376 N.C.—No. 2 Pages 280-557

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

MARCH 2, 2021

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OF
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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 18 DECEMBER 2020

ORDERS

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SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 11, 12, 13, 14
February 15, 16, 17, 18
March 22, 23, 24, 25
May 3, 4, 5, 6
August 30, 31
September 1, 2
October 4, 5, 6, 7
November 8, 9, 10

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.
v.
MARINA MARTIN, BY AND THROUGH HER NATURAL PARENT AND GUARDIAN JEAN O. MARTIN, JEAN O. MARTIN, INDIVIDUALLY, AND DAVID M. MARTIN

No. 391A19

Filed 18 December 2020

Insurance—policy terms—interpretation—"resident" of "household"—separate dwellings

In a dispute concerning insurance coverage for injuries sustained in a car accident, the trial court properly granted summary judgment in favor of plaintiff insurance carrier where evidence clearly indicated defendants (a mother and daughter) never lived in the same dwelling as the policyholder (the daughter's paternal grandmother) and therefore did not qualify as a "resident" of the grandmother's "household" within the meaning of the insurance policy. Although defendants lived on the grandmother's farm, they lived in a separate house with a different address than the grandmother and had never actually lived together under the same roof.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from a divided decision of the Court of Appeals, 833 S.E.2d 183 (N.C. Ct. App. 2019), affirming an order entered on 28 September 2017 by Judge J. Carlton Cole in Superior Court, Currituck County. Heard in the Supreme Court on 15 June 2020.

Breit Cantor Grana Buckner, PLLC, by Jeffrey A. Breit, for defendant-appellants.

Young, Moore, and Henderson, P.A., by Walter E. Brock, Jr., Andrew P. Flynt, and Matthew C. Burke, for plaintiff-appellee.

Pinto Coates Kyre & Bowers, PLLC, by Jon Ward and Paul D. Coates, and Ann C. Ochsner, for amicus curiae North Carolina Advocates for Justice.

George L. Simpson, IV, for amicus curiae North Carolina Association of Defense Attorneys.

DAVIS, Justice.

In this case, we must determine whether defendants are afforded underinsured motorist and medical payments coverage under an insurance policy issued by the plaintiff insurance company to a family member. Because we conclude the trial court properly determined that defendants are not entitled to coverage under the policy, we affirm the decision of the Court of Appeals.

Factual and Procedural Background

This case arises from a car accident that occurred in Virginia Beach, Virginia, involving defendants Jean Martin (Jean) and Marina Martin (Marina). Marina is the teenage daughter of Jean and David Martin (David). On 6 January 2014, Jean was driving her 1994 Ford automobile with Marina in the passenger seat. Jean was crossing a four-way intersection when a vehicle driven by a third party, Santiago Livara, struck her car. Jean and Marina were both injured in the collision.

Jean and Marina subsequently sued Livara for negligence in the Virginia Beach Circuit Court. The parties eventually reached a settlement in which Livara's liability insurer paid its maximum liability coverage limits in the amount of $25,000 to both Jean and Marina.

Jean and Marina also sought additional coverage under two different automobile insurance policies issued by plaintiff North Carolina Farm Bureau Mutual Insurance Company, Inc. (Farm Bureau) to members of the Martin family. The first policy bore policy number APM-3887419 and was issued by Farm Bureau to David and Jean for the coverage period of 19 October 2013 to 19 February 2014. This policy identified David and Jean as the named insureds and listed three covered vehicles, including the Ford automobile that Jean was driving at the time of the accident. The policy provided medical payments coverage of up to $1,000 per person and uninsured/underinsured motorist coverage of up to $50,000 per person/$100,000 per accident. Because Jean and Marina both qualified as "insureds" under this policy, Farm Bureau paid the applicable policy limits of $1,000 each to Jean and Marina under the medical payments coverage and $25,000 each to Jean and Marina under the underinsured motorist coverage.

In addition, Jean and Marina asserted that they were also entitled to medical payments and underinsured motorist coverage under a second Farm Bureau policy. This second policy (the Policy) is the subject of this appeal and bore policy number APM-3482146. The Policy was issued by Farm Bureau to Mary Martin (Mary), who is the mother of David and the paternal grandmother of Marina. The Policy was issued for the period encompassing 13 October 2013 to 13 April 2014. The Policy designated

Mary as the named insured, identified two covered drivers (Mary and her late husband William), and listed one covered vehicle.[1] The Policy provided medical payments coverage of up to $1,000 per person and uninsured/underinsured motorist coverage of up to $100,000 per person/$300,000 per accident. The Policy contained the following provisions that are relevant to this appeal:

DEFINITIONS

Throughout this policy, "you" and "your" refer to:

1. The "named insured" shown in the Declarations; and

2. The spouse if a resident of the same household.

. . . .

"Family member" means a person related to you by blood, marriage, or adoption who is a resident of your household. This includes a ward or foster child.

. . . .

PART B — MEDICAL PAYMENTS COVERAGE

INSURING AGREEMENT

We will pay reasonable expenses incurred for necessary medical and funeral services because of bodily injury:

1. Caused by accident; and

2. Sustained by an insured.

. . . .

"Insured" as used in this Part means:

1. You or any family member;

a. while occupying; or

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1. The vehicle driven by Jean at the time of the 6 January 2014 accident was not identified as a covered vehicle under Mary's policy.

b. as a pedestrian when struck by;

a motor vehicle designed for use mainly on public roads or a trailer of any type.

. . . .

PART C2—COMBINED UNINSURED/ UNDERINSURED MOTORISTS COVERAGE

INSURING AGREEMENT

We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of:

1. Bodily injury sustained by an insured and caused by an accident; . . .

. . . .

We will also pay compensatory damage which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by an insured and caused by an accident.

. . . .

Insured as used in this Part means:

1. You or any family member.

. . . .

Jean and Marina asserted that they were covered under the Policy because they were "family members" of Mary Martin—that is, they were related to Mary and were "residents" of her "household." Farm Bureau disputed coverage and filed a declaratory judgment action on 13 April 2015 in Superior Court, Wake County, against Marina, Jean, and David (defendants) seeking a declaration that they were not entitled to coverage under Mary's policy because they were not "residents" of Mary's "household" at the time of the accident. On 16 March 2016, defendants filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. On 20 April 2016, a consent order was entered transferring the case to Superior Court, Currituck County. Farm Bureau filed a cross-motion for summary judgment on 19 May 2017.

The evidence before the trial court at the summary judgment stage did not contain any material factual disputes. On the date of the accident, Mary was the sole owner of the Martin Farm, a 76-acre property located on Knotts Island, North Carolina, that contained two separate houses located on the property. At all relevant times, Mary lived in the "main house" on the farm, while defendants lived in a separate "guest house" that was also situated on the farm. Both residences were owned by Mary, and Mary never charged defendants rent to live in the guest house.

The houses shared a single driveway but were both stand-alone structures located approximately 100 feet from one another. Each residence was visible from the other, and it took approximately 3-5 minutes to walk between them. The houses had different street addresses. Mary's home was located at 213 Martin Farm Lane, while the address of defendants' residence was 224 Bay Orchard Lane. Defendants and Mary maintained separate post office boxes for the receipt of mail, but packages for both defendants and Mary were delivered to Mary's house. With the exception of occasional overnight stays (such as when a power outage occurred at one of the two houses), defendants and Mary lived separately in their respective homes at all relevant time periods.

Defendants visited with Mary almost every day, ate meals together, and performed chores for each other. Defendants possessed keys to Mary's house and were granted unlimited access to enter her residence. Mary had the same right of access to defendants' house. At all relevant times, David and Jean worked on the Martin Farm, managing the crops and the winery. David and Jean, in turn, received a weekly salary—contingent upon there being sufficient funds available in the farm's bank account after all farm-related bills were paid.

The Martin Farm was operated as a limited liability company (LLC). Mary maintained a business checking account in the name of the LLC, which she used to pay most of the bills for the farm. The salaries of Jean and David were paid by the LLC. The utility bills and property taxes for both houses as well as the cost of repairs for both residences were also paid by the LLC. Additionally, the LLC paid for some of the personal expenses of defendants, including their gas, internet, and cell phone bills. However, defendants paid for their remaining personal expenses such as life insurance, groceries, cable, and clothing.

Beginning in 2013—approximately a year before the accident—Mary began staying for extended periods of time with her son Wayne in Virginia Beach while she received medical treatment for cancer. As

Mary's health worsened, she was increasingly unable to travel back and forth between North Carolina and Virginia and had to remain primarily at Wayne's house in Virginia Beach. At that point, she started having all of her personal mail sent to Wayne's house—although farm-related mail was still sent to her North Carolina home.

A hearing was held on the parties' summary judgment motions on 21 August 2017. On 28 September 2017, the trial court entered summary judgment in favor of Farm Bureau after concluding as a matter of law that defendants were not entitled to coverage under the Policy.

Defendants appealed to the Court of Appeals, which affirmed the trial court's order in a divided decision. In its opinion, the Court of Appeals majority concluded that defendants did not qualify as "residents" of Mary's "household" and, accordingly, were not covered under the Policy. Judge Inman dissented, stating her belief that defendants and Mary were all part of the same household and asserting that the majority's opinion conflicted with the Court of Appeals' prior decision in *N.C. Farm Bureau Mut. Ins. Co v. Paschal*, 231 N.C. App. 558 (2014). On 8 October 2019, defendants filed a notice of appeal with this Court based upon the dissent.

Analysis

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). "A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018). We review de novo an appeal of a summary judgment order. *In re Will of Jones*, 362 N.C. 569, 573, 669 (2008).

This Court has held that a dispute regarding coverage under an insurance policy is appropriate for resolution by summary judgment where the material facts and the relevant language of the policy are not in dispute and the sole point of contention is "whether events as alleged in the pleadings and papers before the court are covered by the policies." *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690–91 (1986). The party seeking coverage under an insurance policy bears the burden "to allege and prove coverage." *Brevard v. State Farm Mut. Auto. Ins. Co.*, 262 N.C. 458, 461 (1964).

The parties here do not dispute either the material facts of the case or the pertinent language of the Policy. Therefore, we agree that this case was appropriate for resolution by summary judgment.

Our interpretation of an insurance policy is based on the fundamental principle that the plain language of the policy controls. *Lunsford v. Mills*, 367 N.C. 618, 623 (2014). As we have previously explained, when interpreting an insurance policy

> the goal of construction is to arrive at the intent of the parties when the policy was issued. Where a policy defines a term, that definition is to be used. If no definition is given, nontechnical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning is intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect.

Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 505–06 (1978).

While it is true that ambiguities in the terms of an insurance policy must be construed against the insurer and in favor of coverage, this rule of construction is only triggered "when a provision in an insurance agreement is ambiguous." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 10 (2010).

> To be ambiguous, the language of an insurance policy provision must, "in the opinion of the court, [be] fairly and reasonably susceptible to either of the constructions for which the parties contend." If the language is not "fairly and reasonably susceptible" to multiple constructions, then we "must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay."

Id. (citations omitted).

The existence of an ambiguity "is not established by the mere fact that the plaintiff makes a claim based upon a construction of [the policy] language which the company asserts is not its meaning"—rather, an ambiguity exists only when the language of the policy could reasonably support "either of the constructions for which the parties contend." *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354 (1970).

In accordance with these principles, we now turn to the language of the Policy. In order to receive coverage under the Policy, defendants must qualify as "insureds." The Policy defines an "insured," for purposes of both medical payments and underinsured motorist coverage, as "[y]ou or any family member." A "family member" is defined, in relevant part, as "a person related to you by blood, marriage, or adoption *who is a resident of your household*." (emphasis added). The Policy does not, however, define the key terms "resident" or "household."

As an initial matter, it is undisputed that defendants were related to Mary "by blood, marriage, or adoption" as Marina was Mary's granddaughter and Jean was Mary's daughter-in-law. Thus, the sole remaining inquiry for this Court is whether defendants qualified as "residents" of Mary's "household."

In *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430 (1966), we stated the following in interpreting a similar provision contained in an insurance policy:

> In the construction of contracts . . . words which are used in common, daily, nontechnical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage, rather than a restrictive meaning which they may have acquired in legal usage. In the construction of contracts the purpose is to find and give effect to the intention of the contracting parties, if possible. Thus the definition of 'resident' in the standard, nonlegal dictionaries may be a more reliable guide to the construction of an insurance contract than definitions found in law dictionaries.

Id. at 438.

It is therefore appropriate to begin our analysis by examining the definitions of the terms "resident" and "household" as contained in nonlegal dictionaries. The Merriam-Webster Collegiate dictionary defines "resident" as "[o]ne who resides in a place." *Resident*, Merriam-Webster Collegiate Dictionary (11th ed. 2007). "Reside" is defined, in turn, as "[t]o dwell permanently or continuously." *Reside*, Merriam-Webster Collegiate Dictionary (11th ed. 2007).

A "household" is defined as "[t]hose who dwell under the same roof and compose a family" or, alternatively, "a social unit composed of those living together in the same dwelling." *Household*, Merriam-Webster Collegiate Dictionary (11th ed. 2007). These definitions are

largely mirrored by the American Heritage Dictionary, which defines "reside" as "[t]o live in a place permanently or for an extended period" and defines "household" as "[a] person or group of people occupying a single dwelling." *Reside*, *Household*, The American Heritage Dictionary (4th ed. 2000).

Next, it is appropriate to examine those decisions from this Court in which we have had occasion to construe these same policy terms or analogous ones. In doing so, we acknowledge at the outset that this Court has struggled in attempting to formulate a precise definition of the term "resident" in connection with an insurance policy.

In *Barker v. Iowa Mut. Ins. Co.*, 241 N.C. 397 (1955), we considered whether a college student who lived in an apartment near campus was still considered a resident of his father's household for purposes of a fire insurance policy issued to the father. *Id.* at 399. At the time the policy originally went into effect, the family had all lived together in a single dwelling in Sparta, North Carolina. However, the son left home at age 19 to attend college in Raleigh and thereafter lived near the campus in a rented apartment, which was paid for and furnished by his father. *Id.*

After the son's apartment burned down, the father's insurance company denied coverage, claiming that after the son moved out he was no longer covered under the policy. The policy provided coverage for "household and personal property . . . belonging to the insured or any member of the family of and residing with the insured." *Id.* The trial court ruled that coverage existed, and the insurance company appealed to this Court. *Id.* at 398.

We explained that the determinative question was "where the minor son had his residence at the time of the loss." *Id.* We observed that the term "[r]esidence has been variously defined by this Court" with definitions ranging from "a place of abode for more than a temporary period of time" to "a permanent and established home." *Id.* at 400. We focused our analysis on the question of whether a college student supported by his father who moves to an apartment "for the purpose of attending college classes become[s] a resident of the college community, or [whether] he retain[s] his residence with his father[.]" *Id.* at 399. We ruled that "[t]o say the son ceased to be a resident of Sparta and became a resident of Raleigh under the facts of this case would be giving the term 'residing with the insured' its most narrow and restricted meaning." *Id.* Accordingly, we concluded that the son was a resident of his father's household at the time of the fire and was therefore covered under the father's insurance policy. *Id.* at 401.

In *Newcomb v. Great Am. Ins. Co.*, 260 N.C. 402 (1963), we addressed whether the plaintiffs, a husband and wife along with their infant daughter, should be considered "residents of the same household" as the wife's mother, Mrs. Gray, within the meaning of her insurance policy. Mrs. Gray was driving the plaintiffs' automobile with their daughter in the backseat when the vehicle ran off the road, killing their daughter. *Id.* at 402.

The evidence showed that after their marriage in 1957, the husband and wife had initially lived in Mrs. Gray's house for a year. *Id.* at 403. In 1958, they "renovated and furnished a house which belonged to Mrs. Gray and which was about one-quarter of a mile distance from Mrs. Gray's home." They lived there on their own until March 1959, at which time the death of a relative caused them to move back in with Mrs. Gray for several months. When the wife's brother, Bobby, came home from college in July 1959 to spend the summer with Mrs. Gray, the plaintiffs again "moved out of Mrs. Gray's home and into their own cottage" for approximately a month. After Bobby returned to college, the plaintiffs moved back into Mrs. Gray's house where they "slept, ate, lived, and stayed . . . up to the time of the accident, June 12, 1960." At all relevant times, "the plaintiffs' cottage ha[d] been kept clean and furnished and all utilities ha[d] been kept on and ready for habitation." The plaintiffs had planned to ultimately "remove themselves from Mrs. Gray's house and into their cottage" upon Bobby's anticipated graduation from college in 1961. *Id.*

Based on these facts, we held that the plaintiffs were residents of the same household as Mrs. Gray. We explained our ruling as follows:

> While the word 'resident' has different shades of meaning depending upon context, we think it clear, under the stipulated facts, that plaintiffs, their infant daughter and Mrs. Gray were living together on June 12, 1960, as members of one household, and were then residents of the same household within the terms of the policy. Their status is determinable on the basis of conditions existing at the time the casualty occurred.

Id. at 405 (citations omitted).

This Court interpreted a similar insurance policy provision in *Jamestown*. The issue in that case was whether an adult son who had recently moved back into his father's home was a "resident of the same household" as his father. *Jamestown*, 266 N.C. at 431. The son had been involved in a car accident on 8 February 1963 and thereafter claimed that he was covered under his father's automobile insurance policy as "a

relative of the Named Insured who is a resident of the same household." *Id.* at 432.

The record demonstrated that the father had lived at all relevant times in the same house in Rutherford County. *Id.* at 432. At the time of the accident, the son was "29 years of age, married but separated from his wife." *Id.* at 433. During his youth, the son had lived with his father until he turned 18, at which time he left home and moved to Virginia for work. He remained in Virginia for 14 months and then returned to his father's house, where he stayed for "several months until his marriage, when he left again." He then enlisted in the army, and for the next few years either lived with his wife in Spindale, North Carolina, or was stationed abroad. After he separated from his wife, he moved to Greenville, South Carolina, and stayed at a boarding house for approximately one year. Upon leaving Greenville, he went to work at a mill in Shelby, North Carolina, where he stayed at his sister's home for several months. *Id.* He was then transferred to a different position at the mill, which made transportation "more convenient[] if he stayed at his father's home." As a result, "he left his sister's home and returned to the home of his father, intending ultimately to find a boarding house in Shelby and get a room there." *Id.*

At the time of the accident, the son had been staying at his father's home for approximately two weeks. *Id.* at 433. The evidence showed that (1) he "did not intend to stay there permanently but he had no fixed plan as to when he would leave;" (2) he "had found a boarding house in Shelby but had not [yet] moved to it;" (3) he "had no home of his own and no furniture" and his "only belongings were his clothes;" and (4) he considered his father's home "the only permanent place that he had to go back to." During this time spent at his father's house, he ate meals together with his father, paid nothing for room and board, occasionally drove his father's car, and used his father's home address "as his permanent mailing address." He also "had the full use of the house and slept in the room which he had used when he was growing up." *Id.* In analyzing the policy, we recognized that

> [t]he words 'resident,' 'residing,' and 'residence' are in common usage and are found frequently in statutes, contracts and other documents of a legal or business nature. They have, however, no precise, technical and fixed meaning applicable to all cases.

Id. at 435.

We ultimately concluded that the son was a resident of his father's household for purposes of the policy. *Id.* at 439. We found it dispositive that (1) the son "had no home of his own;" (2) he "carr[ied] with him all his possessions" when he returned to his father's house; (3) he intended to "remain there until living quarters more convenient to his employment could be found;" (4) while at his father's house, he "lived in and used his father's house as he had done when a boy" by eating, sleeping, and doing laundry there; and (5) the son paid no rent to his father. Based on these factors, we stated the following:

> We think it is clear that under these circumstances [the son] was 'a resident of the same household' as his father. He is not in the same position as an adult child having a home of his own to which he intends to return and is making a mere visit to his parents. Nor is he in the position of a mere roomer or boarder. He was there because he was a member of the family and had no other home.

Id.

These cases aptly demonstrate that the question of who is considered to be a resident of a household can require a particularized, fact-intensive inquiry into the circumstances of the parties' current and prior living arrangements. Nevertheless, our prior decisions do make clear that one basic prerequisite exists when a party seeks coverage under this type of provision contained within a relative's insurance policy—namely, the party must show that they actually lived in the same dwelling as the insured relative for a meaningful period of time. The son in *Barker* lived with his father before leaving for college at age 19. The husband and wife in *Newcomb* had lived with Mrs. Gray off and on for at least three years. The son in *Jamestown* had lived with his father at periodic intervals for most of his adult life. Such a requirement is also fully in accord with the above-quoted dictionary definitions of the terms "resident" and "household."[2]

The dissent accuses us of "imposing [a] novel rule" by holding that family members must have actually lived together in order to be considered residents of the same household, apparently believing it is simply a coincidence that the families in *Barker*, *Newcomb*, and *Jamestown* had

2. The dissent takes us to task for deeming relevant the dictionary definitions of the terms "resident" and "household." However, as noted earlier in our analysis, this Court in *Jamestown* expressly favored such an approach. *See Jamestown*, 266 N.C. at 438 ("Thus the definition of 'resident' in the standard, nonlegal dictionaries may be a more reliable guide to the construction of an insurance contract than definitions found in law dictionaries.").

all lived under a common roof together for meaningful periods of time. This argument is patently incorrect. In each of these three cases, we would not have even considered the possibility that the persons seeking coverage were residents of the named insured's household had they not previously lived together in the same residence for a sufficient time period.[3] Given that the existence of such a threshold requirement is obvious, it is not surprising that this Court felt no need to state it outright. Instead, our prior decisions focused on the question of whether the party seeking coverage had stayed in the insured family member's residence on more than merely a temporary basis and whether the facts supported a finding that the family members intended to form a common household.

Oddly, the dissent characterizes our decision as "results-driven." To the contrary, it is the dissent who engages in an analysis untethered by either the prior decisions of this Court or the plain meaning of the policy terms at issue in order to reach its preferred result. Indeed, the dissent advocates no actual standard at all—instead utilizing a vague and amorphous analysis that would presumably permit a finding of coverage any time a court feels such a result would be desirable. Such an approach finds no refuge in the prior decisions of this Court.

Under the facts of the present case, it is clear that defendants were not residents of Mary's household within the meaning of the Policy. The record unambiguously demonstrates that defendants have never actually lived in the same residence as Mary. Defendants lived in a house at 224 Bay Orchard Lane while Mary resided in a separate home at 213 Martin Farm Lane—the two residences being separated by a 3-5 minute walk. The houses had separate addresses and post office boxes. Although defendants and Mary would occasionally spend the night at each other's houses, they never actually lived together in one dwelling. Instead, they lived and slept primarily in their own homes and stored their clothing, furniture, and personal belongings in their own respective residences.

Defendants, however, ask us to apply a different test to determine whether they qualified as residents of Mary's household. In so doing, they rely heavily on the analysis employed by the Court of Appeals in *N.C. Farm Bureau Mut. Ins. Co. v. Paschal*, 231 N.C. App. 558 (2014), the case serving as the basis for the dissent in the Court of Appeals in the present case.

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3. Although the dissent appears to view *Barker* as the controlling precedent on this subject, it conveniently ignores the fact that in *Barker*, as noted above, our opinion relied on the fact that the son had lived in the father's home—presumably for his entire life—prior to leaving for college.

In *Paschal* the minor plaintiff was injured in a car accident and sought coverage under her grandfather's automobile insurance policy, which provided coverage to "residents" of the insured's "household." *Id.* at 559. At the time of the accident, the grandfather owned a family farm that consisted of "multiple houses" on "several hundred acres of farmland." *Id.* at 560. For much of her childhood, the plaintiff lived with her father in one house on the farm, while the grandfather lived in his own residence. The houses were approximately one mile apart and were both located on a parcel of contiguous land owned by the grandfather. The grandfather's mail was sent to his own house, which was also where he kept the majority of his clothing. The grandfather spent most nights sleeping either at his own house or his girlfriend's house, but "on rare occasions" he would spend the night at the plaintiff's home. *Id.*

The grandfather testified that he considered the farm to be a "family farm" with his relatives living in various houses scattered across the property. The grandfather paid all of the bills associated with the plaintiff's house, including all taxes, utilities, and maintenance costs. *Id.* Because the plaintiff's father had "ongoing trouble with the law," she would stay in her grandfather's house "on occasion" when her father was away. *Id.* at 561. For example, in 2005 (prior to the accident at issue in *Paschal*) the plaintiff spent an entire year living with her grandfather while her father was in prison, and the grandfather was also appointed her legal guardian during that time. The plaintiff was supported by her grandfather through " 'every bit' of her life, providing food, clothes, housing, utilities, phone, and other expenses" and taking her to any necessary medical appointments. Even when not living in the same house, they saw each other almost every day, and each of them was free to enter the other's house at any time. The grandfather testified that he considered the plaintiff and her father to be "a part of his household." *Id.*

Based on these facts, the Court of Appeals held that the plaintiff qualified as a resident of her grandfather's household under the policy. *Id.* The court explained its reasoning as follows:

> Determinations of whether a particular person is a resident of the household of a named insured are individualized and fact-specific . . . . [W]here members of an insured's household are provided coverage under the policy, "household" has been broadly interpreted, and *members of a family need not actually reside under a common roof to be deemed part of the same household* . . . . [I]n determining whether a person in a particular case is a resident of a

> particular household, the intent of that person is material to the question.

Id. at 565–66.

The Court of Appeals found it dispositive that (1) the grandfather "was the most constant caregiver in [plaintiff's] life;" (2) the grandfather "did not charge any rent" for the plaintiff and her father to live on his property; (3) the grandfather "paid for the vast majority of [her] expenses" such as food, clothing, and utilities; (4) the two houses were both located on the family farm and "connected to each other by contiguous land owned by [the grandfather];" (5) on several occasions during her childhood, the plaintiff had lived with her grandfather while her father was away; and (6) both plaintiff and her grandfather considered themselves to belong to the same household. *Id.* at 568.

We need not determine whether the ultimate outcome in *Paschal* was correctly decided. Instead, we simply express our disapproval of the portions of the analysis in *Paschal* that are inconsistent with our holding in the present case—most notably, the proposition that relatives need not have *ever* actually lived in the same dwelling to be considered residents of the same household. Although there is no requirement that members of a family must have *continuously* resided under a common roof—without interruption—to be deemed residents of the same household, they must have done so for some meaningful length of time. The record must also reflect an intent to form a common household. But no matter how close or integrated the family relationship, family members who have never actually lived together in the same dwelling cannot be considered to be residents of a single household.

Alternatively, defendants and the *amici* suggest that *Paschal* established the existence of a "family farm exception," allowing family members who live near each other on a contiguous family farm to qualify as residents of a single household regardless of whether they have ever actually lived in the same dwelling. However, we are unable to discern any basis under this Court's prior case law for adopting a separate test for defining the policy terms "resident" and "household" that would apply uniquely to persons living on "family farms."[4]

The dissent claims that we depart from a "settled rule" by disregarding the decision of the Court of Appeals in *Paschal*. This argument is

4. Nor does the Policy itself recognize any exception to the terms of its coverage that would apply solely to family farms.

incorrect for several reasons. Most basically, *Paschal* is clearly not a decision from this Court. We are, of course, not bound by any decision of the Court of Appeals. *See Misenheimer v. Burris*, 360 N.C. 620, 625 (2006) ("[D]ecisions of the Court of Appeals are clearly not binding on this Court."). Moreover, this Court has never even cited *Paschal*—much less stated our approval of the analysis contained therein. Finally, as stated above, we express no opinion on the question of whether the Court of Appeals reached the correct result in *Paschal*. Indeed, we note that the minor plaintiff in that case lived with her grandfather for a full year, whereas here it is clear that defendants and Mary never actually lived under the same roof.

The dissent resorts to hyperbole in accusing us of doing a "grave disservice to the people of this State" by failing to recognize a special rule for persons living on family farms, but fails to acknowledge that there is no precedent of this Court that would support the recognition of such an exception. Moreover, creating an exception out of whole cloth for residents of family farms would inevitably lead to arguments from litigants in future cases demanding that their unique living arrangements are similarly deserving of an exception to the general rule.

The dissent also attempts to manufacture an "urban versus rural" dynamic to our decision. Obviously, no such distinction exists. Rather, we are simply applying the longstanding and logical requirement that in order to be deemed residents of the same household, parties must have lived in the same dwelling for some meaningful period of time under circumstances demonstrating an intent to form a common household—regardless of where in this state they happen to live.

Because there is no dispute regarding any of the material facts of this case and the record clearly demonstrates that defendants and Mary never lived together under the same roof, defendants are unable to meet their burden of demonstrating that they were residents of Mary's household. Accordingly, we conclude that the Court of Appeals correctly determined that defendants are not entitled to coverage under the Policy and that the trial court appropriately awarded summary judgment in favor of Farm Bureau.

Conclusion

For the reasons stated above, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

The sole issue in this case is whether, as a matter of law, the terms "resident" and "household" in Mary Martin's insurance policy were intended and understood by the contracting parties to include her daughter-in-law and her granddaughter, who lived on her farm. I believe that in defining these terms to exclude family members who live in separate dwellings on a single farm and concluding that Jean and Marina Martin were not residents of Mary's household, the majority imposes an unduly restrictive frame of reference that ignores the realities of rural life and fails to account for the full context of the lives the Martin's led on Mary's 76-acre farm on Knotts Island, North Carolina. Accordingly, I dissent from the majority's decision to construe "household" to deny the defendants coverage under the policy. Because I would hold that Mary Martin and the defendants were members of the same household, I would conclude that they are covered under the plain terms of the insurance policy issued to Mary, which covers all family members who were residents of the insured's household.

The crux of the issue for the majority is that Mary Martin lived in the main house on the farm and Jean and Marina lived in the guest house. According to the majority, because they do not now and have not previously lived together under a single roof, they cannot be members of one "household." As the cases cited by the majority illustrate, the question of whether family members are residents together in a single household is a highly fact-intensive inquiry that necessarily varies on a case-by-case basis. *See Newcomb v. Great Am. Ins. Co.*, 260 N.C. 402, 405, 133 S.E.2d 3, 6 (1963) ("[T]he word 'resident' has different shades of meaning depending upon context."). Although we have looked to dictionaries in evaluating the meaning of a term used in an insurance contract, we have never held that the dictionary definition is dispositive. Instead, we have considered numerous factors relevant in ascertaining the meaning of the term as utilized in a particular contract, including the intent of the individuals claiming residence in a single household, the financial and familial relationships between them, and the "touchstone . . . that the phrase 'resident of the same household' has no absolute or precise meaning, and, if doubt exists as to the extent or fact of coverage, the language used in an insurance policy will be understood in its most inclusive sense." *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 439, 146 S.E.2d 410, 417 (1966) (quoting *Am. Universal Ins. Co. v. Thompson*, 62 Wash. 2d 595, 599, 384 P.2d 367, 370 (1963)); *see also Great Am. Ins. Co. v. Allstate Ins. Co.*, 78 N.C. App. 653, 656, 338 S.E.2d 145, 147 (1986) ("Our courts have also found, however, that in

determining whether a person in a particular case is a resident of a particular household, the intent of that person is material to the question.").

For example, we have previously held that a son who lives in an apartment near his college campus is still a member of his parent's household for insurance purposes, finding compelling the fact that the parent financially supported the son and paid for the apartment. *Barker v. Iowa Mut. Ins. Co.*, 241 N.C. 397, 85 S.E.2d 305 (1955). In reaching this conclusion in *Barker*, the Court emphasized that "[i]t must be remembered that the policy of insurance was written by the company's lawyers and that the courts must, therefore, in case of doubt or ambiguity as to its meaning, construe the policy strictly against the insurer and liberally in favor of the insured." *Id.* at 400, 85 S.E.2d at 307.

