadway in a yard and a pickup truck that was kind of partially in the roadway . . . ." After admitting photographs taken at the scene into evidence, the State then asked the law enforcement officer who, again, *responded* to the scene of the accident, whether he had "form[ed] an opinion whether this was an accident or an intentional act[,]" to which the law enforcement officer replied, "[m]y opinion is it was an intentional act."

On 6 July 2020, defendant was indicted upon a true bill of indictment by a Robeson County Grand Jury for injury to personal property

and assault with a deadly weapon with intent to kill inflicting serious injury. The matter came on for trial at the 22 March 2023 Criminal Session of Robeson County Superior Court. Two days later, on 24 March 2023, defendant was found guilty upon a jury's verdict of assault with a deadly weapon inflicting serious injury without intent to kill, and injury to personal property. Pursuant to the jury's verdict, defendant was sentenced to an active term of 120 to 156 months in the custody of the North Carolina Department of Adult Correction. Defendant entered timely oral notice of appeal at trial.

II. Discussion

On appeal, defendant contends, *inter alia*, that the trial court "committed plain error by allowing a lay witness to give an expert opinion about how the accident happened, and that [defendant] had intentionally hit [Todd]." We agree.

A. Standard of review

At the outset, we note that defense counsel failed to object to the testimony proffered by the lay witness at trial; therefore, this issue is subject to plain error review. Under plain error, "a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (internal quotation marks and citation omitted).

B. Law enforcement officer's testimony

Generally, a law enforcement officer who does not witness an accident, but later observes the scene of the accident is permitted to testify about physical facts observed at the scene, including the condition of the vehicles after the accident and their positioning. *See State v. Wells*, 52 N.C. App. 311, 314, 278 S.E.2d 527, 529 (1981) (noting that our Supreme Court has held in several cases that "it is competent for an investigating officer to testify as to the condition and position of the vehicles and other physical facts observed by him at the scene of an accident").

On the other hand, if the law enforcement officer *did not personally observe the accident*, "[t]he jury is just as well qualified as the witness to determine what inferences the facts will permit or require." *Shaw v. Sylvester*, 253 N.C. 176, 180, 116 S.E.2d 351, 355 (1960). In fact, a law enforcement officer's "testimony as to his conclusions from those facts is incompetent." *Wells*, 52 N.C. App. at 529, 278 S.E.2d at 529.

In *State v. Denton*, this Court observed that, "we can find no instance of lay accident analysis testimony in North Carolina." *State v. Denton*, 265 N.C. App. 632, 636, 829 S.E.2d 674, 678 (2019) (emphasis in original). "Accident reconstruction by its very nature requires expert analysis of the information collected from the scene of the accident and falls under Rule of Evidence 702 . . . ." *Id.* Indeed, in *State v. Maready*, this Court held that, "[a]ccident reconstruction opinion testimony *may only be admitted by experts*, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury." *Maready*, 205 N.C. App. 1, 17, 695 S.E.2d 771, 782 (2010) (emphasis added).

Here, the State did not proffer the law enforcement officer who responded to the scene of the accident as an expert witness in accident reconstruction, and upon our careful review of the transcript, we conclude that the trial court did err in allowing the law enforcement officer to testify about the cause of the accident and defendant's intent at the time of the accident despite the officer not having witnessed the accident. The law enforcement officer testified that his "opinion is it was an intentional act[;]" however, we must reiterate that our Supreme Court has long held that "[t]he jury is just as well qualified as the witness to determine what inferences the facts will permit or require[,]" when the lay witness has not *actually observed the accident*, *Shaw*, 253 N.C. at 180, 116 S.E.2d at 355, and allowing a law enforcement officer to proffer opinion testimony about defendant's intent at the time of the accident has long constituted *reversible* error. *See Wells*, 52 N.C. App. at 316, 278 S.E.2d at 530 (holding that the defendant in that case "is entitled to a new trial on the manslaughter charge as a result of the court's erroneous admission into evidence of the incompetent opinion testimony" of the law enforcement officer); *see also Cheek v. Barnwell Warehouse & Brokerage Co.*, 209 N.C. 569, 183 S.E. 729 (1936) (affirming the trial court's exclusion of opinion testimony by a *lay witness* based upon his examination of the scene of an accident where *the lay witness had not personally witnessed the accident*).

Moreover, the law enforcement officer in the present case made no showing which could be construed as "prov[ing] to the trial court's satisfaction that [he] ha[s] a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury[,]" *Maready*, 205 N.C. App. at 17, 695 S.E.2d at 782. Therefore, we conclude that defendant was prejudiced and the trial court *did* commit *reversible* error in allowing the law enforcement officer—who did not observe the accident—to testify as if the law enforcement officer was an expert witness in accident reconstruction.

However, although the trial court erred in allowing the lay witness to testify as an expert, we review the issue for *plain error*, because defense counsel did not object to the erroneously admitted testimony at trial. After careful review, we conclude that defendant has satisfied this high bar. There was no dispute about whether defendant had struck Todd with his vehicle; the dispute in this case was about whether defendant had *intended* to hit Todd. We conclude that allowing the law enforcement officer to testify that his "opinion is it was an intentional act" had a probable impact on the jury and necessitates a new trial.

Finally, we note that defendant has filed a petition for writ of certiorari with this Court seeking review of the trial court's judgment sentencing defendant as a habitual felon, although the issue was never submitted to the jury and defendant never personally pled guilty to being a habitual felon. However, in light of our disposition, we need not address defendant's meritorious arguments on this issue, as the errors committed below may not be repeated in a new trial. As a result, defendant's petition for writ of certiorari is dismissed as moot.

III. Conclusion

For the aforementioned reason, we conclude that the trial court committed plain error in allowing a lay witness to give an expert opinion about the cause of the accident and defendant's intent at the time of the accident; consequently, we vacate and remand for a new trial.

VACATED AND REMANDED FOR NEW TRIAL.

Judge TYSON concurs.

Judge STADING dissents by separate opinion.

STADING, Judge, dissenting.

I respectfully dissent from the majority's opinion, which addresses only defendant's first argument. I do not believe that the admission of the law enforcement officer's testimony amounted to plain error.

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been

> done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (cleaned up). "Trial errors not amounting to constitutional violations do not warrant awarding a new trial unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *State v. Weldon*, 314 N.C. 401, 411, 333 S.E.2d 701, 707 (1985) (cleaned up). "Erroneous admission of evidence may be harmless where there is an abundance of other competent evidence to support the state's primary contentions, or where there is overwhelming evidence of defendant's guilt." *Id.* (cleaned up).

Here, even if the admission of the officer's testimony was in error, the record contains abundant other evidence to support the jury's verdict, which does not raise a reasonable possibility that a different result would have been reached at the trial. *See State v. Harshaw*, 138 N.C. App. 657, 662, 532 S.E.2d 224, 227 (2000) (holding admission of testimony was not prejudicial because there was plenary other evidence at trial that supported the State's theory of premeditation and deliberation). For example, an eyewitness recounted the events surrounding the collision:

> Q. All right. Did you see the collision between the defendant and Mr. Todd?
>
> A. Yes, sir.
>
> Q. Can you tell the jury about that?
>
> A. Okay. Well[,] I was on my 4-wheeler. [Mr. Todd] was on his . . . 4-wheeler in front of me. We w[ere] about to leave out of the driveway. That's when that - - the white truck comes by, crossed the . . . double yellow lines. Hits the 4-wheeler. It ends up in the ditch.
>
> Q. Did you hear any noise as he approached - - the defendant approached?
>
> A. I heard the truck rev up.

> Q. Can you replicate that for the jury, how that sounded?
>
> A. Whoo, pow. Like that. And . . . I was in shock at the same time so I didn't know . . . what to do. So I jumped off my 4-wheeler and was looking for [Mr. Todd] and I heard [Defendant] say, "Where's that motherf[***]er at? Where's that motherf[***]er at?"
>
> . . . .
>
> Q. All right. Now did the defendant get out of the truck at some point and start fussing at you?
>
> A. Well, when he . . . backed out of the driveway and stopped for a little bit. He was hollering, "Y'all motherf[***]ers w[ere] in my yard."
>
> . . . .
>
> Q. Okay. Did you ever hear the defendant ask if Mr. Todd was okay?
>
> A. No.
>
> Q. Did he ever go check on him and see . . . .
>
> A. No.

Other evidence showed a lack of brake marks on the road, but tire marks existed leading towards the 4-wheeler in the ditch. *See id.*; *see also State v. Buie*, 194 N.C. App. 725, 734, 671 S.E.2d 351, 357 (2009) (concluding admission of law enforcement officer's testimony was a harmless error—not the higher plain-error standard—since there was "sufficient evidence to support the jury's decision, independent from the testimony[.]"). Accordingly, Defendant has not shown a fundamental error occurred at trial; he has not established prejudice such "that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (cleaned up).

Considering the lack of prejudice, I would also hold that defendant has not established that he received ineffective assistance of counsel. To show that his trial counsel's assistance was so defective as to require reversal of his conviction, defendant must satisfy two test components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning

> as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Here, defendant cannot meet the second prong because the outcome would remain the same. *See State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (citation omitted) ("The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.").

Defendant also argues that it was incumbent upon the trial court to intervene during the prosecutor's closing argument, focusing on the statement that defendant "gets back in the truck and he backs out over [Mr. Todd's] legs[.]" But because defendant did not object at trial, our review of the alleged error shows that he faces too high of a hurdle. *See generally State v. Parker*, 377 N.C. 466, 474, 858 S.E.2d 595, 600 (2021) (noting the defense bar cannot "sit back in silence during closing arguments but then claim error whenever a trial court fails to address or otherwise correct a misstatement of the evidence."); *see State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (holding the "standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.").

For a trial court to intervene during a closing argument without a timely objection, the statement must be extreme and "grossly improper" to render the trial "fundamentally unfair" to a defendant's due process rights. *Parker*, 377 N.C. at 472, 858 S.E.2d at 599. That is, "[a] 'trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial.' " *Id.* (quoting *State v. Smith*, 351 N.C. 251, 269, 524 S.E.2d 28, 41 (2000)). Even if a particular argument were improper, we look to whether a defendant was prejudiced by assessing "the likely impact of any improper argument in the context of the entire closing." *State v. Copley*, 374 N.C. 224, 230, 839 S.E.2d 726, 730 (2020) (cleaned up).

Here, the prosecutor's statement during the closing argument was an improper misstatement of the evidence. *See Parker*, 377 N.C. at 474,

858 S.E.2d at 601 ("The misstatements by the prosecutor appear to be mistakes in arguing the evidence admitted at trial for which defendant did not lodge an objection, and defendant has failed to meet his heavy burden."). Still, it was not grossly improper such that it prejudiced defendant to warrant a new trial when measured against the entirety of the closing. *See id.*; *see also State v. Peterson*, 361 N.C. 587, 606–07, 652 S.E.2d 216, 229 (2007) ("Because we assume the argument was improper, we must determine whether the argument prejudiced defendant to the degree that he is entitled to a new trial.").

"This is not the case where an attorney engage[d] in name-calling, ma[de] statements of opinion, intrude[d] upon constitutional rights, or reference[d] events outside of the evidence." *Id.* (citing *Jones*, 355 N.C. at 130, 558 S.E.2d at 106); *see Jones*, 355 N.C. at 133, 558 S.E.2d at 107 ("[W]e hold that the trial court abused its discretion when it allowed, over defendant's objection, the prosecutor's closing argument linking the tragedies of Columbine and Oklahoma City with the tragedy of the victim's death in this case."); *see also State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) (holding the trial court erred in not intervening *ex mero motu* when the prosecutor impermissibly commented on the defendant's right to remain silent during sentencing by stating, "he decided just to sit quietly. He didn't want to say anything that would 'incriminate himself' "). "Absent extreme or gross impropriety in an argument, a judge should not be thrust into the role of an advocate based on a perceived misstatement regarding an evidentiary fact when counsel is silent." *Parker*, 377 N.C. at 474, 858 S.E.2d at 601.

Defendant next contends that the trial court erred by misstating North Carolina Criminal Pattern Jury Instruction 101.20, *Weight of the Evidence*, which reads:

> You are the sole judges of the weight to be given any evidence. *If you decide that certain evidence is believable* you must then determine the importance of that evidence in light of all other believable evidence in the case.

N.C.P.I.—Crim. 101.20 (June 2011 Replacement) (emphasis added). The parties agreed to this instruction, but during the actual charge, the trial court rendered the following:

> Weight of the evidence. You are the sole judges of the weight to be given any evidence -- to any evidence. *You must decide that certain evidence is believable.* You must then determine the importance of that evidence in light of all the other believable evidence in the case.

If a trial court erred by deviating from the agreed-upon instructions, such "[a]n error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (cleaned up). And if the instructions construed as a whole made "it sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed, any exception to it will not be sustained even though the instruction could have been more aptly worded." *State v. Williams*, 299 N.C. 652, 660, 263 S.E.2d 774, 779-80 (1980) (citations omitted).

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

State v. Graham, 287 N.C. App. 477, 486–87, 882 S.E.2d 719, 727 (2023) (cleaned up); *see also Odom*, 307 N.C. at 661, 300 S.E.2d at 378–79 ("In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt.").