The facts of the present case should lead us to the same conclusion as we reached in *Barker*. Mary Martin paid the utility bills and property taxes for Jean and Marina's home, as well as bills for the replacement or repair of appliances, plumbing, and other infrastructure, from the farm account or, if there were insufficient funds, from her personal account. The family operated as a single, unified financial and family unit, with Mary Martin at the head. If it "would be giving to the term 'residing with the insured' its most narrow and restricted meaning" to hold that a father living in Sparta and a son living in Raleigh were not residents of the same household, *id.*, then certainly a mother and her daughter-in-law who live 100 yards from each other are residents of the same household, especially given the background presumption we apply in resolving ambiguous terms of an insurance contract. *See, e.g.*, *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 295, 378 S.E.2d 21, 25 (1989) ("Like all contracts, insurance contracts must be construed against the drafter, which had the best opportunity to protect its interests."); *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978) ("If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder.").

The majority attempts to distinguish away our precedents by imposing the novel rule that "no matter how close or integrated the family relationship, family members who have never actually lived together in the same dwelling cannot be considered to be residents of a single household."[1] The majority divines this supposed prerequisite from the fact that in *Barker*, *Newcomb*, and *Jamestown*, people who this Court

1. The majority does not define the term "dwelling."

deemed to be residents of a single household had also previously lived under a single roof. Although the majority does not dispute that none of our precedents ever expressly refer to this supposed prerequisite, the majority contends that this silence is unsurprising given that "the existence of such a threshold requirement is obvious." According to the majority, "we would not have even considered the possibility that the persons seeking coverage were residents of the named insured's household had they not previously lived together in the same residence for a sufficient time period." This reasoning elevates what our precedents establish as, at most, a factor to be considered in analyzing a term in an insurance contract into a dispositive prerequisite. Even if it were correct that this Court has (silently) "relied on the fact that [the party seeking coverage] had lived in the [insured party's] home," it is not at all obvious why that fact renders moot all the other factors we have previously relied upon in assessing the meaning of the term "resident." In my view, the utterly unremarkable fact that in three cases people who this Court deemed to be residents of a single household had previously lived under a single roof does not establish that this Court has recognized "one basic prerequisite" to claiming coverage in an insurance contract. The majority points to no other context in which we have treated a factual circumstance common in a small number of our precedents as equivalent to the establishment of a binding legal rule.

The new prerequisite the majority recognizes is not found within the plain language of terms of the insurance policy at issue in this case, nor is it found in our precedents. Regardless, the majority's opinion does not negate the reality that in rural North Carolina, the type of living arrangement the Martins experienced at the time of the loss at issue in this case is common and commonly understood to be a family household. I am doubtful that the majority would apply the same stringent definition to living arrangements that are more common in urban parts of the state. If Jean and Marina lived in a semi-detached garage apartment on Mary's property, would they still be part of Mary's household? What if they lived separately in both units of a duplex? Or what if Mary occupied an in-law suite complete with a kitchen, bath, and a separate living room, but which was physically contained within the same structure? No matter how the majority would interpret contracts applying to individuals in these hypothetical circumstances, the majority provides no convincing rationale for why that decision should turn entirely on whether or not the parties previously lived together in a single physical structure. We should apply the same fact-intensive, contextual approach to resolve a claim arising from Knotts Island as we would to a claim arising from Raleigh. The majority does a grave disservice to the people of this State

by failing to account for and give legal recognition to the residential patterns that so many families experience in rural areas.

The majority's treatment of *N.C. Farm Bureau Mut. Ins. Co. v. Paschal*, 231 N.C. App. 558, 752 S.E.2d 775 (2014) is particularly illustrative of its unwillingness to conduct the contextual analysis long held to be necessary in interpreting the meaning of a term in an insurance context. In *Paschal*, the Court of Appeals affirmed that in conducting the "individualized and fact-specific" inquiry which is necessary to determine "whether a particular person is a resident of the household of a named insured," it would follow the settled rule that " 'household' has been broadly interpreted, and *members of a family need not actually reside under a common roof to be deemed part of the same household*." *Id.* at 565, 752 S.E.2d at 780 (quoting *Davis v. Md. Cas. Co.*, 76 N.C. App. 102, 105, 331 S.E.2d 744, 746 (1985)). Of course, a decision of the Court of Appeals is not binding on this Court. But the Court of Appeals' decision gives ample reason to doubt that the "threshold requirement" the majority gleans from *Barker*, *Newcomb*, and *Jamestown* is as self-evidently "obvious" as the majority claims. In my view, *Paschal* accords with the two principles animating our jurisprudence in this domain: (1) courts should resolve disputes through a fact-intensive, contextual analysis, and (2) ambiguities should be resolved in favor of the party claiming coverage. We should not ignore these principles on the basis of an observation about an unsurprising factual circumstance shared by three of our precedents and inconclusive dictionary definitions.

Although the majority's results-driven reasoning in this case fails to consider the realities of family life in rural North Carolina, its decision does not negate a court's responsibility to resolve disputes of this nature through "a particularized, fact-intensive inquiry into the circumstances of the parties' current and prior living arrangements." The majority does not explain why conducting this "particularized, fact-intensive inquiry" in a way that accounts for the lived realities of rural families would require "engag[ing] in an analysis untethered by either the prior decisions of this Court or the plain meaning of the policy terms at issue." Instead, such an approach is firmly consistent with our precedents, which have consistently avoided a one-size-fits-all rule in favor of an analysis that incorporates a variety of factors to account for the varying circumstances of households across our state. If that standard seems "vague and amorphous," it is because "[t]he words 'resident,' 'residing' and 'residence' . . . have, however, no precise, technical and fixed meaning applicable to all cases." *Jamestown*, 266 N.C. at 435, 146 S.E.2d at 414. In my view, the majority opinion relies upon an unduly rigid analysis instead of one

that adequately considers relevant context and nuance, and in doing so disregards "the principle [which] has grown up in the courts that these policies must be construed liberally in respect to the persons insured, and strictly with respect to the insurance company." *Roberts v. Am. All. Ins. Co.*, 212 N.C. 1, 192 S.E. 873, 876 (1937). Hopefully, future courts will analyze these contracts in a manner more consistent with the principles we have established in our previous cases, which this decision does not overrule. Because I believe the majority errs in denying coverage to Jean and Marina Martin, I respectfully dissent.

DELIA NEWMAN ET UX.
v.
HEATHER STEPP ET UX.

No. 383A19

Filed 18 December 2020

Emotional Distress—negligent infliction of emotional distress—foreseeability—judgment on the pleadings

The trial court erred by entering judgment on the pleadings for defendants, operators of an unlicensed at-home day care, on a claim for negligent infliction of emotional distress (NIED) brought by plaintiffs, parents of a two-year-old girl who was fatally shot at defendants' home with a loaded shotgun left on the kitchen table accessible to unsupervised children. The evidence, taken in the light most favorable to plaintiffs, sufficiently forecast that plaintiffs' severe emotional distress was a reasonably foreseeable consequence of defendants' negligent conduct, including the fact that plaintiffs were known to defendants.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 267 N.C. App. 232, 833 S.E.2d 353 (2019), reversing an order granting judgment on the pleadings in favor of defendants entered on 9 January 2019 by Judge Gregory Horne in Superior Court, Henderson County, and remanding to the trial court for further proceedings. Heard in the Supreme Court on 1 September 2020.

F.B. Jackson & Associates Law Firm, PLLC, by Frank B. Jackson and James L. Palmer, for plaintiff-appellees.

Ball Barden & Cury P.A., by J. Boone Tarlton and Ervin L. Ball Jr., for defendant-appellants.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Linda Stephens, for North Carolina Association of Defense Attorneys, amicus curiae.

MORGAN, Justice.

Our review in this matter requires the Court to apply well-established precedent to a trial court's order granting judgment on the pleadings regarding a claim for negligent infliction of emotional distress. Viewing the specific facts alleged here in the light most favorable to plaintiffs, we conclude that the trial court erred by entering judgment on the pleadings in favor of defendants.

Factual Background and Procedural History

In this tragic case, the facts are undisputed. On the morning of 26 October 2015, plaintiff Delia Newman took her two-year-old daughter Abagail, referred to as "Abby," to the residence of defendants Heather and James Stepp in Hendersonville. Delia Newman had a scheduled training class for her ultrasound certification at A-B Technical Community College on this date. Defendants were providing childcare in an unlicensed day care at defendants' home where the couple regularly cared for Abby and other children. At about 8:00 a.m., Abby and defendants' several minor children entered defendants' kitchen where a 12-gauge shotgun belonging to James Stepp, which he had used for hunting on the previous day, had been left on the kitchen table of defendants' home. The firearm was loaded and was not secured by safety, trigger lock, or other mechanism. One of defendants' children under the age of five years somehow discharged the shotgun and Abby was struck in the chest at close range. Shortly thereafter, Heather Stepp contacted emergency services for help.

Plaintiff Jeromy Newman, Abby's father, was a volunteer firefighter. He heard a report over his citizens band (CB) radio about "a young female child [who] was critically wounded by the discharge of a shotgun at close range at the babysitter's home and that her condition was extremely critical." When Jeromy Newman heard defendants' address

over the CB radio as the location of the incident, he drove towards defendants' home and also contacted his wife by telephone. While en route to defendants' residence, Jeromy Newman saw the ambulance which he learned "contain[ed] his daughter who was still alive at the time" and followed the emergency vehicle to the hospital where he observed Abby being removed from the ambulance and taken inside the building. Delia Newman's training class was occurring near the hospital where Abby was taken so, after receiving the telephone call from her husband, Delia Newman reached the hospital shortly after Abby had arrived. At that point, Delia Newman was informed of Abby's death and was allowed to hold Abby's body for an extended period of time.

On 26 June 2018, plaintiffs filed a complaint which included claims for negligent infliction of emotional distress, intentional infliction of emotional distress, wrongful death, and loss of consortium. Plaintiffs voluntarily dismissed their wrongful death claim without prejudice on 16 August 2018. On 2 October 2018, with consent of defendants, plaintiffs filed an amended complaint. In their amended complaint, plaintiffs alleged, *inter alia*, the following:

> 32. Defendants failed to unload the firearm prior to laying it on the kitchen table, where it was readily available to the minor children that had unfettered access to the entire home.
>
> 33. Defendants failed to "check" the firearm to [ensure] it was unloaded prior to allowing the [plaintiffs'] child inside their home.
>
> 34. Defendants failed to properly educate their young children regarding firearms and the dangers involved with "playing" with said firearm.
>
> 35. Defendants failed to [ensure] that they had the proper training prior to possessing such a firearm.
>
> 36. Defendants failed to properly supervise the minor children that were in their home.
>
> 37. That the actions of the [d]efendants were a direct and proximate cause of the injuries and death of [Abby].
>
> . . . .
>
> 39. It was reasonably foreseeable that the conduct of the [d]efendants, and the wounding and death of [Abby] would

cause the [p]laintiffs severe emotional distress, including but not limited to:

> a. Both [p]laintiffs have incurred severe emotional distress. The mother has incurred such severe emotional distress that she has been under constant psychiatric care and has been placed on numerous strong anti-depressants as well as other medications.
>
> b. The mother has had etched in her memory the sight of her lifeless daughter in her arms at Mission Hospital.
>
> c. The mother has convinced herself that she also is going to die, because God would not allow her to suffer as she has suffered without taking her life also.
>
> d. The mother is still unable to deal with the possessions of her dead daughter but has kept every possession in a safe place.
>
> e. At times[,] the mother has wished death for herself.
>
> f. The mother has not been able to tend to her usual household duties and has stopped her efforts to obtain the degree she had sought . . . .
>
> g. There are days the mother has trouble leaving her home.
>
> h. Both [p]laintiffs have lost normal husband and wife companionship and consortium.
>
> i. As a result of all the aforesaid, the mother has been rendered disabled for periods of time since her daughter's death.

On 15 November 2018, defendants filed their answer, along with a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. N.C.G.S. § 1A-1, Rule 12(c) (2019). The trial court heard defendants' motion on 3 December 2018. On 9 January 2019, the trial court filed a corrected order granting judgment on the pleadings, dismissing all three of plaintiffs' remaining claims. On 27 December 2018, plaintiffs appealed from the trial court's judgment in

favor of defendants. Plaintiffs filed an amended written notice of appeal from a Corrected Judgment of Dismissal on 10 January 2019.

On appeal, plaintiffs argued that their complaint sufficiently alleged negligent infliction of emotional distress so as to withstand defendants' motion for judgment on the pleadings. *See* N.C.G.S. § 1A-1, Rule 12(c). The parties and the entire panel of the lower appellate court agreed that the dispositive issue in the case was whether plaintiffs' allegations regarding foreseeability were sufficient to support a claim for negligent infliction of emotional distress as a result of Abby's shooting and resulting death. *Newman v. Stepp*, 267 N.C. App. 232, 833 S.E.2d 353 (2019). To sustain a claim for negligent infliction of emotional distress, "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) *it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress* . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, *P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990) (emphasis added).

The Court of Appeals panel was divided on the question of foreseeability. The majority held that "plaintiffs properly alleged severe emotional distress to support foreseeability in their claim of negligent infliction of emotional distress" and therefore reversed the trial court's ruling in favor of defendants for judgment on the pleadings and remanded the matter for further proceedings. *Newman*, 267 N.C. App. at 233, 833 S.E.2d at 355. The dissent in the lower appellate court cited and considered the same case law as the majority, but in the view of the dissenting judge, "[p]laintiffs' allegations rely *solely* upon the existence of a parent-child relationship and the aftermath and effects they suffered from the wrongful death of their child," and thus they "cannot sustain a claim for negligent infliction of emotional distress." *Id.* at 243–44, 833 S.E.2d at 361 (Tyson, J., dissenting).[1] On 1 October 2019, defendants filed in this Court a notice of appeal on the basis of the dissent in the Court of Appeals. *See* N.C.G.S. § 7A-30(2) (2019).

Analysis

The question before this Court is whether judgment on the pleadings was appropriate in this case, where the underlying claim was negligent

1. The dissenting judge also took issue with the majority opinion's direction to the trial court on remand concerning the loss of consortium claim, first stating that the claim was not before the Court of Appeals and further opining that a claim for loss of consortium resulting from a death may be brought *only* as an ancillary claim to a wrongful death action, citing *Keys v. Duke Univ.*, 112 N.C. App. 518, 520, 435 S.E.2d 820, 821 (1993). *Newman v. Stepp*, 267 N.C. App. 232, 251, 833 S.E.2d 353, 366 (2019) (Tyson, J., dissenting).

infliction of emotional distress, a claim primarily focused upon the element of foreseeability in light of the facts and circumstances presented in this case. After careful consideration, we conclude that the averments contained in plaintiffs' complaint were sufficient as to the element of foreseeability for this case to proceed beyond the pleading stage of this legal controversy. Therefore, we hold that the trial court erred by allowing judgment on the pleadings for defendants.

We begin with an identification of the proper standard of review to be applied in this matter. In considering a motion for judgment on the pleadings, a "trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). This high standard is imposed because

> [j]udgment on the pleadings is a summary procedure and the judgment is final. Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits. The movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment.

Id. (citations omitted).

As the non-moving party, plaintiffs are entitled to have the trial court to view the facts and permissible inferences from plaintiffs' complaint in the light most favorable to them, with plaintiffs' factual allegations taken as true and defendants' opposing responses taken as false. With this established approach, it is apparent that the first and third elements of a claim for negligent infliction of emotional distress as articulated in *Johnson* exist in the present case. In assessing foreseeability, this Court has stated that "the 'factors to be considered' include, *but are not limited to*: (1) 'the plaintiff's proximity to the negligent act' causing injury to the other person, (2) 'the relationship between the plaintiff and the other person,' and (3) 'whether the plaintiff personally observed the negligent act.' " *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993) (quoting *Johnson*, 327 N.C. at 305, 395 S.E.2d at 98).

Turning to the substance of the negligent infliction of emotional distress claim, it is clear that "a plaintiff may recover for his or her severe emotional distress arising due to concern for another person, *if* the

plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence." *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97. As noted above, plaintiffs' allegations were undisputed that defendants' negligent act of leaving a loaded shotgun unsecured and accessible to a group of young children was the proximate cause of both Abby's death and plaintiffs' resulting mental anguish and suffering; therefore, only the sufficiency of the allegations regarding the element of foreseeability remains for this Court's determination in this appeal. *See id.* ("Although an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim; mere temporary fright, disappointment or regret will not suffice. In this context, the term 'severe emotional distress' means any emotional or mental disorder . . . ." (citation omitted)). In *Johnson*, we observed that "[f]actors to be considered on the question of foreseeability . . . include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." *Id.* at 305, 395 S.E.2d at 98.

In recalling the three aforementioned *Johnson* factors undergirding a negligent infliction of emotional distress claim as we applied then in *Sorrells*, we further emphasized that

> *such factors are not mechanistic requirements* the absence of which will inevitably defeat a claim for negligent infliction of emotional distress. *The presence or absence of such factors simply is not determinative in all cases*. Therefore, North Carolina law forbids the mechanical application of any arbitrary factors . . . for purposes of determining foreseeability. Rather, the question of reasonable foreseeability under North Carolina law *must be determined under all the facts presented, and should be resolved on a case-by-case basis* by the trial court and, where appropriate, by a jury.

Sorrells, 334 N.C. at 672–73, 435 S.E.2d at 322 (extraneity omitted) (emphasis added). *See also Johnson*, 327 N.C. at 291, 395 S.E.2d at 89 ("[O]ur law includes *no arbitrary requirements to be applied mechanically* to claims for negligent infliction of emotional distress." (emphasis added)).

Relying on their interpretation of this standard and in light of the facts alleged in plaintiffs' complaint, defendants contend that dismissal

on the pleadings was appropriate because plaintiffs did not observe and were not in close proximity to the shooting or the death of Abby. Among other cases which defendants cite, they most heavily regard *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993), and *Andersen v. Baccus*, 335 N.C. 526, 439 S.E.2d 136 (1994), as factually analogous to, and legally controlling on, the facts of the case at bar.

In *Gardner*, the plaintiff, the mother of a thirteen-year-old son, sued the child's father for negligent infliction of emotional distress after the youngster, while riding in a truck being operated by the father, was injured when the father negligently drove the vehicle into a bridge abutment, seriously injuring the child. *Gardner*, 334 N.C. at 663, 435 S.E.2d at 326. The mother was alerted to the accident by a telephone call and upon rushing to the hospital where her son had been transported, saw the child being wheeled into the emergency room by medical personnel as resuscitation efforts were instituted. *Id.* at 663–64, 435 S.E.2d at 326. The mother did not see her child again but shortly thereafter was informed that her son had died. *Id.* at 664, 435 S.E.2d at 326. In rendering the opinion in *Gardner*, this Court stated that

> [t]he trial court treated defendant's motion to dismiss as a motion for summary judgment. For purposes of that motion the parties stipulated that their son had died as a result of defendant's negligence and that plaintiff had suffered severe emotional distress as a result of the accident and death. The trial court granted summary judgment as to plaintiff's claim for [negligent infliction of emotional distress] and dismissed that claim with prejudice. It ruled that, as a matter of law, plaintiff could not establish a claim for [negligent infliction of emotional distress] because she did not witness the accident nor was she in sufficiently close proximity thereto to satisfy the "foreseeability factors" set forth in *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990).
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> On appeal, the Court of Appeals held that plaintiff's emotional distress as a result of defendant's negligence was foreseeable. Emphasizing that the [*Johnson*] factors were not requirements for foreseeability but were "*to be considered* on the question of foreseeability," the court stated:
>
> > In common experience, a parent who sees its mortally injured child soon after an accident,

> albeit at another place, perceives the danger to the child's life, and experiences those agonizing hours preceding the awful message of death may be at no less risk of suffering a similar degree of emotional distress than . . . a parent who is actually exposed to the scene of the accident.
>
> *Gardner v. Gardner*, 106 N.C. App. 635, 639, 418 S.E.2d 260, 263 (1992). The [Court of Appeals] held that defendant "could have reasonably foreseen that his negligence might be a direct and proximate cause of the plaintiff's emotional distress," *id.*, and it accordingly reversed the trial court.

Id. at 664-65, 435 S.E.2d at 326 (fifth alteration in original). The dissenting judge at the Court of Appeals in *Gardner* opined that the claim for negligent infliction of emotional distress must fail because the plaintiff "did not observe and was not in close proximity to the negligent act," the truck accident. *Id.* at 665, 435 S.E.2d at 326. Upon review, this Court quoted the *Johnson* factors, but emphasized that in *Johnson* itself

> [n]otably, these factors were not termed "elements" of the claim. They were neither requisites nor exclusive determinants in an assessment of foreseeability, but they focused on *some* facts that could be particularly relevant in any one case in determining the foreseeability of harm to the plaintiff. Whatever their weight in this determination, we stressed that "[q]uestions of foreseeability and proximate cause must be determined under *all* the facts presented" in each case.

Id. at 666, 435 S.E.2d at 327 (second alteration in original) (citing *Johnson*, 327 N.C. at 305, 395 S.E.2d at 98). Thus, this Court in *Gardner*, just as in *Johnson*, continued to focus on the importance of flexibility regarding the pertinent factors to be considered in evaluating allegations of foreseeability when reviewing a claim for negligent infliction of emotional distress. Ultimately, in *Gardner*, this Court reversed the decision of the Court of Appeals, finding that the plaintiff's allegations were not sufficient to sustain her claim for negligent infliction of emotional distress.

> [The p]laintiff was not . . . in close proximity to, nor did she observe, defendant's negligent act. At the time defendant's vehicle struck the bridge abutment, plaintiff was at her mother's house several miles away. This fact, *while not*

> *in itself determinative*, unquestionably militates against defendant's being able to foresee, at the time of the collision, that plaintiff would subsequently suffer severe emotional distress as a result of his accident. Because she was not physically present at the time of defendant's negligent act, plaintiff was not able to see or hear or otherwise sense the collision or to perceive immediately the injuries suffered by her son. Her absence from the scene at the time of defendant's negligent act, *while not in itself decisive*, militates against the foreseeability of her resulting emotional distress.

Id. at 666–67, 435 S.E.2d at 328 (emphases added).

In *Andersen*, the plaintiff husband filed a complaint against defendant which included a claim for negligent infliction of emotional distress as a result of a traffic accident in which the vehicle being driven by defendant collided with the vehicle being operated by plaintiff's wife upon defendant's driving maneuver to avoid a collision with a third vehicle. Plaintiff did not see the accident occur but was present at the scene of the accident before his wife—who was with child at the time—was removed from her wrecked vehicle and accident site. *Andersen*, 335 N.C. at 527, 439 S.E.2d at 137. After being freed, "[the plaintiff's wife] was taken to a local hospital and the next day gave birth to a stillborn son . . . . [The] plaintiff's wife died from injuries allegedly received in the accident." *Id.* Defendants prevailed in the trial court on summary judgment on plaintiff's claim of negligent infliction of emotional distress. *Id.* at 528, 439 S.E.2d at 137. The Court of Appeals reversed the trial court on this issue, concluding that it was reasonably foreseeable that the plaintiff would suffer such distress as a result of the alleged negligence. *Id.* at 530, 439 S.E.2d at 138–39. This Court reversed, interspersing in our analysis the law of *Johnson* with the salient facts of *Sorrells*—a case in which this Court held that it was not reasonably foreseeable that defendant business which served alcohol to the twenty-one-year-old son of plaintiff parents would negligently inflict emotional distress upon the parents as a result of the son's death when his loss of control of his motor vehicle caused him to strike a bridge abutment—as we explained the rationale for our determination of the lack of foreseeability in *Andersen*:

> Holding that [the] plaintiffs' alleged distress arising from their concern for their son was a possibility too remote to be reasonably foreseeable, the Court [in *Sorrells*] said:
>
> > Here, it does not appear that the defendant had any actual knowledge that the plaintiffs existed.

> Further, while it may be natural to assume that any person is likely to have living parents or friends [who might] suffer some measure of emotional distress if that person is severely injured or killed, those factors are not determinative on the issue of foreseeability. The determinative question for us in the present case is whether, absent specific information putting one on notice, it is reasonably foreseeable that such parents or others will suffer "severe emotional distress" as that term is defined in law. We conclude as a matter of law that the *possibility* (1) the defendant's negligence in serving alcohol to [the plaintiffs' child] (2) would combine with [the plaintiffs' child's] driving while intoxicated (3) to result in a fatal accident (4) which would in turn cause [the plaintiffs' child's] parents (if he had any) not only to become distraught, but also to suffer "severe emotional distress" as defined in [*Johnson*], simply was a possibility too remote to permit a finding that it was reasonably foreseeable. This is so despite the parent-child relationship between the plaintiffs and [their child]. With regard to the other factors mentioned in [*Johnson*] as bearing on, *but not necessarily determinative of*, the issue of reasonable foreseeability, we note that these plaintiffs did not personally observe any negligent act attributable to the defendant. However, we reemphasize here that any such factors are merely matters to be considered among other matters bearing on the question of foreseeability.

Id. at 531–32, 439 S.E.2d at 139 (third alteration in original) (quoting *Sorrells*, 334 N.C. at 674, 435 S.E.2d at 323)). Utilizing the unique, though comparable facts presented by the *Gardner* and *Sorrells* cases, in *Andersen* we held that the defendant

> could not reasonably have foreseen that her negligent act, if any, would cause [the] plaintiff to suffer severe emotional distress. While in this case [the] plaintiff observed his wife before she was freed from the wreckage, as in *Gardner*, plaintiff was not in close proximity to and did

> not observe [the] defendant['s] negligent act, if any. As in *Sorrells*, nothing suggests that [the defendant] knew of [the] plaintiff's existence. The forecast of evidence is undisputed that at the moment of impact [defendant] did not know who was in the car which her vehicle struck and had never met [plaintiff's wife]. Both *Gardner* and *Sorrells* teach that the family relationship between plaintiff and the injured party for whom [the] plaintiff is concerned is insufficient, standing alone, to establish the element of foreseeability. In this case as in *Sorrells* the possibility that the decedent might have a parent or spouse who might live close enough to be brought to the scene of the accident and might be susceptible to suffering a severe emotional or mental disorder as the result of [the defendant's] alleged negligent act is entirely too speculative to be reasonably foreseeable.

Andersen, 335 N.C. at 532–33, 439 S.E.2d at 140. Accordingly, this Court reversed the decision of the Court of Appeals, reinstating the trial court's entry of summary judgment for the defendants on the claim for negligent infliction of emotional distress. *Id.* at 533, 439 S.E.2d at 140.

The factual circumstances presented in this Court's opinions of *Gardner*, *Andersen*, and *Sorrells* upon which defendants, as well as our learned dissenting colleague, primarily rely to advance the position that the trial court was correct to grant a judgment on the pleadings to defendants regarding plaintiffs' claim for negligent infliction of emotional distress are readily distinguishable from those which are existent in the instant case. Fundamentally, here the concept of the foreseeability of the infliction of emotional distress resulting from defendants' negligent act of leaving a loaded and unsecured shotgun in an unattended state within reach of a group of young children—as compared to the foreseeability of a defendant father inflicting emotional distress upon the mother for the alleged negligent act of having a traffic accident which killed their passenger son in *Gardner*, the foreseeability of the infliction of emotional distress resulting from defendant motor vehicle operator's alleged negligent act in killing an expecting mother and causing the baby to be stillborn because defendant swerved to avoid a collision with a third vehicle in *Andersen*, and the foreseeability of the infliction of emotional distress upon the parents of an adult son who was killed in the operation of his motor vehicle after defendant business committed the allegedly negligent act of serving alcoholic beverages to the son of plaintiffs during his patronage of defendant business—is a measure

of foreseeability indisputably governed by the factors which this Court articulated in *Johnson* which is necessary for a jury to determine in light of the "case-by-case basis" premised upon "all the facts presented" which this Court expressly discussed in *Sorrells*. 334 N.C. at 673, 435 S.E.2d at 322 (quoting *Johnson*, 327 N.C. at 305, 395 S.E.2d at 98).

While the dissenting opinion is careful to quote the direction given in *Sorrells* that the guiding "factors are not mechanistic requirements" and the mandate established by *Johnson* that negligent infliction of emotional distress "cases must be resolved on a case-by-case basis, considering all facts presented," the dissent nevertheless acquiesces in its acceptance of defendants' automated application of the *Johnson* factors without expending the requisite effort to navigate the nuances of the configuration of fact patterns. For example, in the present case, plaintiffs and defendants knew each other to such a degree that plaintiffs allowed their young child to spend appreciable amounts of time in defendants' home; however, in *Sorrells*, in noting that foreseeability was not reasonable for a negligent infliction of emotional distress claim, this Court expressly recognized that "it does not appear that the defendant had any actual knowledge that the plaintiffs existed." *Sorrells*, 334 N.C. at 674, 435 S.E.2d at 323. In *Andersen*, in noting that defendant "could not reasonably have foreseen that her negligent act, if any, would cause plaintiff to suffer severe emotional distress," we deemed it to be germane that "nothing suggests that [the defendant] knew of plaintiff's existence. The forecast of evidence is undisputed that at the moment of impact [the defendant] did not know who was in the car which her vehicle struck and had never met [the plaintiff's wife]." *Andersen*, 335 N.C. at 532–33, 439 S.E.2d at 140.

The same cases from this Court which the dissent and defendants invoke to support their position in the case sub judice that the foreseeability factors set forth in *Johnson* did not allow plaintiffs to sustain actions for negligent infliction of emotional distress are the same cases which this Court now reaffirms afford plaintiffs in the instant case the right to pursue their claim for negligent infliction of emotional distress beyond the pleading stage. Although we held in the cited series of cases that the foreseeability factor of *Johnson* did not exist due to such circumstances as the defendant's lack of knowledge of plaintiff's existence, the prospect of parents suffering "severe emotional distress," and the inability of the defendant to know the identity of the fatally injured party, conversely we hold that the foreseeability factor of *Johnson* does exist in the case at bar because defendants have knowledge of plaintiffs' existence, there is the prospect of plaintiffs suffering severe emotional

distress, and defendants were able to know the identity of the fatally injured party Abby.

Conclusion

We conclude that plaintiffs' allegations regarding the factor of foreseeability as addressed in *Johnson* were sufficient to support their claim for negligent infliction of emotional distress against defendants. Consequently, the trial court erred in entering judgment on the pleadings in favor of defendants. In affirming the Court of Appeals, we reiterate the established standard for a trial court's consideration of a defending party's motion to for judgment on the pleadings and, when such a motion is made in a negligent infliction of emotional distress action, the question of reasonable foreseeability must be determined under all of the facts presented and should be resolved on a case-by-case basis instead of mechanistic requirement associated with the presence or absence of the *Johnson* factors.

AFFIRMED.

Justice NEWBY dissenting.

The heartbreak a parent endures from the loss of a child simply cannot be overstated. "The shock and anguish suffered by plaintiffs upon learning of the wholly unexpected death of their young daughter is unfathomable to anyone not experiencing a similar loss." *Newman v. Stepp*, 267 N.C. App. 232, 242, 833 S.E.2d 353, 360 (2019) (Tyson, J., dissenting). I also agree with the dissent at the Court of Appeals that, "[w]hile nothing can change these facts nor restore the child plaintiffs have lost, the law affords these parents a claim and remedy of monetary compensation for damages they suffered through a claim for wrongful death." *Id*. In an attempt to fashion a different legal remedy to address this tragedy, the majority strays from our jurisprudence regarding claims for negligent infliction of emotional distress (NIED). Were we writing on a blank slate, I could agree as my sympathies lie with plaintiffs; however, we have several cases that determine foreseeability in the context of a NIED claim by applying the factors this Court articulated in *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*, 327 N.C. 283, 305, 395 S.E.2d 85, 98 (1990). These cases also have tragic facts where individuals lost dear loved ones—children, spouses, and parents—under terrible circumstances. In each of these cases we held that the alleged NIED was not foreseeable. Faithfully applying this precedent, the trial court correctly dismissed this action. I respectfully dissent.

To properly plead a claim for NIED, "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as 'mental anguish'), and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97. In this case, we address whether it was reasonably foreseeable that the negligent conduct would cause plaintiffs severe emotional distress. We have previously set forth factors to be considered in determining whether it was reasonably foreseeable that the conduct at issue would cause severe emotional distress. These factors "include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." *Id.* at 305, 395 S.E.2d at 98. Our cases emphasize that "such factors are not mechanistic requirements," *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993) (emphasis omitted), and that courts must evaluate NIED claims on a case-by-case basis, considering all facts presented, *Johnson*, 327 N.C. at 305, 395 S.E.2d at 98. Nonetheless, our case law has emphasized that the parent-child relationship standing alone is not enough. We have never previously focused on the nature of the negligent act. Generally, foreseeability requires plaintiffs to be present during the negligent act and perhaps observe the resulting injury. The majority fails to apply these factors and places the foreseeability determination with a jury.

The case before us is controlled by our decision in *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993), which has all of the factors present in this case. There, a thirteen-year-old child was injured in a vehicular wreck when his father recklessly ran into a bridge abutment on a rural road. *Id.* at 663–64, 435 S.E.2d at 326. The plaintiff, the child's mother, found out about the accident over the phone. *Id.* at 663, 435 S.E.2d at 326. She then went directly to the local hospital's emergency room (ER) where she saw her son being wheeled into the ER and medical professionals attempting to resuscitate him. *Id.* at 663–64, 435 S.E.2d at 326. The plaintiff did not see her son thereafter and was later informed that he had died. *Id.* at 664, 435 S.E.2d at 326.

The plaintiff sued, claiming NIED. *Id.* She alleged that her husband's reckless driving that caused the accident violated at least four criminal statutes. The trial court granted summary judgment for the defendant-husband on the NIED claim. *Id.* The wife appealed to the Court of Appeals. *Gardner v. Gardner*, 106 N.C. App. 635, 418 S.E.2d 260 (1992). After considering the above facts and stating its view of the rules set

forth in *Johnson*, the Court of Appeals reversed the trial court's judgment for many of the same reasons that the majority utilizes in its opinion in the present case. *Id.* at 639, 418 S.E.2d at 263. In analyzing the impact of the parent-child relationship and a plaintiff's proximity to the scene of the accident, the Court of Appeals stated that

> [i]n common experience, a parent who sees its mortally injured child soon after an accident, albeit at another place, perceives the danger to the child's life, and experiences those agonizing hours preceding the awful message of death may be at no less risk of suffering a similar degree of emotional distress than . . . a parent who is actually exposed to the scene of the accident.

Id. Thus, the Court of Appeals ultimately concluded that the parent-child relationship combined with the fact that the plaintiff saw the child soon after the accident was sufficient to establish the foreseeability element required for a NIED claim. *Id.*

This Court, however, reversed the Court of Appeals' decision, rejecting its reasoning. *Gardner*, 334 N.C. at 668, 435 S.E.2d at 328. We held that the trial court properly granted summary judgment on the plaintiff-wife's NIED claim. *Id.* In doing so, this Court again explained the *Johnson* foreseeability factors and utilized those factors to reach its result. *Id.* at 666–68, 435 S.E.2d at 327–28. We found persuasive that the wife was not in close proximity to her husband's negligent act, nor did she observe the resulting wreck; instead, the plaintiff was several miles away when the accident happened, which "militates against the foreseeability of [the plaintiff's] resulting emotional distress." *Id.* at 667, 435 S.E.2d at 328. Despite the fact that the complaint alleged that the husband's reckless driving violated at least four criminal statutes, this Court did not even mention that the nature of the negligent act could be a factor.

Moreover, recognizing that there must be a showing of foreseeability of severe emotional distress, this Court reasoned that the plaintiff-wife had not alleged that the husband knew that she would be especially susceptible to severe emotional distress. Severe emotional distress as defined by law requires allegations or a forecast of evidence of "any emotional or mental disorder, such as . . . neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Id.* (alteration in original) (quoting *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97). As this Court explained,

"[w]hile anyone should foresee that virtually any parent will suffer *some* emotional distress—'temporary disappointment . . . or regret'—in the circumstances presented, to establish a claim for NIED the law requires reasonable foresight of an emotional or mental disorder or other severe and disabling emotional or mental condition." *Id.* (second alteration in original). Thus, despite the fact that the husband certainly knew of his wife's relationship with their son, without the husband having knowledge or foresight that the wife would suffer *severe* emotional distress, we stated that the reasonable foreseeability element was not satisfied. *Id.* at 667–68, 435 S.E.2d at 328. Therefore, this Court concluded that the defendant-husband could not be held accountable for his actions though a NIED claim. *Id.* at 668, 435 S.E.2d at 328.

The facts in the present are similar to those in *Gardner*. Though defendants here knew of plaintiffs' parent-child relationship, that fact alone is inadequate. We rejected that same reasoning in *Gardner*. Moreover, like *Gardner*, defendants here had no reason to know that plaintiffs would suffer severe emotional distress as defined by law, meaning emotional distress exceeding that distress any parent would suffer when losing a child. In *Gardner*, defendant-husband would have had even more of an intimate understanding of the potential of severe emotional distress his wife would have suffered from losing their child. Certainly a husband would have been in a better position to know of any particular susceptibility of his wife to suffer severe emotional distress than a daycare owner interacting with a child's parents.

Plaintiffs here were not present when the negligent act or the accident occurred, as they neither saw the shotgun negligently being placed and left on the table nor did they see the discharge of the shotgun that ultimately led to their daughter's death. The same was true in *Gardner*, where the plaintiff did not observe the accident, but only saw her child arriving at the hospital after learning of the accident through a phone call, just as the father here learned of the accident through a CB-radio communication. Further, in *Gardner*, the mother saw the child while emergency personnel were attempting to resuscitate him at the hospital, whereas neither parent did so here. Our cases repeatedly consider a plaintiff's absence from the scene of the negligent act or accident as militating against foreseeability, despite how soon after the accident plaintiffs saw an injured or deceased individual. Simply put, while certainly these facts are tragic and heartbreaking, under our existing case law, it was not reasonably foreseeable that plaintiffs would endure severe emotional distress as defined by law to support a NIED claim.

The majority seeks to distinguish this case from *Gardner* because of the nature of the negligent act, noting that defendants' actions of leaving a loaded shotgun accessible to minors was egregious. The majority holds that severe emotional distress arising from that negligent act is more foreseeable than severe emotional distress caused by other types of negligent acts that also result in injury. The complaint in *Gardner* indicates the defendant's actions violated numerous criminal statutes as he carelessly and recklessly ran his truck into the bridge abutment. Nonetheless, our decision in *Gardner* did not attempt to evaluate the nature of the father's negligent act. It was simply not a factor in the foreseeability determination in *Gardner* or any of our other relevant cases. The question is not whether it *could be* reasonably foreseeable that a plaintiff would suffer severe emotional distress, but whether, under the specific facts presented, it *was* reasonably foreseeable that the plaintiff would suffer severe emotional distress as defined by law. Therefore, the majority's analysis primarily relies on a factor that this Court has not adopted in the past. Further, the majority now places the foreseeability determination with the jury, not the trial court.

Our foreseeability analysis in *Gardner* is consistent with our analysis of other cases where we have considered and rejected a plaintiff's NIED claim. In *Andersen v. Baccus*, the plaintiff-husband's pregnant wife had a car accident when the defendant swerved to avoid a vehicle driven by the a third person. 335 N.C. 526, 527, 439 S.E.2d 136, 137 (1994). The plaintiff did not witness the accident, but he went to the scene and saw his wife before she was freed from the wreckage. *Id.* The plaintiff's wife ended up giving birth to their baby, who was stillborn, and she later passed away as well. *Id.* The plaintiff brought a claim for punitive damages based on NIED, and the trial court granted summary judgment in the defendant's favor. *Id.* at 528, 439 S.E.2d at 137. Reviewing the case on appeal, this Court stated that the defendant's actions, while negligent, were not actions that were reasonably foreseeable to cause the plaintiff's severe emotional distress. *Id.* at 532, 439 S.E.2d at 140. Though the plaintiff observed his pregnant wife in her car before she was freed from the wreckage, even that was not enough to establish a NIED claim since the plaintiff was not in close proximity to nor did he observe the negligent act that caused his wife's and child's deaths. *Id.* at 532–33, 439 S.E.2d at 140. Moreover, we noted that the defendant did not know who was in the vehicle that the defendant struck. *Id.* at 533, 439 S.E.2d at 140. Specifically, "the family relationship between plaintiff and the injured party for whom plaintiff is concerned is insufficient, standing alone, to establish the element of foreseeability." *Id.* Therefore, this Court upheld

the trial court's grant of summary judgment because it was not reasonably foreseeable that plaintiff would suffer severe emotional distress. *Id.* Notably again, we did not address whether the defendant's negligent actions violated any criminal laws.

In another case, *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, a 21-year-old college student was drinking alcohol at a bar. 334 N.C. at 671, 435 S.E.2d at 321. The student's friends asked the bartenders not to serve the student any more drinks due to his intoxication and explained that the student had to drive himself home that evening. *Id.* Nevertheless, the employees continued to serve him alcohol. *Id.* When he was driving home, the student lost control of his car, struck a bridge abutment, and was killed. *Id.*

The student's parents brought a claim against the defendant-bar for NIED, which the trial court dismissed. *Id.* The Court of Appeals, however, reversed the trial court's decision. *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 108 N.C. App. 668, 672, 424 S.E.2d 676, 680 (1993). In doing so, the Court of Appeals focused on the fact that the parents, despite not being at the scene, learned their son was killed in an automobile accident and that his body had been mutilated, which the Court of Appeals determined could be found to be reasonably foreseeable to cause severe emotional distress. *Id.* at 672, 424 S.E.2d at 679.

This Court, however, rejected the Court of Appeals' reasoning. *Sorrells*, 334 N.C. at 675, 435 S.E.2d at 323. In doing so, this Court applied the *Johnson* factors to determine whether the plaintiffs had established foreseeability. *Id.* at 672–73, 435 S.E.2d at 322. We first reasoned that the determinative question in the case was "whether, absent specific information putting one on notice, it is reasonably foreseeable that such parents or others will suffer 'severe emotional distress' as that term is defined in law." *Id.* at 674, 435 S.E.2d at 323. We noted that the defendant did not specifically know of the plaintiff-parents' existence, and more so, the defendant did not know that the plaintiffs would suffer emotional distress like that described in *Gardner*, i.e., manifesting itself in mental and/or physical disorders. *Id.* Because of the lengthy chain of events that led to the student's death as well as the fact that the plaintiffs did not observe the accident or any of the defendant's negligent actions attributable to the student's death, this Court concluded that the trial court properly dismissed the plaintiffs' NIED claim. *Id.* at 675, 435 S.E.2d at 323.

The Court of Appeals has also utilized the *Johnson* foreseeability factors to reach similar results despite the tragic circumstances involved

in those cases. *See Fields v. Dery*, 131 N.C. App. 525, 529, 509 S.E.2d 790, 792 (1998) (concluding that the plaintiff had not established foreseeability to maintain a NIED claim, despite the fact that she was driving behind her mother and saw the defendant violate a criminal statute and crash into her mother's car, since the defendant could not reasonably have foreseen that the deceased's daughter would be driving behind her and see the accident that caused her mother's death); *see also Riddle v. Buncombe Cnty. Bd. of Educ.*, 256 N.C. App. 72, 77, 805 S.E.2d 757, 762 (2017) (concluding that, despite the fact that the plaintiff, a close friend of the deceased, was present at and observed the accident, there was no allegation of a relationship making him particularly susceptible to suffering severe emotional distress, meaning that the plaintiff could not advance a NIED claim).

An analysis of the egregious nature of the negligent act is not mentioned as a foreseeability factor in any of our prior cases. The majority adds this new factor, whether leaving a loaded shotgun accessible to minors was involved, to our NIED foreseeability jurisprudence and places the foreseeability determination with the jury. The *Johnson* factors have worked well for thirty years. We now embark into uncharted territory. The majority assures us that these new considerations will not open a floodgate of new NIED claims—only time will tell. The proper remedy under these circumstances is a wrongful death action, not a change to our NIED jurisprudence. Because I believe the trial court faithfully applied our NIED jurisprudence, I would affirm its decision. I respectfully dissent.

PARKES v. HERMANN

[376 N.C. 320 (2020)]

ANITA KATHLEEN PARKES
v.
JAMES HOWARD HERMANN

No. 241PA19

Filed 18 December 2020

Medical Malpractice—loss of chance—for improved outcome—proximate cause—stroke

In a medical malpractice case, the Supreme Court declined to recognize a new cause of action—"loss of chance"—where a stroke patient (plaintiff) showed only, at most, that defendant-physician's negligence in failing to timely diagnose her stroke lost her the opportunity to receive a time-sensitive treatment that could have given her a 40 percent chance of improved neurological outcome. Plaintiff's claim failed to meet the "more likely than not" (greater than a 50 percent chance) threshold for proximate cause, making summary judgment for defendant-physician proper.

Justice EARLS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 265 N.C. App. 475, 828 S.E.2d 575 (2019), affirming an order entered on 25 May 2018 by Judge Jesse B. Caldwell III in Superior Court, Lincoln County, granting defendant's motion for summary judgment. Heard in the Supreme Court on 1 September 2020.

Melrose Law, PLLC, by Mark R. Melrose and Adam R. Melrose, for plaintiff-appellant.

Roberts & Stevens, P.A., by Phillip T. Jackson, David C. Hawisher, and Elizabeth Dechant, for defendant-appellee.

D. Hardison Wood and Charles Monnett III for North Carolina Advocates for Justice, amicus curiae.

John H. Beyer and Katherine H. Graham for North Carolina Association of Defense Attorneys, amicus curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Christopher G. Smith, for North Carolina Chamber Legal Institute, amicus curiae.

Linwood Jones for North Carolina Healthcare Association, amicus curiae.

Norman F. Klick Jr., Jerry A. Allen, and Jocelyne Riehl for North Carolina Medical Society and North Carolina College of Emergency Physicians, amici curiae.

NEWBY, Justice.

In this case we are asked to change our existing jurisprudence regarding proximate causation and to establish a new cause of action, "loss of chance." We decline to make these significant changes because they are best left to the legislative branch. Specifically, this case is about whether a patient who experienced a stroke failed to show, more likely than not, that the physician's negligence caused her diminished neurological function. Further, this case raises the question of whether the patient's "loss of chance" at a better outcome following her stroke is a separate type of injury for which she could recover in medical malpractice action. Plaintiff concedes that she failed to show that it was more likely than not that defendant's negligence caused her diminished neurological function. Nonetheless, plaintiff argues her claims should stand because defendant's negligence diminished her likelihood of full recovery, thus proximately causing her injury. Further, plaintiff argues that her "loss-of-chance" claim is a separate claim. We now affirm the decision of the Court of Appeals, which affirmed the trial court's decision to grant summary judgment to defendant.

Because the trial court granted summary judgment, we review the facts in the light most favorable to plaintiff, the nonmoving party. As alleged in plaintiff's complaint, at approximately 12:15 a.m. on or about 24 August 2014, plaintiff told her husband she thought she might be having a stroke as "her left arm and left leg felt heavy and weak and . . . her tongue felt thick and her speech was slurred." Her family rushed her to the nearby hospital. By approximately 1:35 a.m. plaintiff was in triage at the hospital complaining of slurred speech and numbness in her left arm, symptoms that had started about one hour earlier. Plaintiff received a CT scan of her head at approximately 1:35 a.m., and those results were available soon after. At approximately 3:00 a.m. defendant contacted plaintiff's primary care physician, Dr. Wheeler, and erroneously communicated that plaintiff "had no neurological deficits." Plaintiff's same symptoms continued and at about 6:00 a.m. the hospital staff noted that plaintiff "had left facial droop, left arm drift and slightly slurred

speech." At approximately 7:15 a.m. Dr. Wheeler arrived at the hospital, noted plaintiff's neurological signs and symptoms, ordered a neurological consult, and admitted plaintiff to the hospital. After the neurological consult, Dr. Wheeler spoke with the neurologist who advised her that plaintiff's opportunity to benefit from certain time-sensitive treatment, namely administering alteplase, a tissue plasminogen activator ("tPA"), had passed.

In her complaint, plaintiff alleged that, "[d]ue to the delay in diagnosis, the Plaintiff has suffered additional harms, damages and losses, including permanent injuries, and including additional medical expenses for which the Defendant is liable." Plaintiff claimed defendant "was negligent and failed to use reasonable care and diligence" to timely diagnose plaintiff's stroke using the methods and techniques available, assess and reassess plaintiff's conditions which demonstrated the signs of an ongoing stroke, and timely treat plaintiff with tPA. Plaintiff alleged that her injury was "a direct and proximate result" of defendant's negligence and, "[h]ad timely and appropriate medical care been provided to the Plaintiff, then her ultimate medical outcome would have had an increased opportunity for an improved neurological outcome." This secondary claim, that plaintiff lost an increased opportunity for an improved neurological outcome by defendant's failure to timely treat her with tPA, is referred to as plaintiff's loss-of-chance claim.

Defendant moved for summary judgment, arguing that the stroke caused plaintiff's injuries, not defendant's failure to treat plaintiff with tPA, and that plaintiff's loss-of-chance claim is not a recognized claim in North Carolina. The trial court, having reviewed the pleadings, depositions, and memoranda of law submitted by both parties, granted summary judgment in favor of defendant.

On appeal, a unanimous panel of the Court of Appeals acknowledged that plaintiff's injury was proximately caused by the stroke and not by defendant's negligence. *Parkes v. Hermann*, 265 N.C. App. 475, 477, 828 S.E.2d 575, 577 (2019). The evidence in the light most favorable to plaintiff only showed a 40% chance that defendant's negligence caused plaintiff's injury. In other words, there was only a 40% chance that plaintiff's condition would have improved if defendant had properly diagnosed plaintiff and timely administered tPA. *Id.* By presenting evidence of only a 40% chance, plaintiff failed to show it was more likely than not that defendant's negligence caused plaintiff's current condition. *Id.*

Plaintiff also claimed that the loss of the 40% chance itself was a cognizable and separate type of injury—her loss of chance at having

a better neurological outcome—that warranted recovery. *Id.* at 478, 828 S.E.2d at 577–78. The Court of Appeals discussed that a plaintiff cannot recover for a loss of less than a 50% chance under "the 'traditional' approach" applied to loss-of-chance claims in other jurisdictions, but a plaintiff may recover the full value of a healthier outcome if he or she can show that, more likely than not, the outcome could have been achieved absent the defendant's negligence. *Id.* at 478, 828 S.E.2d at 578 (citing *Valadez v. Newstart, LLC*, No. W2007-01550-COA-R3-CV, 2008 WL 4831306, at *4 (Tenn. Ct. App. Nov. 7, 2008)). Here plaintiff's loss was at best a 40% chance; thus, plaintiff could not recover under this traditional approach.

Regardless, relying in part on this Court's precedent in *Gower v. Davidian*, 212 N.C. 172, 193 S.E. 28 (1937), the Court of Appeals stated that this Court had not adopted "loss of chance" as a separate cause of action, *Parkes*, 265 N.C. App. at 478, 828 S.E.2d at 578, and concluded that "any change in our negligence law lies 'within the purview of the legislature and not the courts,' " *id.* at 478–79, 828 S.E.2d at 578 (quoting *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 656–57, 654 S.E.2d 76, 81 (2007)). Thus, the Court of Appeals affirmed the trial court's order granting summary judgment in favor of defendant. *Id.* at 479, 828 S.E.2d at 578.

Summary judgment is proper if "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). "The movant is entitled to summary judgment . . . when only a question of law arises based on undisputed facts." *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 334, 777 S.E.2d 272, 278 (2015) (citation omitted). "All facts asserted by the [nonmoving] party are taken as true [and] . . . viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). "This Court reviews appeals from summary judgment de novo." *Ussery*, 368 N.C. at 334–35, 777 S.E.2d at 278 (citation omitted).

Here plaintiff's filings and discovery showed that for tPA to be possibly beneficial, it must be administered within three hours of the onset of a certain kind of stroke. A medical study reviewed by plaintiff's expert showed that stroke patients who receive placebo treatment, or in other words are not treated with tPA, have roughly a 20% to 26% chance of a good neurological outcome, such as a full or nearly full recovery. Those patients who receive the treatment add an additional thirteen percentage points to their chance of recovery, resulting in a 39% total chance of a good neurological outcome. Based on the expert's testimony, with the treatment also comes a certain degree of risk, dependent on the patient,

with a 6.4% risk of doing harm. According to plaintiff's expert, plaintiff "had an opportunity for [a] maximum benefit of 35 [percent]—well, according to the trial, I say about 30 to 35, the trial is up to 39 percent, but yes, under 40 percent."[1] Plaintiff claims that these percentages represent the lost chance of an increased opportunity for an improved neurological outcome had tPA been administered in time and constitute a compensable injury separate from traditional negligence.

As determined by the Court of Appeals, neither the additional thirteen percentage points, the 30% to 35% total chance, nor the 40% total chance of an improved neurological outcome meets the "more likely than not," or greater than a 50% chance, threshold for proximate cause in a traditional medical malpractice claim. But, plaintiff argues that the loss-of-chance claim is appropriate when a plaintiff cannot meet the greater than a 50% threshold, thereby allowing a plaintiff to present a loss-of-chance claim to the jury when a traditional negligence claim may not survive summary judgment. Plaintiff advocates for lowering the proximate cause standard for cases like this one because the loss of chance for an improved outcome, whether it be the additional thirteen percentage points, the 30% to 35% total chance, or the 40% total chance of an improved neurological outcome, represents a compensable injury separate from a traditional medical malpractice claim. Plaintiff maintains that advances in medicine allow these percentages to translate to calculable damages. The issue presented to this Court is whether losing the chance for an increased opportunity for an improved outcome is a cognizable and compensable claim in North Carolina. We hold that it is not.

In *Gower*, the plaintiff sustained a neck fracture during a motor-vehicle accident. 212 N.C. at 173, 193 S.E. at 29. This Court considered whether a physician was negligent in failing to timely diagnose the neck fracture, which resulted in about a thirteen-day delay in diagnosis. *Id.* at 174, 193 S.E. at 29. The plaintiff argued that the delay in the diagnosis caused the fracture to develop a callus, preventing it from being set properly once diagnosed. *Id.* at 174, 193 S.E. at 29–30. To have the opportunity to present his case to the jury, "the burden rested upon the plaintiff to offer evidence tending to show a causal connection between his injury and the negligent conduct of the defendant." *Id.* at 175, 193 S.E. at 30.

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1. The Court of Appeals assumed a 40% total chance of an improved neurological outcome when viewing the evidence in the light most favorable to plaintiff. *See Parkes*, 265 N.C. App. at 477, 828 S.E.2d at 577.

In an attempt to show that causal connection, the plaintiff offered testimony of an expert witness who opined "that had this case received immediate attention and had that fracture and dislocation reduced, his chances for further recovery, or for perfect recovery, would have been much greater." *Id.* "Analyzing this statement," the Court "found [it] to be entirely conditional." *Id.* The expert opinion simply failed to establish proximate cause between the defendant's delay in diagnosis and the injury sustained by the plaintiff: "His opinion in this respect is based entirely upon an actual reduction of the fracture, which the evidence discloses could not be reduced, and he merely says that the chances for further recovery would have been much greater. The rights of the parties cannot be determined upon chance." *Id.* at 176, 193 S.E. at 30. In short, the injury sustained by the plaintiff was attributable to the motor-vehicle accident rather than a delay in diagnosis. *See id.* In the light most favorable to the plaintiff, the expert testimony that the plaintiff would have had an improved chance of recovery if certain facts were true was inadequate. *Id.* The loss of that chance was not a compensable injury that could support a negligence claim. *Id.* at 176, 193 S.E. at 30–31.

Even if the Court in *Gower* did not outright reject what is today called a loss-of-chance claim, it firmly framed medical malpractice claims within the confines of traditional proximate cause, which allows a negligence claim to proceed when the evidence shows that the negligent act more likely than not caused the injury. If the evidence falls short of this causation standard, then there is no recovery. The Court did not relax the proximate cause requirement for a medical malpractice claim when presented with the opportunity. *See*, *e.g.*, *Buckner v. Wheeldon*, 225 N.C. 62, 65, 33 S.E.2d 480, 483 (1945) (A physician is liable "only when the injurious result flows proximately" from the physician's negligence.). Under a lesser standard, a plaintiff alleging medical malpractice need only offer evidence tending to show that the defendant's negligence "possibly" caused his injury, rather than "probably" caused it. Such a standard would create an anomaly in medical malpractice actions. Moreover, damages for a possible chance simply cannot fit within our traditional framework.

Here the evidence showed that if plaintiff had received the tPA medication in time and if the tPA medication had worked in her favor, then her chances for a better recovery would have been greater. The expert's opinion relied on the assumption that the tPA medication would have improved plaintiff's condition. To reach plaintiff's desired result would require a departure from our common law on proximate causation and damages since a loss-of-chance claim would award for the possibility

that defendant's negligence contributed to plaintiff's condition. We decline to do so. Such a policy judgment is better suited for the legislative branch of government.[2] *See Henson v. Thomas*, 231 N.C. 173, 176, 56 S.E.2d 432, 434 (1949). Accordingly, the trial court properly granted summary judgment to defendant. We affirm the holding of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

Early in the morning on 24 August 2014, plaintiff Anita Parkes began experiencing concerning neurological symptoms.[1] She believed she was having a stroke. Her family rushed her to Highlands-Cashiers Hospital. Dr. Hermann, an emergency physician, evaluated her at 1:47 a.m., approximately one and a half hours after the initial onset of her neurological symptoms. Ms. Parkes complained of left arm weakness and slurred speech. Defendant called Ms. Parkes' primary care physician and said that Ms. Parkes' speech was slurred but that he "was not seeing it." He attempted to discharge plaintiff from the hospital, but her family protested, and Dr. Hermann agreed to keep her overnight "for observation." The following morning, Ms. Parkes' family returned to the hospital, where they found Ms. Parkes laying on a stretcher in the emergency-room area suffering from obvious facial drooping. It would later be determined that plaintiff had suffered an acute ischemic stroke.

The standard of care for treating a patient who incurs an ischemic stroke is to administer alteplase, a tissue plasminogen activator (tPA), which is the only known FDA-approved treatment for this condition. A patient who receives tPA within three hours of the onset of neurological symptoms has an approximately 30%–35% chance of ultimately experiencing improved neurological functioning. While administering tPA is

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2. The General Assembly has already modified the common law in this area and is certainly equipped to do so again if it so desires.

1. At the motion for summary judgment stage, "[a]ll facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). Accordingly, on appeal, we consider the facts as alleged by Ms. Parkes to be true. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) ("On appeal of a trial court's allowance of a motion for summary judgment . . . [e]vidence presented by the parties is viewed in the light most favorable to the non-movant.").

not without risk, a patient who receives tPA has a measurably better chance of recovery than a patient who does not receive the treatment. Sadly, Ms. Parkes did not recover, and she continues to suffer neurological symptoms to this day, including severely impaired functioning on the left side of her body.

As alleged by Ms. Parkes, if Dr. Hermann had administered tPA at or around the time he initially examined her, she would have had a significantly better chance of recovering from her stroke. Ms. Parkes asserts that she lost her chance of recovery due to Dr. Hermann's failure to adhere to the appropriate standard of medical care. Our decision today denies Ms. Parkes the opportunity to seek to hold Dr. Hermann liable for the consequences of his assertedly negligent actions. According to the majority, this result is necessary because Ms. Parkes "failed to show that it was more likely than not that defendant's negligence caused her diminished neurological function." The majority is correct that, in North Carolina, a plaintiff who brings a common law negligence claim has the burden of proving a probabilistic connection between his or her alleged injury and the defendant's purportedly negligent conduct. *See Phelps v. City of Winston-Salem*, 272 N.C. 24, 30, 157 S.E.2d 719, 723 (1967) ("If the connection between negligence and the injury appears unnatural, unreasonable and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause.") Ms. Parkes concedes that the scientific evidence cannot support the conclusion that Dr. Hermann's failure to administer tPA was more likely than not the cause of the neurological symptoms she continues to experience. Nevertheless, she asserts that she can carry her burden by showing that Dr. Hermann's negligent conduct more likely than not caused her to lose her chance of recovering from the stroke.

In so arguing, Ms. Parkes urges us to adopt the "loss of chance" doctrine, which has been recognized by courts applying the common law of negligence in no less than twenty-five jurisdictions. *See* Lauren Guest, David Schap & Thi Tran, *The "Loss of Chance" Rule as a Special Category of Damages in Medical Malpractice: A State-by-State Analysis*, 21 J. Legal Econ. 53, 58–60 (2015) (reviewing case law as of 2014 and concluding that 41 states had addressed loss of chance, with 24 states having adopted some version of the doctrine).[2] Under the loss of chance doctrine, the injury that Ms. Parkes seeks redress

2. Since then, the Oregon Supreme Court has also recognized the loss of chance doctrine. *Smith v. Providence Health & Servs.-Oregon*, 361 Or. 456, 393 P.3d 1106 (2017).

for is not her diminished neurological functioning.[3] Instead, Ms. Parkes asserts that Dr. Hermann's negligent conduct deprived her of the opportunity to recover from her ischemic stroke. In other words, Ms. Parkes claims that due to Dr. Hermann's failure to administer tPA, she lost the 30%–35% chance of an improved outcome that she would have enjoyed if Dr. Hermann had adhered to the standard of care. Even under this theory, Ms. Parkes must still satisfy the four elements of a common law negligence claim: she must show that "(1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) damages resulted from the injury." *Parker v. Town of Erwin*, 243 N.C. App. 84, 110, 776 S.E.2d 710, 729–30 (2015) (citation omitted). The only difference is that in a loss of chance claim, the injury is defined as the plaintiff's diminished opportunity to recover due to the defendant's negligent conduct, not the plaintiff's physical condition itself. *See Delaney v. Cade*, 255 Kan. 199, 215, 873 P.2d 175, 185 (1994). ("In an action to recover for the loss of a chance to survive or for the loss of a chance for a better recovery, the plaintiff must first prove the traditional elements of a medical malpractice action by a preponderance of the evidence."). On this theory, Ms. Parkes argues her claim should survive defendant's motion for summary judgment because she has alleged that (1) Dr. Hermann owed her a duty of care when he treated her in the emergency room, (2) Dr. Hermann's failure to diagnose her stroke and administer tPA breached that duty, (3) Dr. Hermann's actions were the actual and proximate cause of her foregone 30%–35% chance of recovering from the stroke, and (4) damages resulted from her lost chance of recovery.