While the trial court erroneously varied in its application of the instructions, the impact failed to have a probable impact on defendant's guilt when read in context. *See State v. Williams*, 315 N.C. 310, 327-28, 338 S.E.2d 75, 86 (1986) (cleaned up) ("We have recognized that every variance from the procedures set forth in the statute does not require the granting of a new trial."). In other words, given the charge instructions in their entirety, the variance is not so fundamental that the jury would have reached a different result. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Next, the State concedes defendant's argument that the habitual felon indictment was fatally defective since two of the referenced convictions fall outside the purview of N.C. Gen. Stat. § 14-7.1 (2023). Both parties are correct on this point. I would therefore remand the case for resentencing. This result renders defendant's petition for writ of *certiorari* moot.

Last, defendant argues that the trial court erred by ordering restitution for $592,000 as unsupported by the evidence. "[T]he quantum of evidence needed to support a restitution award is not high. When there is some evidence about the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011) (cleaned up). Mr. Todd testified, "First bill I got was $525,000. Then I got an air flight bill. I think it was $42,000. And I'm still going to doctors." Hence, there was at least "some evidence" supporting an award of restitution. Still, it does not provide the level of specificity required to support the award. *Id.* at 286, 715 S.E.2d at 849. As a result, remand is necessary "for the trial court to determine the amount of damage proximately caused by defendant's conduct and to calculate the correct amount of restitution." *Id.* at 286, 715 S.E.2d at 849-50.

Considering the foregoing, I would hold any error allowing the trooper's opinion testimony did not rise to the level of plain error and defendant's trial counsel did not provide ineffective assistance. Additionally, I would hold that the trial court did not prejudicially err when it instructed the jury or failed to intervene *ex mero motu* during the prosecutor's closing argument. Therefore, I would affirm defendant's convictions for injury to personal property and assault with a deadly weapon with intent to kill or inflict serious bodily injury. However, as conceded by the State, I would reverse defendant's habitual felon status conviction due to the fatally defective indictment and remand this case for resentencing without the habitual felon sentencing enhancement. Additionally, on remand, the trial court should review the restitution award to determine the amount of damage proximately caused by defendant.

STATE OF NORTH CAROLINA
v.
RAJI MILLS

No. COA23-1097

Filed 15 October 2024

Sentencing—presumption of regularity—improper considerations—defendant's decision to go to trial—no error shown

In an appeal from sentences for robbery with a dangerous weapon and possession of a firearm by a felon, where defendant had arrived late to trial after rejecting the State's plea offer, and where the trial court denied defendant's request at sentencing for concurrent rather than consecutive sentences, defendant could not overcome the presumption of regularity (afforded to sentences falling within the statutory range) by showing that the court improperly considered his decision to exercise his constitutional right to a jury trial. In its pretrial comments, the court did not reference any plea offers or potential sentences, focusing instead on defendant's failure to timely appear and on setting bail at an amount that would ensure his attendance at trial. During sentencing, the court expressly stated that it was not punishing defendant for going to trial; further, in referencing its discretion to impose lesser sentences for defendants who accept responsibility for their crimes, the court merely made a truthful assertion about North Carolina sentencing law. Additionally, the court not only sentenced defendant within the presumptive range for his crimes, but it also suspended his sentence for the possession conviction.

Appeal by defendant from judgments entered 16 February 2023 by Judge Mike Adkins in Rowan County Superior Court. Heard in the Court of Appeals 13 August 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Sage A. Boyd, for the State.

Stephen G. Driggers for defendant-appellant.

ZACHARY, Judge.

Defendant Raji Mills appeals from the trial court's judgments entered upon a jury's verdicts finding him guilty of two counts of robbery with

a dangerous weapon and one count of possession of a firearm by a felon. Defendant does not challenge his convictions; he challenges only the trial court's sentencing upon those convictions. We conclude that Defendant has failed to show any sentencing error.

BACKGROUND

On 2 August 2021, Defendant was indicted for two counts of robbery with a dangerous weapon and one count of possession of a firearm by a felon. On 13 February 2023, the day before Defendant's case came on for jury trial, Defendant rejected the State's plea offer. The next day, when this matter was called for trial, Defendant failed to appear. The trial court set Defendant's bond at one million dollars, stating:

> I'm going to set his bond at a million because he – you know, this is reckoning day. And [it] seemed to be he was bouncing back and forth all day yesterday, and now that he's facing [the] reality of, you know, having to be held accountable for what he's done he's not here.
>
> . . . .
>
> John Wayne says life is tough, it's tougher if you're stupid, and [Defendant has] made a bad decision, another bad decision today.

Prior to jury selection, Defendant arrived. He was taken into custody and the trial proceeded without any mention of his tardiness or choice to proceed to trial.

On 16 February 2023, the jury returned verdicts finding Defendant guilty of all three charges. At sentencing, the State requested that the trial court impose consecutive sentences:

> THE COURT: All right. [Does the] State want to be heard on sentencing other than prior record level?
>
> [THE STATE]: Yes, sir. The [S]tate would request these sentences to run consecutive to each other based in part o[n] [Defendant]'s record. And Your Honor's heard a lot of testimony about the nature of these crimes. And I also have a victim impact statement here from [one of the robbery victims] who . . . wanted to address the Court . . . . His request would also be of the Court to run these sentences consecutively.
>
> So, again, based on the nature of the testimony and [Defendant]'s record that Your Honor has before

> you, those prior felony convictions, it does appear [that Defendant] has been previously convicted of possession of a firearm by [a] felon. As Your Honor knows, robbery with a dangerous weapon is just a hairline away from murder, that's all it takes is to pull the trigger, and there were two of these. You've heard from the two victims whose lives were impacted, and based on [Defendant]'s sentencing record I would ask the Court to run these all consecutively.

Defendant then stipulated to his prior record level but asked that the trial court run his sentences concurrently.

During its oral rendering of Defendant's sentence, the trial court directly addressed Defendant:

> THE COURT: . . . I don't know what transpired to cause you to go out of five years of not having been in trouble and decide to jump in feet first into . . . the deep end of the pool, but an armed robbery is one of the more serious things that can happen in this society. It is, as the former district attorney Bill Kenerly used to say, six pounds of pressure from being a murder. At the distance that these victims were from the people holding the firearms, there would have been no missing.
>
> . . . .
>
> I want to sentence you for what you've done, all right? . . . I'm not passing judgment upon you as a person. I'm passing judgment on your actions.
>
> Your attorney makes the point that you have the constitutional right to a jury trial. I'm not going to punish you for exercising that; however, the law also allows me in my sentencing discretion to consider a lesser sentence for people who step forward and take responsibility for their actions. By exercising your right to a jury trial[,] you never ever did that.

After remarking that it had "considered the evidence and the arguments of counsel, statements from the victim," the trial court imposed consecutive terms of 84 to 113 months for the robbery with a dangerous weapon convictions, those sentences being in the presumptive range for that offense given Defendant's prior record level. The trial court also sentenced Defendant to 17 to 30 months for the possession of a firearm

by a felon conviction, which the trial court suspended for 36 months' supervised probation.

Defendant filed timely written notice of appeal on 20 February 2023.

DISCUSSION

Defendant presents a single argument on appeal: that certain of the "trial court's pretrial comments," together with its statements at sentencing, "created an inference that [Defendant's] choice to have a jury trial was improperly considered during his sentencing." For those reasons, Defendant contends that "[a]lthough [his] sentences were within the presumptive range, they are improper as a matter of law" such that he is entitled to resentencing. The State, by contrast, contends that "the trial court's statements were an accurate reflection of the law" and were not made in error. We agree with the State's position.

"The general rule is that a judgment is presumed to be valid and will not be disturbed absent a showing that the trial [court] abused [its] discretion." *State v. Pickens*, 385 N.C. 351, 359–60, 893 S.E.2d 194, 200 (2023) (citation omitted). "A decision entrusted to a trial [court]'s discretion may be reversed only if it is manifestly unsupported by reason or so arbitrary that it could not have been a reasoned decision." *Id.* at 360, 893 S.E.2d at 200 (citation omitted). However, "[t]he extent to which a trial court imposed a sentence based upon an improper consideration is a question of law" that this Court reviews de novo. *State v. Johnson*, 265 N.C. App. 85, 87, 827 S.E.2d 139, 141 (2019) (citation omitted).

"A sentence within the statutory limit will be presumed regular and valid." *State v. Tice*, 191 N.C. App. 506, 511, 664 S.E.2d 368, 372 (2008) (citation omitted). Yet "[i]t is well established that a criminal defendant may not be punished at sentencing for exercising his constitutional right to trial by jury." *Id.* (cleaned up). Accordingly, trial courts must "ensure that sentencing decisions are not based upon a defendant's decision to proceed to trial[.]" *Id.* at 516, 664 S.E.2d at 375.

In light of that precedent, error is shown where the trial court's "statements at the sentencing hearing clearly establish that he is punishing the defendant for not accepting the plea bargain offered by the State." *State v. Pinkerton*, 205 N.C. App. 490, 507, 697 S.E.2d 1, 11 (2010) (Hunter, J., dissenting), *rev'd for the reasons stated in the dissent*, 365 N.C. 6, 708 S.E.2d 72 (2011). Nonetheless, the "mere reference to a defendant's refusal to enter a guilty plea as the basis for determining the defendant's sentence . . . does not necessitate an award of appellate relief[.]" *Id.* at 504, 697 S.E.2d at 10.

For example, in *Tice*, the trial court remarked to the defendant at sentencing:

> I imagine you've got to be feeling awfully dumb . . . right now. You've had ample opportunities to dispose of this case. The State has given you ample opportunity to dispose of it in a more favorable fashion and you chose not to do so. And I'm not sure if you thought that you were smarter than everybody else or that everybody else was just dumb.

Tice, 191 N.C. App. at 513, 664 S.E.2d at 373.

This Court rejected the defendant's argument that the sentencing court's statements "indicate[d] that [the] defendant received the sentences that he did because he chose to exercise his right to a jury trial[.]" *Id.* at 514, 664 S.E.2d at 374. In reaching that holding, we explained that

> the remarks in this case, when viewed in context, [do not] indicate an improper motivation. The totality of the trial [court]'s remarks reveals that [it] was not sentencing [the] defendant more severely for choosing to reject a plea bargain, but rather *the trial* [*court*] *was focusing on* [*its*] *conclusion that* [*the*] *defendant had submitted false testimony and "fabricated" testimony from other witnesses*. The trial [court]'s initial comments referencing the plea bargain appear to be an unfortunate comment on [the] defendant's strategic gamble to forego a plea to a misdemeanor in favor of defending against substantial evidence with fabricated evidence. While such comments are unnecessary, they do not necessarily mandate—in light of the trial [court]'s further explanation—the conclusion that the trial [court] was basing [its] choice of sentence on [the] defendant's exercise of his constitutional right to a jury trial.

Id. (emphasis added).

In *Pinkerton*, the defendant based his appellate challenge on several statements made during both the pretrial and sentencing hearings. On appeal, a divided panel of this Court determined that the trial court had erroneously considered and punished the defendant for rejecting the State's negotiated plea offer and opting instead to exercise his constitutional right to a jury trial. *Pinkerton*, 205 N.C. App. at 502–03, 697 S.E.2d at 8–9 (majority opinion). In reaching this conclusion, the

majority singled out as improper two of the trial court's statements to the defendant during sentencing: "I'm not punishing you for not pleading guilty" and "I would have rewarded you for pleading guilty." *See id.* at 505–06, 697 S.E.2d at 11 (Hunter, J., dissenting). Particularly, the majority concluded that the trial court's statement, "I would have rewarded you for pleading guilty," was impermissible error. *Id.* at 502, 697 S.E.2d at 8–9 (majority opinion) ("[I]t is difficult for us to read the trial court's comment that he would have rewarded [the d]efendant for pleading guilty as anything other than an acknowledgement that [the d]efendant's sentence was heavier than it otherwise would have been had [he] not exercised his right to trial by jury.").

By contrast, the dissenting judge—whose reasoning would be adopted by our Supreme Court[1]—opined that there was "nothing improper about" these statements because they were simply "truthful assertion[s]":

> Clearly, every plea bargain serves to reward the defendant for admitting his or her guilt and saving the State the time and expense of trial. The reward is, in actuality, offered by the State, not the trial court. In approving the bargain reached between the State and the defendant, the trial court is then, in effect, rewarding the defendant with a sentence that is presumably less than it would have been had the defendant been convicted by a jury. Once the State has proceeded to try the defendant and he is convicted of the crimes charged, the State no longer seeks to reward the defendant. At that point, the trial court . . . is responsible for sentencing [the] defendant . . . . At this stage in the trial process, it would be illogical to expect the trial [court] to reward [the] defendant . . . .

Id. at 506, 697 S.E.2d at 11 (Hunter, J., dissenting).