To date, North Carolina courts have not recognized a common law negligence claim under the loss of chance theory Ms. Parkes advances in the present case. Despite the majority's characterization of our precedents, this Court has never squarely considered the loss of chance doctrine. Ms. Parkes does not ask this Court to allow her claim as an exercise of sound policy judgment, nor does she ask us to invent a new

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3. In stating that Ms. Parkes "advocates for lowering the proximate cause standard," the majority appears to conflate two distinct theories of recovery—one that does argue for relaxing the proximate cause standard to allow a plaintiff to recover directly for his or her physical injuries even if there is a less than 50% chance that the injuries were caused by a defendant's negligent conduct and one that argues for leaving the proximate causation standard unaltered but defining the plaintiff's lost chance of recovery as a distinct, cognizable category of injury. Plaintiff advocates for the latter, which still requires a showing that the defendant's conduct was the proximate, probable cause of the plaintiff's injury. I examine the merits of Ms. Parkes' argument on the basis of this theory alone.

cause of action. Instead, Ms. Parkes invites this Court to do something it routinely and necessarily does: she invites us to adapt and apply common law principles to evolving conditions and new factual circumstances. *See*, *e.g.*, *Young v. W. Union Tel. Co.*, 107 N.C. 370, 385, 11 S.E. 1044, 1048 (1890) (recognizing for the first time that "mental anguish is actual damage"); *Jackson v. Bumgardner*, 318 N.C. 172, 178, 347 S.E.2d 743, 747 (1986) (recognizing for the first time that pregnancy can be a kind of legal injury); *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 178 (1992) (recognizing for the first time "a common law negligence claim against a social host for serving alcoholic beverages"). Indeed, when this Court abolished the doctrine of charitable immunity in 1967, it looked to how the common law had been evolving in other states, quoting with approval the following observation from an opinion of the Oregon Supreme Court which abandoned the rule in 1963:

> [I]t is neither realistic nor consistent with the common-law tradition to wait upon the legislature to correct an outmoded rule of case law. . . . Negligence law is common law. . . . The fact that a rule has been followed for fifty years is not a convincing reason why it must be followed for another fifty years if the reasons for the rule have ceased to exist. . . . Tort law in 1963 differs from tort law in 1863 for the most part because of the work of the courts. When courts have recognized the need for remedies for new injuries, the remedies have been found.

Rabon v. Rowan Mem'l Hosp., Inc., 269 N.C. 1, 15, 152 S.E.2d 485, 494 (1967) (alterations in original) (quoting *Hungerford v. Portland Sanatorium & Benev. Ass'n*, 235 Or. 412, 414–15, 384 P.2d 1009, 1010–11 (1963)). This Court has an obligation to do justice when interpreting the common law. *See*, *e.g.*, *State v. Jones*, 367 N.C. 299, 313, 758 S.E.2d 345, 354 (2014) ("The common law 'is not inflexible, and therefore we will not hesitate to abandon a rule which has resulted in injustices, whether it be criminal or civil.' "); *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892–93 (1998) ("Nonetheless, we also are aware that '[i]t is the tradition of common-law courts to reflect the spirit of their times and discard legal rules when they serve to impede society rather than to advance it.' "). Abdicating our responsibility, as the majority does here, based on a vague, legally unsupported intuition that this decision should be made by the legislature is just as improper as overriding a legislative enactment to implement a different policy option. The possibility that the legislature could act in an area of the common law in which it has not yet enacted legislation is an excuse, not a reasoned explanation

for eschewing our judicial duty, no matter how strenuously the majority invokes the need for deference to our coordinate branch of government.

Ultimately, I do not believe that the harsh result of denying Ms. Parkes the opportunity to hold Dr. Hermann liable for his negligent conduct is compelled by our precedents, by "traditional" principles of tort law, or by the separation of powers. Instead, I agree with the courts in the majority of jurisdictions which have examined the loss of chance doctrine and concluded that claims like Ms. Parkes' are cognizable. Accordingly, I dissent and would permit Ms. Parkes to present her claim to a jury on the theory that her lost chance of recovering from her ischemic stroke is a cognizable injury.

Both the Court of Appeals and the majority erroneously state that recognizing the loss of chance doctrine would create tension with this Court's settled precedents. The precedents the Court of Appeals and the majority rely upon are simply irrelevant to the issue before this Court today. First, *Gower v. Davidian*, 212 N.C. 172, 193 S.E. 28 (1937), did not "outright reject what is today called a loss of chance claim," nor did it "firmly frame[ ] medical malpractice claims within the confines of traditional proximate cause." A close reading of *Gower* demonstrates that it is neither controlling nor persuasive authority because the evidence presented in that case conclusively defeated plaintiff's negligence claim under any theory of injury.

The plaintiff in *Gower* was injured in an automobile accident. *Id.* at 173, 193 S.E. at 29. On the day of the accident, the plaintiff was admitted to a hospital, where he was examined by the defendant. *Id.* at 173–74, 193 S.E. at 29. At the summary judgment stage, the Court accepted as alleged that the defendant had failed to conduct a thorough physical examination before discharging the plaintiff to his home without treatment. *Id.* Less than two weeks after the accident, the plaintiff was admitted to Duke Hospital, where physicians diagnosed him with a fractured neck. *Id.* at 174, 193 S.E. at 29. Surgeons at Duke Hospital attempted to reset the fracture, but "[d]ue to the condition and location of his injury it was impossible to apply sufficient traction to reset the bone, and [the plaintiff suffered] a permanent injury." *Id.* Subsequently, the plaintiff filed suit against the defendant seeking damages for the defendant's assertedly negligent failure to appropriately diagnose and treat the plaintiff's neck fracture. *Id.*

At trial, the plaintiff's expert witness testified that "had that fracture and dislocation been replaced, put in proper position immediately it would have been much easier [to fix], but to wait until after two

weeks it would be almost impossible to replace it owing to callus." *Id.* at 175, 193 S.E. at 30. In modern parlance, the expert witness testified that the standard of care for resetting fractures demanded an attempt to reset the bone within two weeks. *Id.* After two weeks, the risk of calluses forming significantly diminished the likelihood that treatment would be successful. *Id.* It was undisputed that the defendant did not attempt to reset the plaintiff's fracture. *Id.* However, the plaintiff still received a thorough examination by physicians at Duke Hospital within two weeks of his injury. *Id.* The physicians determined that the fracture could not be reset, but it was not because calluses had formed. As the Court explained, "[a]ll the evidence tends to show that [a] callus does not develop to an extent that would interfere with the resetting of a fracture within a minimum of two weeks, and that there was no evidence of [a] callus around the fracture of plaintiff's neck which would impede or interfere with the resetting of the bone [at the time he was examined at Duke Hospital]." *Id.* The evidence established that the plaintiff's chances of recovery were the same on the day he was appropriately treated by the Duke Hospital physicians as they were on the day the defendant negligently failed to adhere to the standard of care. *Id.* at 176, 193 S.E. at 30–31. The fact that the Duke Hospital physicians could not reset the plaintiff's fracture resulted from "the condition and location of his injury," not because of the time that had elapsed between the defendant's examination and the examination conducted by the Duke Hospital physicians. *Id.* at 174, 193 S.E. at 29. Accordingly, the defendant could affirmatively prove that his actions had no impact on either the plaintiff's actual recovery or his chances of recovering. *Id.*

> The evidence discloses that the use of modern equipment and methods by trained and skillful surgeons at a time when callus had not developed [e.g., within two weeks of incurring the fracture] sufficiently to interfere with proper setting of the bone has availed nothing. The character and location of the fracture is such that proper traction cannot be successfully used. Unfortunately, upon this record as it now appears, the plaintiff has suffered an injury that *could not then and cannot now* be relieved by the medical profession, except by performing a most dangerous operation. *There is no evidence of any injury which the plaintiff sustained by reason of the delay of less than two weeks caused by the alleged conduct of the defendant*. In so far as plaintiff's right to recover is concerned, what boots it that the defendant did not make a thorough clinical and X-ray examination? Plaintiff's

> unfortunate condition results from his own act and not from any negligent conduct of the defendant.

Id. at 176, 193 S.E. at 30–31 (emphases added).[4] Unlike the plaintiff in *Gower*, Ms. Parkes did not receive appropriate treatment within the time period prescribed by the applicable standard of care.

These facts help contextualize this Court's statement in *Gower* that "[t]he rights of the parties cannot be determined upon chance." *Id.* at 176, 193 S.E. at 30. Of course, the "rights of the parties" are, to some extent, "determined upon chance" in every medical malpractice case. Any individual patient's right to hold a physician liable for negligent conduct inevitably depends on circumstances out of either parties', or any parties', forecast and control.[5] Denying Ms. Parkes an opportunity to bring her loss of chance claim to a jury will not purge "chance" from North Carolina's medical malpractice law. Instead, our statement that "[t]he rights of the parties cannot be determined upon chance" only refers to the nature of the evidence required to establish a causal link between a defendant's conduct and a plaintiff's alleged injury. *See Shumaker v. United States*, 714 F. Supp. 154, 163 (M.D.N.C. 1988) ("The supreme court's principal concern [in *Gower* and its progeny] was the sufficiency of the evidence of causation, not recognition of a different type of harm."). In *Gower*, the only evidence the plaintiff presented which supported his argument that the defendant's negligence caused his injury was speculative testimony that "had this case received immediate attention and had that fracture and dislocation reduced, [the plaintiff's] chances for further recovery, or for perfect recovery, would have been much greater." *Gower*, 212 N.C. at 175, 193 S.E. at 30. Yet, the plaintiff's

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4. To analogize the facts of *Gower* to the present case, it would be as if thirty minutes after Dr. Hermann initially examined Ms. Parkes, a second physician examined her, correctly diagnosed her stroke, and administered tPA within three hours of the onset of her neurological symptoms. If Ms. Parkes failed to recover despite receiving tPA within the three-hour window, a court could ascertain that Dr. Hermann's negligent failure to diagnose and treat Ms. Parkes had not deprived her of an opportunity to recover from her stroke.

5. For example, imagine that Treatment X is the only available treatment for Condition Y. When administered, Treatment X is effective for 80% of patients who suffer from Condition Y. If left untreated, Condition Y is fatal for 90% of patients and inconsequential for all others. If a physician negligently fails to administer Treatment X to a patient suffering from Condition Y, the "rights of the parties" will be fixed by "chance"—the 20% chance that the patient would not have recovered even if she had received Treatment X (creating liability for an action that did not contribute to the patient's death) or the 10% chance that the patient will recover without treatment (absolving liability for an otherwise negligent act).

evidence also established that even if he had received "immediate attention," there was no chance that his "fracture and dislocation" could have been "reduced." *Id.* at 176, 193 S.E. at 30. The expert witness "testified that an effort to reset [a fracture] should be made within two weeks," and other testimony established that "an effort was actually made by [a] competent physician[ ] to reset the fracture within the two weeks." *Id.* The expert witness's testimony that "the chances for further recovery would have been much greater [if the plaintiff received immediate treatment]" was both unsupported by medical evidence and affirmatively repudiated by events as they unfolded. *Id.* A naked assertion that there is a "chance" the plaintiff might have recovered if the defendant had not acted negligently is, without supporting evidence, insufficient to meet the plaintiff's burden of proof. That is no less true in the context of loss of chance claims. If the only evidence Ms. Parkes presented was an expert witness's bare testimony that there was a "chance" tPA would have improved her odds of recovery, the trial court certainly would not have erred in denying her claim.

The majority's reliance on *Buckner v. Wheeldon*, 225 N.C. 62, 33 S.E.2d 480 (1945), is similarly misplaced. In *Buckner*, this Court did not pass up on an "opportunity" to "relax the proximate cause requirement for a medical malpractice claim" as the majority asserts. Instead, the Court in *Buckner* merely reaffirmed that a qualified physician who treats a patient in accordance with the applicable standard of care cannot be held liable for the patient's subsequent failure to fully recover.

> [I]t has been repeatedly held here that the physician or surgeon who undertakes to treat a patient implies that he possesses the degree of professional learning, skill and ability which others similarly situated ordinarily possess; that he will exercise reasonable care and diligence in the application of his knowledge and skill to the patient's care; and exert his best judgment in the treatment and care of the case entrusted to him.
>
> And in accordance with rules of general application *the liability of a surgeon cannot be predicated alone upon unfavorable results of his treatment*, and he may be held liable for an injury to his patient only when the injurious result flows proximately from want of that degree of knowledge and skill ordinarily possessed by others of his profession, or from the omission to exercise reasonable care and diligence in the application of his knowledge and skill to the treatment of his patient.

Id. at 65, 33 S.E.2d at 483 (cleaned up) (emphasis added). It is incorrect to construe *Buckner* to stand for anything beyond the uncontroversial proposition that a qualified physician who provides appropriate medical care to a patient will not be held liable because he or she has not acted negligently, even if the patient does not fully recover.

Regardless, the disposition in *Buckner* was reversal of the trial court's grant of defendant's motion for summary judgment, which allowed the plaintiff to bring his case to trial. *Id.* at 66, 33 S.E.2d at 483 ("While all the injurious results complained of may not be attributed to the negligence of the attending physician . . . we think there was sufficient evidence to warrant submission of the case to the jury . . . ."). Thus, even if there were some indication that the *Buckner* plaintiff had invited this Court to recognize the loss of chance doctrine and even if there were some language in the opinion that could be fairly construed as expressing skepticism about the doctrine—and there is neither—the statement the majority relies upon would be dicta, at most. *See Moose v. Bd. of Comm'rs of Alexander Cnty.*, 172 N.C. 419, 433, 90 S.E. 441, 448 (1916) ("The doctrine of stare decisis contemplates only such points as are actually involved and determined in a case, and not what is said by the court or judge outside of the record or on points not necessarily involved therein. Such expressions, being obiter dicta, do not become precedents."). The view of a federal district court called upon to apply North Carolina negligence law further confirms that *Gower*, *Buckner*, and more recent Court of Appeals' decisions have not expressed a clear opinion one way or the other on loss of chance claims. *Shumaker*, 714 F. Supp. at 163–64 (previous decisions by North Carolina courts "can, but need not, be construed as inconsistent with recognizing lost possibility as a compensable loss.").

In straining to apply extraneous precedents to the novel legal question presented to us today, the majority overlooks numerous more relevant precedents which indicate that recognizing the loss of chance doctrine is not inconsistent with our common law tort jurisprudence. For example, when this Court has previously confronted an issue "of first impression" under North Carolina's common law, "[w]e have accordingly investigated the law in other jurisdictions to see how these jurisdictions have ruled on cases similar to the one at bar." *Jackson*, 318 N.C. at 178, 347 S.E.2d at 747; *see also Gillikin v. Bell*, 254 N.C. 244, 246–47, 118 S.E.2d 609, 611 (1961) (citing numerous cases from sister jurisdictions in "ascertain[ing] if [the common law] afforded such a right of action"); *Rabon*, 269 N.C. at 12, 152 S.E.2d at 493 (examining the "view[s] expressed in the recent decisions of our sister States" before

overturning North Carolina precedent and abolishing the charitable immunity doctrine). Of course, decisions from sister jurisdictions are only instructive in this Court to the extent that we find their "reasoning and the results . . . persuasive." *Jackson*, 318 N.C. at 179, 347 S.E.2d at 748. Nonetheless, it is notable that the majority omits any reference to the numerous well-reasoned decisions from our sister jurisdictions recognizing the loss of chance doctrine as consonant with common law tort principles. *See*, *e.g.*, *Matsuyama v. Birnbaum*, 452 Mass. 1, 4, 890 N.E.2d 819, 823 (2008) ("We conclude that recognizing loss of chance in the limited domain of medical negligence advances the fundamental goals and principles of our tort law."); *Smith v. Providence Health & Servs.-Oregon*, 361 Or. 456, 479, 393 P.3d 1106, 1118 (2017) ("We agree with plaintiff that . . . the causation element of a medical negligence cause of action in Oregon . . . can apply to the loss of chance when it is understood as an injury." (cleaned up)).

A fair reading of our precedents confirms that recognizing the loss of chance doctrine serves the animating purposes and principles of North Carolina's common law of torts. This Court has endorsed the idea that, under the common law, "liability for tortious conduct is the general rule; immunity is the exception." *Rabon*, 269 N.C. at 4, 152 S.E.2d at 487; *see also Young*, 107 N.C. at 373, 11 S.E. at 1045 ("The principle that for the violation of every legal right, nominal damages, at least, will be allowed, applies to all actions, whether for tort or breach of contract, and whether the right is personal, or relates to property."). We have refused to permit concerns regarding how damages should be calculated to deter us from recognizing novel categories of injury. *Id.* at 385, 11 S.E. at 1049 ("The difficulty of measuring damages to the feelings is very great, but it is submitted to the jury in many other instances, as above stated, and it is better it should be left to them under the wise supervision of the presiding judge, with his power to set aside excessive verdicts, than, on account of such difficulty, to require parties injured in their feelings by the negligence, the malice, or wantonness of others, to go without remedy."). We have held that recognizing that a plaintiff has "stated a cognizable claim" arising from a novel factual context "for liability under common law principles of negligence" is not in tension with our judicial role, nor should recognition of the claim be avoided for prudential reasons, even when the result of our decision creates liability in a circumstance where none existed previously. *Hart*, 332 N.C. at 304, 420 S.E.2d at 177.

In departing from our historic approach to novel tort claims, the majority establishes a rule that immunizes physicians from liability for their negligent conduct any time they fail to administer a treatment that

cannot be proven to be effective 50% of the time or more. *See Smith*, 361 Or. at 480, 393 P.3d at 1119 ("[A] negligent medical provider who prevents a patient from having a shot at a 45 percent chance of a favorable medical outcome need not compensate that patient at all. That patient bears the entire cost of the negligent conduct, a result that does not spread the risk of the negligent conduct to the negligent party, although a function of the tort system is to distribute the risk of injury to or among responsible parties." (cleaned up)). This "all or nothing rule is inadequate to advance the fundamental aims of tort law" because it "does not serve the basic aim of 'fairly allocating the costs and risks of human injuries' " and also " 'fails to deter' medical negligence because it immunizes 'whole areas of medical practice from liability.' " *Matsuyama*, 452 Mass. at 13, 890 N.E.2d at 830. This approach is likely to have harmful consequences given that "[m]uch treatment of diseases is aimed at extending life for brief periods and improving its quality rather than curing the underlying disease. Much of the American health care dollar is spent on such treatments, aimed at improving the odds." *McMackin v. Johnson Cnty. Healthcare Ctr.*, 73 P.3d 1094, 1099 (Wyo. 2003), *on reh'g*, 2004 WY 44, 88 P.3d 491 (Wyo. 2004).

Further, I firmly disagree with the majority's conclusion that it would be improper for this Court to recognize the loss of chance doctrine because doing so "would require a departure from our traditional common law on proximate causation and damages . . . [because s]uch a policy judgment is better suited for the legislative branch of government." Recognizing loss of chance as a cognizable injury does not require us to create a new cause of action—the cause of action is the common law cause of action of negligence. *Cf. Hart*, 332 N.C. at 305–06, 420 S.E.2d at 178 ("The defendants, relying on cases from other jurisdictions, say that there is not a common law negligence claim against a social host for serving alcoholic beverages. . . . Our answer to this is that we are not recognizing a new claim. We are applying established negligence principles and under those principles the plaintiffs have stated claims."). As we have long held, it is entirely appropriate for this Court to "re-examine our rule[s] in the light of current conditions [and] the tide of judicial decision elsewhere." *Rabon*, 269 N.C. at 4, 152 S.E.2d at 487.

The majority approvingly quotes the Court of Appeals opinion for the proposition that "any change in our negligence law lies 'within the purview of the legislature and not the courts.' " *Parkes v. Hermann*, 265 N.C. App. 475, 478, 828 S.E.2d 575, 578 (2019) (quoting *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 656–57, 654 S.E.2d 76, 81 (2007)). However, "[a]bsent a legislative declaration, this Court possesses the

authority to alter judicially created common law when it deems it necessary in light of experience and reason." *State v. Freeman*, 302 N.C. 591, 594, 276 S.E.2d 450, 452 (1981). Interpreting and applying the common law in no way arrogates for this Court a function "better suited for the legislative branch of government." *See Funk v. United States*, 290 U.S. 371, 383 (1933) ("It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."). Common law adjudication is not transformed into impermissible policymaking every time we "adapt[ ] [the common law] to changing scientific and factual circumstances." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011). Rather, it is how this Court discharges one of its core judicial functions. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002) ("[S]tate-court judges possess the power to 'make' common law . . . ."). Evolution of the common law through the application of existing principles in novel circumstances is both appropriate and obligatory because

> [o]ne of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court. There is not a rule of the common law in force today that has not evolved from some earlier rule of common law, gradually in some instances, more suddenly in others, leaving the common law of today when compared with the common law of centuries ago as different as day is from night. The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice.

Gastonia Pers. Corp. v. Rogers, 276 N.C. 279, 287, 172 S.E.2d 19, 24 (1970) (quoting *State v. Culver*, 23 N.J. 495, 129 A.2d 715 (1957)). Thus, it in no way threatens the separation of powers that "from time to time when this Court has been convinced that changes in the way society or some of its institutions functioned demanded a change in the law, it rejected older rules which the Court itself developed in order that justice under the law might be better achieved," even if "[t]hese decisions were sometimes made in the face of arguments that such changes ought to be made, if at all, by the legislature." *Mims v. Mims*, 305 N.C. 41, 55, 286 S.E.2d 779, 788 (1982).

It is certainly possible that recognizing the loss of chance doctrine would have consequences for the practice of medicine and the market

for health insurance in North Carolina, both of which are subjects fit for regulation by the legislature. But the majority's decision to deny Ms. Parkes the opportunity to recover for her lost chance of recovery will have policy consequences all the same. *Cf.* Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 852 (1994) ("A rule of law is a policy, however it is explained."). What distinguishes a permissible judicial adjudication from an impermissible policymaking exercise is not the existence or nonexistence of attendant policy effects: it is whether or not the decision is justified by precedent and the reasonable application of legal principles and methods. While this Court must remain attuned to the real-world consequences of our decisions, we intrude upon an authority exclusively reserved to the legislature when we base our decisions on extrinsic policy considerations. *Id.* at 855 ("[Courts] must resolve novel issues of liability within a matrix of statutes and tort principles without claiming public policy for its own decision. Only this preserves the distinction between the adjudicative and the legislative function."). For example, I have no doubt that it would be improper for this Court to resolve Ms. Parkes' claim based upon our own determination that "the benefits of allowing loss of chance damages . . . offset the detriments of a probable increase in medical malpractice litigation and malpractice insurance costs." *Fennell v. S. Maryland Hosp. Ctr., Inc.*, 320 Md. 776, 794, 580 A.2d 206, 215 (1990). But it does not follow that a decision arrived at through the application of sound legal principles is a "policy judgment" merely because it allows (or disallows) a claim that, inevitably, will have benefits and detriments when judged as a matter of policy. Indeed, because our resolution of this case solely involves our interpretation of the common law, the legislature may choose to override our judgment by statutory enactment, just as it would have been able to if we had instead decided to adopt the loss of chance doctrine. *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 356, 416 S.E.2d 166, 171 (1992) ("[I]f our state legislature has expressed its intent to supplant the common law with exclusive statutory remedies, then common law actions . . . will be precluded.").

Our decision today unnecessarily creates an unjust rule. Because of our decision, Ms. Parkes and patients like her are denied any opportunity to seek recompense for the harms caused by the negligent conduct of the medical professionals to whom they have entrusted their care. It accords with our precedents and principles to recognize Ms. Parkes' lost chance of recovery for what it truly was: a tangible injury caused by defendant's negligent conduct which is susceptible to valuation and is redressable in tort law. The fact that advances in medical science allow researchers to demonstrate that a treatment is 35% (or 49.9%) effective,

rather than 50.01% effective, is not a reason for denying the sole remedy available to patients wronged by medical malpractice. In contrast to the majority, I would recognize that when a physician's negligent conduct "reduces or eliminates the patient's prospects for achieving a more favorable medical outcome, the physician has harmed the patient" by destroying "something of value, even if the possibility of recovery was less than even prior to the physician's tortious conduct." *Matsuyama*, 452 Mass. at 3, 890 N.E.2d at 823. I agree with Professor Joseph King, who wrote in an influential article that

> [o]n a more visceral level [ ] the question [is] whether one who loses a not-better-than-even chance of achieving some favorable result, perhaps life, really loses nothing worthy of redress. The loss includes not only the then-existing chance, but also the loss of the opportunity to benefit from potential scientific breakthroughs that could transform the chance into reality. From a psychological standpoint, there is a qualitative difference between a condition that affords a chance of recovery and one that offers no chance at all, as any patient with terminal cancer will confirm. This inherent worth of a chance is added reason for recognizing its loss as a compensable interest.

Joseph H. King Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L. J. 1353, 1378 (1981). Extending existing common law principles to allow Ms. Parkes' claim would serve the predominant goal of tort law by providing a remedy to a "victim of medical malpractice" who otherwise lacks "any remedy at all if the common law does not provide one." *Smith*, 361 Or. at 478, 393 P.3d at 1118. The Court of Appeals decision should be reversed, and Ms. Parkes should be allowed to present her case to a jury.

Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
NORFOLK JUNIOR BEST

No. 300A93-3

Filed 18 December 2020

Constitutional Law—due process—Brady violation—exculpatory evidence—materiality

In a trial for first-degree murder, the State violated defendant's due process rights by failing to disclose exculpatory evidence—including a witness interview, unidentified hairs found on the victim, and forensic lab notes regarding blood residue—which would have allowed defendant to impeach the State's principal witness and undermine the persuasiveness of the State's forensic evidence. Given the lack of overwhelming evidence of defendant's guilt presented by the State at trial, combined with the materiality of some of the previously undisclosed evidence, there was a reasonable probability that, had the evidence been disclosed, the jury's verdict would have been different.

Justice NEWBY dissenting.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 23 January 2018 by Judge Douglas B. Sasser, Sr. in Superior Court, Bladen County denying defendant's motion for appropriate relief. Heard in the Supreme Court on 1 September 2020.

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

Thomas, Ferguson & Mullins, LLP, by Jay H. Ferguson, and Center for Death Penalty Litigation, by Ivy A. Johnson, for defendant-appellant.

EARLS, Justice.

In December 1991, the bodies of an elderly couple, Gertrude and Leslie Baldwin, were found in their home in Whiteville, North Carolina. The couple had been beaten, stabbed, and apparently robbed. Norfolk Junior Best, the defendant in this case, was indicted for first-degree burglary, first-degree rape, robbery with a dangerous weapon, and two

counts of first-degree murder. Following a jury trial, he was convicted of all counts and sentenced to death. His conviction was affirmed on direct appeal by this Court. *State v. Best*, 342 N.C. 502, 467 S.E.2d 45 (1996).

In postconviction proceedings, it became clear that the State failed to produce certain pieces of evidence to Mr. Best prior to the 1993 trial. Instead, the evidence was, in part, voluntarily provided to Mr. Best's postconviction counsel in 2011. Later that year, postconviction counsel located additional evidence in the attic of Whiteville City Hall. After the additional evidence was produced and uncovered, Mr. Best filed a motion for appropriate relief arguing, *inter alia*, that the State's failure to disclose exculpatory evidence was a violation of his right to due process pursuant to the United States Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). The trial court denied the motion, concluding that Mr. Best had not shown prejudice.

Mr. Best claims, and the State denies, that the undisclosed evidence was material to his guilt such that he was prejudiced by the State's failure to produce it. Mr. Best argues, and the State denies, that had the evidence been disclosed, there is a reasonable probability that the outcome of his trial would have been different. We conclude that the undisclosed evidence was material. It was reasonably probable that, had it been disclosed to Mr. Best prior to trial, the outcome would have been different. Therefore, we reverse the trial court's denial of Mr. Best's motion for appropriate relief, remanding with instructions to grant the motion and order a new trial.

Background[1]

Prior to trial, Mr. Best had requested discovery from the State several times regarding the case against him. On 20 December 1991, Mr. Best filed a motion for discovery requesting, *inter alia*, the following:

> 6. To permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion picture, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and which are

1. The State does not dispute that the evidence identified by Mr. Best was not disclosed prior to trial, arguing instead that Mr. Best has not shown that there is a reasonable probability that the undisclosed evidence affected the outcome of Mr. Best's trial. We note this only to emphasize our sensitivity to the principle that "[f]act finding is not a function of our appellate courts." *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986). If there was a factual dispute to be resolved in this case, the appropriate remedy would likely be to remand to the trial court for an evidentiary hearing.

> material to the preparation of this defendant's defense, which the State intends to use as evidence at defendant's trial or which were obtained from or belong to the defendant (G.S., 15A-903(d);
>
> 7. To provide a copy or permit the defendant or his attorney to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with this case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor (G.S. 15A-903(e);
>
> 8. The District Attorney is also given notice that these requests are continuing, and the State is under a duty to disclose any of the requested material promptly to the defendant or his attorney if discovered or the State decides to use it at the captioned defendant's trial (G.S. 15A-907);

On 12 March 1992, Mr. Best filed a motion (dated 7 January 1992) seeking to inspect, examine, and test physical evidence in the State's control. On the same date, remarking that the 20 December 1991 request had gone unanswered, Mr. Best filed a motion to compel the State to produce discovery. The motion to compel specifically requested test results, exculpatory information, and potentially favorable evidence. After being told that the District Attorney had an "open file policy," defense counsel attempted on 19 March and 20 March 1992 to review Mr. Best's file at the District Attorney's office, but in both instances was told that the file was unavailable. On 2 April 1992, the District Attorney provided defense counsel with discovery, and continued to produce materials until shortly before trial.

Although the file stamps are unclear, it appears that Mr. Best filed two more discovery requests on 24 June and 16 September 1992. In the first, Mr. Best requested DNA test results from samples referenced in a report that had been produced to him. In the second, he requested information relevant to the reliability of the DNA testing expected to be offered as evidence during trial.

In the preliminary statement that appears before our decision on Mr. Best's direct appeal, the evidence presented at trial was described as follows:

> The defendant was tried on two charges of first-degree murder and one charge each of first-degree burglary, robbery with a dangerous weapon, and first-degree rape.

> The State's evidence showed that Leslie Baldwin and his wife, Gertrude Baldwin, were eighty-two and seventy-nine years of age, respectively. They were killed in their home during the night of 30 November [1991]. Earlier that day, the defendant had done yard work for them.
>
> Mr. Baldwin died as a result of the cutting of his carotid artery, and Mrs. Baldwin died of blunt-force trauma to the head. Money was missing from Mr. Baldwin's wallet and from Mrs. Baldwin's purse. The defendant's DNA matched one of the semen samples taken from Mrs. Baldwin, and his fingerprint matched one on a paring knife found beside Mr. Baldwin's body. The defendant bought between $700 and $1,000 worth of crack cocaine within two days after the killings.

Best, 342 N.C. at 508–09, 467 S.E.2d at 49–50.

The Baldwins were discovered dead in their home on Tuesday, 3 December 1991. At trial, the State presented evidence that the Baldwins were robbed of several hundred dollars, killed in their home, and that Mrs. Baldwin had been raped. The couple's daughter testified that Mrs. Baldwin, who took various medications, filled her pillbox regularly each Thursday. The medicine in the pillbox was arranged by time of day, as well as day of the week. Based on the slots that were filled with medicine in the pillbox, the couple's daughter testified that Mrs. Baldwin had last taken her medication at 11:00 p.m. on Saturday, 30 November 1991. The couple's daughter also testified that Mr. Baldwin habitually turned on a light in the kitchen before retiring to bed. The light was discovered to be on in the kitchen. Similarly, she testified that Mr. Baldwin, by routine, retrieved and read the newspaper every morning, and that it was the first thing he did after rising, getting dressed, and taking his medicine. When the Baldwins' bodies were discovered, the papers for Sunday, 1 December; Monday, 2 December; and Tuesday, 3 December 1991 were all laying on the front porch. The State points to this evidence as support for the conclusion that the deaths occurred in the late evening of Saturday, 30 November 1991. A witness for the State testified that she was with Mr. Best at a night club beginning at 12:30 a.m. or 1:00 a.m. on 1 December 1991.

At trial, the State also tendered evidence that Mr. Best was the perpetrator. The trial evidence identified by the State consists of (1) a latent bloody fingerprint, matched to Mr. Best, found on the blade of a paring knife which was lying near Mr. Baldwin's body; (2) the results of a DNA test showing that sperm found in Mrs. Baldwin's vagina was a partial

match to Mr. Best, and that the probability of another unrelated person matching the tested profile was "approximately 1 in 459 for the North Carolina white population, 1 in 18 for the North Carolina black population,[2] and 1 in 484 for the North Carolina Lumbee population;" and (3) testimony from Tammy Rose Smith that Mr. Best spent one or two hundred dollars on cocaine in the early morning hours of 1 December 1991, and from Carolyn Troy that Mr. Best spent several hundred dollars on cocaine during the evening of 2 December 1991.

At the trial's conclusion, Mr. Best was convicted and sentenced to death. After we affirmed the conviction, Mr. Best sought postconviction relief. He filed a motion for appropriate relief in August 1997, which the trial court denied in April 1998. We denied certiorari review. *State v. Best*, 349 N.C. 365, 525 S.E.2d 179 (1998).

In March and August of 2011, the State voluntarily produced parts of its file to Mr. Best's new postconviction counsel. After defense counsel filed a motion seeking complete discovery pursuant to N.C.G.S. § 15A-1415(f), defense counsel discovered additional evidence "in a storage room in the attic of the Whiteville City Hall." The following evidence arose in postconviction discovery:

Undisclosed Forensic Evidence

At trial, a witness for the State testified that hairs were collected from the crime scene. Further, testimony established that, in addition to Mr. Best, head and pubic hair samples were collected from two other suspects, Eddie Best and Daniel Blanks, and from Mr. and Mrs. Baldwin. The hair was analyzed. At trial, Mr. Best's counsel attempted to elicit that none of the hairs had been identified as coming from a Black person but was unable to cross-examine the witness on the findings of a nontestifying expert. However, the State never disclosed that more than 70 hairs collected from the crime scene, found on Mrs. Baldwin's arm, in her pubic hair combings, and beneath Mr. Baldwin's fingernails, were identified as Caucasian and were not a match to anyone who was tested.

At trial, a witness for the State testified that tapings from the crime scene were taken and tested for trace hair and fiber evidence. The State did not disclose, however, that a fiber comparison analysis was conducted between (1) a number of items, including various items of clothing and shoes, from Mr. Best's home and person; and (2) various items from the crime scene, including bedding, tapings, clothing, fingernail scrapings, a place mat, and carpeting. The results of the undisclosed

2. Mr. Best is African-American.

comparison were that no association was found between Mr. Best's effects and the items from the crime scene.

As discussed previously, Mr. Best's fingerprint was located on a paring knife that was lying next to Mr. Baldwin's body at the crime scene. Lab notes which had not been disclosed prior to trial contained the following statement pertaining to the possible fingerprint: "The ridge detail on item #4 was examined & determined to be of no value @ this time however; major case inked impressions will be needed in order to effect any kind of conclusive comparison."

At trial, witnesses for the State testified that blood remnants were found as a result of luminol testing "on the carpet in Gertrude Baldwin's bedroom and in the hallway" near where Mr. Baldwin was found. Another witness testified that she tested a pair of Mr. Best's shoes and determined that they did not have blood on them. Undisclosed lab notes indicated that the luminol tests had revealed shoe tracks of blood residue, about which the witness did not testify and of which defense counsel was not aware.

Undisclosed Witness Interviews

As discussed previously, Carolyn Troy testified at trial that Mr. Best spent hundreds of dollars during the evening of 2 December 1991, near the time that the State believes the Baldwins were robbed and murdered. However, the State did not disclose Ms. Troy's initial witness interview, during which Ms. Troy stated that she was with Mr. Best at the time, but that he only had $30 to $40 on him.

Other Evidence

The evidence at trial also indicated that the assailant broke a pane of glass to enter the home. A lab report discussing the analysis of the glass indicated that clothing and two pairs of shoes from Mr. Best did not have any glass that matched the glass collected from the crime scene—although one of the pairs of shoes showed glass particles which did not match the glass from the crime scene. The record includes an affidavit from Mr. Best's trial counsel indicating that the report was included in postconviction discovery, and had not been previously disclosed to trial counsel.

The State also did not disclose that three one-hundred-dollar bills were found in a money holder in Mrs. Baldwin's purse.

Undisclosed Alternate Suspects

Finally, the State failed to disclose evidence regarding two alternate suspects: Ricky Winford and Destene Harris.

Ricky Winford

The State's 2011 disclosures contained a number of documents relating to Ricky Winford, an alternate suspect in the crime. Interview notes suggest that a woman called police on the evening of 4 December 1991 to report that, on the morning of 3 December 1991, someone named "Rick" was driving around the Baldwins' neighborhood without lights. The driver drove up and down the street three or four times until someone exited the car and walked away. The car drove off and returned about forty-five minutes later, at which time a friend of the woman's asked the driver what he was doing. The driver stated that he was looking for a friend. This occurred before the Baldwins' bodies were discovered. Police ran the license plate and connected the vehicle to someone named Gary Clayton Derrick, who apparently knew Mr. Winford. Mr. Derrick reported that Mr. Winford had stolen his car and taken off, and later reported speaking with a third person, Janet. The notes indicate that Mr. Winford told Janet "that he had killed some people in Whiteville." In a record of a phone interview, Mr. Derrick reported that Winford had previously bragged about killing people, had previously committed burglaries, and had once pulled a knife on Derrick.

Destene Harris

The State's 2011 disclosures also included a number of documents pertaining to Destene Harris. According to a 5 December 1991 report from Alice Cooke, Mr. Harris threatened to kill some "old farts" that lived hear him. He apparently also often carried a knife. Ms. Cooke also reported that, on 2 December 1991 (a Monday), she had heard Mr. Harris state that he had killed two "old farts" over the weekend. Mr. Harris was incarcerated in Alamance County from 29 November until 3 December 1991.

Mr. Best filed the instant motion, his second motion for appropriate relief, on 16 January 2014. He argued (1) that the State withheld exculpatory evidence in violation of his constitutional rights established in *Brady* and its progeny; (2) that the State misled the jury as to the victims' time of death, or, in the alternative, that his trial counsel was ineffective for failing to refute the State's theory on time of death; and (3) that the State misled the jury as to the reliability of the DNA evidence it presented against him, or, in the alternative, that his trial counsel was ineffective for failing to refute the DNA evidence. Because we determine that Mr. Best's *Brady* claim is meritorious, we need not address the remaining claims.

As to Mr. Best's claim that he is entitled to a new trial due to the State's failure to disclose favorable evidence, the superior court made the following conclusions of law:

7. In his MAR2 Claim I, Best claims that he is entitled to a new trial because the state wrongfully concealed exculpatory evidence regarding (a) two alternate suspects[,] (b) exculpatory forensic testing results[,] and (c) key evidence undermining its theory of motive and identity.

8. Best has failed to show the existence of the asserted ground for relief. N.C. Gen[.] Stat. § 15A-1420(c)(6); Brady v. Maryland, 373 U.S. 83 (1963); State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997).

9. In the present case there was overwhelming evidence at trial against defendant and none of the alleged Brady material would have amounted to a reasonable probability of a different result. Therefore, defendant's Brady claim must fail. Strickland at 457, 488 S.E.2d at 202.

10. In post-conviction, the overwhelming evidence presented at trial was not refuted or weakened. Instead the post-conviction DNA removed any doubt, reasonable or unreasonable, of defendant's guilt. Both experts testified in post-conviction that the sperm fraction, not the skin fraction, taken from the rape/murder victim was an exact match for defendant's DNA profile. (See 11 April 2016 Post-conviction hearing transcript pp. 56 [testimony of Maher Noureddine] and 68 [testimony of Mark Boodee].)

11. Given the evidence showing defendant's guilt presented at trial, none of the complained of evidence in Claim I, if turned over could have amounted to a reasonable probability of a different result. Additionally, the post-conviction DNA testing results further illustrate the lack of any possible prejudice.

12. As this Court can determine from the motion and any supporting or opposing information presented that this claim is without merit, an evidentiary hearing is not necessary to decide the issues raised in this claim. N.C. Gen. Stat. § 15A-1420(c)(1) and State v. McHone, 348 N.C. 254, 257, 499 S.E.2d 761, 762-63 (1998), cert. denied, 528 U.S. 1095, 120 S. Ct. 835, 145 L. Ed. 2d 702 (2000).

Mr. Best petitioned for a writ of certiorari to this Court, which we allowed.

Standard of Review

The trial court denied Mr. Best's motion for appropriate relief without an evidentiary hearing, deciding that it could "determine from the motion and any supporting or opposing information presented that this claim is without merit." *See* N.C.G.S. § 15A-1420(c)(1) (2019) (permitting a trial court to forgo an evidentiary hearing on a motion for appropriate relief if "the court determines that the motion is without merit"). Because the trial court did not make findings of fact, instead concluding that Mr. Best was not entitled to relief as a matter of law, our review of the trial court's decision is de novo. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) ("Conclusions of law are reviewed de novo and are subject to full review.").

Analysis

The State violates the federal constitution's Due Process Clause "if it withholds evidence that is favorable to the defense and *material* to the defendant's guilt or punishment." *Turner v. United States*, 137 S. Ct. 1885, 1888 (2017) (quoting *Smith v. Cain*, 565 U.S. 73, 75, 132 S. Ct. 627, 630 (2012)). However, not every failure to disclose violates the Constitution. Instead, "prejudicial error must be determined by examining the materiality of the evidence." *State v. Tirado*, 358 N.C. 551, 589, 599 S.E.2d 515, 540 (2004) (quoting *State v. Howard*, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993)). To establish prejudice on such a claim, often referred to as a *Brady* claim,[3] a defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985)).

A reasonable probability is one "sufficient to undermine confidence in the outcome" of the proceeding. *State v. Byers*, 375 N.C. 386, 400, 847 S.E.2d 735, 741 (2020) (quoting *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006)). The defendant's burden to show a reasonable probability is less than that for showing a preponderance. *Smith*, 565 U.S. at 75, 132 S. Ct. at 630 ("A reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial." (cleaned up)); *accord Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct.

3. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

1555, 1565–66 (1995). However, a reasonable probability is more than a mere possibility. *Strickler v. Greene*, 527 U.S. 263, 291, 119 S. Ct. 1936, 1953 (1999). A defendant's burden, then, on a *Brady* claim, is more than showing that withheld evidence might have affected the verdict, but less than showing that withheld evidence more likely than not affected the verdict. When we consider whether there was a reasonable probability that the undisclosed evidence would have altered the jury's verdict, we consider "the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112, 96 S. Ct. 2392, 2402 (1976).

While we review the entire record, we need not consider every piece of undisclosed material evidence identified by the defendant. Where any portion of the evidence "alone suffice[s] to undermine confidence in [the defendant's] conviction, we have no need to consider his arguments that the other undisclosed evidence also requires reversal under *Brady*." *Smith*, 565 U.S. at 76, 132 S. Ct. at 631. As a result, any piece of undisclosed evidence, if sufficiently material to undermine confidence in the outcome of the trial, is sufficient to satisfy the defendant's burden on a *Brady* claim.

The question that we must answer when deciding such a claim is not whether the defendant is guilty or innocent, but whether he received a fair trial in accordance with the requirements of due process. *See Brady*, 373 U.S. at 87, 83 S. Ct. at 1196–97 (holding that nondisclosure of favorable evidence to the defense violates due process). As a result, we cannot, and do not here, consider new evidence produced after conviction which may tend to support or negate either guilt or innocence.[4] After a thorough review of the record, and consideration of the arguments of the parties, we are convinced that Mr. Best has met his burden.

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4. The State refers at various points in its brief to the results of a postconviction DNA test which Mr. Best requested pursuant to N.C.G.S. § 15A-269. Results indicated an exact match between Mr. Best's DNA profile and that of a sperm fraction recovered from a vaginal swab of Mrs. Baldwin's body. While this result may be relevant to subsequent proceedings designed to prove Mr. Best's guilt or innocence, that is not the question before us now. Instead, we must decide whether Mr. Best's *original trial*, which took place in 1993, was procedurally fair. *See United States v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381 (1985) ("[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome *of the trial*." (emphasis added)); *see also id.* at 699, 105 S. Ct. at 3392 (Marshall, J., dissenting) ("[The Court] defines the right . . . by reference to the likely effect the evidence will have on the outcome of the trial."). Because the postconviction DNA test result identifying Mr. Best did not exist until decades after the trial took place, it could not have affected the outcome of the trial. As a result, we do not consider it here. We note also defense counsel's assertions that the test sample may have been contaminated—although, again, the test result does not factor into our analysis.

According to the State, the principal evidence presented at trial which proved Mr. Best's guilt consisted of: (1) Best's fingerprint on a paring knife; (2) the partial DNA match between Mr. Best and the semen found in Mrs. Baldwin's vagina; and (3) testimonial evidence that the Baldwins had been robbed, and that Mr. Best was spending large amounts of money on drugs around the time of the murders. This evidence was strong enough at trial for the jury to have convicted Mr. Best. However, upon consideration of the undisclosed evidence, the case is far less compelling.

Regarding the assertion that Mr. Best was spending large sums of money around the time of the murders, the State relied upon the testimony of both Carolyn Troy and Tammy Rose Smith. The State's undisclosed witness interview of Carolyn Troy, in which she stated that Mr. Best had only thirty or forty dollars on him on the night of 2 December 1991, would have permitted Mr. Best to impeach Ms. Troy's testimony. In addition to directly contradicting what Ms. Troy testified to at trial, the fact that Ms. Troy's story had changed over time, if admitted to at trial, could have been used by Mr. Best to impeach her credibility. We have previously stated that "exculpatory evidence is evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed, . . . including impeachment evidence." *State v. Lewis*, 365 N.C. 488, 501, 724 S.E.2d 492, 501 (2012) (cleaned up). Ms. Troy was the principal witness testifying to what the State identifies as a principal piece of evidence—namely, that Mr. Best was spending the money stolen from the Baldwins.

The State argues that the undisclosed witness interview is not material because another witness, Tammy Rose Smith, testified that Mr. Best was spending money on 1 December 1991. However, according to the State, Ms. Smith testified that Mr. Best spent about two hundred dollars, and may have also paid for a hotel room. This is a far cry from the $1,800 that the State claims were stolen from the Baldwins. More importantly, it is a significant departure from the testimony of Ms. Troy, who testified at trial that she saw Mr. Best with $300 and saw him purchase $750 to $900 worth of drugs during the late night of Monday, 2 December 1991 and early morning of Tuesday, 3 December 1991. The State cannot credibly claim that the evidence undermining the testimony of Ms. Troy, who claimed that Mr. Best used over $1000 to buy drugs, is inconsequential because another witness testified that Mr. Best had about $200 and paid for a hotel room.[5]

5. The dissent refers to three additional persons who might have, but did not, testify that Mr. Best was spending money around the time the State argued the Baldwins were

While the other evidence identified by Mr. Best does not directly refute the DNA and fingerprint evidence presented at trial, it does undermine its persuasive effect. For example, because the State failed to disclose the lab notes for the luminol tests conducted in the Baldwins' home, the jury did not learn that the State found "shoe tracks" in the hallway and kitchen areas, suggesting that the assailant left bloody footprints during the attack. This increases the exculpatory relevance of the testimony, presented at trial, that Mr. Best's shoes were tested and found to be devoid of blood. Had these pieces of evidence been presented together, it is more likely that the jury may have concluded that Mr. Best was not in the home during the murders. Similarly, due to the State's failure to disclose, the jury never learned that the State had discovered 70 Caucasian hairs on the bodies of the victims which were not yet matched to anyone in the case. Mr. Best could have easily pointed out at trial that, as a Black man, he could not have left those hairs on the victims' bodies and underneath the fingernails of Mr. Baldwin. It also does not appear from the lab notes that the hairs were tested to see if they matched Ricky Winford. We do not conclude or suggest that this proves Mr. Best's innocence. Instead, we conclude only that this evidence creates a reasonable probability that the jury would have returned a different verdict had it been presented with the undisclosed evidence. *See Tirado*, 358 N.C. at 589, 599 S.E.2d at 540 (stating that establishing prejudice requires a showing that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (quoting *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383)); *see also Smith*, 565 U.S. at 75, 132 S. Ct. at 630 ("A reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial." (cleaned up)).

Not all of the withheld evidence described by Mr. Best is material. Mr. Best makes much in his brief of a statement in the fingerprint analyst's lab notes that "[t]he ridge detail on [the knife] was examined

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murdered. However, the question before us is whether there is a reasonable probability that the result of the proceeding would have been different if the undisclosed evidence had been provided to the defense. *State v. Tirado*, 358 N.C. 551, 589, 599 S.E.2d 515, 540 (2004). As a result, we cannot speculate as to what evidence the State could have, but did not, put on. We must instead look to the record of the proceeding as it exists, and determine whether there is a reasonable probability that the outcome of *that* proceeding, rather than a hypothetical proceeding with stronger evidence from the State, would have changed with the undisclosed evidence. *Cf. Browning v. Trammell*, 717 F.3d 1092, 1105 (10th Cir. 2013) (confining *Brady* analysis "to the record before the state trial court").

& determined to be of no value." As the State correctly points out, Mr. Best ignores the rest of the sentence, which clarifies that the ridge detail is not of value "[at] this time" and that a conclusive comparison will require "major case inked impressions." As to Mr. Best's fingerprint on the knife, then, the evidence highlighted by Mr. Best does not undercut the reliability of the fingerprint identification.

That being said, the evidence against Mr. Best is not as strong as the State claims it is. The State's evidence establishes that Mr. Best touched the knife while he had blood on his finger—Mr. Best testified at trial that he was using the knife to clean the gutters, which he had been hired to do that day, and had scraped the backs of his hands. While the dissent claims that the fingerprint on the knife consisted of Mr. Baldwin's blood, this claim is unsupported by the record.[6] While the jury certainly did not have to believe Mr. Best's testimony, the existence of a ready explanation for the fingerprint on the knife undermines the State's argument that the fingerprint is such overwhelming evidence so as to render harmless the State's failure to disclose other exculpatory evidence.

Finally, the State relies on the partial DNA match between Mr. Best and the semen recovered from Mrs. Baldwin. However, this evidence is similarly underwhelming. The State's expert testified that, regarding the reliability of the DNA match, one out of every eighteen African-American men would match the sample recovered from Mrs. Baldwin. To put that into perspective, out of every 90 African-American men, five would match the sample, but at least four of them would not be the actual source of the DNA sample. Typically DNA evidence is significantly more compelling. *See*, *e.g.*, *State v. Honeycutt*, 235 N.C. App. 656, 764 S.E.2d 699 (2014) (stating that a DNA analysis of the victim's bedsheet indicated "a DNA match probability with defendant of one in 730 billion Caucasians, and her rape kit had a match probability with defendant of one in 36.2 billion Caucasians" and that another victim's "rape kit was consistent with defendant with a match probability of one in 16.2 million Caucasians"). Where, here, the DNA evidence presented at trial indicated that the tested DNA sample would match one out of

6. It appears that the dissent takes a stray statement from the State's brief and attempts to create a factual dispute in the evidence regarding the source of the blood that made up the fingerprint on the knife. Contrary to the dissent's assertion, the State's brief claims only that the knife had Mr. Baldwin's blood on it, not that the fingerprint was composed of Mr. Baldwin's blood. It is unsurprising that the State made no such claim, as Special Agent Lucy Milks, testifying for the State at Mr. Best's trial, stated that she tested the blood from the fingerprint and was able to determine only that it was blood—she was unable to determine a blood type, or even whether it was animal or human blood.

every eighteen African-American men, we conclude that it is not nearly the overwhelming evidence that the State suggests it is.

While it is not relevant to our analysis on Mr. Best's *Brady* claim, Mr. Best also raised a claim of ineffective assistance of counsel which casts doubt on the State's timeline of events. At trial, the State relied upon the testimony of the Baldwins' daughter to establish that, based on the contents of Mrs. Baldwin's pillbox, the presence of newspapers on the Baldwins' front porch, and the fact that a light in the kitchen was on which Mr. Baldwin habitually turned on before retiring to bed, the Baldwins had been killed after 11 p.m. on 30 November 1991 and before Mr. Baldwin would have normally awoken the following morning. The State also presented testimony that Mr. Best was out at a nightclub at approximately 12:30 a.m. or 1:00 a.m. on 1 December 1991. The State, in its brief, argues that the killings must have occurred between 11:00 p.m. on 30 November 1991 and 12:30 a.m. on 1 December 1991:

> To sum up – all the physical evidence at the crime scene indicated the victims were killed after 11:00 p.m. Saturday night and before Mr. Baldwin went to bed, and certainly before the next morning. At some point between 12:30 am Sunday morning and 1:00 a.m. Sunday morning defendant was seen paying for hotel rooms, beer, and drugs with cash. Ms. Smith was called by defendant at trial and was the witness who testified about the large amount of cash spent by defendant after midnight Saturday night.

Mr. Best argued that effective trial counsel would have challenged this timeline, pointing out that the State's theory that Mr. Best killed the Baldwins required that the crime occur during an exceedingly narrow window of time, unsupported by expert testimony as to time of death. Mr. Best points to medical evidence gathered after conviction by post-conviction counsel, which suggests the Baldwins did not die during the narrow window of time posited by the State. While the dissent views the State's evidence on this point as persuasive, the combination of (1) no medical evidence confirming the State's timeline and (2) the postconviction medical evidence suggesting that the State's timeline was inaccurate confirms our independent view that the State's evidence presented at trial was weak enough that there is a reasonable probability of a different outcome if the State had disclosed the exculpatory evidence.

We are not considering and do not decide whether Mr. Best received effective assistance of counsel during his original trial. Further, we cannot and do not decide that the production of this additional evidence

postconviction supports a reasonable probability that the jury in Mr. Best's trial would have come to a different result if presented with evidence that the State failed to disclose. Instead, we mention Mr. Best's ineffective assistance of counsel claim, and the evidence supporting it, only to underscore the weakness of the State's case at trial, and the likelihood that the jury may have decided to acquit if it had been presented with all of the evidence.

Our decision is based upon Mr. Best's claim that the State failed to disclose material exculpatory evidence. We are sufficiently disturbed by the extent of the withheld evidence in this case, and by the materiality of that evidence, that it undermines our confidence in the jury's verdict. The exculpatory evidence withheld by the State for approximately twenty years was material. It either negated or cast doubt upon the principal evidence presented by the State at Mr. Best's trial. For that reason, we are of the opinion that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Tirado*, 358 N.C. at 589, 599 S.E.2d at 540.

We have not discussed all of the evidence which the State failed to disclose, but "we have no need to consider [Mr. Best's] arguments that the other undisclosed evidence also requires reversal under *Brady*." *Smith*, 565 U.S. at 76, 132 S. Ct. at 631. The undisclosed witness interview of Carolyn Troy and the undisclosed forensic evidence, particularly the unidentified Caucasian hairs and luminol test notes indicating the presence of bloody shoe tracks, are sufficiently material. When considered against the facts that (1) the State relied heavily on the testimony of Ms. Troy that Mr. Best was spending the proceeds of the robbery on drugs; (2) Mr. Best is not white and could not have contributed the "Caucasian" hairs recovered from the crime scene, while no "Negroid" hairs were recovered; and (3) Mr. Best's shoes were tested and revealed no traces of blood, there is a reasonable probability that the jury would have returned a different verdict if presented with the undisclosed evidence.

Conclusion

We have not decided today that Mr. Best is guilty or innocent, that the district attorney was right or wrong to charge him, or that Mr. Best should be convicted or acquitted on retrial. Instead, our review of the record in this case shows that the failure to disclose exculpatory evidence prejudiced Mr. Best's ability to present a defense. Every criminal defendant in this state is entitled to a fair trial with full opportunity to confront the evidence against him and to attempt to rebut the charges of which he is accused. The state and federal constitutional guarantees

of due process require that the State turn over favorable evidence that is material to the defendant's guilt or punishment prior to trial. That did not happen in this case. Accordingly, we reverse the superior court's denial of Mr. Best's motion for appropriate relief and remand this case to the Superior Court, Bladen County, with instructions to grant the motion and order a new trial.

REVERSED AND REMANDED.

Justice ERVIN did not participate in the consideration or decision of this case.

Justice NEWBY dissenting.

The issue in this case is whether evidence that the State presumably should have disclosed before defendant's trial under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), creates a reasonable probability of a different outcome of that trial. Because the undisclosed evidence is not sufficient to undermine the substantial evidence of defendant's guilt presented at trial, any *Brady* violation did not meet the standard of being prejudicial to defendant. The majority inflates the significance of vague undisclosed evidence and improperly minimizes the weight of the State's strong evidence presented at trial. The majority seems to find facts, weighing conflicting evidence in the light most favorable to defendant. The decision of the superior court denying defendant's motion for appropriate relief should be affirmed. I respectfully dissent.

Due process guards a defendant's right to a fair trial free from prejudicial error. The State may deprive a defendant of due process when it fails to disclose evidence that is favorable to the defendant and material to the defendant's guilt or punishment. *Smith v. Cain*, 565 U.S. 73, 75, 132 S. Ct. 627, 630 (2012). As the majority notes, however, not every failure to disclose amounts to a constitutional violation. Instead, a defendant also must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985).

The following evidence presented at trial supported defendant's conviction and sentencing: Eighty-two-year-old Leslie Baldwin met defendant at a gas station the evening of 29 November 1991. The details of their encounter are unclear, but the evidence shows that Mr. Baldwin hired defendant to perform yard work for him the next day. Defendant

walked to the home of Mr. Baldwin and his wife, seventy-nine-year-old Gertrude Baldwin, on 30 November 1991. He performed yard work, including cleaning the gutters. Mr. Baldwin fed him lunch. At the completion of defendant's work, Mr. Baldwin paid him $30.

Mr. and Mrs. Baldwin were then murdered—Mr. Baldwin by a cut to his carotid artery on his neck and other trauma and Mrs. Baldwin by blunt force trauma to her head and multiple knife wounds. The State put on substantial evidence that the murders occurred the night of defendant's work at the victims' home. Specifically, testimony indicated that Mrs. Baldwin's niece spoke to her on the phone at 7:00 p.m. that evening and that Mrs. Baldwin's medication dose, which she habitually took at 11:00 p.m. before going to bed, was gone when the bodies were later discovered. Testimony also showed that the 1 December 1991 newspaper, which Mr. Baldwin typically would have retrieved by around 5:00 a.m. that day, was still on the front porch, along with the papers for the following few days. Thus, evidence showed that the Baldwins were likely killed late at night on 30 November 1991 or very early in the morning on 1 December 1991.

Mrs. Baldwin was also raped, and the evidence at trial showed a DNA sample taken from her vaginal swab matched defendant's DNA.[1] A paring knife found at the crime scene, under Mr. Baldwin's body and covered in his blood, bore a fingerprint in the blood that matched defendant's print.

Defendant claimed that the bloody print came from him using a similar knife to clean gutters, and that during that process, he scraped the back of his hand. Defendant alleges that the scrapes on the back of his hand would have produced the blood for the fingerprint later found on the knife. But defendant's testimony is undermined by the fact that his bloody fingerprint was placed on the paring knife since it was last washed. Further, testimony indicated that the paring knife was typically stored in a kitchen drawer and that Mr. Baldwin never used kitchen utensils for yard work.

The Baldwins were also robbed of between one and two thousand dollars cash, some of which consisted of one-hundred-dollar bills. Witness testimony indicated that defendant possessed several

1. The DNA test ruled out about a 99.7% of unrelated members of North Carolina's Caucasian population, about 99.7% of the Lumbee population, and about 94.4% of the Black population. A second DNA test conducted at defendant's request showed a 100% match to defendant. While not considered in this *Brady* analysis, the second DNA test further confirms the reliability of the first test.

one-hundred-dollar bills after the murders, spent one hundred dollars on cocaine just hours after the murders, and spent several hundred dollars more on cocaine within a couple days of the murders. When defendant filed this motion for appropriate relief over twenty years later, alleging certain evidence not disclosed before trial could have been used for his benefit, the superior court determined any nondisclosed evidence could not create a reasonable probability that the evidence's disclosure would have produced a different result. The superior court thus denied his motion.

The majority reverses that decision and awards defendant a new trial nearly thirty years after this tragedy. It does so because in its view the evidence defendant presents that was not disclosed by the State before the trial would have a reasonable probability of bringing about a different trial outcome. The evidence defendant identifies would not do so. It does not begin to outweigh the evidence the jury considered at trial that is highly probative of defendant's guilt.

First, the majority properly rejects defendant's argument that the State failed to disclose evidence related to defendant's bloody fingerprint on the knife. Although records indicate that the print was not useful on its own at first, an analyst went on to explain how the print was eventually evaluated and found to be a match with defendant. This evidence does not benefit defendant; thus, it cannot serve as a foundation for establishing a *Brady* violation.

Second, defendant asserts that the State's failure to disclose evidence of two other potential culprits prejudiced his defense. The majority does not appear to give this evidence much weight. Rightly so, because one of the potential suspects was incarcerated during the time the murders likely occurred, and the other was excluded as a possible source of the DNA found from Mrs. Baldwin's vaginal swab.

Next, defendant argues that the State improperly withheld evidence from a witness interview with Carolyn Troy. Troy testified at trial that defendant spent hundreds of dollars a couple nights after the murders, but the prior witness interview indicates that Troy originally stated defendant had around $40 on his person on that same night. The majority claims that this evidence could have been used to impeach Troy's testimony, which helped the State show that defendant was spending money he stole from the Baldwins.

There are two problems with the majority's position. First, in addition to Troy's testimony, the State was able to present testimony from Tammy Rose Smith, who testified that defendant spent a couple hundred

dollars or more just a couple hours after the crime likely occurred. The majority sidesteps this evidence and says that amount "is a far cry from the $1,800[2] that the State claims were stolen from the Baldwins." That response is unsatisfying. The evidence shows that defendant spent one-hundred dollar bills shortly after the robbery. That testimony is probative enough in its own right. There is no reason whatsoever to expect that someone who stole over one thousand dollars would spend the entirety of that sum only hours after acquiring it. Second, Troy's later testimony went into far greater detail about the large bills defendant possessed and the sums he spent on various purchases. This more detailed testimony would likely weaken the impact of any vague earlier statement she made. Therefore, a jury would still have substantial reason to believe Troy's subsequent testimony, and the State had presented other evidence of defendant's substantial spending after the crime on which it could rely even if Troy's testimony were undermined. Additionally, the SBI interviewed three other people who gave witness statements about defendant possessing one-hundred-dollar bills and spending them on cocaine. Thus, if the evidence of defendant's possession and spending of cash presented at trial had been at all questioned, these other three witnesses were available to support the State's case.