Moreover, a criminal defendant is typically "informed by the trial court that he will be exposing himself to a longer term of imprisonment if he goes to trial and is convicted. A harsher penalty is a risk that the defendant bears when he elects to reject a plea bargain and proceeds to trial." *Id.* at 507, 697 S.E.2d at 11. "That harsher penalty is *not* a punishment for rejecting the plea"; rather, upon conviction, the trial court "is entitled to sentence the defendant to a term of imprisonment for each

1. *Pinkerton* was further appealed to our Supreme Court, which ultimately reversed our Court's decision for "the reasons stated in the dissenting opinion." *State v. Pinkerton*, 365 N.C. 6, 708 S.E.2d 72 (2011) (per curiam).

crime he is convicted of, and, in [the court's] discretion, to run those sentences concurrently or consecutively." *Id.*

In this case, Defendant takes issue with comments by the trial court both prior to trial and at his sentencing, after the jury's return of guilty verdicts. Our careful review of the transcript shows that these challenged pretrial remarks, in context, plainly result from and refer to the trial court's frustration that Defendant failed to appear when his case was called for trial, which the court may have considered to be a show of disrespect for the judicial process or an indication that Defendant was considering flight to avoid the consequences of his alleged crimes. Regardless, we fail to see how these comments implicate Defendant's potential sentencing in any manner. The trial court did not refer to any plea offers or potential sentences, but rather focused solely on setting bail at a level that would ensure Defendant's presence at trial. Accordingly, Defendant's case citations are inapposite and his argument as to these pretrial remarks is misplaced.

Turning to Defendant's contention that the trial court's comments at sentencing were constitutionally impermissible, we are similarly not persuaded. Defendant challenges the trial court's comments that Defendant had "the constitutional right to a jury trial" and the trial court was "not going to punish [him] for exercising" that right, but "the law also allow[ed] [the trial court] in [its] sentencing discretion to consider a lesser sentence for people who step forward and take responsibility for their actions[,]" and that "[b]y exercising [Defendant's] right to a jury trial [Defendant] never ever did that."

As in *Pinkerton*, the trial court here "specifically stated that [it] was *not* punishing [D]efendant for going to trial, and [we] see no reason to disbelieve" the trial court. *Id.* at 507, 697 S.E.2d at 11–12. As to the court's comment regarding its discretion to impose "a lesser sentence for people who step forward and take responsibility for their actions[,]" this is merely a "truthful assertion" regarding the discretion accorded by the General Assembly to trial courts under our statutory sentencing scheme. *Id.* at 506, 697 S.E.2d at 11 ("[N]o error in the trial court's comment, which took place after trial, that had defendant accepted the plea bargain, he would have been rewarded."); *see also* N.C. Gen. Stat. § 15A-1340.16(e)(15) (2023) (providing a mitigating factor at sentencing for a "defendant [who] has accepted responsibility for the defendant's criminal conduct").

Importantly, the court did not suggest, much less explicitly state, that it was imposing a harsher sentence because Defendant invoked

his right to a jury trial. *See Pickens*, 385 N.C. at 362, 893 S.E.2d at 202 ("The trial court in [this] case did not explicitly state that it was giving [the defendant] a harsher sentence because he chose to exercise his right to a jury trial."). Instead, "it is clear that the trial [court was] commenting on [Defendant's] missed opportunity to dispose of [his] case[ ] in a more favorable fashion," *Pinkerton*, 205 N.C. App. at 508, 697 S.E.2d at 12 (Hunter, J., dissenting) (cleaned up), by taking responsibility for his crimes and using that action to appeal to the trial court's sentencing discretion.

"The trial court proceeded to sentence [D]efendant within the presumptive range to [two] consecutive sentences" for the two counts of robbery with a dangerous weapon. *Id.* at 507, 697 S.E.2d at 12. "The trial court was statutorily permitted to impose this sentence, it is presumed regular and valid, and [we] see no improper basis for the sentence." *Id.* (cleaned up). Further, we note that the trial court not only imposed presumptive range sentences on the robbery counts; it also elected to suspend Defendant's sentence on the conviction for possession of a firearm by a felon. "[B]ecause the trial court's remarks did not overcome the presumption that the trial court's sentence was valid[,]" *id.* at 508, 697 S.E.2d at 12, Defendant's argument is overruled.

CONCLUSION

For the reasons stated herein, we hold that Defendant has failed to demonstrate any error in his sentence.

NO ERROR.

Judges CARPENTER and WOOD concur.

STATE OF NORTH CAROLINA
v.
MICHAEL JOHN MOORE, SR., DEFENDANT

No. COA23-816

Filed 15 October 2024

1. Search and Seizure—search of residence—wife's body found—inevitable discovery doctrine—standing to challenge search

In defendant's trial for his wife's murder, the trial court properly applied the inevitable discovery doctrine when denying defendant's motion to suppress evidence from a search of the marital residence, where law enforcement had discovered the wife's body tied down to the bed in their main bedroom. The doctrine prevents the exclusion of illegally obtained evidence that would have been inevitably discovered, not only by law enforcement, but also by civilians who could turn in the evidence to law enforcement; here, the State presented ample evidence that the wife's body would have been inevitably discovered by either her family or by the landlord, who had begun eviction proceedings. At any rate, defendant lacked standing to challenge the search because of evidence showing that he had permanently abandoned the residence.

2. Kidnapping—restraint—beyond that inherent in other crime—sufficiency of evidence—double jeopardy

In an appeal from convictions for first-degree murder and first-degree kidnapping arising from the death of defendant's wife, whose body was found tied down to a bed with trash bags covering her head, the Court of Appeals—after invoking Appellate Rule 2 to review defendant's waived constitutional argument—vacated the kidnapping conviction, holding that the trial court violated defendant's constitutional right against double jeopardy when it declined to dismiss the kidnapping charge at trial. Because the binding of her hands, feet, and arms prevented the wife from removing the bags that caused her death by suffocation, the State failed to introduce substantial evidence that the restraint of the wife—which served as the basis for the kidnapping charge—was independent and apart from that inherent in the commission of the murder.

3. Evidence—murder trial—testimony regarding prior incident with victim—no prejudice shown

After defendant's trial for his wife's murder by suffocation, during which defendant moved to exclude testimony about a prior

incident when his mother-in-law saw defendant put his hands around his wife's neck, defendant failed to show on appeal that, even if the testimony had been inadmissible under Evidence Rules 403 and 404(b), he was prejudiced by its admission into evidence. Based on the overwhelming evidence of defendant's guilt apart from that testimony, there was no reasonable possibility that the outcome of defendant's trial would have been different had the jury not heard the challenged testimony.

4. Appeal and Error—preservation of issues—waiver—constitutional argument—murder trial

In a first-degree murder prosecution, defendant failed to preserve for appellate review (and therefore waived) his constitutional argument regarding the exclusion of his own testimony at trial, where he failed to properly raise the argument before the trial court.

Judge THOMPSON dissenting.

Appeal by defendant from judgment entered 10 August 2022 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 12 June 2024.

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

Widenhouse Law, by M. Gordon Widenhouse, Jr., for defendant-appellant.

DILLON, Chief Judge.

Defendant Michael John Moore, Sr., appeals from a jury's verdict convicting him of first-degree murder, first-degree kidnapping, and common law robbery. We discern error only with the denial of his motion to dismiss.

I. Background

On 22 August 2018, Wendy Timmons-Moore was found dead by police in the master bedroom of the residence she and Defendant were renting. Her body was tied down to the master bed. Police had entered the house to conduct a wellness check after Ms. Timmons-Moore's family was unable to contact her for over a week. Within hours of the discovery, the police obtained a warrant to search the house.

During the search, officers found a Walmart receipt dated 10 August 2018, twelve days prior to their discovery of the body, showing a purchase for duct tape. In the master bedroom, they removed two trash bags that were covering the head of Ms. Timmons-Moore's body. Upon removing the trash bags, they observed duct tape running horizontally and vertically around the victim's head and over her mouth. The victim's hands and feet were also tied down to the bed by zip ties, electrical cords, an HDMI cable, and handcuffs. Upon conducting a DNA analysis, Defendant's DNA was found on the duct tape binding the victim's wrists and ankles, and DNA was found on the "knotted area" of the HDMI cord binding the victim's ankles. Subsequently, the officers discovered that Defendant had not paid rent for August and that the landlord had begun eviction proceedings.

On 23 August 2018, the day after Ms. Timmons-Moore's body was discovered, the Las Vegas Police Department notified the Fayetteville Police Department that they had found the victim's car in Las Vegas. Inside the car, officers found a wedding band that resembled the victim's wedding ring and the keys to the handcuffs that were used on Ms. Timmons-Moore's body. Further investigation revealed that Defendant had pawned some of Ms. Timmons-Moore's jewelry two days prior to officers finding her body.

Defendant was convicted by a jury of first-degree murder (for killing Ms. Timmons-Moore), first-degree kidnapping (for tying Ms. Timmons-Moore to the bed), and common law robbery (for stealing her personal property). The trial court sentenced Defendant to active prison terms consistent with the jury's verdicts. Defendant was sentenced to life without parole for the murder conviction, a consecutive sentence of 60 to 84 months for the kidnapping conviction, and a consecutive sentence of 12 to 24 months for the robbery conviction. Defendant appeals.

II. Analysis

We note Defendant's appeal is improper. However, he has petitioned our court to issue a writ of *certiorari*. In our discretion, we grant Defendant's petition in aid of our jurisdiction.

Defendant presents four arguments in this appeal. We address each argument in turn.

A. Motion to Suppress

[1] Defendant first argues the trial court erred in denying his motion to suppress the evidence collected during the 22 August 2018 search. Specifically, Defendant argues that the trial court inappropriately

expanded the inevitable discovery doctrine by relying on the possible discovery of Ms. Timmons-Moore's body by *civilians* unconnected to law enforcement. For the reasoning below, we disagree.

Our Supreme Court has held that

> evidence which would otherwise be excluded because it was illegally seized may be admitted into evidence if the State proves by a preponderance of the evidence that the evidence would have been inevitably discovered by the law enforcement officers if it had not been found as a result of the illegal action.

State v. Pope, 333 N.C. 106, 114 (1992).

In this case, regardless of whether the evidence at the residence was initially obtained illegally, we conclude that the trial court properly applied the inevitable discovery doctrine. First, we note that our Supreme Court in *Pope* held that the inevitable discovery doctrine applied where the illegally obtained evidence would have been inevitably discovered by civilians and turned over to law enforcement. *See id.* at 114–15. Here, there was ample evidence presented from which the trial court could determine that Ms. Timmons-Moore's body would have been inevitably discovered by either her family or by the landlord who had begun eviction proceedings.

Further, there was evidence presented which showed that Defendant did not have standing to challenge the search of the residence, as there was evidence that he had permanently abandoned the residence. *See State v. McKinney*, 361 N.C. 53, 56 (2006) (holding that "[a] reasonable expectation of privacy in real property may be surrendered . . . if the property is permanently abandoned."). Thus, we conclude the motion to suppress was properly denied.

B. Motion to Dismiss

[2] Next, Defendant argues that the trial court erred in denying his motion to dismiss the charge of kidnapping because it violates his constitutional right against double jeopardy. Specifically, Defendant argues that the State failed to introduce substantial evidence that the restraint of Ms. Timmons-Moore's body was independent and apart from the inherent commission of the murder. The State, however, argues that Defendant waived his right to review his double jeopardy claim since he failed to raise the issue at sentencing.

"[T]he Double Jeopardy Clauses of the North Carolina and United States Constitutions only protect against multiple *punishments* for the

same offense." *State v. Stroud*, 345 N.C. 106, 113 (1996) (emphasis in original). Thus, merely submitting both the kidnapping charge and the murder charge to the jury does not subject Defendant to multiple punishments. *See id*. It may be that a jury would have convicted Defendant of one crime but not the other. Instead, double jeopardy would be an issue during sentencing only after the jury convicted Defendant of both crimes.

At trial, Defendant moved to dismiss the kidnapping charge at the close of the State's evidence and again at the close of all evidence, but Defendant failed to raise the issue during his sentencing. In our discretion, to the extent Defendant has waived appellate review of this issue, we invoke Rule 2 of our Rules of Appellate Procedure, which allows our Court to consider the issue. *See State v. Campbell*, 369 N.C. 599, 603 (2017) (recognizing that Rule 2 is invoked only in exceptional circumstances).

Our Supreme Court has held that "[t]o avoid constitutional violations related to double jeopardy, the confinement, restraint, or removal element [of a kidnapping charge] 'requires a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony.' " *State v. Stokes*, 367 N.C. 474, 481 (2014) (citing *State v. Irwin*, 304 N.C. 93, 103 (1981)).

Defendant contends that *State v. Prevette* is controlling in this case. 317 N.C. 148 (1986). In *Prevette*, the victim's hands, feet, and knees were bound, and the victim's mouth was bound and gagged, suffocating her to death. *Id*. at 160–61. Our Supreme Court found that the victim's death would not have occurred without the restraints and that "the restraint of the victim which resulted in her murder [was] indistinguishable from the restraint used by the State to support the kidnapping charge." *Id*. at 157. Thus, the Court concluded that "[b]ecause the State failed to produce substantial evidence of restraint, independent and apart from the murder . . . the trial court improperly failed to allow defendant's motion to dismiss the charge of first[-]degree kidnapping." *Id*. at 158.

Conversely, the State contends that *Stroud* controls. In *Stroud*, the victim was struck dozens of times during an argument that spanned six or seven hours. 345 N.C. at 112. The accumulation of injuries affected the victim's ability to move and eventually incapacitated her. *See id*. Our Supreme Court found that some of the blows merely immobilized and restrained the victim, while other blows caused her death. *See id*. Thus, the Court concluded that since not all the blows were necessary conditions of the murder, there was sufficient evidence that the restraint and death blows were separate and independent of each other, permitting the Defendant to be charged for both murder and kidnapping. *See id*.

Relying on *Stroud*, the State argues that the manner and degree of the restraint was excessive. More specifically, not all the bindings were necessary to kill the victim. The State's argument is compelling. However, we conclude the facts in the current case are analogous to *Prevette*.