The majority also relies on undisclosed luminol tests and hair follicle samples. But these pieces of potential evidence have minimal probative value at best. The luminol tests indicated that bloody footprints were found in the home. The majority suggests that if such prints were found, then blood perhaps should have been found on defendant's shoes after the crime. The hair follicle collections revealed Caucasian hairs on the victims' bodies which could not have been left by defendant, who is Black. Yet, DNA testing and fingerprint analysis are well known to be more probative than hair follicle comparisons. Moreover, it is unclear that reports of Caucasian hair particles found on the victims would be helpful to defendant. The DNA test implicating defendant left only a 0.3% chance that the DNA left by the rapist belonged to a Caucasian person. Despite the fact that the footprints and the hair follicles do not point to anyone in particular, however, it is key that the DNA testing and fingerprint evidence *did* specifically implicate defendant. Evidence that implicates no one does not invalidate or even significantly undermine solid evidence that implicates one person. Therefore, any introduction of evidence not pointing to a specific individual does not raise a

2. It is unclear precisely how much money was stolen from the Baldwins, but testimony indicates that about $1000 was likely stolen from Mr. Baldwin and as much as $800 from Mrs. Baldwin.

reasonable probability that a different result would have been reached at trial, especially considering the two pieces of evidence that specifically implicate defendant.

In light of the strength of the evidence from the DNA and fingerprint testing, the majority finally resorts to attacking those things. Though the majority cannot point to any new evidence that would undermine the credibility of either the DNA test or the bloody fingerprint, it asserts that "the evidence against Mr. Best is not as strong as the State claims it is." As to the fingerprint, the majority states that defendant testified at trial that his bloody fingerprint was on the knife because he used a similar one to clean the gutters and scraped the back of his hand, meaning he could have touched the knife while he had blood on his fingers. The majority admits that defendant already tried this explanation at trial and that the jury did not have to believe him. Indeed, it would be implausible for the jury to believe him because the knife (1) bore defendant's fingerprint in Mr. Baldwin's blood after the knife had just been washed; (2) was found underneath the body of Mr. Baldwin, whose neck was sliced open;[3] and (3) rarely left the kitchen and was not used for yard work. But the majority nonetheless considers defendant's bare assertion significant as evidence that could undermine the State's case.

The majority then, confusingly, describes the DNA test results directly implicating defendant as "similarly underwhelming." It notes that "[t]he State's expert testified that, regarding the reliability of the DNA match, one out of every eighteen African-American men would match the sample recovered from Mrs. Baldwin." Stated another way, the DNA test revealed that if defendant were being falsely accused, there is only a one-in-eighteen chance, just over a five percent chance, that he would be a match to the sample taken from Mrs. Baldwin's vaginal swab. Thus, the DNA test alone (without even considering the other evidence of defendant's guilt) presents a high likelihood that he raped Mrs. Baldwin. Of course, on top of that, defendant has been unable to point to a plausible alternative suspect of the same race to whom the DNA sample could belong. The majority simply asserts, contrary to logic and evidence, that the incriminating result of the DNA test is underwhelming.

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3. The majority contests whose blood was on the knife as well as the location of the knife. The State reiterated multiple times throughout this case and in its brief that the blood found on the knife was Mr. Baldwin's and that the knife was found under the victim. If there is a dispute over this evidence, this dispute should be resolved by the trial court. The majority states that it is not their job to weigh facts or find evidence, but that is exactly what the majority does here by making a finding about the placement of the knife.

The majority's ultimate contention is that, in its view, the State's evidence presented at trial is weak, and thus there is a reasonable probability the withheld evidence defendant identifies, had it been disclosed, would have produced a different result in the proceeding. But the evidence the State presented at trial is indeed strong, and the evidence defendant argues should be included is weak. The State has shown: a statistically reliable DNA test directly implicating defendant as Mrs. Baldwin's rapist; defendant's bloody fingerprint on a likely murder weapon; uncontradicted testimony that defendant was at the Baldwin's home before the crime; and testimony that defendant possessed and spent considerable sums of cash soon after the Baldwins were robbed of a considerable sum of cash. Defendant, on the other hand, has only: minimally called into question just one witness's statement as to precisely how much cash defendant carried a couple days after the murders; pointed to two other potential culprits, whom the evidence has generally ruled out as the assailants; and identified some tests and samples that do not implicate defendant (or anyone else in particular). As the superior court determined, a rational jury would not conclude that any reasonable doubt existed as to defendant's guilt.[4]

Thus, even if the additional evidence to which defendant points had been available for trial, there is not a reasonably probability that the jury would have reached a different result. Holding otherwise, the majority weighs the evidence in favor of defendant, inappropriately attempts to undermine strong evidence supporting the State's case, and inflates the significance of flimsy evidence defendant uncovered later. If there is a conflict in the evidence, this issue should be remanded to the trial court. The superior court's denial of defendant's motion for appropriate relief should be affirmed. I respectfully dissent.[5]

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4. The evidence here indicates that the knife was found under the victim. The State reiterated this point multiple times throughout the case and in its brief. If there is a dispute over this evidence, this dispute should be resolved by the trial court. The majority states that it is not their job to weigh facts or find evidence, but that is exactly what the majority does here by making a finding about the placement of the knife.

5. Defendant also asserts that his trial counsel's representation was unconstitutionally deficient. I disagree. Defendant has not shown either that his trial counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment or that there is a reasonable probability that, but for counsel's purported errors, the result of the proceeding likely would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687–96, 104 S. Ct. 2052, 2064–69 (1984).

STATE OF NORTH CAROLINA
v.
KENNETH CALVIN CHANDLER

No. 189A19

Filed 18 December 2020

1. Appeal and Error—preservation of issues—automatic preservation—statutory mandate—acceptance of guilty plea

Defendant's argument that the trial court erred by rejecting his guilty plea was automatically preserved for appellate review because the trial court acted contrary to the statutory mandate in N.C.G.S. § 15A-1023(c), which required a specific act by the trial court—that the "judge must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea."

2. Criminal Law—guilty plea—rejection by trial court—refusal to admit factual guilt

The trial court erred by rejecting a defendant's guilty plea based on defendant's refusal to admit his factual guilt where the plea was based on defendant's informed choice, a factual basis existed for the plea, and the sentencing was left to the trial court's discretion. There is no requirement that a defendant admit to factual guilt in order to enter a guilty plea.

3. Criminal Law—guilty plea—rejection by trial court—error—prejudice analysis—remedy

The trial court's error in rejecting defendant's guilty plea (based on defendant's refusal to admit his factual guilt) was prejudicial because the maximum sentence defendant could have received under the plea was 59 months and when he was convicted at trial he was sentenced to a minimum of 208 months and a maximum of 320 months imprisonment. The matter was remanded with instruction to the district attorney to renew the plea that the trial court erroneously rejected and for the trial court to consider the plea if defendant accepts it.

Justice MORGAN dissenting.

Justice NEWBY joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 265 N.C. App. 57 (2019), determining no error upon review of a judgment entered on 11 August 2017 by Judge Mark E. Powell in Superior Court, Madison County. Heard in the Supreme Court on 10 December 2019.

Joshua H. Stein, Attorney General, by Jennifer T. Harrod, Special Deputy Attorney General, for the State-appellee.

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

HUDSON, Justice.

Here we consider whether a trial court erred in refusing to accept a criminal defendant's tendered guilty plea. Because we conclude that the trial court lacked discretion to reject defendant's plea pursuant to N.C.G.S. § 15A-1023(c) (2019), we reverse the decision of the Court of Appeals and remand with instructions to the district attorney to renew—and the trial court to consider if defendant accepts—the rejected plea offer.

I. Factual and Procedural History

On 3 August 2015, defendant was indicted on one count of first-degree sexual offense with a child and one count of indecent liberties with a child. Prior to trial, defendant negotiated a plea arrangement with the State. Pursuant to the plea arrangement, defendant agreed to plead guilty to the offense of taking indecent liberties with a child in exchange for the State's dismissal of the first-degree sexual offense charge.

On 6 February 2017, defendant, his trial counsel, and the assigned prosecutor signed a standard Transcript of Plea form. The first page of the Transcript of Plea displays three checkbox options to indicate the type of plea that a defendant is entering: (1) guilty, (2) guilty pursuant to *Alford* decision, or (3) no contest. Defendant checked the "guilty" box. In other places throughout the Transcript of Plea form, defendant reiterated that he was pleading guilty: defendant checked the "guilty" box to indicate that he understood that he was pleading guilty to one count of the charged offense of the Class F felony of "indecent liberties" with a maximum punishment of 59 months; defendant checked the "guilty" box to indicate that he personally pleaded guilty to the charge described by the trial judge; and defendant checked the "guilty" box to indicate that he agreed to plead guilty as part of a plea arrangement.

On the following day, 7 February 2017, defendant appeared in the Superior Court, Madison County for the entry of the guilty plea. During the colloquy required under N.C.G.S. § 15A-1022 (2019)—the statute which establishes the components of a criminal defendant's plea and a trial judge's acceptance of such a plea—defendant stated that he was guilty, but went on to explain to the trial judge that he did not commit the act he was accused of perpetrating and was only pleading guilty to the charged offense in order to prevent his granddaughter (the victim) from having to endure court proceedings. Ultimately, the trial judge chose to reject defendant's plea.

During the colloquy defendant and the trial judge had the following exchange:

> [The Court:] Do you understand that you are pleading guilty to the following charge: 15 CRS 50222, one count of indecent liberties with a minor child, the date of offense is April 19 to April 20, 2015, that is a Class F felony, maximum punishment 59 months?
>
> [Defendant:] Yes, sir.
>
> [The Court:] Do you now personally plead guilty to the charges I just described?
>
> [Defendant:] Yes, sir.
>
> [The Court:] Are you, in fact, guilty?
>
> [Defendant:] Yes, sir.
>
> [The Court:] Now, I want to make sure you understand—you hesitated a little bit there and looked up at the ceiling. I want to make sure that you understand that you're pleading guilty to the charge. If you need additional time to talk to [defense counsel] and discuss it further or if there's any question about it in your mind, please let me know now, because I want to make sure that you understand exactly what you're doing.
>
> [Defendant:] Well, the reason I'm pleading guilty is to keep my granddaughter from having to go through more trauma and go through court.
>
> [The Court:] Okay.
>
> [Defendant:] I did not do that, but I will plead guilty to the charge to keep her from being more traumatized.

[The Court:] Okay, I understand, [Defendant]. Let me explain something to you. I practiced law 28 years before I became a judge 17 years ago, and I did many trials and many pleas of guilty and represented a lot of folks over the years. And I always told my clients, I will not plead you guilty unless you are, in fact, guilty. I will not plead you guilty if you say "I'm doing it because of something else. I didn't do it." And that's exactly what you told me just then, "I didn't do it." So for that reason I'm not going to accept your plea. Another judge may accept it, but I will never, ever, accept a plea from someone who says, "I'm doing it because of another reason, I really didn't do it." And I'm not upset with you or anything like that, I just refuse to let anyone do anything, plead guilty to anything, that they did not—they say they did not do. I want to make sure that you understand you have the right to a trial, a jury trial. Do you understand?

[Defendant:] Yeah, I understand that. We discussed that, me and my lawyer.

[The Court:] Okay.

[Defendant:] And like I say, I did not intentionally do what they say I've done.

[The Court:] Okay, that's fine. That's good.

[Defendant:] But like I say, I told [defense counsel] that I would be willing to plead guilty to this, have a plea deal, to keep this child from having to be drug [sic] through the court system.

[The Court:] That's fine. I'm not going to accept your plea on that basis because I really don't want you to plead guilty to anything that you stand there, uh, and you've said you didn't do. So I'm not going to accept your plea. We'll put it over on another calendar where another judge will be here. If you want to do that, you be sure and tell the judge what you told me if you still feel that way. I'm going to write it down here on this transcript of plea of why I didn't take your plea.

See, the easy thing for me to do is just take pleas and put people in jail or do whatever I need to do, or think is best for their sentence, and that's easy. But I can't lay down and

> go to sleep at night knowing that I put somebody in jail or entered a sentence of probation or whatever to something they did not do, or they say they did not do. I don't know any of the facts of your case; I don't know anything except what I just read in the indictment. That's all I know. But when a man or woman says, I didn't do something, that's fine, I accept that.

As a result of this conversation, defendant's case was continued until a later court date. Upon his subsequent arraignment on 7 August 2017, defendant entered a plea of not guilty and did not raise any issue with the previous trial judge's rejection of defendant's attempted guilty plea on 7 February 2017.

Upon his plea of not guilty, defendant's trial began on 7 August 2017 with a different trial judge presiding. Defendant did not raise any argument, challenge, or issue regarding the first trial judge's rejection of defendant's attempt to plead guilty under the plea arrangement. During his trial, defendant maintained his factual innocence and testified that he had never knowingly touched his granddaughter in a sexual manner. After its deliberations, the jury returned guilty verdicts against defendant on the charges of first-degree sex offense and taking indecent liberties with a child. The trial court sentenced defendant to consecutive sentences of 192 to 291 months for the first-degree sex offense conviction and 16 to 29 months for the indecent liberties with a child conviction. Defendant appealed to the Court of Appeals.

At the Court of Appeals, defendant raised the argument for the first time that the original trial judge erred in rejecting defendant's attempted guilty plea on 7 February 2017. Defendant argued that a trial judge is required to accept a guilty plea pursuant to N.C.G.S. § 15A-1023(c) even when a defendant maintains his innocence. Defendant further asserted that, if the first trial judge had accepted defendant's guilty plea, defendant would not have been exposed to trial for, and conviction of, the charges of first-degree sex offense and taking indecent liberties with a child, and thus would not have been subject to the punishment that he consequently received.

The Court of Appeals panel agreed that defendant had attempted to enter a guilty plea before the first trial judge. The majority concluded that "[t]he trial court correctly rejected [d]efendant's tendered guilty plea because the trial court did not and could not find that it was the product of his informed choice." *State v. Chandler*, 265 N.C. App. 57, 62 (2019). The dissenting judge would have held that the first trial judge

was obligated to accept defendant's guilty plea pursuant to N.C.G.S. § 15A-1023(c) which mandates that a trial judge "must accept the plea." *Id.* at 65–66 (Dillon, J., dissenting).

On 21 May 2019, defendant gave notice of appeal pursuant to N.C.G.S. § 7A-30(2) (2019) based upon the dissent in the Court of Appeals.

II. Analysis

[1] We must first determine whether defendant's argument about the guilty plea has been properly preserved for appellate review.

"[I]t is well established that when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *In re E.D.*, 372 N.C. 111, 116 (2019) (cleaned up); *see also State v. Hucks*, 323 N.C. 574, 579 (1988) ("When a trial court acts contrary to a statutory *mandate*, the error ordinarily is not waived by the defendant's failure to object at trial."). A statute contains a statutory mandate when it "is clearly mandatory, and its mandate is directed to the trial court." *In re E.D.*, 372 N.C. at 117 (quoting *Hucks*, 323 N.C. at 579). A statutory mandate is directed to the trial court when it, either "(1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial or at specific courtroom proceedings that the trial judge has authority to direct." *Id.* at 121 (cleaned up).

Here, N.C.G.S. § 15A-1023(c) is clearly a statutory mandate that "requires a specific act by a trial judge." Specifically, it states that "[t]he judge *must* accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea." N.C.G.S. § 15A-1023(c) (emphasis added). Accordingly, any error that the trial court committed under the statute which prejudiced defendant is an issue that is automatically preserved for appellate review.

[2] Next, we must determine whether the trial court committed any error of law that prejudiced defendant. It appears from the transcript of the colloquy that the first trial judge rejected defendant's guilty plea because defendant refused to admit he was factually guilty.

Under our general statutes, a defendant is not required to admit factual guilt in order for a trial judge to accept a guilty plea. *See* N.C.G.S. § 15A-1022(a). In fact, we have explicitly held that nothing in N.C.G.S. § 15A-1022 requires the court to make an inquiry into whether a defendant is factually guilty. *State v. Bolinger*, 320 N.C. 596, 603 (1987).

Here, in rejecting defendant's guilty plea, the trial court stated:

> [The Court:] . . . I will not plead you guilty unless you are, in fact, guilty. I will not plead you guilty if you say "I'm doing it because of something else. I didn't do it." And that's exactly what you told me just then, "I didn't do it." So for that reason I'm not going to accept your plea.

Nothing in N.C.G.S. § 15A-1022 or our case law announces a statutory or constitutional requirement that a defendant admit factual guilt in order to enter a guilty plea. Accordingly, the trial court erred by rejecting defendant's guilty plea because he would not admit that he was factually guilty.

As explained by the dissenting judge below, N.C.G.S. § 15A-1023(c) requires a trial judge to accept a guilty plea where (1) the plea is based on defendant's own informed choice, (2) a factual basis exists for the plea, and (3) sentencing is left to the discretion of the court. N.C.G.S. § 15A-1023(c). Here, the plea arrangement did not include a sentencing recommendation. Therefore, the trial court could only have rejected the plea if it found either (1) that the plea was not the product of defendant's informed choice or (2) there was not a factual basis for the plea.

There is no indication in the record that defendant did not make an informed choice. The Court of Appeals majority concluded that because defendant wanted to plead guilty, but maintained that he was in fact innocent, his guilty plea could not be based on his informed choice. But as the dissenting judge below explained, "[i]n North Carolina there is no constitutional or statutory barrier for a defendant to plead guilty while maintaining his innocence." *Chandler*, 265 N.C. App. at 65 (Dillon, J., dissenting).

From the colloquy, it is clear that defendant was making the informed decision to plead guilty. When asked if he understood he was pleading guilty to the charge described by the trial judge, he answered "Yes, sir." He then cogently explained that he had a reason for pleading guilty: "to keep [his] granddaughter from having to go through more trauma and go through court." When the trial judge followed up to ensure defendant knew he had a right to a jury trial, defendant responded, "Yeah, I understand that. We discussed that, me and my lawyer." Nothing in the colloquy, the Transcript of Plea form, or anything else in the record indicates that defendant was not informed in his choice to plead guilty.

It is also apparent from the record that there was a sufficient factual basis for defendant's plea. The factual basis prong of N.C.G.S.

§ 15A-1023(c) requires only "that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty." *State v. Sinclair*, 301 N.C. 193, 199 (1980); *see also Bolinger*, 320 N.C. at 603 (stating that nothing in N.C.G.S. § 15A-1022 requires the court to make an inquiry into whether defendant was in fact guilty). Thus, whether or not defendant admits to the crime is not part of the information the trial court should consider under the factual basis prong of N.C.G.S. § 15A-1023(c). Here, although the trial court rejected the plea before the prosecution offered a factual basis for the plea, when the evidence was eventually presented at trial, the jury found that defendant had committed both crimes beyond a reasonable doubt. Therefore, it is clear that there would have been a sufficient factual basis for defendant's plea at the time it was tendered to the trial court.

Because the plea was based on defendant's informed choice, a factual basis existed for the plea, and the sentencing was left to the discretion of the trial court, the trial court was required to accept defendant's guilty plea pursuant to N.C.G.S. § 15A-1023(c). Rejecting defendant's plea was error.

[3] We further conclude that the trial court's error prejudiced defendant. Specifically, under the plea arrangement, defendant agreed to plead guilty to indecent liberties in exchange for the State dismissing the charge of first-degree sexual offense with a child. As a result, the maximum sentence that defendant could have received on the indecent liberties charge, a Class F felony, was fifty-nine months imprisonment. However, after the trial court rejected defendant's plea arrangement, his case proceeded to trial where he was eventually convicted of both indecent liberties and first-degree sexual offense with a child. Pursuant to those convictions, defendant was ultimately sentenced to a minimum of 208 months and a maximum of 320 months in prison. This subjected defendant to more than three times the maximum amount of jail time he would have had to serve under the plea agreement. Thus, defendant was prejudiced by the trial court's error in rejecting his guilty plea.

Finally, we conclude that the proper remedy for the trial court's error is to remand this case, consistent with *State v. Lineberger*, 342 N.C. 599 (1996), with an instruction to the district attorney to renew—and the trial court to consider if defendant accepts—the plea offer that was rejected by the trial court. In *Lineberger*, we concluded that:

> A new trial . . . cannot wholly remedy the prejudice to defendant resulting from the trial court's refusal to consider the plea agreement. Since defendant's due process

> rights have been affected by these unique circumstances, we must fashion a remedy. Accordingly, we instruct the district attorney on remand to renew the plea offer accepted by defendant and presented to the trial court. If defendant accepts the offer, then we instruct the trial court to consider the offer and exercise its discretion whether to approve the plea agreement and enter judgment or, subject to the provisions of N.C.G.S. § 15A–1023(b), to proceed to trial.

342 N.C. at 607.

As in *Lineberger*, merely remanding for a new trial will not "wholly remedy the prejudice to defendant resulting from the trial court's refusal to consider the plea agreement," *id.*, because without an instruction to renew the rejected plea agreement, the district attorney could simply decide not to renew the plea agreement, leaving defendant with essentially no remedy for the prejudicial error committed by the trial court in this case. Accordingly, we remand this case with instructions to the district attorney to renew—and the trial court to consider if defendant accepts—the rejected plea offer.

III. Conclusion

In sum, we conclude that the trial court erred by rejecting defendant's guilty plea, that the error prejudiced defendant, and that this issue was automatically preserved for appellate review. Accordingly, we reverse the decision of the Court of Appeals and remand with an instruction to the district attorney to renew—and the trial court to consider if defendant accepts—the plea offer that was rejected by the trial court.

REVERSED AND REMANDED.

Justice MORGAN dissenting.

My distinguished colleagues in the majority conclude that the original trial judge did not have the discretion to reject defendant's attempted guilty plea and, because the judge erred by acting contrary to a statutory mandate by refusing to accept the guilty plea and thereby prejudicing defendant, the error which the majority has determined was committed has been deemed to be automatically preserved for appellate review. In my view, the issue of the first trial judge's rejection of defendant's attempted guilty plea was not automatically preserved and the lack of an objection by defendant at the trial level to the original trial judge's

rejection of defendant's guilty plea negates defendant's opportunity for review of the matter by this Court. Since I am of the opinion that this Court does not have proper authority to entertain this appeal of defendant because the refusal of his guilty plea by the first trial judge was not properly preserved for appellate review, I respectfully dissent from the opinion of the majority.

Early in their analysis, the members of the majority take an unfortunate step in their application of N.C.G.S. § 15A-1023(c) (2019) to the present case, thus predictably embarking upon a wayward journey to their ultimate conclusion. The statutory provision states, in pertinent part: "The judge must accept the plea *if* he determines that the plea is the product of the informed choice of the defendant *and* that there is a factual basis for the plea." N.C.G.S. § 15A-1023(c) (emphasis added). It is clear from the plain words of this segment of N.C.G.S. § 15A-1023(c) that (1) it is the trial judge who makes the determination that a defendant's guilty plea is the product of an informed choice and, in addition to this decision which is reserved for the trial judge, (2) it is the trial judge who makes the determination that there is a factual basis for the plea. In the event that the trial judge is satisfied that *both* of these components of N.C.G.S. § 15A-1023(c) exist, only then does the mandate of the statute operate to require that the trial judge accept the guilty plea. I agree that, in the instant case, the first trial judge was required to accept defendant's guilty plea if it was the product of an informed choice and if there existed a factual basis for the plea, irrespective of any direct admission of guilt. *See State v. Melton*, 307 N.C. 370, 377, 298 S.E.2d 673, 678 (1983) (holding that "once the trial judge determined that the defendant's guilty plea had been made voluntarily and that there was a factual basis for the plea, he was required by statute to accept the plea").

During the plea arrangement colloquy at trial between the first trial judge and defendant, the following exchange occurred:

> [The Court:] Do you understand that you are pleading guilty to the following charge: 15 CRS 50222, one count of indecent liberties with a minor child, the date of offense is April 19 to April 20, 2015, that is a Class F felony, maximum punishment 59 months?
>
> [Defendant:] Yes, sir.
>
> [The Court:] Do you now personally plead guilty to the charges I just described?
>
> [Defendant:] Yes, sir.

[The Court:] Are you, in fact, guilty?

[Defendant:] Yes, sir.

[The Court:] *Now, I want to make sure you understand—you hesitated a little bit there and looked up at the ceiling. I want to make sure that you understand that you're pleading guilty to the charge.* If you need additional time to talk to [defense counsel] and discuss it further or if there's any question about it in your mind, please let me know now, because *I want to make sure that you understand* exactly what you're doing.

[Defendant:] Well, *the reason I'm pleading guilty is to keep my granddaughter from having to go through more trauma and go through court.*

[The Court:] Okay.

[Defendant:] *I did not do that, but I will plead guilty to the charge to keep her from being more traumatized.*

[The Court:] Okay, I understand, [Defendant]. Let me explain something to you. I practiced law 28 years before I became a judge 17 years ago, and I did many trials and many pleas of guilty and represented a lot of folks over the years. And I always told my clients, *I will not plead you guilty unless you are, in fact, guilty.* I will not plead you guilty if you say "I'm doing it because of something else. I didn't do it." And that's exactly what you told me just then, "I didn't do it." So for that reason I'm not going to accept your plea. Another judge may accept it, but I will never, ever, accept a plea from someone who says, "I'm doing it because of another reason, I really didn't do it." And I'm not upset with you or anything like that, I just refuse to let anyone do anything, plead guilty to anything, that they did not—they say they did not do. *I want to make sure that you understand you have the right to a trial, a jury trial. Do you understand?*

[Defendant:] Yeah, I understand that. We discussed that, me and my lawyer.

[The Court:] Okay.

[Defendant:] *And like I say, I did not intentionally do what they say I've done.*

> [The Court:] Okay, that's fine. That's good.
>
> [Defendant:] *But like I say, I told [defense counsel] that I would be willing to plead guilty to this, have a plea deal, to keep this child from having to be drug [sic] through the court system.*

(Emphasis added.)

I construe the original trial judge's repeated statement to defendant throughout the colloquy, "I want to make sure that you understand," to be the original trial judge's effort to comply with the duty imposed upon the judge by N.C.G.S. § 15A-1023(c) to determine if defendant, through understanding the explored aspects of the plea, is making an informed choice. I interpret defendant's consistent statements to the first trial judge during the colloquy such as "I did not do that, but I will plead guilty to the charge" and "like I say, I did not intentionally do what they say I've done," along with other similar representations of defendant's position, as amounting to a circumstance justifiably comprehended by the first trial judge that there was not a factual basis for the plea. These words which are contained in the record of this case, coupled with the first trial judge's chronicled observation that defendant "hesitated a little bit . . . and looked up at the ceiling" during this portion of the plea arrangement colloquy, convince me that the first trial judge gleaned sufficient information during this exchange with defendant to provide the judge with a legitimate basis to determine that *neither* of the two required aspects of N.C.G.S. § 15A-1023(c) existed to compel the judge to accept defendant's guilty plea.

However, the majority here sees fit to substitute its judgment for the determination exclusively exercised by the original trial judge pursuant to N.C.G.S. § 15A-1023(c) by ignoring the statute's singular recognition of a trial judge as the determiner of a statutory provision's elements, diminishing the sanctity of a trial judge's ability to assemble all of the circumstances of the courtroom proceedings in ascertaining and considering the appropriateness of accepting the proffered guilty plea, and dismissing a trial judge's wherewithal under N.C.G.S. § 15A-1023(c) to exercise the judge's ability to identify the existence of a defendant's informed choice and a guilty plea's factual basis. Instead, the majority opts to look at the cold record before this Court, clinically read the words in a vacuum that were interspersed by defendant throughout the colloquy, combine the operative terms and phrases from these various statements of defendant to invoke the majority's view of a trial judge's requirement under N.C.G.S. § 15A-1023(c) that the guilty plea

must be accepted, and then ultimately decide that the trial judge's failure to comply with the majority's identified applicable mandate here under N.C.G.S. § 15A-1023(c) automatically preserved defendant's issue for appellate review by this Court after defendant failed to raise the issue in any fashion in any previous legal forum. I agree with the majority that when a trial court acts contrary to a statutory mandate the right to appeal the trial court's action is preserved, notwithstanding the failure of the appealing party to object at trial. *State v. Golphin*, 352 N.C. 364, 411, 533 S.E.2d 168, 202 (2000). This circumstance, however, does not exist here. As a result, my recognition of the established principles of statutory construction, deference to recognized determinations by trial judges, and the application of the North Carolina Rules of Appellate Procedure dictate my dissenting view.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure reads as follows:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

N.C. R. App. P. 10(a)(1).

In the present case, upon the original trial judge's rejection of defendant's attempted guilty plea, defendant did not object to the trial judge's refusal to accept defendant's plea and the corresponding plea arrangement. Similarly, defendant did not present to the trial court any request or motion which stated the specific grounds for a ruling which defendant desired the trial court to make in order to effect acceptance of defendant's guilty plea. Without such an objection, request, or motion made by defendant at the trial level regarding the trial judge's rejection

of defendant's guilty plea, Rule 10(a)(1)'s necessitation for defendant's attainment of a ruling from the trial court on the determination to reject defendant's attempted guilty plea obviously was not satisfied. The cited rule expressly specifies that an issue is properly preserved for review and may be made the basis of an issue presented on appeal when there is action taken during the course of the proceedings in the trial tribunal by a noted objection, or which by rule or law was deemed preserved or taken without any such action.

Due to the lack of any action taken by defendant to comply with the requirements of Rule 10(a)(1) regarding the preservation of an issue for appellate review upon the first trial judge's rejection of defendant's attempted guilty plea, defendant has not preserved this issue for appellate review. The rule is clear that defendant *must* have presented to the first trial judge a timely request, objection, or motion during the course of the proceedings in Superior Court, Madison County, which stated the grounds for defendant's position that the trial judge was required to accept defendant's plea and that it was also necessary for defendant to obtain a ruling upon the request, objection, or motion in order to present the issue on appeal. Defendant failed to satisfy the mandates of Rule 10(a)(1) which govern preservation of issues for appellate review. The liberties which the majority has taken with its construction of N.C.G.S. § 15A-1023(c) and its concomitant diminution of principles otherwise routinely recognized by this Court do not obviate, in my view, the requirement for defendant's compliance with Rule 10(a)(1) in order to properly obtain appellate review of the matter which he has raised.

For these reasons, I would modify and affirm the decision of the Court of Appeals. Accordingly, I respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

STATE v. CRUMP

[376 N.C. 375 (2020)]

STATE OF NORTH CAROLINA
v.
RAMAR DION BENJAMIN CRUMP

No. 151PA18

Filed 18 December 2020

Jury—voir dire—limits on questioning—police officer shootings—racial bias

In a prosecution for multiple crimes arising from a robbery committed during an underground poker game and a subsequent incident during which defendant exchanged gunfire with police officers, the trial court abused its discretion by restricting defendant's questioning during voir dire that prevented any inquiry into whether prospective jurors harbored implicit or racial bias or to explore what opinions those jurors might have regarding police shootings of black men. The trial court's limitations were prejudicial where defendant's attempted questioning, which did not include impermissible stakeout questions, involved issues pertinent to the case.

Justice DAVIS dissenting.

Justices NEWBY and MORGAN join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 259 N.C. App. 144, 815 S.E.2d 415 (2018), finding no error after appeal from judgments entered on 7 June 2016 by Judge Gregory R. Hayes in Superior Court, Mecklenburg County. Heard in the Supreme Court on 12 October 2020.

Joshua H. Stein, *Attorney General*, *by Mary Carla Babb*, *Assistant Attorney General*, *for the State-appellee.*

Ann B. Petersen for defendant-appellant.

EARLS, Justice.

This case requires us to determine whether the Court of Appeals erred by finding no error in the judgments arising from an incident involving a black male defendant who exchanged gunshots with two officers from the Charlotte-Mecklenburg Police Department. Without deciding

whether or not the trial court abused its discretion when it "flatly prohibited questioning as to issues of race and implicit bias during *voir dire*," *State v. Crump*, 259 N.C. App. 144, 145, 815 S.E.2d 415, 417 (2018), and "categorically denied [defendant] the opportunity to question prospective jurors not only about a specific police officer shooting, but also even *generally* about their opinions and/or biases regarding police officer shootings of (specifically) black men," *id.* at 155, 815 S.E.2d at 423, the Court of Appeals held that "[o]n the specific facts of the instant case . . . the trial court's rulings were not ultimately prejudicial to defendant," *id.* at 156, 815 S.E.2d at 424. We conclude that the trial court did abuse its discretion and that the trial court's improper restrictions on defendant's questioning during voir dire did prejudice defendant. Accordingly, we reverse.

Background

At around 3:00 a.m. on 24 September 2013, two black men gained entry to an office suite where about a dozen people were participating in an underground poker game. Both men were armed. The men forced most of the poker players to undress and barricaded them in a restroom. The men then proceeded to ransack the office suite and steal the poker players' clothing, wallets, cell phones, personal identification cards, credit cards, debit cards, and cash.

A few days later, one of the organizers of the underground poker game, Gary Smith, devised a plan to identify the robbers. He knew that one of the robbery victims, Matios Tegegne, had not cancelled the service for his stolen cell phone, hoping to track its location. Smith sent a text message to a group that included Tegegne providing fake information about an upcoming poker game. When someone responded to Smith's text message from Tegegne's cell phone number, Smith provided that person with details of an invented poker game (the "bait game") at a mixed-use office and commercial building at 1801 N. Tryon Street in Charlotte. Smith planned to confront the person using the victim's cell phone—ostensibly, one of the perpetrators of the 24 September 2013 robbery—if and when he arrived at the bait game.

Early on the morning of 29 September 2013, three black males—Jamel Lewis, Warren Lewis, and defendant Ramar Crump—arrived at 1801 N. Tryon Street in defendant's silver Mustang. Defendant was driving. After receiving a text message from Tegegne's phone number seeking to confirm the address of the bait game, Smith pulled his own vehicle into the parking lot in front of the building. At this point, Smith saw defendant's silver Mustang, pulled closer, and noticed that defendant

was armed. Rather than confronting the occupants of the vehicle himself, Smith drove to a nearby Amtrak station parking lot and called 911 to report "a suspicious vehicle . . . occupied by at least two black males [who] appeared [to be] loading up guns." Meanwhile, defendant drove the Mustang to a rear parking area of the complex.

After receiving Smith's 911 call, four officers with the Charlotte-Mecklenburg Police Department—Anthony Holzhauer, David Sussman, Jason Allen, and Luke Amos—were dispatched to 1801 N. Tryon Street. The officers were advised that there were at least two black men inside a silver Mustang in the parking lot with loaded firearms, intending to commit a robbery. Each officer arrived alone in a marked patrol vehicle. Each officer parked his patrol vehicle in a lower portion of the parking lot, out of view from the rear parking lot. None of the officers activated the lights or sirens on his patrol vehicle.

After investigating and clearing a man in a different silver vehicle near the parking lot entrance, Officer Holzhauer and Officer Sussman walked to the rear parking lot. Officer Holzhauer was carrying a shotgun. Officer Sussman was carrying his service weapon. They observed two dump trucks parked parallel to one another, approximately four feet apart and next to a building, and defendant's silver Mustang, parked perpendicular to the rear of the two trucks and facing away from the building. The officers wanted to approach the vehicle surreptitiously in order to investigate its occupants without being detected, so they decided to walk between the two dump trucks, believing that the path would lead them to the rear of defendant's vehicle. Instead, their route brought them directly to the Mustang's passenger-side window. The officers could not see inside the vehicle because the windows were tinted. They did not affirmatively identify themselves as police officers.

Defendant and the officers would later dispute what happened next. What is undisputed is that there was an exchange of gunshots between defendant and the officers. One of the bullets hit one of the dump truck's side-view mirrors, right near Officer Holzhauer's head. Officer Holzhauer and Officer Sussman sought cover in front of one of the dump trucks. Defendant started the Mustang and sought to escape. To exit the parking lot, he drove the Mustang around the side of the dump truck where Officer Holzhauer and Officer Sussman were sheltering. Believing that they were being ambushed, Officer Holzhauer and Officer Sussman began shooting at the Mustang as it passed. Defendant eventually steered his vehicle, which sustained a shattered passenger-side window and a shot-out passenger-side front tire, out of the parking lot. Officer Amos and Officer Allen pursued the Mustang in their

patrol vehicles, with the lights and sirens of their vehicles now activated. They were eventually joined in pursuit by other officers from the Charlotte-Mecklenburg Police Department, the North Carolina Highway Patrol, the Cabarrus County Sherriff's Office, and the City of Concord Police Department.

According to defendant, it was only after he exited 1801 N. Tryon Street that he realized he had exchanged gunshots with law enforcement officers. He began to fear that he "might not make it out of this one" alive and called his mother to say his final goodbyes. While driving down Route 49 into Cabarrus County, defendant and the occupants of the Mustang put their hands and a white t-shirt out the windows, in an apparent effort to signal their intent to surrender. Defendant also called 911 to explain the situation, in the hopes of figuring out a way to surrender without getting shot at by the pursuing officers. However, defendant never stopped his vehicle. Eventually, law enforcement officers deployed stop sticks and blew out the Mustang's tires. Defendant, Jamel Lewis, and Warren Lewis were all arrested.

Law enforcement officers proceeded to search defendant's Mustang. Inside the driver's seat, they found a six-shot .38-caliber revolver and six spent shell casings. Inside the glove box, they found a cell phone, a knife, a wallet with defendant's identification inside, wristwatches, credit cards, and various forms of identification. Inside the trunk, they found two rifles and an additional revolver, a bag containing four cellphones, and a bag containing more credit cards, debit cards, and identification cards along with mail addressed to defendant. It was later determined that the credit cards, debit cards, and personal identifications found in the interior and trunk of the Mustang belonged to victims of the underground poker game robbery committed on 24 September 2013.

A grand jury indicted defendant on eleven counts of robbery with a dangerous weapon, eleven counts of second-degree kidnapping, one count of conspiracy to commit robbery with a dangerous weapon, and one count of possession of a firearm by a felon for his alleged role in the events of 24 September 2013. He was indicted on two counts of assault with a deadly weapon with intent to kill (AWDWIK), two counts of assault on a law enforcement officer with a firearm, and one count of possession of a firearm by a felon arising from his 29 September 2013 confrontation with Officer Holzhauer and Officer Sussman.

At trial, the State and defendant offered differing accounts of both incidents. According to the State, defendant was one of the two black men who robbed the underground poker game at gunpoint on

24 September 2013. The State relied upon testimony from six victims of the poker game robbery who all identified defendant as one of the two perpetrators of the robbery, although the victims offered varying accounts of defendant's precise role in the events of that night. Defendant claimed instead that he lent Jamel Lewis his Mustang on the evening of 23 September 2013 and that Jamel committed the robbery with his brother, Warren Lewis, without defendant's knowledge or permission.

According to the State, defendant came to 1801 N. Tryon Street on 29 September 2013 with the intention of robbing the bait game. Officer Holzhauer and Officer Sussman testified that defendant fired first, unprovoked. Defendant claimed that he drove his Mustang to 1801 N. Tryon Street at Warren's urging, intending only to "check out" the poker game. He testified that as he was sitting in the Mustang, he saw the silhouette of a man with a long gun aimed at him, heard gunshots, and felt an impact on the passenger side of his car. At this point, fearing for his life, defendant testified that he returned fire with the .38-caliber revolver that he always stored in his vehicle.

At the close of the State's evidence, the trial court dismissed two of the robbery with a dangerous weapon charges and one of the second-degree kidnapping charges. During the jury charge, the trial court gave a self-defense instruction for the offenses of AWDWIK and assault on a law enforcement officer with a firearm. Ultimately, the jury found defendant guilty of all remaining charges with the exception of the two counts of assault on a law enforcement officer with a firearm. The trial court consolidated defendant's convictions and entered thirteen separate judgments with thirteen sentencing terms. The trial court ordered defendant to serve the terms consecutively, resulting in a combined sentence of 872 to 1,203 months incarceration. Defendant gave oral notice of appeal in open court.

On appeal, defendant broadly raised three claims. First, defendant challenged the trial court's jury instructions on self-defense, asserting that the trial court erred by failing to include language requiring the jury to find a "causal nexus" between the circumstances leading to defendant's perceived need to use defensive force and the felonious conduct that would otherwise disqualify him from claiming self-defense under N.C.G.S. § 14-51.4(1). Second, defendant challenged the trial court's refusal to allow him to pursue certain lines of inquiry relating to racial bias and police-officer shootings of black civilians while questioning prospective jurors during voir dire. Third, defendant challenged the trial court's admission of evidence during the State's case-in-chief showing that no disciplinary actions were taken against Officer Holzhauer and

Officer Sussman after the shooting on 29 September 2013. In a unanimous opinion, the Court of Appeals rejected each of defendant's claims and found no error in the trial court's judgment. *Crump*, 259 N.C. App. 144, 815 S.E.2d 415. In this Court, defendant presents two of these issues for review: his challenge to the trial court's jury instruction on self-defense and his challenge to the limits imposed by the trial court on his questioning during voir dire. Because of how we resolve defendant's claim regarding the trial court's limitations on his questioning during voir dire, we do not reach his argument regarding the trial court's jury instruction.

The Court of Appeals did not explicitly address whether or not the trial court erred by preventing defendant from asking certain questions of prospective jurors. Nor did the court conclude that defendant's questions were inappropriate or irrelevant subjects for voir dire. Indeed, the court began its analysis by "express[ing its] concern" about the limitations imposed by the trial court on defendant's questioning during voir dire. *Id.* at 145, 815 S.E.2d at 417. Later, the court acknowledged that questions about police-officer shootings of black men "could very well be a proper—even necessary—subject of inquiry as part of the jury voir dire" in a case involving a black male defendant involved in a shooting with police officers "in order to allow both parties—the State and defendant—to intelligently exercise their peremptory challenges." *Id.* at 157, 815 S.E.2d at 424 (cleaned up). However, the court reasoned that even if the trial court erred by restricting defendant's questioning, the trial court's actions could not have been prejudicial because "[p]er defendant's own testimony, it was not until the car chase ensued that he was even aware the individuals he fired on were police officers." *Id.* at 156, 815 S.E.2d at 424.

Analysis

In general, "[r]egulation of the form of *voir dire* questions is vested within the sound discretion of the trial court." *State v. Chapman*, 359 N.C. 328, 346, 611 S.E.2d 794, 810 (2005); *see also State v. Rodriguez*, 371 N.C. 295, 312, 814 S.E.2d 11, 23 (2018) ("[T]he trial judge has broad discretion to regulate jury *voir dire*.") (quoting *State v. Fullwood*, 343 N.C. 725, 732, 472 S.E.2d 883, 887 (1996)). "[D]efendant must show abuse of discretion and prejudice to establish reversible error relating to *voir dire*."[1] *State v. Bishop*, 343 N.C. 518, 535, 472 S.E.2d 842, 850 (1996).

1. In the alternative, defendant argues that he is not required to show prejudice because restrictions on voir dire questioning which "impair[ ] the defendant's ability to exercise his challenges intelligently [are] grounds for reversal, irrespective of prejudice."

Under both the Federal Constitution and the North Carolina Constitution, every criminal defendant has the right to be tried by a fair and impartial jury. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."); N.C. Const. art. I, § 24; *see also State v. Chandler*, 324 N.C. 172, 185–86, 376 S.E.2d 728, 737 (1989) ("Both defendant and the State are entitled to a fair trial and a fair trial requires an impartial jury."). An essential feature of the right to a fair and impartial jury is the right to be tried by jurors who do not judge a party or the evidence based on animus or bias towards a racial group. *See State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987) ("The people of North Carolina have declared . . . that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice. They have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction. It must also be *perceived* to operate evenhandedly."); *see also Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869, 197 L. Ed. 2d 107 (2017) ("A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."). A defendant is permitted to challenge any individual prospective juror who he or she believes is "unable to render a fair and impartial verdict." N.C.G.S. § 15A-1212(9) (2019). In order to "exercise intelligently . . . their challenges for cause," defendants typically may inquire into prospective jurors' morals, attitudes, and beliefs during voir dire, provided that the inquiry is relevant to a subject at issue at trial. *State v. Carey*, 285 N.C. 497, 507, 206 S.E.2d 213, 221 (1974). In this manner, "[*v*]*oir dire* plays an essential role in guaranteeing a criminal defendant's Sixth Amendment right to an impartial jury"—and the defendant's concomitant rights under the North Carolina Constitution—"because it is the means by which prospective jurors who are unwilling

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State v. Wiley, 355 N.C. 592, 611–12, 565 S.E.2d 22, 37 (2002), *cert. denied*, 537 U.S. 1117 (2003). He argues that because he was unable to ask prospective jurors about racial bias and their opinions regarding police-officer shootings of black men, he was unable to identify and challenge biased jurors, either peremptorily or for cause, which was necessary to safeguard his constitutional right to a fair and impartial jury. The State disagrees and, regardless, maintains that defendant waived appellate review of any constitutional argument by failing to specifically note an exception on constitutional grounds at trial. Because we ultimately hold that the trial court's actions were an abuse of discretion that prejudiced defendant, we need not reach defendant's constitutional argument.

or unable to apply the law impartially may be disqualified from jury service." *State v. Wiley*, 355 N.C. 592, 611, 565 S.E.2d 22, 37 (2002).

However, a defendant's right to ask questions of prospective jurors during voir dire is circumscribed. "It is well established that while counsel are allowed wide latitude in examining jurors on *voir dire*, the extent and manner of the inquiry rests within the trial court's discretion." *State v. Locklear*, 349 N.C. 118, 142, 505 S.E.2d 277, 291 (1998). Thus, even when a defendant seeks to inquire into a prospective juror's views on an otherwise relevant subject, the trial court may exercise its discretion to restrict the extent and manner of the defendant's questioning. *State v. Cummings*, 361 N.C. 438, 465, 648 S.E.2d 788, 804 (2007) (holding that it is permissible for a trial court to "limit questioning" and "not permit the hypothetical and speculative questions" regarding substantively appropriate topics). For example, a trial court may prevent a defendant from "attempt[ing] to indoctrinate potential jurors as to the substance of [his or her] defense" by asking questions that "tend to stake out a juror as to what his decision would be under a given set of facts." *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). A trial court may prevent a defendant from asking prospective jurors "hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law." *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *vacated in part on other grounds*, 428 U.S. 902 (1976). A trial court does not abuse its discretion when it prevents a defendant from asking questions that are "irrelevant, improper in form, attempts to 'stake out' a juror, questions to which the answer was admitted in response to another question, or questions that contained an incomplete statement of the law." *State v. Gregory*, 340 N.C. 365, 389, 459 S.E.2d 638, 651 (1995).

In the present case, the trial court prevented defendant from asking two related sets of questions during voir dire. First, defendant sought to question prospective jurors about the possibility that they harbored racial biases against African Americans.

> [DEFENSE COUNSEL]: Now, something else I want to talk about. This one is a difficult one. It's called implicit bias. It's the concept that race is so ingrained in our culture that there's an implicit bias against people of a particular race, specifically African Americans, that people experience. What I'm going to do is I'm going to ask a couple of pointed questions of you all about that. . . . When you hear the statement the only black man charged with robbery, what's the first thing that pops into your head?

> [THE STATE]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Is there anything that pops into your head when I say that statement, any thoughts?
>
> [THE STATE]: Objection.
>
> THE COURT: Sustained.

Second, defendant sought to question prospective jurors about their awareness of and opinions regarding incidents of police-officer shootings of black men. Initially, defense counsel attempted to pursue this line of inquiry by asking prospective jurors about their awareness of a case that had recently occurred in Charlotte where a police officer shot and killed an unarmed black man, Jonathan Ferrell.

> [DEFENSE COUNSEL]: There have been some cases in the recent history of this country dealing with this issue, specifically as to some African-American men and police officers is the first thing that comes to mind. Additionally I expect there to be testimony regarding the Jonathan Ferrell case and what effect that impact—that case had on Mr. Crump's mindset. Is anyone familiar with the Jonathan Ferrell case that happened here in Charlotte approximately September of 2013?
>
> [THE STATE]: Objection, your Honor.
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> THE COURT: Sustained.

The judge emptied the courtroom and defense counsel explained why he was asking about the Ferrell case. Defense counsel then asked the judge if he could inquire into prospective jurors' opinions regarding police-officer shootings of civilians generally, rather than in the specific context of the Jonathan Ferrell case.

> [DEFENSE COUNSEL]: Your Honor, generally as to incidents, can I inquire of the jury if they have opinions related to incidents of cops firing on civilians that happened in the past couple years?
>
> THE COURT: I think that's another stake-out question. I think he's right. Once you get into a quote, unquote here's a situation, what do you think, how would you vote, I think that's a stake-out question, so I would sustain that objection, also.

> [DEFENSE COUNSEL]: Understood, your Honor. Please note our exception.

As a threshold matter, the State contends that the trial court did not prohibit defendant from asking *all* questions about racial bias and police-officer shootings of black men. The State disputes the Court of Appeals' conclusions that the trial court "flatly prohibited questioning as to issues of race and implicit bias during *voir dire*" and "categorically denied [defendant] the opportunity to question prospective jurors not only about a specific police officer shooting, but also even *generally* about their opinions and/or biases regarding police officer shootings of (specifically) black men." *Crump*, 259 N.C. App. at 145, 155, 815 S.E.2d at 417, 423. Instead, the State argues that the trial court appropriately sustained the State's narrow objections to a limited number of improper questions. The distinction between foreclosing upon entire lines of inquiry and rejecting specific inappropriate questions is, in this case, crucial. While a trial court generally has the discretion to regulate the "*manner and the extent* of inquiries [during] voir dire" by rejecting improper questions, *State v. Allen*, 322 N.C. 176, 189, 367 S.E.2d 626, 633 (1988), it exceeds the trial court's discretion to entirely prevent a party from asking any questions at all about an appropriate subject that is relevant at trial. *State v. Robinson*, 330 N.C. 1, 13, 409 S.E.2d 288, 294–295 (1991) (emphasizing that while a defendant in a capital case "is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias," it is not an abuse of discretion for trial court to manage "the *form and number of questions* on the subject") (quoting *Turner v. Murray*, 476 U.S. 28, 37 (1986)).

In reviewing a challenge to the trial court's management of questioning during voir dire, "we examine the entire record of the jury voir dire, rather than isolated questions." *Parks*, 324 N.C. at 423, 378 S.E.2d at 787. Reading the transcript holistically, we agree with the Court of Appeals that the trial court prevented defendant from pursuing any line of inquiry regarding racial bias, implicit or otherwise. Defendant was unable to ask prospective jurors about racial bias at any point during voir dire. Nor could he ask other related questions that would have elicited information allowing him to identify, and seek to exclude, biased prospective jurors. *Cf. State v. Elliott*, 344 N.C. 242, 263, 475 S.E.2d 202, 209 (1996) (holding that the trial court did not abuse its discretion where "a careful review of the transcript of the *voir dire* shows that the trial court permitted defendant to explore this panel of prospective jurors' understanding of their right to reach their own opinions," the substantive issue defendant's rejected question sought to address).

Viewed in context, it is clear that defendant's effort to question prospective jurors about the Jonathan Ferrell case represented an attempt to cure the purported deficiencies that caused the trial court to reject his first question about implicit bias.[2] He sought to approach the same topic from a different angle. The connection between the question about the Ferrell case and the topic of racial bias was readily apparent. Defense counsel explicitly referenced "African-American men and police officers" in framing the question for the prospective jurors. He also referenced the protests that erupted after a white police officer shot and killed a black man, Michael Brown, in Ferguson, Missouri, in subsequently explaining why he sought to question jurors about the Ferrell case. Defendant was attempting to address the same substantive topic—race and racial bias—in a new manner after the trial court rejected his first attempt. As he explained immediately after the trial court denied his initial question about implicit bias, "[t]here have been some cases in the recent history of this country dealing with *this issue*," by which he meant racial bias against black people. Yet his efforts to inquire into this subject were again rebuffed by the trial court, in contrast to cases where this Court has upheld trial court restrictions on voir dire questioning. Although defendant in this case "made . . . an attempt [after his first attempt was denied] to clarify or rephrase the question," the trial court was not "willing to allow the question [after] defendant had provided more clarity." *State v. Davis*, 340 N.C. 1, 23, 455 S.E.2d 627, 638–39 (1995).

The dissent's claim that "there is simply nothing in the transcript to support the proposition that the trial court would have prohibited defense counsel from asking further questions to the prospective jurors on [the topic of racial bias]" rests on the incorrect belief that after being denied the opportunity to ask prospective jurors the question about implicit bias, defendant abandoned this line of inquiry altogether. Although it is true that defense counsel's question about "incidents of cops firing on civilians . . . did not even mention race," the dissent ignores the numerous contextual indicators which make it clear that

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2. While the dissent is correct that defendant does not separately challenge the trial court's refusal to allow his question about the Jonathan Ferrell case on appeal to this Court, defendant's attempted question is still relevant to our analysis of his claim, which must be based upon our examination of "the entire record of the jury voir dire." *Parks*, 324 N.C. at 423, 378 S.E.2d at 787. Notwithstanding defendant's failure to separately challenge the trial court's restriction of this particular question on appeal, the fact that the trial court rejected defendant's question about the Ferrell case, which came immediately after defendant's question about implicit bias, supports our conclusion that the trial court did more than deny a single discrete question about race.

his question about police-officer shootings—which directly followed a question about implicit racial bias and a question about a prominent incident of a police officer shooting a black man—was a question that was, in substantial part, about race. We are not impermissibly "analyzing the relevance of questions defense counsel *never actually asked*," as the dissent contends, simply because we interpret the meaning of defense counsel's questions by examining the context in which they arose. In our view, the fact that the trial court rejected three questions in a row that related to the topic of racial bias is strong evidence that "the trial court would have prohibited . . . further questions to the jurors" about racial bias, even if defense counsel did not return to the subject again after being repeatedly denied. By the dissent's logic, a trial court does not abuse its discretion even if it rejects every question a defendant asks about a substantively appropriate topic, provided that the trial court never expressly states that the defendant is not allowed to inquire into the subject. Such a proposition finds no support in our precedents and would convert an important right necessary to assure the fairness of a criminal proceeding into a hollow promise.

We agree with the Court of Appeals that the trial court "categorically denied [defendant] the opportunity to question prospective jurors not only about a specific police officer shooting, but also even *generally* about their opinions and/or biases regarding police officer shootings of (specifically) black men." *Crump*, 259 N.C. App. at 155, 815 S.E.2d at 423. The State argues that the trial court possessed the discretion to reject these questions because they were "stake out questions" designed "to ascertain how [a] prospective juror would vote upon a given state of facts." *State v. Burr*, 341 N.C. 263, 286, 461 S.E.2d 602, 614 (1995). This is incorrect. Defendant's questions about the Jonathan Ferrell case specifically, and about police-officer shootings of black men generally, were not impermissible stakeout questions. As this Court has previously explained, a question is "not an improper stakeout of a prospective juror" when "(1) the question did not incorrectly or inadequately state the law, (2) the question 'was not an impermissible attempt to ascertain how this prospective juror would vote upon a given state of facts,' and (3) the question permissibly sought to measure the ability of the prospective juror to be unbiased." *State v. Jones*, 347 N.C. 193, 204, 491 S.E.2d 641, 648 (1997) (citation omitted).[3] Merely asking prospective jurors if

3. We certainly agree with the State, as they argued in their brief, that "depending on the way defendant phrased questions about how incidents of cross-racial officer-involved shootings relate to the factual issue of who fired first in his case, such questions certainly have the potential, at least, to also be stake-out questions." But we examine the questions

they are "familiar with the Jonathan Ferrell case that happened here in Charlotte approximately September of 2013" and if they "have opinions related to incidents of cops firing on civilians that happened in the past couple years" is not an attempt to "predetermine what kind of verdict prospective jurors would render or how they would be inclined to vote." *Id.* Defendant did not present prospective jurors with a "hypothetical fact situation" and then "ask[ ] what kind of verdict they would render under certain named circumstances." *Parks*, 324 N.C. at 423, 378 S.E.2d at 787. He asked if they were aware of a recent case in Charlotte and if they had opinions about police-officer shootings of unarmed black men. Those are not stakeout questions as defined by this Court's precedents.[4]

The mere fact that the question defense counsel asked (or tried to ask) implicated a factual circumstance bearing similarity to the defendant's own case does not transform an appropriate question into an impermissible stakeout question. For example, in *Burr*, we held that it was permissible for counsel to ask prospective jurors if they could "focus . . . on whether or not this defendant, Mr. Burr, is guilty or not guilty of killing the child" if presented with evidence that the child was neglected or abused, even though the case involved the death of a child who had previously been neglected and abused. 341 N.C. at 286, 461 S.E.2d at 614. The question deemed appropriate in *Burr* explicitly asked prospective jurors to forecast how they might approach the question of defendant's guilt or innocence if presented with circumstances that were going to be presented at trial. This question was "substantially more direct in relation to the verdict itself" than the question at issue in the present case, and yet still permissible. *Jones*, 347 N.C. at 204, 491 S.E.2d at 648.

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the defendant actually asked, not the universe of questions a defendant could possibly have asked about a given subject.

4. The dissent would hold that the trial court did not abuse its discretion when it denied defendant the opportunity to ask about the Ferrell case and about police-officer shootings more generally because the questions "were wholly unrelated to the incident for which defendant was on trial . . . [and] were likely to confuse and distract the jurors from the facts of the present case." Questions about the Ferrell case and police-officer shootings of black men were not "wholly unrelated to the incident for which defendant was on trial," given that the trial required the jury to make a determinative assessment of the credibility of, on the one hand, a black man who had been fired upon by police officers, and, on the other hand, the police officers involved in the shooting. Further, the trial court's stated justification for rejecting the question was its determination that the question represented "another stake-out question." Yet there is nothing in the transcript to support the dissent's assertion that the trial court was concerned this question would "confuse and distract the jurors."

Further, defendant's questioning about the Ferrell case and police-officer shootings of black men had a proper purpose in the context of *voir dire*: the questions "sought to measure the ability of the prospective juror[s] to be unbiased," *Jones*, 347 N.C. at 204, 491 S.E.2d at 648, by soliciting responses that would help defendant determine if "the prospective juror[s] could impartially focus on the issue of defendant's guilt or innocence, regardless of" the factual circumstances surrounding the legal question they would be required to resolve. *Burr*, 341 N.C. at 286, 461 S.E.2d at 614. As defense counsel explained at trial, he wanted to ask questions that would enable him to "make sure that the jurors are properly qualified to hear this trial" by assessing whether or not they held "opinions [that] would impact their ability to determine the evidence in this case."[5] Our precedents establish that defendant's proposed question about police-officer shootings of black men was an appropriate inquiry into a relevant topic, not an impermissible stakeout question.[6]

Based on the foregoing analysis, we agree with the Court of Appeals that the trial court "flatly prohibited" questions about racial bias and "categorically denied" defendant the opportunity to ask prospective jurors about police-officer shootings of black men. *Crump*, 259 N.C. App. at 145, 155, 815 S.E.2d at 417, 423. We hold further that in a case such as this one "involving a black male defendant involved in a shooting with police officers," *id.* at 157, 815 S.E.2d at 424, the trial court abused its discretion in so doing. This conclusion does not cast doubt upon the settled proposition that a trial court may discretionarily

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5. The dissent strenuously emphasizes the fact that when defense counsel was asked to explain why he wanted to ask about the Ferrell case, he stated that the question related to an argument defendant planned to raise regarding his state of mind as he was fleeing the scene of the shooting. However, the dissent ignores the additional, broader justification offered by defense counsel in the same colloquy. Even if we agreed with the dissent that the only place to look in the transcript for evidence of defense counsel's purpose in asking the more general question about police-officer shootings is the explanation defense counsel offered for asking a different, preceding question, our characterization of defendant's purpose in asking about police-officer shootings is amply supported by a reading of the transcript of the full colloquy, during which defense counsel also explained that he wanted "to make sure that the jurors are properly qualified to hear this trial" by determining "if [the prospective jurors] have opinions about [the Ferrell] case," and then "explor[ing] if those opinions would impact their ability to determine the evidence in this case."

6. In the alternative, the State contends that it was within the trial court's discretion to prohibit questions about a "divisive, extraneous case which had the potential to inflame the jury's prejudice and passions." Assuming *arguendo* that this explanation justified the trial court's decision to prevent defendant from asking about the Jonathan Ferrell case specifically, the State offers no reason why that explanation applies to defendant's more general question about police-officer shootings.

prevent parties from asking questions during voir dire that are "inherently ambiguous and totally confusing to prospective jurors." *Vinson*, 287 N.C. at 338, 215 S.E.2d at 69. Admittedly, defendant's initial question about implicit bias was somewhat confusingly phrased. However, as we have explained, there is a significant difference between rejecting one confusingly phrased question but permitting follow-up questions that clarify or reframe the inquiry and restricting appropriate questioning on a relevant topic altogether.

Having determined that the trial court's erroneous restriction on defendant's questioning during *voir dire* was an abuse of discretion, we now turn to the question of whether or not defendant "was prejudiced thereby." *State v. Maness*, 363 N.C. 261, 269, 677 S.E.2d 796, 802 (2009). An error is prejudicial "when 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." N.C.G.S. § 15A-1443(a) (2019).

Defendant asserts that he was prejudiced by the trial court's restrictions on his questioning during voir dire because the jurors' determination of his guilt or innocence depended upon their resolution of a core factual dispute—who shot first on the night of 29 September 2013, defendant or the police officers—based solely on their weighing of defendant's and the officers' competing accounts. Thus, defendant contends that if he had been given the opportunity to assess the jurors' possible racial biases and opinions regarding police-officer shootings of black men, he would have been able to intelligently exercise his for-cause and peremptory challenges in a manner that would have allowed him to exclude jurors who might impermissibly base their decision to believe one witness and disbelieve the other on improper biases. In addition, defendant emphasizes that the questions he sought to ask were also relevant to other disputed facts considered by the jury at trial, most notably what inference to draw from defendant's refusal to immediately surrender to law enforcement officers after the shooting. In response, the State echoes the Court of Appeals in first contending that the trial court's restrictions could not have prejudiced defendant because "it was not until the car chase ensued that he was even aware the individuals he fired on were police officers." *Crump*, 259 N.C. App. at 156, 815 S.E.2d at 424. Relatedly, the State asserts that "defendant's race and the officers' occupation were essentially co-incidental to the crimes in this case." Finally, the State also argues that the restrictions on questioning were not prejudicial because defendant was permitted to ask numerous other questions which elicited information about the prospective jurors' attitudes towards law enforcement officers.

Addressing the State's first argument, we disagree with the Court of Appeals that defendant could not have been prejudiced because he did not know the individuals he was shooting at were police officers at the time of the shooting. It is true that defendant testified that he did not know he was firing at law enforcement officers.[7] But it is also true that the law enforcement officers knew that the occupants of the silver Mustang they were approaching were armed black men, given that the dispatch call summoning the officers to 1801 N. Tryon Street reported "two black males inside a Mustang loading firearms." Regardless, defendant's purported lack of awareness that he was shooting at police officers does not alter the possible relevance of any biases held by the jurors to their own resolution of this determinative factual dispute. A juror who harbored racial animus against black people—or who believed that any police officer who shot an unarmed civilian was inevitably in the wrong—might struggle to fairly and impartially determine whose testimony to credit, whose version of events to believe, and, ultimately, whether or not to find defendant guilty.