Here, evidence shows that because Ms. Timmons-Moore's hands, feet, and arms were restrained, she could not remove the bags that caused her suffocation, just as the victim in *Prevette*. There is no evidence that Ms. Timmons-Moore died from blows to her body, but rather the evidence shows that she died by suffocation. It may be that the restraining of Ms. Timmons-Moore's legs/feet was not inherent in causing her suffocation. That is, she would have died anyway without *that* restraint. However, the victim's legs/feet were restrained in *Prevette* as well. And we are bound by our Supreme Court's holding in that case that the binding of the legs/feet were inherent in the murder by suffocation.

Giving the State every reasonable inference, we must conclude, based on our Supreme Court's holding in *Prevette*, that the State failed to produce substantial evidence that Defendant restrained the victim independently and apart from the murder. Thus, the trial court committed reversible error, and we vacate Defendant's sentence on the kidnapping charge.

C. Inclusion of Testimony

[3] Defendant moved to exclude evidence of a prior incident where Ms. Timmons-Moore's mother testified that Defendant put his hands around her daughter's neck. Defendant objected to this evidence under North Carolina Rules of Evidence 403 and 404(b), N.C.G.S. §§ 8C-1, R. 403, 404(b), but the objection was overruled.

We conclude that Defendant failed to meet his burden of showing that he was prejudiced by that testimony. Based on the overwhelming evidence of Defendant's guilt apart from that testimony, we conclude there is no reasonable possibility that the outcome of Defendant's trial would have been any different had the jury *not* heard the challenged testimony.

D. Exclusion of Defendant's Testimony

[4] Lastly, Defendant argues that the trial court abused its discretion by sustaining certain evidentiary objections by the State in which the trial court excluded certain testimony. After careful review of the record, we agree with the State that Defendant failed to properly raise his argument as a constitutional issue in the trial court. Therefore, those arguments are waived on appeal. *See State v. Hunter*, 305 N.C. 106, 112 (1982). In

any event, based on our review of the record, we further conclude that the trial court did not commit reversible error by sustaining the evidentiary objections.

III. Conclusion

Because binding precedent compels us to conclude that Defendant's restraint of Ms. Timmons-Moore was inherent in the murder, we vacate Defendant's sentence for his kidnapping conviction. We, otherwise, conclude Defendant received a fair trial, free of reversible error and, accordingly, leave undisturbed the portion of the judgment sentencing him to life without parole for the murder conviction and to 12 to 24 months for the robbery conviction.

NO ERROR IN PART, VACATED IN PART.

Judge GORE concurs.

Judge THOMPSON dissents by separate opinion.

THOMPSON, Judge, dissenting.

I disagree with the majority that the State failed to introduce substantial evidence of a restraint of the victim's body independent of and apart from the inherent commission of the victim's murder, in order to support the conviction for first-degree kidnapping. For this reason, I respectfully dissent.

A motion to dismiss due to insufficiency of the evidence "presents a question of law and is reviewed *de novo* on appeal." *State v. Norton*, 213 N.C. App. 75, 78, 712 S.E.2d 387, 390 (2011). In making this determination, we "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." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). As the majority notes, "[t]o avoid constitutional violations related to double jeopardy, the confinement, restraint, or removal element requires a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony." *State v. Stokes*, 367 N.C. 474, 481, 756 S.E.2d 32, 37 (2014).

I am persuaded by the State's argument, set forth in their appellate brief, that a coffee cup and ashtray filled with cigarette butts creates a

"reasonable inference that [d]efendant sat and smoked cigarettes while his wife l[ay] there hopeless, *but alive*." Indeed, evidence proffered at trial established that the victim had duct tape over her mouth and around her head, was bound to the bed by zip ties and electrical cords around her ankles, had handcuffs on her hands, zip ties binding her wrists to her knees, and a brown electrical cord wrapped around her neck and the bed's headboard.

The sheer number of restraints exercised against the victim in the present case, coupled with evidence that there were multiple cigarettes, a cup of coffee, and a chair near the bed where the victim was discovered, creates a reasonable inference that defendant first kidnapped the victim, restrained her for some unknown period of time, and *then* after having kidnapped and restrained the victim, at a later point in time, proceeded to place a bag over her head while her hands were handcuffed, killing her by asphyxiation.

In the present case, binding the victim's hands and placing a bag over her head were the restraints necessary in the commission of the underlying felony, murder by asphyxiation. However, there were additional restraints exerted against the victim—a brown electrical cord wrapped around her neck and the bed's headboard, and zip ties and electrical cords wrapped around her ankles—which again, coupled with evidence of a chair near the bed, multiple cigarette butts, and a cup of coffee, creates a reasonable inference that defendant exerted a restraint separate and apart from that which was inherent in the commission of the murder, by first kidnapping and restraining the victim for some unknown period of time while he smoked cigarettes and drank coffee, and after having done so, placed the final restraint, a bag, over her head.

After giving the State the benefit of *every* reasonable inference and resolving any contradictions in its favor, I would conclude that the evidence of the additional restraints of the victim—the zip ties and electrical cords wrapped around her ankles, and electrical cord around her neck—restraints separate and apart from the handcuffs on her hands and the bag over her head— which, again, were the restraints necessary to commit murder by asphyxiation in the present case—were sufficient to overcome defendant's motion to dismiss due to insufficiency of the evidence. For this reason, I would affirm defendant's first-degree kidnapping conviction, and respectfully dissent.

STATE OF NORTH CAROLINA
v.
TERREL DAWAYNE ROWDY

No. COA24-64

Filed 15 October 2024

Search and Seizure—traffic stop—odor of marijuana—lawfulness of frisk—probable cause to search vehicle

In a prosecution for carrying a concealed weapon, the trial court properly denied defendant's motion to suppress a firearm found during a search of his vehicle based on findings of fact that were supported by competent evidence and which, in turn, supported the ultimate conclusions of law that investigating officers lawfully conducted a *Terry* frisk of defendant's person based on a reasonable suspicion that defendant was armed and dangerous and that they had probable cause to conduct a search of the car. Defendant did not immediately pull over in response to the officer's blue lights and sirens and eventually stopped in a known high-crime area; the officer detected an odor of marijuana coming from defendant's open car window and discovered that defendant had prior convictions for drug offenses and for carrying a concealed weapon; after defendant was asked to step out of the car, he stopped answering questions, began speaking on his cell phone, and turned his body away from the officers; and officers found a "blunt" in defendant's pocket that they believed to contain marijuana. Defendant's arguments regarding the similarity between marijuana and legal hemp were grounded in policy and did not lessen the significance of the officers' observations that they smelled marijuana for purposes of establishing probable cause.

Judge ARROWOOD concurring by separate opinion.

Appeal by Defendant from judgment entered 7 June 2023 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 28 August 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alan D. McInnes, for the State.

Stephen D. Fuller for the Defendant.

WOOD, Judge.

Terrel Dawayne Rowdy ("Defendant") appeals from a jury conviction finding him guilty of carrying a concealed weapon in violation of N.C. Gen. Stat. § 14-269(a1). On appeal, Defendant argues the trial court erred when it denied his motion to suppress evidence of the firearm seized pursuant to a vehicular search. Defendant contends that the events following the law enforcement officer's investigatory stop due to a traffic violation were unlawful. Specifically, Defendant argues the officers lacked sufficient grounds to conduct a *Terry* frisk and lacked probable cause to search his vehicle. For the reasons stated below, we affirm the trial court's order denying Defendant's motion to suppress and hold Defendant received a trial free from error.

I. Factual and Procedural Background

On 26 July 2020, Forsyth County Sheriff Deputy Brandon Baugus was patrolling the area of Rural Hall. At approximately 3:45 p.m., Deputy Baugus was stationed at a parking lot observing the traffic on a nearby intersection. At this time, he observed the following: two vehicles approached the intersection and entered the left-hand turning lane; the vehicles were in the same lane of travel, with the front vehicle waiting to make the turn; the car in the rear, a Blue Ford Mustang, moved into the oncoming lane of traffic, accelerated past the other vehicle, and made a left turn. Recognizing this traffic violation, Deputy Baugus activated his blue lights and sirens and pursued the Mustang to conduct a traffic stop.

Despite Deputy Baugus' lights and sirens, the operator of the Mustang continued to drive and did not immediately heed to the officer's show of authority. The vehicle then entered the parking lot of the West Wall Street Apartments. Deputy Baugus again activated his siren several times in the parking lot to get the vehicle to stop, but the Mustang drove further into the parking lot. Eventually, the Mustang went in reverse, as if it was backing into a parking space, and stopped; Deputy Baugus parked his vehicle at the rear of the Mustang.

Deputy Baugus approached the Mustang and initiated conversation with the driver, Defendant, through the open passenger side window. Deputy Baugus informed Defendant that he was pulled over for a traffic violation and Defendant promptly provided his license and registration. During this short interaction, Deputy Baugus smelled an odor of marijuana emitting from Defendant's vehicle. Deputy Baugus then returned to his patrol vehicle to verify Defendant's information and check for outstanding warrants. He learned Defendant had a prior record of narcotics

offenses and a prior conviction for carrying a concealed gun. As Deputy Baugus reviewed the information, Deputy M.D. Mitchell was nearby and arrived to assist him at the traffic stop.

Deputy Baugus briefed Deputy Mitchell on the situation, asked him to obtain a current address from Defendant, and informed him that he detected an odor of marijuana in Defendant's vehicle. Upon Deputy Mitchell's return, he confirmed the odor. The officers went back to Defendant's vehicle and asked him to step out of the vehicle. Deputy Baugus asked Defendant why the odor was coming from his vehicle, if he had been smoking, and if he had been around someone who had smoked marijuana. Defendant responded "no" to each of the questions. As Deputy Baugus continued his questioning regarding the odor, Defendant stopped answering his questions and began speaking on his cell phone. Deputy Baugus told him he could not answer questions and speak on his phone at the same time, to which Defendant responded by "blading" his body away from Deputy Baugus at a 45-degree angle toward the vehicle. According to Deputy Baugus "blading" is "a detection device of someone who is getting confrontational or who is attempting to avoid conversation with you."

After Defendant disengaged from the conversation, the officers detained him but told him he was not under arrest. For the officer's safety, Deputy Mitchell frisked Defendant to ensure he did not have any weapons on him. According to Deputy Baugus it is "common practice" to frisk anyone that was detained. As a result of the frisk, Deputy Mitchell felt a "cylindrical object" in Defendant's left front pants pocket, which he discovered was a "blunt." Due to the odor and the officers' training and experience, they suspected it was a marijuana blunt. Deputy Baugus then performed a search of Defendant's vehicle and found the gun at issue in this case.

On 30 November 2020, a grand jury indicted Defendant for carrying a concealed weapon, pursuant to N.C. Gen. Stat. § 14-269(a1) and § 14-269(c), and possession of a stolen firearm. Defendant filed a motion to suppress on 28 April 2023. Defendant argues that the basis for the search, seizure, and arrest arose from the officer's opinion that the odor of marijuana was coming from Defendant's vehicle. However, Defendant contends, there is no factual way to differentiate between legal hemp and illegal marijuana, so the basis of odor alone is insufficient to identify the substance. Defendant asserts that because of the similarities between hemp and marijuana in both odor and appearance, the officers lacked probable cause to search him and the vehicle. Defendant further contends that without confirmation that the odor emanated from

an illegal substance, the officers acted under the presumption that it was marijuana resulting in an unlawful search. Defendant argues because the officers lacked probable cause, the search that led to the seizure of the gun was also unlawful. In Defendant's motion, he asked the trial court to suppress all evidence obtained as a result of the illegal search, seizure, and detention of Defendant.

On 5 June 2023, the trial court held an evidentiary hearing on Defendant's motion to suppress. By written order, the court denied Defendant's motion to suppress. The court found as follows: Deputy Baugus lawfully stopped Defendant after he observed a traffic violation; Defendant did not immediately pull over and drove to the West Wall Apartment complex; Deputy Baugus knew the area was a high crime area; Deputy Baugus detected an odor of marijuana in Defendant's vehicle; Deputy Baugus was informed Defendant had prior offenses for narcotics and carrying a concealed gun; Mitchell also observed a "strong" odor of marijuana; and Defendant stopped answering questions and turned his body away from the officers. The trial court concluded that the officer's decision to frisk Defendant was based on specific and articulable facts. Moreover, following the frisk and discovery of the "blunt," there was probable cause to search the vehicle. Because the search of Defendant and his vehicle was lawful, the trial court denied Defendant's motion to suppress.

On 7 June 2023, a jury found Defendant guilty of carrying a concealed weapon but not guilty of possession of a stolen firearm. He was sentenced to a term of eight to nineteen months of imprisonment, suspended for thirty months of supervised probation. Defendant gave oral notice of appeal at trial.

II. Analysis

On appeal, Defendant argues the trial court erred by denying his motion to suppress, specifically challenging certain findings of fact and conclusions of law regarding: (1) the officer's detection of marijuana based on odor; (2) the *Terry* frisk; and (3) the establishment of probable cause to search Defendant's vehicle. Defendant further argues that, due to these errors, the trial court plainly erred by denying his motion to suppress and by admitting the gun into evidence.

A. Motion to Suppress

The scope of review of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support

the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "We accord great deference to a trial court's findings of fact, as it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and then based upon those findings, render a legal decision." *State v. Knudsen*, 229 N.C. App. 271, 275, 747 S.E.2d 641, 645 (2013) (cleaned up). When "the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). "Conclusions of law, however, are reviewed *de novo*" meaning, "the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Faulk*, 256 N.C. App. 255, 262, 807 S.E.2d 623, 629 (2017) (cleaned up).

1. Challenged Findings of Fact

Defendant first argues the following findings of fact are not supported by competent evidence:

> 9. As he received the license and registration from Defendant, Deputy Baugus was only at the window of the Blue Mustang for a very short time, *and he observed a faint odor of marijuana* coming from the interior of the Blue Mustang.
>
> 16. Deputy Mitchell approached the Defendant, and asked him to roll the window down. While he was speaking to the Defendant, Deputy Mitchell *observed a strong odor of marijuana* coming from the Blue Mustang.
>
> 22. Defendant was frisked by Deputy Mitchell, and, during that frisk, Deputy Mitchell *pulled a "blunt" out of the Defendant's left front pants pocket*, and placed it on the spoiler of the Blue Mustang. When Deputy Mitchell pulled the "blunt" out, *he informed the Defendant that it was "marijuana"*. The Defendant did not, at any point, claim that he possessed industrial hemp.
>
> 23. The blunt removed from Defendant's pocket *appeared to be*, in the training and experience of both Deputy Baugus and Deputy Mitchell, *a marijuana "blunt*."

Each of the challenged findings relate to the odor of marijuana and the contents of the "blunt." Defendant argues there is insufficient evidence to support these findings and directs us to: (1) an SBI Memo explaining the difficulties in differentiating between legal hemp versus illegal

marijuana due to the similarities in odor and appearance, and (2) the officer's testimony at the hearing that they could not identify that the odor or "blunt" was marijuana as opposed to legal hemp. Thus, Defendant argues there is no evidence that the substance the officers smelled and recovered was illegal marijuana, rather than legal hemp. Defendant's argument is misplaced because the legalization of hemp does not eliminate the significance of the officer's detection of an odor of marijuana for the purposes of determining probable cause.

Here, the trial court found that Deputy Baugus received training on marijuana and on the identities, textures, and odor of marijuana; Mitchell received training to identify drugs, including weekly training with K-9's as to the detection of narcotics; Mitchell has identified marijuana hundreds of times in his years on patrol; and Mitchell investigated cases involving marijuana "blunts" hundreds of times. Accordingly, both officers were trained and had experience in identifying marijuana by sight and smell.

This Court analyzed similar challenged findings in *State v. Dobson*, 293 N.C. App. 450, 900 S.E.2d 231 (2024). In that case, the defendant argued "in light of the advent of legal hemp, it is now impossible for any law enforcement officer—whether human or canine—to identify 'the odor of marijuana' with only her nose." *Id.* at 454, 900 S.E.2d at 234. Like the present case, the defendant contended that the odor *may* be marijuana, but it also could be legal hemp. The Court in *Dobson* overruled the defendant's argument and concluded:

> [C]ontrary to Defendant's arguments, the legalization of industrial hemp did not eliminate the significance of detecting "the odor of marijuana" for the purposes of a motion to suppress. The legalization of industrial hemp "has not changed the State's burden of proof to overcome a motion to suppress." *Teague*, 286 N.C. App. at 179 n.6, 879 S.E.2d at 896 n.6.
>
> Indeed, to the extent that Defendant challenges these portions of the trial court's findings of fact because of their potential to suggest, by implication, that the officers *actually smelled marijuana*, any such concern is irrelevant to the dispositive issue. Ultimately, the significance of these findings is that the officers *smelled the odor of marijuana*, an odor that we have previously concluded continues to implicate the probable cause determination despite the legalization of industrial hemp.

Id. at 454, 900 S.E.2d at 234.

Similarly, in *Little*, the defendant relied on the SBI memo and argued "the trial court should have made a finding of fact that hemp and marijuana are indistinguishable by smell or appearance and that this fact requires a conclusion that the officers did not have probable cause to conduct the search." *State v. Little*, No. COA23-410, 2024 WL 4019033, at *3 (N.C. Ct. App. Sept. 3, 2024). There, the trial court made findings that three law enforcement officers smelled and observed what they believed to be marijuana, and the defendant did not claim it was hemp. *Id.* at *7. The Court in *Little* stated, "[e]ven if industrial hemp and marijuana look and smell the same, the change in the legal status of industrial hemp does not substantially change the law on the plain view or plain smell doctrine as to marijuana." *Id.* at *9. This Court ultimately held that the trial court's findings supported its conclusion that there was probable cause to search the defendant's vehicle, because the officer had a reasonable belief that the substance he smelled, and saw was marijuana. *Id.* at *9.

Here, too, Defendant argues there was insufficient evidence that the recovered substance was marijuana based on the smell and appearance. As in *Little*, there was evidence presented to the trial court that, based on the officers' training and experience, the officers smelled and observed marijuana, and Defendant did not claim he possessed legal hemp. Moreover, the officers had a reasonable belief that the substance was marijuana. The trial courts findings of fact "adequately addressed this evidence" and were supported. *Little*, 2024 WL 4019033, at *7. Thus, in view of *Little*, we hold that Defendant's challenged findings of fact are supported by competent evidence.

We further note, Defendant's arguments are grounded in policy, identifying the future challenges of distinguishing between the two substances. However, the duty of this Court when reviewing challenged findings of fact is to determine whether those facts are supported by competent evidence, considering the evidence presented to the trial court. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. The role of this Court is to make decisions based on the law not on policy. When viewing the record and evidence presented at the hearing, the trial court heard testimony from the officers that they detected an odor of marijuana; that both officers had experience and training in identifying marijuana; that Defendant did not at any time claim to the officers that he possessed or used legal hemp; and when Deputy Baugus asked Defendant about the odor, if he had any marijuana, and if he had been smoking marijuana, Defendant responded, "No." Defendant's policy arguments do not call into question the competency of this evidence. *See Little*, 2024 WL 4019033, at *4 (noting the trial

court correctly refused to take judicial notice of the SBI memo and that this Court has not previously "accorded the [SBI] [m]emo the status of binding law." (citations omitted)). Thus, Defendant's arguments, even if reasonable, do not alter the scope of our review and we hold the challenged findings are supported by competent evidence.

2. *Terry* Frisk

Defendant next argues that the trial court erred when it concluded the frisk of Defendant was lawful, as the officers lacked reasonable suspicion that he was armed and dangerous. Defendant does not challenge the lawfulness of the traffic stop or the duration of the stop, thus those issues are deemed abandoned on appeal. N.C. R. App. P. 28(a). Our review is therefore limited to whether the trial court's findings support its conclusions of law, under a *de novo* standard, that the frisk of Defendant was lawful.

"During a lawful stop, 'an officer may conduct a pat down search, for the purpose of determining whether the person is carrying a weapon, when the officer is justified in believing that the individual is armed and presently dangerous.' " *State v. Johnson*, 246 N.C. App. 677, 692, 783 S.E.2d 753, 764 (2016) (citation omitted). The purpose of a *Terry* frisk is for the "protection of the police officer" and it is "justified by the legitimate and weighty interest in officer safety." *Id.* (cleaned up). This Court has stated, in many circumstances, "once the defendant is outside the automobile, an officer is permitted to conduct a limited pat down search for weapons if he has a reasonable suspicion based on articulable facts under the circumstances that defendant may be armed and dangerous." *State v. Briggs*, 140 N.C. App. 484, 488, 536 S.E.2d 858, 860 (2000) (citation omitted). However, the search is limited to "the person's outer clothing and to [a] search for weapons that may be used against the officer." *State v. Shearin*, 170 N.C. App. 222, 226, 612 S.E.2d 371, 375–76 (2005) (citation omitted). It is well-established that the key inquiry is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *State v. King*, 206 N.C. App. 585, 589, 696 S.E.2d 913, 915 (2010) (cleaned up). Moreover, "the officer need not be absolutely certain that the individual is armed" and is "entitled to formulate common-sense conclusions . . . in reasoning that an individual may be armed." *Id.* (cleaned up).

Here, the trial court concluded that the frisk was lawful because Defendant failed to immediately pull over and instead pulled into the West Wall Apartments which in the officer's experience, was known to be a high crime area; Deputy Baugus was aware that Defendant had

prior convictions for narcotics and carrying a concealed gun; Defendant stopped answering questions and bladed, or turned, his body away from the officers, while remaining on his cell phone; and the officers smelled an odor of marijuana from Defendant's car. Defendant argues that his "blading" may not be considered under this analysis because it was merely an attempt to disengage from the officer's incriminating questioning. Defendant also argues the trial court's finding that he pulled into a high crime area is irrelevant because the record suggests no connection between Defendant and the criminal activity at the West Wall Apartments. To the contrary, Defendant suggests it was merely a location that he pulled into as a result of the traffic stop. We are unpersuaded.

In *State v. Scott*, this Court recognized that "each of these factors, standing alone, might not be sufficient to justify a weapons frisk." *State v. Scott*, 287 N.C. App. 600, 605-06, 883 S.E.2d 505, 510-11 (2023) (citations omitted). However, this Court is instructed to "examine the totality of the circumstances surrounding [the officer's] interaction with [D]efendant in order to achieve a comprehensive analysis as to whether the officer's conclusion that [D]efendant may have been armed and dangerous was reasonable." *Id.* at 606, 883 S.E.2d at 511 (citation omitted). Thus, we consider each of the trial court's findings to determine whether there was a reasonable suspicion that Defendant was armed and dangerous under the totality of the circumstances.

First, our Supreme Court has noted the potential dangers of associating an individual's location with an assumption of criminal activity. It instructed that such an association, in isolation, is not sufficient to "establish the existence of reasonable suspicion." *State v. Jackson*, 368 N.C. 75, 80, 772 S.E.2d 847, 850 (2015). However, it also stated in that case "[the] defendant was walking in, and the stop occurred in, a 'high crime area' which is among the relevant contextual considerations in a *Terry* analysis." *Id.* (cleaned up). In the case *sub judice*, Defendant pulled into the West Wall Apartments, which both officers knew, from training and experience, was a high crime area. We acknowledge that Defendant's decision to pull over into this complex, by itself, does not establish a connection between his presence and criminal activity. Notwithstanding, the trial court found the following unchallenged findings of fact: Defendant did not immediately stop in response to the blue lights and sirens but proceeded into the parking lot of the apartments; Defendant again did not immediately stop when Deputy Baugus activated his siren several more times, and Defendant put his car into reverse as if to back into a parking space. *See State v. Jordan*, 120 N.C. App. 364, 367, 462 S.E.2d 234, 237 (1995) (considering the defendant's

failure to immediately pull over in response to the officer's lights in reasonable suspicion analysis.).

As to Defendant's convictions, our Supreme Court recognized, "[s]tanding alone, defendant's criminal record for which defendant has already paid his debt to society does not constitute reasonable suspicion." *State v. Johnson*, 378 N.C. 236, 245, 861 S.E.2d 474, 484 (2021). In the same regard, it acknowledged that it could be considered under the totality of the circumstances test, by holding the court could consider that the defendant "possessed a criminal history which depicted a trend in violent crime." *Id.* 378 N.C. at 246, 861 S.E.2d at 484 (cleaned up). Here, Defendant had prior convictions for narcotics and carrying a concealed gun. Additionally, when Deputy Baugus learned of Defendant's criminal record, he received information from communications to "approach [Defendant] with caution." *See Scott*, 287 N.C. App. at 606, 883 S.E.2d at 511 (This Court considered that the officer received "caution data revealing [the defendant's] prior charge of murder and gang involvement" when analyzing the reasonableness of the weapons frisk.). In addition to Defendant's convictions, Deputy Baugus was aware that the West Wall Apartments was an area with many police calls, high crime, and numerous reports of narcotics.

Next, Deputy Baugus testified "[blading] is a detection device of someone who is getting confrontational or who is attempting to avoid conversation with you." Further, "[Defendant] had stopped answering all questions and informed [the officers] that he was on the phone and then turned away from us." In *State v. Malachi*, this Court included "blading" when analyzing whether the officer had a reasonable suspicion under the totality of the circumstances. *State v. Malachi*, 264 N.C. App. 233, 239, 825 S.E.2d 666, 671 (2019). There, this Court considered that the defendant "turned his body in such a way as to prevent the officer from observing a weapon." *Id.* at 237, 825 S.E.2d at 670. Here too, Defendant turned his body away from the officer's and stopped answering their questions. Although Defendant was not required to answer the officers' questions, his posture of turning away from the officers, "blading," is relevant to our consideration of the fact before us. Moreover, "an officer's experience and training can create reasonable suspicion. Defendant's actions must be viewed through the officer's eyes." *State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995) (citations omitted).

Looking at the totality of the circumstances, we conclude that the factors identified by the trial court are sufficient for an officer to believe that Defendant was armed and dangerous. Defendant failed to immediately pull over after Deputy Baugus turned on his lights and siren;

subsequently pulled into an area that the officer knew was a high crime location; Deputy Baugus was notified of Defendant's prior convictions and was to "proceed with caution;" and Defendant turned his body away from the officers, which Deputy Baugus testified is a sign that an individual "may become confrontational." While "reasonable suspicion demands more than a mere 'hunch' on the part of the officer," it "requires only some minimal level of objective justification." *Scott*, 287 N.C. App. at 605, 883 S.E.2d at 510 (cleaned up). When viewing the evidence and the interaction between the officers and Defendant, under the totality of the circumstances, we hold the officers had "objective justification" when Deputy Mitchell frisked Defendant. Thus, the trial court did not err when it concluded that the frisk was reasonable and lawful.

3. Probable Cause

Defendant next contends that the officers lacked probable cause to search his vehicle despite finding a "blunt" in his pocket. Defendant makes similar assertions as above, arguing that the officers could not have probable cause to seize the blunt since the item could have been legal hemp. Likewise, it could not be "immediately apparent" that the object was marijuana when there is no practicable way to tell the substance is marijuana as opposed to legal hemp. Defendant urges this Court to hold that without the discovery of the blunt, the officers did not have probable cause to search his vehicle, thus the evidence concerning the recovery of the gun should have been suppressed. We do not deem it necessary to consider Defendant's arguments concerning the blunt, as the search of Defendant's vehicle was lawful and supported by probable cause without the discovery of the blunt. The odor of marijuana emanating from the vehicle provided probable cause.

"A police officer in the exercise of his duties may search an automobile without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials." *State v. Degraphenreed*, 261 N.C. App. 235, 241, 820 S.E.2d 331, 336 (2018) (citation omitted). "An officer has probable cause to believe that contraband is concealed within a vehicle when given all the circumstances known to him, he believes there is a 'fair probability that contraband or evidence of a crime will be found' therein." *State v. Ford*, 70 N.C. App. 244, 247, 318 S.E.2d 914, 916 (1984) (citation omitted). Importantly, "[t]his Court and our Supreme Court have repeatedly held that the *odor of marijuana alone* provides probable cause to search the object or area that is the source of that odor." *State v. Springs*, 292 N.C. App. 207, 215, 897 S.E.2d 30, 37 (2024) (citations omitted) (emphasis added); *see State v. Greenwood*, 301 N.C. 705,

708, 273 S.E.2d 438, 441 (1981) ("[T]he smell of marijuana gave the officer probable cause to search the automobile for the contraband drug."); *see also State v. Corpening*, 200 N.C. App. 311, 315, 683 S.E.2d 457, 460 (2009) ("The 'plain smell' of marijuana by the officer provided sufficient probable cause to support a search and defendant's subsequent arrest." (citation omitted)).

More recently, in *State v. Guerrero*, this Court explained "our case law made it clear the legalization of hemp has no bearing on our Fourth Amendment jurisprudence[.]" *State v. Guerrero*, 292 N.C. App. 337, 342, 897 S.E.2d 534, 538 (2024). There, this Court cited to *Johnson*, when it stated, "[t]he smell of marijuana 'alone . . . supports a determination of probable cause, even if some use of industrial hemp products is legal under North Carolina law. This is because *only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause*.' " *State v. Johnson*, 288 N.C. App. 441, 457-58, 886 S.E.2d 620, 632 (2023) (citation omitted). Moreover, "we have repeatedly applied precedent established before the legalization of hemp, even while acknowledging the difficulties in distinguishing hemp and marijuana *in situ*." *State v. Walters*, 286 N.C. App. 746, 758-59, 881 S.E.2d 730, 739 (2022) (citations omitted). This Court, again, addressed a similar issue in *Little*, when an officer immediately smelled a strong odor of marijuana in the defendant's vehicle after conducting a traffic stop and observed marijuana residue on the floorboard of the vehicle. *Little*, 2024 WL 4019033, at *1. The Court in *Little* stated, "[t]he issue is not whether the substance was marijuana or even whether the officer had a high degree of certainty that it was marijuana," rather, the issue is "whether the discovery under the circumstances would warrant a man of reasonable caution in believing that an offense has been committed or is in the process of being committed, and that the object is incriminating to the accused." *Id.* at *9. In any event, "the odor and sight of what the officers reasonably believed to be marijuana gave them probable cause for the search." *Id.* at *9.

Thus, consistent with this Court's holdings, we follow well-established precedent. Despite the alleged, indistinguishable similarities between illegal marijuana and legal hemp, the odor or smell of marijuana "would warrant a man of reasonable caution" to believe that the substance is of an incriminating nature. That belief, based on smell or appearance, provides grounds for probable cause. Thus, the odor of marijuana, alone, is sufficient to establish probable cause to search a vehicle.

In the present case, Deputy Baugus observed an odor of marijuana coming from Defendant's vehicle. Mitchell confirmed he also detected

a "strong odor" of marijuana when he spoke with Defendant. Deputy Baugus and Deputy Mitchell testified about their training and experience in identifying marijuana. When Defendant was questioned about the odor, he denied any affiliation with the possession or use of marijuana; notably, at no time did he indicate that the substance was hemp. Because "the smell of marijuana gave the officer probable cause to search the automobile for the contraband drug[,]" the trial court did not err when it concluded that the search of Defendant's vehicle was lawful and proper. *Greenwood*, 301 N.C. at 708, 273 S.E.2d at 441 (1981); *see State v. Walton*, 277 N.C. App. 154, 160, 857 S.E.2d 753, 759–60 (probable cause to search the defendant's vehicle was established when the officer smelled marijuana with "increasing intensity throughout the traffic stop," the officer provided testimony of his training and expertise in the recognition of the odor of marijuana, and the police dog alerted the vehicle.). As a final note, even if Deputy Baugus confused legal hemp for illegal marijuana, that issue must be resolved under the beyond a reasonable doubt standard. *See Little*, 2024 WL 4019033, at *8 ("the issue here is not whether the officers could identify the substance in [the] [d]efendant's car as hemp or marijuana for purposes of proving the elements of a criminal offense beyond a reasonable doubt."). Whereas, here, at a suppression hearing, the issue that must be resolved is whether there was evidence to support the probable cause determination. *See id.* *8 (citation omitted) ("The issue for purposes of probable cause for the search is only whether the officer . . . had reasonable basis to believe . . . that incriminating evidence would be found in the vehicle." (citation omitted)).

B. Admission of the Evidence

Defendant further argues that the trial court plainly erred in failing to suppress the evidence of the gun, which was the basis of Defendant's carrying a concealed firearm conviction, because it was gathered as a result of (1) an unconstitutional *Terry* frisk; and (2) an unconstitutional search of Defendant's vehicle. Defendant argues that had the motion to suppress been granted, the jury would not have considered any evidence concerning the recovery of the gun, and thus would not have convicted Defendant for possession of the gun. Defendant motioned pretrial to suppress all evidence obtained because of what he contends is an unlawful *Terry* frisk and search of his vehicle; however, Defendant did not renew his objection to the admission of the evidence at trial. Thus, this issue is unpreserved due to the absence of an objection at trial and is reviewed on appeal under a plain error standard. *See* N.C. R. App. P. 10(a)(4).

Because we hold, as discussed *supra*, that the *Terry* frisk and search of Defendant's vehicle was lawful, it is unnecessary to consider Defendant's plain error analysis regarding the failure of the trial court to suppress the evidence of the gun. We conclude the trial court neither erred nor plainly erred in allowing the evidence.

III. Conclusion

For the foregoing reasons, we hold that the trial court's findings of fact are supported by competent evidence and the findings support its ultimate conclusions of law. The trial court did not err by denying Defendant's motion to suppress and did not plainly err by admitting the gun into evidence. We hold Defendant received a fair trial free from error.

NO ERROR.

Judge COLLINS concurs.

Judge ARROWOOD concurs by separate opinion.

ARROWOOD, Judge, concurring.

I concur in the outcome of this case as bound by our precedent and *In re Civil Penalty*, 324 N.C. 373 (1989), but write separately to highlight the need for the Supreme Court to clarify this issue.

As the majority correctly notes, this Court has addressed whether the perceived odor of marijuana is sufficient to constitute probable cause, most recently addressed in *State v. Dobson*, 293 N.C. App. 450, 900 S.E.2d 231 (2024), and *State v. Little*, No. COA23-410, 2024 WL 4019033, at *3 (N.C. Ct. App. Sept. 3, 2024). Similarly in *State v. Parker*, 277 N.C. App. 531, 541 (2021), this Court was not required to "determine whether the scent or visual identification of marijuana alone remains sufficient to grant an officer probable cause to search a vehicle[,]" because the defendant in *Parker* admitted to law enforcement officers that he had just smoked marijuana and produced a partially smoked marijuana cigarette. *Id.*

Likewise in *State v. Teague*, this Court noted that "our appellate courts have yet to fully address the effect of industrial hemp's legalization on the panoply of standards and procedures applicable during the various stages of a criminal investigation and prosecution for acts

involving marijuana," (citing *Parker*, 277 N.C. App. at 541), but held that "[t]he passage of the Industrial Hemp Act, in and of itself, did not modify the State's burden of proof at the various stages of our criminal proceedings." *State v. Teague*, 286 N.C. App. 160, 179 (2022), *writ denied*, *review denied*, 891 S.E.2d 281 (N.C. 2023). The *Teague* Court discussed two federal cases it found persuasive, including *United States v. Harris*, No. 4:18-CR-57-FL-1, 2019 WL 6704996, at *3 (E.D.N.C. Dec. 9, 2019) (explaining that "the smell of marijuana alone . . . supports a determination of probable cause, even if some use of industrial hemp products is legal under North Carolina law . . . because 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' ") and *United States v. Brooks*, No. 3:19-CR-00211-FDW-DCK, 2021 WL 1668048, at *4 (W.D.N.C. Apr. 28, 2021) ("[T]he presence of hemp does not make all police probable cause searches based on the odor unreasonable. The law, and the legal landscape on marijuana as a whole, is ever changing but *one thing is still true: marijuana is illegal*.").

We are bound by these opinions in like circumstances where a law enforcement officer detects the odor of marijuana, the possessor does not claim that the odor came from legal hemp, and the odorous substance was in fact marijuana. However, as the SBI memo cautions, legal hemp and illegal marijuana have become increasingly difficult to distinguish between, in detecting by odor or testing for chemical composition. In light of these challenges and questions that have occurred since the changes in the law regarding hemp, I respectfully suggest that this issue presents an emerging issue that is ripe for our Supreme Court to address to assist in clarifying for courts and law enforcement in light of the new legal landscape after the legislation pertaining to hemp.

STATE OF NORTH CAROLINA
v.
WILLIAM SHAWN SANDEFUR, DEFENDANT

No. COA23-1012

Filed 15 October 2024

Sentencing—prior record level—out-of-state convictions—no evidence of substantial similarity—resentencing required

During defendant's sentencing after being convicted of multiple firearm and drug offenses, the State failed to present evidence that two out-of-state felony convictions were for offenses substantially similar to North Carolina offenses for purposes of calculating defendant's prior record level. Where defendant was erroneously classified as a prior record level V after his two out-of-state convictions were classified as G and F felonies without the requisite comparative analysis, the matter was remanded for resentencing.

Appeal by defendant from judgments entered 6 March 2023 by Judge Hugh B. Lewis in Superior Court, Cleveland County. Heard in the Court of Appeals 24 September 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Tanisha D. Folks, for the State.

Sandra Payne Hagood for defendant-appellant.

STROUD, Judge.

Defendant William Shawn Sandefur appeals from judgments entered following a jury trial finding him guilty of (1) possession of firearm by felon, (2) possession of methamphetamine, (3) possession of drug paraphernalia, (4) misdemeanor carrying a concealed gun, and (5) possession of burglary tools. Defendant argues the trial court erred in sentencing him at prior record level V based upon its erroneous classification of two prior convictions from Kentucky. Because the State failed to present sufficient evidence to support the trial court's classification of the two Kentucky felonies for purposes of determining Defendant's prior record level, we must remand for resentencing.

I. Background

The State's evidence tended to show that on 14 April 2022 the Cleveland County Sheriff's Office received a call reporting suspicious

activity and a potential breaking and entering in progress at a house on Mooresboro Road. The caller, Tamara McCurry, indicated a man, carrying bolt cutters, was at the house and was driving a white Kia Soul with a yellow bumper sticker. The house was owned by Ms. McCurry's uncle, but Ms. McCurry had power of attorney to oversee the property since her uncle's transition into a nursing home in 2021.

Patrol Deputy Elijah Spurling was dispatched to the address. Before Deputy Spurling could arrive on scene, however, Ms. McCurry called again to inform law enforcement that the suspect had left the home and was traveling towards Ellenboro Road. After redirecting and traveling in that direction, Deputy Spurling noticed a vehicle matching the description parked outside of a convenience store, Deb's Mini Mart, on Ellenboro Road.

Deputy Spurling pulled into the convenience store parking lot at 7:56 p.m. and parked his vehicle without initiating his blue lights. Deputy Spurling approached the vehicle and started a conversation with Defendant. Deputy Spurling began questioning Defendant as to what he was doing at the Mooresboro Road home. Defendant admitted to being at the home, exited his vehicle, and proceeded to show Deputy Spurling the contents of the vehicle's trunk, which included bolt cutters. When asked what he was doing at the home with the bolt cutters, Defendant stated he was obtaining some items from the home that belonged to him. Specifically, Defendant indicated to Deputy Spurling he was going to see a friend, Rocky Sloan, who was allegedly living at the home and had some tire rims and soundbars belonging to Defendant.

After obtaining Defendant's identification, Deputy Spurling returned to his vehicle to begin running routine checks. Deputy Lesmeister, who was also on scene, remained outside talking with Defendant while Deputy Spurling was conducting his investigation. At some point, Deputy Spurling called for a K-9 unit, Deputy Bonino, who arrived on scene at 9:00 p.m. Deputy Spurling asked for Deputy Bonino to perform a K-9 sniff around Defendant's vehicle. In performing the drug sniff, Deputy Bonino's K-9 alerted to the potential presence of narcotics within Defendant's vehicle.

Based upon the K-9's positive narcotics alert, Deputy Spurling returned to Defendant's vehicle to perform a search. This search revealed a Smith & Wesson 9-millimeter handgun concealed within the vehicle's center console, ammunition, and a lockbox located in the rear of the vehicle. Inside the lockbox was about a gram of a clear, crystal substance, and three glass pipes commonly used for smoking narcotics.

On 16 May 2022, a Cleveland County grand jury indicted Defendant for possession of firearm by felon, possession of methamphetamine, possession of drug paraphernalia, possession of burglary tools, misdemeanor carrying a concealed gun, and misdemeanor driving while license revoked. The case came on for trial at the 1 March 2023 session of the Superior Court, Cleveland County. At the close of the State's case, the State dismissed the driving while license revoked charge. On 6 March 2023, a jury found Defendant guilty of all remaining charges.

During sentencing, the trial court allotted Defendant 16 prior record level felony points, placing him at prior record Level V for sentencing purposes. In concluding this prior record level, the trial court relied on a prior record level worksheet submitted by the State, identifying several out-of-state convictions obtained by Defendant in Kentucky. Defendant appeals.

II. Analysis

On appeal, Defendant argues the trial court erred in calculating his prior record level for sentencing purposes. Specifically, Defendant contends the trial court improperly classified two prior, out-of-state convictions as G and F level felonies when the State failed to meet its burden in establishing these convictions were substantially similar to North Carolina offenses. Due to this alleged misclassification, Defendant argues the trial court improperly sentenced him under a prior record level V when he should have been sentenced under a prior record level IV. We agree with Defendant and conclude the State failed to meet its burden in establishing substantial similarity.

> The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal. It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review.

State v. Bohler, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citations omitted).

Under North Carolina General Statute Section 15A-1340.14, "[t]he prior record level of a felony offender is determined by calculating the sum of points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (2023). For the classification of prior convictions occurring outside of North Carolina, "[e]xcept as otherwise

provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony[.]" N.C. Gen. Stat. § 15A-1340.14(e) (2023). If the State wishes to classify a prior out-of-state conviction as higher than the baseline Class I, it must meet its burden of showing substantial similarity between the out-of-state conviction and a North Carolina offense:

> If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

Id. Thus, to calculate prior record level, the baseline classification for out-of-state felonies is Class I, unless the State can prove substantial similarity between the out-of-state conviction(s) and their respective North Carolina offense classification(s). *See id.*

The main issue we are presented with is whether the State met its burden in showing substantial similarity between Defendant's past Kentucky convictions and their respective North Carolina offenses for the purpose of determining his prior record level. Defendant argues, and we agree, the State did not present sufficient evidence to show the out-of-state convictions were substantially similar to North Carolina offenses.

To show substantial similarity, the State must submit to the trial court a copy of the applicable out-of-state statute it claims to be substantially similar to a North Carolina offense. *See State v. Sanders*, 367 N.C. 716, 718, 766 S.E.2d 331, 332 (2014) ("[T]he Court of Appeals has consistently held that when evidence of the applicable law is not presented to the trial court, the party seeking a determination of substantial similarity has failed to meet its burden of establishing substantial similarity by a preponderance of the evidence." (citations omitted)). After the State has identified the applicable out-of-state statute, the "[d]etermination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina Offense." *State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010) (citation omitted).

During sentencing, the State submitted to the trial court Defendant's prior record level worksheet, which shows Defendant had several prior convictions in Kentucky. Although this worksheet lists Defendant's

prior convictions obtained in states other than North Carolina, there is no reference to the applicable statutes defining those offenses within their respective jurisdictions. Defendant argues on appeal, and the State concedes, this worksheet was the only evidence submitted for the purpose of identifying Defendant's prior convictions.

The State also further concedes neither the State nor the trial court conducted any comparative analysis of the elements of Defendant's prior convictions. In submitting the prior record level worksheet, the State stated "[a]s for sentencing, Your Honor, I believe the record – the record speaks for itself and the prior convictions speak for themselves and we just leave – obviously leave it in your discretion, but we don't have a position one way or another." Neither the State nor the trial court engaged in any further discussion of alleged similarity between the out-of-state convictions and North Carolina offenses.

Because the State failed to identify the applicable statutes, and no comparison of the elements took place at the trial court during sentencing, the State did not meet its burden to establish substantial similarity for purposes of determining Defendant's prior record level. *See State v. Wright*, 210 N.C. App. 52, 71-72, 708 S.E.2d 112, 126 (2011) (concluding substantial similarity had not been established when the State failed to provide sufficient evidence of the applicable out-of-state statutes under which the defendant was previously convicted, and where the trial court failed to conduct any form of analysis of the elements between the out-of-state convictions and North Carolina offenses).

Although the State concedes its failure to adequately identify the applicable Kentucky statutes and to address the comparison of the elements, the State still contends it should prevail on appeal. Specifically, the State argues these shortcomings are harmless error and that under *de novo* review, this Court can properly determine whether the Kentucky offenses are substantially similar to a North Carolina offense. In making this argument, the State presents, for the first time within its brief, the allegedly applicable Kentucky statutes "obvious[ly]" referenced by Defendant's prior record level worksheet. The State contends there are no other potential crimes defined within Kentucky's criminal code that could apply to the alleged offenses.

But this Court has previously rejected this argument. In *State v. Henderson*, the State failed to demonstrate substantial similarity before the trial court and on appeal this Court noted:

> [T]he State identifies in its brief the statutes under which it contends that defendant was convicted in South Carolina

> and Pennsylvania and argues that these statutes establish the necessary substantial similarity. The State did not identify these South Carolina and Pennsylvania statutes during sentencing before the trial court or in the record on appeal.

State v. Henderson, 201 N.C. App. 381, 388, 689 S.E.2d 462, 467 (2009). We recognized "it may be possible for a record [on appeal] to contain sufficient information regarding an out-of-state conviction for this Court to determine if it is substantially similar to a North Carolina offense," but that record did not contain sufficient evidence of the applicable out-of-state statutes and this Court "will not speculate as to whether the State has for the first time, in its brief on appeal, properly identified the out-of-state statutes for comparison." *Id.* Here, as in *Henderson*, the record before us does not contain sufficient evidence to identify the applicable Kentucky statutes to conduct a substantial similarity analysis of our own.

Because the State failed to meet its burden to establish substantial similarity of Defendant's Kentucky offenses to North Carolina crimes which would carry the sentencing points as assigned by the trial court and because we lack the information necessary to conduct our own substantial similarity analysis for harmless error purposes, we must remand for resentencing. At the resentencing hearing, the trial court may consider additional information presented by the State or by Defendant regarding Defendant's prior offenses. *See id.*

III. Conclusion

We conclude the trial court erred in assigning Defendant 16 prior record level points based on his out-of-state convictions where the State failed to meet its burden to establish substantial similarity between the out-of-state convictions and North Carolina offenses. Accordingly, we remand for resentencing.

REMANDED FOR RESENTENCING.

Judges ZACHARY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
MILAN DION TANNER

No. COA24-166

Filed 15 October 2024

Probation and Parole—probation revocation—absconding—failure to provide new address—failure to report in person

The trial court did not abuse its discretion by revoking defendant's probation where the State's evidence was sufficient to reasonably satisfy the trial court that defendant had violated probation by willfully absconding supervision. Defendant failed to report to multiple in-person appointments with his probation officer without justification, made his whereabouts unknown by failing to provide his new physical address or the name and address of the hotel he stayed in after moving out of his marital home due to a domestic violence protective order, and traveled to another city without providing notice.

Chief Judge DILLON dissenting.

Appeal by defendant from judgment entered 5 June 2023 by Judge Lora C. Cubbage in Guilford County Superior Court. Heard in the Court of Appeals 11 September 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Christopher J. Stipes, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for the defendant-appellant.

TYSON, Judge.

Defendant petitions for a writ of *certiorari* for this Court to review the trial court's judgment revoking Defendant's probation and activating Defendant's suspended sentence for willfully absconding supervision. We allow Defendant's petition, issue the writ, and affirm the trial court's judgment.

I. Background

Milan Dion Tanner ("Defendant") a prior record level IV offender, voluntarily pled guilty to felony possession of a schedule II-controlled substance and felony possession of cocaine on 12 December 2022. The trial court sentenced Defendant in the presumptive range to two consecutive terms 8 to 19 months of imprisonment, suspended for 24 months of supervised probation. Defendant was placed on supervised probation.

Defendant's probation officer, Patra Smith ("Smith"), testified Defendant was assigned to her caseload on 12 December 2022 after he was released from custody. Defendant was ordered to report to the probation office within 48 hours of his release, *i.e.*, 14 December 2022. Defendant failed to report in-person, and instead he called Smith on 15 December 2022. Smith instructed Defendant to report to her in-person the next day, 16 December 2022. Defendant again failed to report in-person on 16 December 2022.

Smith further testified Defendant's criminal attorney had informed her that Defendant's wife had secured a 50B domestic violence protective order ("DVPO") against Defendant, and Defendant could not return to his former residence. *See* N.C. Gen. Stat. § 50B-1 to 50B-9 (2023). Smith explained the only address she had on file for Defendant was his former apartment, though she was informed Defendant was staying in a hotel and in the process of moving out of his home. Smith did not testify about whether Defendant had informed her of which hotel he was staying in, or if he had provided his hotel's address. Smith testified Defendant only provided the hotel phone number he had called from.

On 17 December 2022, Smith called the number Defendant had provided and instructed him to report in-person to the office the following Monday, 19 December 2022. Defendant failed to report in-person on 19 December 2022. This 17 December 2022 phone call was the last contact Smith had with Defendant.

Smith visited the address on file for Defendant's former apartment to attempt to locate him. Per probation policy, Smith left a door tag with the telephone number and information for Defendant to return her call. Defendant missed three additional in-person reporting appointments.

Another probation officer was able to reach Defendant by phone on 2 March 2022. Defendant "stated he was unaware that he was on probation, because he had short-term memory loss and was located in Winston-Salem at the time." This probation officer instructed Defendant to report in-person on 3 March 2023 and sent a text to Defendant's cell

phone to remind him. Defendant again failed to report. Defendant never submitted himself or appeared to Smith for probation supervision.

Smith filed probation violation reports alleging Defendant had violated his probation by committing multiple new criminal offenses and by willfully absconding supervision on 2 March 2023 and 22 March 2023. At a hearing held on 8 June 2023, the trial court found Defendant had willfully violated the terms and conditions of his probation by absconding supervision, revoked his probation, and activated his sentence.

Defendant purports to appeal and has filed a petition for writ of *certiorari* in the event his notice of appeal is defective.

II. Jurisdiction

N.C. R. App. P. 4(a) requires a criminal defendant to enter notice orally at trial or in writing within fourteen days of entry of judgment. N.C. R. App. P. 4(b) requires a written notice of appeal to specify the party taking the appeal, to specify "the judgment or order from which appeal is taken and the court to which appeal is taken," and to be signed by the appealing party's counsel. Defendant timely filed his notice of appeal, specified the judgment from which appeal was taken, referenced the file numbers in the notice, and properly served the State. The filed notice to appeal did not specify the appeal was to this Court.

In *State v. Rankin*, this Court held a criminal notice of appeal failing to designate this Court did not warrant dismissal of appeal "[b]ecause this Court is the only court possessing jurisdiction to hear [the] appeal, [and] it can be fairly inferred that Defendant intended to appeal to this Court." 257 N.C. App. 354, 356, 809 S.E.2d 358, 360 (2018), *aff'd*, 371 N.C. 885, 821 S.E.2d 787 (2018).

Here, Defendant referenced N.C. R. App. P. 4(b) in his notice of appeal, and it can be inferred he intended to appeal to this Court. We allow Defendant's petition, issue the writ of *certiorari*, and address the merits of his arguments.

III. Standard of Review

This Court has stated the standard of review applied to the revocation of a defendant's probationary sentence:

> A hearing to revoke a defendant's probationary sentence only requires . . . the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation . . . . The judge's finding of such

> a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

State v. Jones, 225 N.C. App. 181, 183, 736 S.E.2d 634, 636 (2013) (citation omitted).

An abuse of discretion occurs "when a ruling 'is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (citation omitted).

IV. Analysis

N.C. Gen. Stat. § 15A-1343(b)(3a) (2023) requires a defendant on probation "[n]ot abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer . . . ." Here, Defendant failed to initially appear or to respond to multiple directions to attend the required, in-person, agreed-upon appointments without justification or excuse.

Defendant also failed to give his probation officer his new physical address or the name and address of the hotel he was purportedly staying in. Defendant also left the area without required notice to Smith and traveled to Winston-Salem.

Based upon these facts, the trial judge could reasonably conclude Defendant had absconded by "willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer." *Id*.

V. New Criminal Charges While on Probationary Supervision

Defendant argues the trial court announced in open court, "the court is not going to move forward on the new conviction" allegation located in the 2 March 2023 violation report. The written judgment indicates Defendant had "waived a violation hearing and admitted that he[] violated each of the conditions of his[] probation as set forth below" including allegations of multiple violations located in the 2 March 2023 violation report.

The statute provides two distinctive grounds upon which a trial court may revoke a defendant's probation, based upon its finding and conclusion: (1) the defendant willfully absconded supervision, pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a); ***or***, (2) the defendant committed a new criminal offense, pursuant to N.C. Gen. Stat § 15A-1343(b)(1). *See State v. Johnson*, 246 N.C. App 132, 136, 782 S.E.2d 549, 552-53 (2016).

The trial court's written order on the AOC-CR-607 Judgment and Commitment included a checked box indicating Defendant had waived a hearing and admitted to the violations and the court was revoking Defendant's probation "for willful violation of the condition(s) that he/she not commit any criminal offense [] **or** abscond from supervision[] as set out above." (emphasis supplied). Any objection and asserted error in the trial court using the AOC-CR-607 Judgment and Commitment, which uses the disjunctive "or" as grounds to revoke Defendant's probation is without merit. The trial court clearly found and concluded Defendant was "willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer." N.C. Gen. Stat. § 15A-1343(b)(3a).

VI. Conclusion

The standard of review for a hearing "to revoke a defendant's probationary sentence only requires . . . the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation[.]" *Jones*, 225 N.C. App. at 183, 736 S.E.2d at 636. A trial court's finding a defendant violated their probationary sentence "if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion." *Id.*

Defendant has failed to show any abuse of discretion in the trial court's findings or conclusion to revoke his probation for willfully absconding. N.C. Gen. Stat. § 15A-1343(b)(3a). The trial court's judgment is affirmed. *It is so ordered.*

AFFIRMED.

Judge WOOD concurs.

Chief Judge DILLON dissents by separate opinion.

DILLON, Chief Judge, dissenting.

I agree the State offered sufficient evidence that Defendant violated various conditions of his probation. However, as explained below, I do not believe the State met its burden to offer evidence showing that Defendant absconded *based on the conduct alleged in the probation violation reports*. Accordingly, I dissent.

I. Analysis

The record shows that Defendant was released from prison on or about 13 December 2022 and placed on probation. Within three months, his probation officer filed two violation reports, alleging various conduct by Defendant.

Our General Assembly has mandated that before revoking the probation of a probationer, "[t]he State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged." N.C.G.S. § 15A-1345(e). Our Supreme Court has interpreted this language as a mandate that the State provide the probationer notice of his alleged non-complying "conduct":

> [T]he phrase "a statement of the violations alleged" [as used in G.S. 15A-1345(e)] refers to a statement of what a probationer *did* to violate his conditions of probation. It does not require a statement of the underlying conditions that were violated . . . [G.S. 15A-1345(e)] requires only a statement of the actions that violated the conditions [of probation], not the conditions that those actions violated.

State v. Moore, 370 N.C. 338, 341 (2017). *See also State v. Crompton*, 380 N.C. 228 (2022) (following *Moore*). "The purpose of the notice mandated by [G.S. 15A-1345(e)] is to allow the defendant to prepare a defense[,]" and "[a] statement of a defendant's alleged actions that constitute the alleged violation will give that defendant the chance to prepare a defense because he will know what he is accused of doing." *Moore*, 370 N.C. at 342.

In reversing a trial court's order revoking probation, we held that a trial court errs when it relies in reaching its decision on conduct by the probationer that was not alleged in the notice. *See State v. Cunningham*, 63 N.C. App. 470, 475 (1983).

Here, the State alleged in its second probation violation report (dated 23 March 2023) that Defendant willfully absconded supervision as follows:

> The Defendant left his place of residence without prior approval or knowledge of his probation officer and failed to make his whereabouts known, making him unavailable for supervision. As of the date of this report, the Defendant's whereabouts are unknown and all efforts to locate the Defendant have been unsuccessful.

In the first violation report filed three weeks earlier (dated 2 March 2023), the State alleged that Defendant had violated *other* conditions of probation by failing to report to his supervising officer as directed on four occasions, specifically on 12/16/22, 1/30/23, 2/14/23, and 3/2/23, and that he had failed to obtain a substance abuse assessment as directed.[1]

I recognize the State has a *low* evidentiary bar at a probation hearing, as we review the trial court's order revoking Defendant's probation for an abuse of discretion. *State v. Murchinson*, 367 N.C. 461, 464 (2014). Indeed, our Supreme Court has stated

> [a]ll that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which his sentence was suspended.

State v. Robinson, 248 N.C. 282, 285–86 (1958). However, we must also remember that a trial court abuses its discretion when it revokes a defendant's probation where *no evidence* is offered to support the allegation. As stated by our Supreme Court,

> [t]here *must be* substantial evidence [to support the trial court's determination] that defendant has in fact breached the condition in question. *In the absence of such proof, the defendant is entitled to his discharge as a matter of right and not of discretion.*

State v. Millner, 240 N.C. 602, 605 (1954) (emphasis added).

Here, I simply do not believe the State met its evidentiary burden to support its allegation that Defendant absconded by "[leaving] his place of residence without prior approval or knowledge of his probation officer and fail[ing] to make his whereabouts known, making him unavailable for supervision." Rather, as explained below, the evidence shows: Defendant's probation officer had both the phone number of the motel where Defendant was staying and Defendant's cell phone number; the probation officer knew he was reachable by phone; and she knew, or should have known, that her means of contacting him at the address on file would be ineffective. And the State offered no evidence to rebut Defendant's evidence that the probation officer knew the specific motel where he was staying.

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1. The first violation report also alleged that Defendant was charged on 3/4/23 with a misdemeanor. However, the trial court expressly stated that it was not basing its order of revocation on any allegation that Defendant had committed a new criminal offense.

The evidence offered at the hearing *in the light most favorable to the State* (from the testimony of Defendant's probation officer) shows as follows:

On or about 7 December 2022, about a week before Defendant was released from prison, Defendant's wife was granted a domestic violence protective order ("DVPO") against Defendant that prevented Defendant from returning to the marital home.

On or about 13 December 2022, defendant was released from prison.

Two days later, on 15 December 2022, he moved out of the marital home and moved into a motel in Greensboro. The probation officer testified that she spoke with Defendant on that same day via a direct phone number to his motel room. She testified that she was aware of his DVPO, that he was staying at a motel, and that Defendant provided her with his phone number at the motel.

> [Attorney]: [T]he address that you had for him [his marital residence where he was no longer allowed to be] is the one that he provided to you?
>
> [Probation Officer]: Correct. When we spoke on the phone on the 17th, again, he was inside of a hotel room. He did explain to me that he was in the process of moving out of that apartment complex. However, this was the only address that we had on file to locate him. . . .
>
> [Attorney]: And when you called him, that was the number he provided – a phone number that he provided to you?
>
> [Probation Officer]: Correct. From the hotel.

She testified that she told him to report to her in person the next day, 16 December 2022. However, Defendant did not report on that day. She testified that she did speak to Defendant the next day on 17 December 2022.

The probation officer never testified that she ever tried to reach Defendant again by phone or by leaving any notice *at the motel* prior to the filing of the first probation report on 2 March 2023. She never testified that Defendant would not respond when someone from her office tried to reach him by phone. And such conduct is not alleged in the notices. Rather, the probation officer testified that she followed "the protocol" of her office when a probationer misses an appointment, by placing notices on the door *of Defendant's marital home* directing Defendant to call her and to report on a specified date:

> [Attorney]: Okay. And with regards to [the violation alleged that Defendant had missed four appointments,] could you inform the Court about these?
>
> [Probation Officer]: Yes. So we reached out - - our policy is whenever we start the absconding process, we have to go out to the residence that we know, leave a door tag with our telephone number and our information for them to call back. So he did miss those appointments.

However, she used this means of trying to communicate with Defendant even though she knew Defendant was not allowed to be at his marital home, based on the DVPO.

Defendant, though, affirmatively testified that he told her in their initial conversation that he was living at the Sands Motel in Greensboro. The State argues in its brief that "the record lacks competent evidence to support Defendant's contention that [the probation officer] knew where Defendant was residing." But it is the State who has the burden to present evidence that the probation officer *did not know* in which hotel Defendant was residing. *Millner*, 240 N.C. at 605. The probation officer, however, never testified that she did *not* know the name of the motel. The State simply never asked her. She did, however, testify that she had the phone number of the motel where Defendant was staying by testifying that she called that number and spoke with Defendant on the day he moved into the motel.

Therefore, since the State has the burden, we must assume the probation officer knew the specific motel where Defendant was living. We must also assume Defendant was always reachable by telephone. No evidence was provided that Defendant failed to answer his telephone. For instance, though the probation officer testified she never spoke with Defendant by telephone after mid-December 2022, she did testify in passing that others in her office did speak to Defendant by telephone on at least two occasions. And she testified that on 2 March 2023—the date of the first probation report—her office was able to reach Defendant on his cell phone, suggesting Defendant procured a cell phone and provided the number to the probation office.

The probation officer's means of notifying Defendant of issues and appointments, by hanging notices on the door of a home where she knew Defendant was not allowed to be, was unreasonable when it is assumed that she had his motel address and phone number. Therefore, these missed appointments should not serve as a basis for finding that Defendant willfully absconded.

Admittedly, Defendant did violate *other* conditions of his probation by failing to show up for appointments *he knew about* and by failing to get an assessment, as alleged in the first notice. But these violations do not amount to absconding, where there is uncontradicted evidence the probation officer knew where Defendant was living and had his phone number. The State simply failed to "connect the dots" that Defendant absconded through the conduct *as alleged in the notices*.

In sum, I do not believe the State offered evidence to prove the conduct it alleged Defendant engaged in to abscond, that he "left his place of residence without prior approval or knowledge of his probation officer and failed to make his whereabouts known, making him unavailable for supervision." However, because the State did offer evidence, which the trial court announced it was not considering, which would support revoking Defendant's probation (evidence that Defendant committed a new criminal offense), my vote is to vacate the order and remand for consideration of the allegation that Defendant committed a new criminal offense.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 15 October 2024)

ADAMS v. ADAMS No. 23-1049	Mecklenburg (16CVD19293)	Vacated and Remanded.
ADAMS v. HARRISON No. 24-279	Onslow (23CVS2039)	Affirmed
GUZMAN v. TRIPLE P ROOFING No. 24-42	N.C. Industrial Commission (18-737155) (PH8291)	Affirmed
HUFFSTICKLER v. DUKE ENERGY CAROLINAS,LLC No. 23-856	Cleveland (20CVS1499)	Affirmed in Part, Vacated in Part, and Remanded
IN RE C.B. No. 24-498	Johnston (23JA000003-500)	Affirmed
IN RE CLARK No. 24-117	N.C. State Bar (22BCR2)	Affirmed
IN RE G.I.S. No. 24-133	Forsyth (23JT75)	Affirmed
IN RE H.K.S. No. 24-70	Mitchell (19JT42)	Affirmed
IN RE K.G. No. 24-3	Mecklenburg (20JT193)	Affirmed
IN RE T.J.A. No. 23-1033	Cabarrus (20JT82) (20JT83)	Affirmed
IN RE T.O.C. No. 24-218	Burke (23JB84)	Affirmed in Part; Remanded in Part
IN RE Y.D.W. No. 24-293	Rockingham (22JT15-17)	Affirmed
SHEPPARD v. SHEPPARD No. 24-228	Pitt (23SP16)	Affirmed
STATE v. BERRY No. 24-174	Haywood (22CRS347981) (22CRS50687)	Dismissed

STATE v. BURNETTE No. 24-80	Haywood (22CRS293-300)	Remanded
STATE v. CARMICHAEL No. 23-886	Mecklenburg (19CRS226921) (19CRS226925-26)	No Error In Part; Vacated In Part; And Remanded For Resentencing In Part.
STATE v. ESTRADA No. 24-54	Union (20CRS51461)	No Error
STATE v. FORNEY No. 24-617	Watauga (15CRS000541,) (15CRS050683)	Dismissed
STATE v. GORDON No. 23-990	Forsyth (21CRS57780-83)	No Error
STATE v. GRANT No. 23-964	Rowan (18CRS54371)	No Error
STATE v. GUESS No. 24-264	Catawba (23CR2070)	Affirmed in Part and Reversed in Part
STATE v. KEETER No. 24-160	Person (22CRS50145)	No Error
STATE v. MARTIN No. 24-44	Gaston (21CRS54917-21)	No Plain Error
STATE v. MERRITT No. 23-510	Wake (20CRS214120) (20CRS214141-42) (20CRS214286)	No Error
STATE v. SANTIAGO CORTEZ No. 23-1063	Buncombe (22CRS85558)	No Error
STATE v. SOUTHERS No. 24-41	New Hanover (20CRS2234) (20CRS52785)	No Error
STATE v. STEPHANY No. 23-863	Guilford (19CRS726444) (19CRS83818) (20CRS28231)	Dismissed

STATE v. TATE No. 23-1093	McDowell (22CRS50313-14) (22CRS50315)	Affirmed
STATE v. WILSON No. 23-485	Surry (17CRS51177) (18CRS50489) (18CRS50827)	Affirmed in part; remanded in part
STATE v. YOUNGER No. 23-1155	Davidson (21CRS55551-53)	Dismissed
WESTLING v. GRAVITT No. 24-205	Orange (22CVD500271)	Vacated and Remanded
WHITE v. WHITE No. 24-109	Mecklenburg (20CVD11008)	Affirmed

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