In addition, there were other important factual disputes at trial where defendant's race, and the jurors' possible biases, were relevant. As defense counsel explained in a colloquy with the trial court, one of the reasons he wanted to ask prospective jurors about police-officer shootings of black men like Jonathan Ferrell was because he intended to argue that defendant's awareness of these incidents "directly impacted [his] state of mind as to why he was not stopping for police when they were firing at him. It goes to rebut the contention that the [S]tate I assume will make that he was fleeing the scene of the crime."[8]

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7. It is notable that during closing argument, the State argued that at the time he fired his weapon, "[d]efendant knew or had reasonable grounds to believe that Anthony Holzhauer and David Sussman were, in fact, police officers. . . . [b]ecause we know that [the officers] did announce themselves. . . . They had their uniforms on with white patches, large white patches on either shoulder, a shiny badge, and a shiny nameplate, both of which reflected light." At a minimum, this indicates that it was an open factual question at trial whether or not defendant knew or had reasonable grounds to believe that he was firing on law enforcement officers.

8. Even if defense counsel had failed to offer sufficiently compelling reasons for asking about the Jonathan Ferrell case at trial, defense counsel was not asked and did not provide his reasons for asking about police-officer shootings of black men more generally. Thus, we also reject the State's argument that we must restrict our examination of defendant's prejudice claim to the explanations defense counsel offered during his colloquy with the trial court. The dissent claims that our willingness to look beyond this colloquy "appears to be saying that this Court is free to come up with arguments of its own that trial counsel could—and perhaps should—have made in the trial court." However, we think it uncontroversial to suggest that when defense counsel offered an explanation for asking the second question in a series of three questions, it does not legally or logically mean that his explanation addressed all of his substantive reasons for asking the third question.

As defense counsel predicted, the State put this exact argument before the jurors, urging them to conclude that defendant's refusal to immediately surrender to law enforcement officers was motivated not by a fear that he would not survive his interaction with the police, but instead by a desire to escape apprehension "because he thought that the Charlotte-Mecklenburg Police Department—maybe they'll stop at the county line." And, as defense counsel previewed, defendant argued in reply that he was reluctant to surrender to law enforcement because he had just been "shot at by someone who he eventually learned was the police" and he "[f]ear[ed] for his life."

Nor was the law enforcement officers' occupation "co-incidental" to the jury's resolution of defendant's case.[9] During closing argument, the State explicitly emphasized Officer Holzhauer and Officer Sussman's occupation in disputing defendant's version of events, asking rhetorically "[w]hy [ ] two Charlotte-Mecklenburg police officers [would] walk up to a car that they didn't know was occupied, that wasn't even turned on, and just open fire with a shotgun. That doesn't make any sense whatsoever, it just doesn't." The State relied upon Officer Holzhauer and Officer Sussman's status as police officers in order to persuade the jury that their account of the incident on 29 September 2013 was more accurate than the one put forward by defendant, a black man who had admitted to shooting at the officers. If the jurors believed the law enforcement officers, it was overwhelmingly likely that they would convict defendant. In this context, defendant's race and the police officers' occupation were not extraneous to the issues resolved by the jury at trial.

Finally, we reject the State's argument that defendant was not prejudiced because the trial court allowed him to ask the prospective jurors other questions about their attitudes toward law enforcement officers. It is correct that both parties asked numerous questions inquiring into the prospective jurors' attitudes regarding police officers, their past interactions and personal relationships with police officers, and their awareness that police-officer witnesses are not to be accorded special credibility. However, none of these questions touched upon issues of race, and none elicited information about the prospective jurors' opinions of police-officer shootings of black men. While we do not impugn the integrity of the jurors who ultimately decided to convict defendant,

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9. It would be wrong to conclude that the law enforcement officers' occupation was "co-incidental to the crimes in this case" when one of the crimes defendant was charged with was assault on a law enforcement officer with a firearm, an essential element of which is the victim's occupation as a law enforcement officer. N.C.G.S. § 14-34.5(a) (2019).

defendant's inability to question prospective jurors about racial bias and police-officer shootings of black men deprived him of a crucial tool needed to mitigate the risk that his trial would be infected by racial prejudice. Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. Rev. Online 180, 186 (2015) ("Especially in times when issues of race are on the minds of potential jurors, such as currently in the St. Louis area due to the shooting of Michael Brown and continuing protests in Ferguson and several other cities over racial injustices, failing to question about bias in some cases may result in stacking the jury against the accused.") General questioning about prospective jurors' attitudes towards law enforcement is simply no substitute for inquiry into prospective jurors' racial biases when, as in the present case, the defendant's race and the law enforcement officers' occupation are salient at trial.[10] Thus, we conclude the trial court's restrictions on defendant's questioning during voir dire were prejudicial.

Conclusion

It is a jury that is tasked with "find[ing] the ultimate facts beyond a reasonable doubt." *State v. White*, 300 N.C. 494, 503, 268 S.E.2d 481, 487 (1980) (quoting *Cnty. Ct. of Ulster Cnty., N.Y. v. Allen*, 442 U.S. 140, 156 (1979)). To protect a criminal defendant's right to be found guilty or not guilty by a jury that discharges this weighty responsibility fairly and impartially, through "[p]robing and thoughtful deliberation," a defendant is entitled to question prospective jurors on topics that would help him identify, and seek to exclude, those whose "reasoning . . . is prompted

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10. Contrary to the State's assertion that any reference to the Jonathan Ferrell case would have been "highly divisive" and would have "inflame[d] the jury's prejudice and passions," numerous empirical studies have concluded that white jurors are *more* likely to discriminate against black defendants in cases where racial issues are not prominent or referenced explicitly. *See generally* Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 Psychol. Pub. Pol'y & L. 201, 203 (2001). At a minimum, this empirical data suggests that the way to stop jurors' racial biases from undermining the fairness of criminal proceedings is not to stop parties from openly discussing race, but instead to acknowledge and discuss these issues sensitively, appropriately, and forthrightly. *Cf.* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555, 1563 (2013) (describing studies which show that "making race salient or calling attention to the operation of racial stereotypes encourages individuals to suppress what would otherwise be automatic, stereotype-congruent responses and instead act in a more egalitarian manner. . . . [W]hen race is made salient, individuals tend to treat White and Black defendants the same."); Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. Rev. 1241, 1277 (2002) (arguing that empirical studies "suggest that there is good reason explicitly to instruct juries in every case, stereotype-salient or not, about the specific potential stereotypes at work in the case").

or influenced by improper biases, whether racial or otherwise." *Pena-Rodriguez*, 137 S. Ct. at 871, 197 L. Ed. 2d at 127. In this case, where there was a clear connection between the questions defendant asked or tried to ask prospective jurors and meaningful factual disputes that the jury was required to resolve to reach a verdict, the trial court abused its discretion and prejudiced defendant by restricting all inquiry into prospective jurors' racial biases and opinions regarding police-officer shootings of black men. Accordingly, we reverse.

REVERSED.

Justice DAVIS dissenting.

The issue in this case is whether the trial court abused its discretion by ruling during voir dire that defense counsel would not be permitted to ask the prospective jurors three specific questions. Defense counsel sought to ask these questions pursuant to a defense strategy involving defendant's state of mind at the time of the incident giving rise to the charges for which he was being tried. Rather than focusing on the specific questions defense counsel actually sought to ask and the reasons he actually articulated to the trial court as his purpose for asking these questions, the majority instead bases its analysis on questions defense counsel *could* have asked and grounds that counsel *could* have asserted as to why these questions were appropriate. Therefore, I respectfully dissent.

Initially, it is important to clarify the proper standard of review to be employed by this Court in reviewing defendant's arguments in this appeal. Defendant contends in his briefs to this Court that the trial court's limitation on his ability to ask certain questions during voir dire amounted to a deprivation of his constitutional right to intelligently exercise his peremptory challenges, thereby entitling him to a new trial—irrespective of whether he can show prejudice. However, defendant has clearly waived this constitutional argument.

It is well established that "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Meadows*, 371 N.C. 742, 749 (2018) (alteration in original) (citation omitted). Before the trial court, defendant failed to raise any specific constitutional argument as to why he should be allowed to pursue these lines of inquiry with the prospective jurors. Accordingly, any constitutional challenge to the trial court's rulings during voir dire has been waived by defendant.

Therefore, in order to prevail on this issue defendant must show both an abuse of discretion by the trial court and resulting prejudice to him. This Court has previously articulated our standard of review in such cases as follows:

> The primary goal of the jury selection process is to ensure selection of a jury comprised only of persons who will render a fair and impartial verdict. Pursuant to N.C.G.S. § 15A-1214(c), counsel may question prospective jurors concerning their fitness or competency to serve as jurors to determine whether there is a basis to challenge for cause or whether to exercise a peremptory challenge. . . . [T]he trial judge has broad discretion to regulate jury *voir dire*. In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby.

State v. Rodriguez, 371 N.C. 295, 311–12 (2018) (cleaned up); *see also State v. Ward*, 354 N.C. 231, 255 (2001) ("To demonstrate reversible error in the jury selection process, the defendant must show a manifest abuse of the court's discretion and prejudice resulting therefrom.").

This Court has explained that an abuse of discretion occurs "where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285 (1988). A defendant is prejudiced by a trial court's erroneous ruling when "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." N.C.G.S. § 15A-1443(a) (2019). Accordingly, the two questions before us are (1) whether the limitations imposed by the trial court during voir dire were arbitrary or manifestly unsupported by reason; and (2) whether defendant can demonstrate that absent those limitations, there is a reasonable possibility that the jury would have reached a different result.

The crux of defendant's argument is that the trial court abused its discretion by prohibiting him from questioning prospective jurors about their views on certain unrelated incidents involving shootings by law enforcement officers. Defendant's entire argument is based upon the following exchange that took place on the fourth day of a lengthy voir dire process after defense counsel had previously asked prospective jurors about their ability to remain impartial when hearing testimony from police officers and persons convicted of crimes, as well as their thoughts

on the use of self-defense, the use of firearms, and illegal gambling. In order to demonstrate why the majority's analysis is incorrect, this portion of the proceedings must be considered in its entirety.

> [DEFENSE COUNSEL]: Now, something else I want to talk about. This one is a difficult one. It's called implicit bias. It's the concept that race is so ingrained in our culture that there's an implicit bias against people of a particular race, specifically African Americans, that people experience. What I'm going to do is I'm going to ask a couple of pointed questions of you all about that. . . . When you hear the statement the only black man charged with robbery, what's the first thing that pops into your head?
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> [PROSECUTOR]: Objection.
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> THE COURT: Sustained.
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> [DEFENSE COUNSEL]: Is there anything that pops into your head when I say that statement, any thoughts?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
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> [DEFENSE COUNSEL]: There have been some cases in the recent history of this country dealing with this issue, specifically as to some African-American men and police officers is the first thing that comes to mind. Additionally I expect there to be testimony regarding the Jonathan Ferrell case *and what effect that impact—that case had on Mr. Crump's mindset.* Is anyone familiar with the Jonathan Ferrell case that happened here in Charlotte approximately September of 2013?
>
> [PROSECUTOR]: Objection, your Honor.
>
> THE COURT: Sustained.
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> [DEFENSE COUNSEL]: Your Honor, it's an issue that we need to discuss.
>
> . . . .
>
> [DEFENSE COUNSEL]: Yes. *There's a reason I'm asking about this. I expect that at some point the [S]tate is going to talk about flight, specifically as relates to the assault charges. I expect that they're going to ask the*

Court at some point for a flight instruction, that that be considered part of guilt. We have the opportunity for Mr. Crump to testify, to talk about his state of mind. Certainly if he's claiming self-defense, he has—is required to testify about his state of mind at that point in time.

My expectation is that this testimony regarding the Jonathan Ferrell case is relevant to Mr. Crump's state of mind in that this case, the Jonathan Ferrell case, happened just two weeks prior to this particular case. The Jonathan Ferrell case, as the Court probably is aware, but for purposes of the record, there was a young black man by the name of Jonathan Ferrell who was involved in some sort of incident that night. Eventually the police were called, and there was an officer that fired and ended up killing . . . Mr. Ferrell that night. I think that that incident happening just two weeks prior to this one, not far on the heels of Ferguson, *directly impacted Mr. Crump's state of mind as to why he was not stopping for police when they were firing at him. It goes to rebut the contention that the [S]tate I assume will make that he was fleeing the scene of the crime. Our intention is to rebut that, saying he was fleeing to save his life and was scared that there were shots fired at him, there were stop sticks deployed that made the tires explode that sounded like further shots. That was the reason that there was flight.*

If that's the case, your Honor, it is imperative that we find out what this jury thinks about that situation, if any. This is an explosive issue, it's an issue that needs to at least be discussed. And they may have no opinions, I don't know. But it's certainly something that I need to be able to inquire about to see if they do have opinions, and if they do, what those opinions are *as related to Mr. Crump and his ability to—or, excuse me—his state of mind at the time of this offense.*

You know, if it's going to be something that's testified about, you know, I think it will be admissible, that this jury should be made aware of that possibility and we be able to gauge their reactions to it.

THE COURT: Okay. Thank you. Yes, sir, [prosecutor].

[PROSECUTOR]: Your Honor, I think before we go any further, there needs to be a *Harbison* inquiry of this defendant. . . .

. . . .

THE COURT: Okay. Now let's talk about the other issue . . . bringing in this extraneous trial, what may not have been on Mr. Crump's mind.

[PROSECUTOR]: Absolutely, your Honor. There's at this point no evidence that has been presented, there's no evidence that Mr. Crump had any idea that that event had happened. The event had been reported on, yes, but there were very few details that were out in the public sphere. Mr. Crump hasn't testified under oath or any other way about any type of knowledge.

Your Honor, this is an improper stake-out question on a particular issue. [Defense counsel] is asking these folks essentially how they would vote based on having this information in front of them, and that's an improper question, your Honor, and there—obviously we haven't got any evidence. So whether or not this is even relevant, whether it will ever come to the jury's attention, is completely speculative at this point and serves only one purpose, your Honor. Thank you.

THE COURT: Yes, sir. [Defense counsel].

[DEFENSE COUNSEL]: Just briefly on that. Frankly, if—we're before evidence. We don't know what any of the evidence will be at this point, so that the argument that we don't know whether or not this is going to come before the jury, we don't. We can only speculate at this point. That's what the job of the attorneys is, to speculate, to preview the evidence. Some things may be deemed admissible or not. We don't know at this point.

The purpose of the jury selection is to make sure that the jurors are properly qualified to hear this trial. I contend this is not a stake-out question. I'm simply asking if anyone had heard about the reporting of this case. It happened two weeks prior to this incident. And then if they had, which is where we're getting to, what, if any, opinions they hold about that case; and then if they have

any opinions about that case, I will explore if those opinions would impact their ability to determine the evidence in this case. That's—I think it's important, I think that it's necessary for the jury to be prepared for these kinds of questions.

THE COURT: So that I'm completely clear on this issue, this case that you're referring to is the Jonathan Ferrell case.

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: I believe that was actually the case that resulted in Officer Kerrick being tried?

[DEFENSE COUNSEL]: That's correct. Yes, your Honor. The defendant was Officer Kerrick. I was referring to the decedent.

THE COURT: Okay. So this is—we're talking about—so I know what we're talking about. The Jonathan Ferrell case is the case where Charlotte-Mecklenburg Police Officer Kerrick was charged and tried for that offense.

[PROSECUTOR]: And acquitted, your Honor.

THE COURT: And acquitted. Okay. But regardless, I just want to make sure I understand what it was. So I'm going to sustain the objection. We're not going to go down that road during jury selection, if it comes to the point during the trial that this becomes an issue, then we can have a lot more discussions about it, but I'm not going to get into an extraneous case that happened in Charlotte during jury selection, so I'm going to sustain that objection.

[DEFENSE COUNSEL]: Your Honor, generally as to incidents, can I inquire of the jury if they have opinions related to incidents of cops firing on civilians that happened in the past couple years?

THE COURT: I think that's another stake-out question. I think [the prosecutor is] right. Once you get into a quote, unquote here's a situation, what do you think, how would you vote, I think that's a stake-out question, so I would sustain that objection, also.

> [DEFENSE COUNSEL]: Understood, your Honor. Please note our exception.

(Emphases added).

In holding that the trial court abused its discretion by making these rulings, the majority's analysis contains two fundamental errors. First, the majority fails to focus on the specific questions that defense counsel actually sought to ask the prospective jurors. Second, it fails to properly acknowledge the reasons articulated by defense counsel as to why he sought to ask those questions.

First, the majority mischaracterizes defense counsel's proposed lines of voir-dire questioning. The majority asserts that "the trial court prevented defendant from pursuing any line of inquiry regarding racial bias." The above-quoted portion of the transcript shows that this assertion is simply not true. In reality, the trial court's rulings were quite narrow—only prohibiting defense counsel from asking three discrete questions: (1) "When you hear the statement the only black man charged with robbery, what's the first thing that pops into your head?"; (2) "Is anyone familiar with the Jonathan Ferrell case that happened here in Charlotte approximately September of 2013?"; and (3) "[G]enerally as to incidents, can I inquire of the jury if they have opinions related to incidents of cops firing on civilians that happened in the past couple years?"

The majority simply ignores the fact that (1) defense counsel never actually asked the prospective jurors non-objectionable questions about the general topic of racial bias; and (2) the trial court never actually ruled that this subject was not a permissible topic for questioning. Indeed, as noted above, the trial court *allowed* defense counsel to explain the concept of implicit bias to the prospective jurors. It was only when the State objected to defense counsel's confusing question—"When you hear the statement the only black man charged with robbery, what's the first thing that pops into your head?"—that the trial court intervened by sustaining the State's objection.

Following the trial court's ruling, defense counsel never returned to the subject of implicit bias or racial bias generally. Thus, there is simply nothing in the transcript to support the proposition that the trial court would have prohibited defense counsel from asking further questions to the prospective jurors on these topics. Accordingly, by asserting that an abuse of discretion occurs when a trial court "entirely prevent[s] a party from asking any questions at all about an appropriate subject that is relevant at trial[,]" the majority is simply building a straw man and then knocking it down, as the trial court did no such thing.

After the trial court informed defense counsel that he could not ask about "incidents of cops firing on civilians that happened in the past couple years"—a question that did not even mention race—defense counsel did not seek clarification as to the boundaries of this ruling or ask any other questions on race-related issues. Instead, he simply moved on to another topic. It was the responsibility of defense counsel to ask appropriate questions during voir dire, and the trial court certainly had no duty to help defense counsel formulate properly worded questions or to suggest possible subjects of inquiry.

The majority purports to recognize this proposition when it states that "we examine the questions the defendant actually asked, not the universe of questions a defendant could possibly have asked about a given subject." This statement is odd, however, because the majority's analysis proceeds to do the exact opposite—that is, analyzing the relevance of questions defense counsel *never actually asked*.

Upon an examination of the three discrete questions that defense counsel actually posed to the prospective jurors, it is clear that the trial court did not abuse its discretion in disallowing them. Defendant's first question to the jurors—"When you hear the statement the only black man charged with robbery, what's the first thing that pops into your head?"—was properly excluded as an awkward and poorly-worded inquiry that was likely to confuse the prospective jurors. This Court has previously explained that it is within the trial court's broad discretion in regulating voir dire to disallow questions that are confusing or ambiguous. *See, e.g.*, *State v. Jones*, 347 N.C. 193, 202 (1997) ("On the *voir dire* . . . of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed."); *State v. Vinson*, 287 N.C. 326, 338 (1975) (holding that a voir dire question was "properly rejected" by the trial court because the form of the question was "inherently ambiguous and totally confusing to prospective jurors"), *vacated in part on other grounds*, 428 U.S. 902 (1976).

Defense counsel's question here was ambiguous in several respects. To begin with, it is not at all clear what defense counsel was referring to by referencing "the only black man charged with robbery." The two individuals who witnesses identified as the poker-game robbers here—defendant and Jamel Lewis—were both black men. Both defendant and Lewis were subsequently charged with robbery offenses, and Lewis eventually pled guilty to armed robbery while defendant proceeded to trial.

Thus, given that both black men involved in the poker-game robbery were charged with robbery offenses, this statement by defense counsel was based upon a factually inaccurate premise and was appropriately disallowed. *See Vinson*, 287 N.C. at 338 (holding that the trial court properly rejected a voir dire question that was "premised on . . . an assumption [that was] not supported by the record"). Moreover, it is not clear what type of information defense counsel hoped to glean from the prospective jurors by posing this odd hypothetical. If defense counsel was aiming to uncover implicit racial bias in the prospective jurors, there were much simpler and less confusing ways to go about accomplishing that objective.

The trial court's ruling on defendant's second question posed to the jury—"Is anyone familiar with the Jonathan Ferrell case that happened here in Charlotte approximately September of 2013?"—is not before this Court. Defendant's briefs in this Court make clear that he is not challenging the trial court's ruling as to that question in this appeal, stating that "[t]he ruling relating to the Ferrell case is not challenged in this appeal." *See State v. Thompson*, 306 N.C. 526, 533 (1982) ("[A]ssignments of error not briefed and argued by defendant are deemed abandoned under N.C. Rule of Appellate Procedure 28(a)."); N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Given defendant's decision not to appeal this issue, the majority has no proper basis for proceeding to analyze the propriety of the trial court's ruling regarding the question about the Ferrell case.

The trial court's refusal to allow defendant's third question—"[G]enerally as to incidents, can I inquire of the jury if they have opinions related to incidents of cops firing on civilians that happened in the past couple years?"—was also not an abuse of discretion. Given the wide discretion that trial courts possess to regulate voir dire, it is difficult to understand how the trial court's prohibition on questions regarding specific police shootings that were wholly unrelated to the incident for which defendant was on trial—questions that were likely to confuse and distract the jurors from the facts of the present case—could amount to an abuse of discretion. Indeed, although the majority pays lip service to the broad discretion possessed by trial courts during voir dire to prohibit questions that have the potential to divert the attention of the jurors from the case at hand, the remainder of its analysis essentially ignores the existence of such discretion.

A second reason why the majority's analysis is erroneous is that it largely ignores the reasons articulated by defense counsel to the trial

court for asking the questions at issue in this appeal. As explained above, defense counsel argued before the trial court that he intended to introduce evidence of the Ferrell case and other unrelated police shootings in order to speak to defendant's "state of mind" at the time of the offense. Defense counsel stated unambiguously that "[m]y expectation is that this testimony regarding the Jonathan Ferrell case is relevant to Mr. Crump's state of mind in that this case, the Jonathan Ferrell case, happened just two weeks prior to this particular case" and "directly impacted Mr. Crump's state of mind" at the time of the offense. Defense counsel further stated that this state-of-mind evidence would "go[ ] to rebut the contention that . . . [defendant] was fleeing the scene of the crime," in addition to being relevant to his self-defense claim. Defense counsel argued that it was "imperative" that he "be able to inquire about . . . what [the prospective jurors'] opinions are as related to Mr. Crump and his ability to—or, excuse me—his state of mind at the time of this offense." Defense counsel never informed the trial court of any other specific reason for wanting to ask these questions.

Rather than assess these specific grounds that defense counsel articulated to the trial court as the basis for asking these questions, the majority instead makes the extraordinary assertion that "we also reject the State's argument that we must restrict our examination . . . to the explanations defense counsel offered during his colloquy with the trial court." In other words, the majority appears to be saying that this Court is free to come up with arguments of its own that defense counsel could—and perhaps should—have made in the trial court and then rely on those same manufactured grounds to hold that the trial court abused its discretion. Needless to say, such a proposition is inconsistent with both law and logic.

By substituting more favorable arguments for the defendant than those actually made by defense counsel in the trial court, the majority is complicit in defendant's attempts to "swap horses" on appeal. *State v. Sharpe*, 344 N.C. 190, 194 (1996) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts . . . .' "). This Court has made clear that such attempts to advance a more favorable legal theory on appeal are impermissible. Instead, our review is limited to the theory upon which defendant actually relied in the trial court. *See, e.g.*, *State v. Hunter*, 305 N.C. 106, 112 (1982) ("The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of [the defendant's] exceptions.").

The majority also errs by concluding that defendant was prejudiced by the trial court's decision to disallow these challenged lines of questioning. I believe that defendant has failed to show prejudice for two main reasons. First, defendant was allowed to ask a myriad of other questions regarding the prospective jurors' opinions of, and experiences with, law enforcement officers. Second, based on the evidence that was introduced at trial, defense counsel's proposed line of questioning about other police shootings was not relevant to his stated rationale for pursuing this line of inquiry—that is, showing defendant's state of mind at the time of the offense, which was the sole purpose offered by defense counsel for his desire to explore this topic.

First, defendant cannot show prejudice because the trial court allowed the parties to ask the prospective jurors a wide variety of other questions regarding their perceptions of the police, the credibility of police officers, and their own personal experiences with the police. In assessing the degree of prejudice a defendant has suffered from a trial court's refusal to allow certain questions on voir dire, a factor that our Court has frequently examined is whether the parties were sufficiently able to elicit the information sought by posing other similar questions to the prospective jurors.

For example, in *Rodriguez*, the defendant contended that the trial court erred by refusing to allow him to ask certain questions about prospective jurors' "ability to follow the applicable law prohibiting the imposition of the death penalty upon an intellectually disabled person." *Rodriguez*, 371 N.C. at 309. We disagreed, reasoning that although the trial court did limit the defense counsel's questioning in some respects, it also allowed defense counsel to ask a broad range of other questions regarding intellectual disabilities and explain relevant legal topics to the jury. *Id.* at 312–13. Specifically, the trial court had allowed defense counsel to (1) question prospective jurors about "their prior experiences with intellectually disabled individuals," "their familiarity with intelligence testing," and "their willingness to consider expert mental health testimony;" and (2) explain to prospective jurors "that '[m]ental retardation is a defense to the death penalty.' " *Id.* (alteration in original). We concluded that "we do not believe that the limitations that the trial court placed upon the ability of defendant's trial counsel to question prospective jurors concerning intellectual disability issues constituted an abuse of discretion." *Id.* at 313.

Other cases from this Court similarly demonstrate that no matter how important the topic being pursued on voir dire—whether it be

racial bias, intellectual disability, or the death penalty—the trial court still "retains discretion as to the form and number of questions on the subject" and may properly use that discretion to allow some, but not all, of counsel's proposed questions. *State v. Robinson*, 330 N.C. 1, 13 (1991) (emphasis added) (quoting *Turner v. Murray*, 476 U.S. 28, 37 (1986)); *see*, *e.g.*, *Ward*, 354 N.C. at 256 (holding that the defendant could not establish prejudicial error stemming from the trial court's restrictions on certain questions related to the death penalty, as "defense counsel was allowed to conduct an exhaustive examination into the prospective jurors' attitudes about the death penalty and whether those attitudes would interfere with their ability to serve"); *Robinson*, 330 N.C. at 12–13 (holding that the trial court did not err by restricting certain questions "with respect to jurors' feelings about racial prejudice" because the trial court allowed defense counsel to ask several other probative questions on the issue of racial bias).

Once again, it is crucial to emphasize that although the trial court disallowed defendant's specific request to question prospective jurors about their thoughts on "incidents of cops firing on civilians that happened in the past couple years," the trial court never ruled that defense counsel was barred from asking any questions about race. The fault lies with defense counsel—not the trial court—for failing to pose such questions in an appropriate manner. Moreover, the trial court allowed defendant to thoroughly question prospective jurors regarding their attitudes on issues of police violence, police officers as witnesses, and their prior personal experiences with the police. Indeed, a careful reading of the transcript reveals that the trial court permitted counsel to do the following:

- Explain and define for prospective jurors the concept of "implicit bias against people of a particular race, specifically African Americans."
- Inform prospective jurors that this case involved an exchange of gunfire between defendant and police officers. Defense counsel further stated the following: "[I]f you haven't heard media reports before [about] officer-involved shootings, then you haven't been watching any news. They're out there. There is another dynamic that is going on here, too . . . I'll tell you, you can see Mr. Crump is an African-American gentleman, and these officers are white officers, okay? So we're going to be talking about some real issues here this afternoon, because people have some real strong feelings because of media reports but also based on their personal experiences."

- Question prospective jurors regarding their general opinions about police officers, their perceptions of the credibility of police officers, whether their prior interactions with the police were positive or negative, and whether they had any friends or family in law enforcement.
- Inform prospective jurors that police officers are not entitled to any special considerations as to their credibility.
- Ask if the prospective jurors had "any opinions regarding the fact of whether or not a person has a right to self-defense if an officer is the aggressor in the case."

These examples demonstrate that the trial court allowed both the State and defense counsel to thoroughly examine prospective jurors regarding their experiences, attitudes, and perceptions of the police. Accordingly, defendant has failed to show how the information gleaned via this questioning was insufficient to allow him to uncover any existing biases of prospective jurors and to intelligently exercise his peremptory challenges.

Second, defendant cannot show that he was prejudiced by the trial court's voir dire rulings because—as noted by the Court of Appeals—the information that defendant sought to elicit by asking about unrelated police shootings was not actually relevant to his state-of-mind defenses based on his own testimony at trial. As the above-quoted portion of the transcript makes abundantly clear, defense counsel informed the trial court that he wanted to question prospective jurors about their thoughts on the Ferrell case and police shootings generally because he believed these topics were relevant to the State's claim that defendant fled the scene as well as to defendant's claim of "self-defense . . . as relat[ing] to the assault charges." Defense counsel asserted that concerns about police violence and the recent Ferrell shooting had "directly impacted [defendant's] state of mind . . . at the time of this offense."

However, defendant's own trial testimony reveals that police shootings were not, in fact, on his mind at the time of the incident. To the contrary, defendant's testimony makes clear that he was not actually aware that the persons shooting at him were police officers until after he had already fired shots and fled the scene. Defendant testified that it was not until "after [he] came out onto" N. Tryon Street and saw sirens that he realized "it was the police that [were] shooting at [him]," and it was only during the subsequent car chase that defendant began to think he "might not make it out of this one." Based on this testimony, even the majority

concedes that "[i]t is true that defendant testified that he did not know he was firing at law enforcement officers."

Thus, because defendant did not know he was interacting with police officers at the time he was actually firing the shots in the parking lot, any apprehensions he had about recent police shootings (either as a result of the Ferrell case or otherwise) could not have motivated his allegedly defensive shots or his flight from the scene. Given this admission by defendant during his testimony, the effect of unrelated police shootings on his state of mind simply was not relevant to the issues that the jury had to decide based on the evidence actually presented at trial. Accordingly, defendant cannot demonstrate that he was prejudiced by the trial court's rulings.

Finally, I wish to note my agreement with the majority that the general issue of racial bias would have been a proper subject of inquiry during voir dire in this case. However, for the reasons explained above, defense counsel failed to pursue this topic through appropriate questioning. Had he actually done so, it likely *would* have been an abuse of discretion for the trial court to disallow such questions. But a trial court cannot be found to have abused its discretion during voir dire based on questions that defense counsel did not actually ask or based on rulings that the trial court did not actually render. Accordingly, I respectfully dissent.

Justices NEWBY and MORGAN join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
JIMMY LEE FARMER

No. 8A19

Filed 18 December 2020

Constitutional Law—right to speedy trial—Barker balancing test—no prejudice from delay

A five-year delay between an indictment and trial (for a first-degree sex offense with a child and indecent liberties with a child) did not violate defendant's Sixth Amendment right to a speedy trial where the *Barker v. Wingo*, 407 U.S. 514 (1972), four-factor balancing test showed that although the length of delay was unreasonable, the reason for the delay was crowded court dockets rather than negligence or willfulness by the State, defendant waited nearly five years to assert his right to a speedy trial, and defendant failed to present evidence establishing any actual prejudice.

Appeal pursuant to N.C.G.S. § 7A-30(2) from a divided panel of the Court of Appeals, 262 N.C. App. 619, 822 S.E.2d 556 (2018), affirming a judgment entered on 20 July 2017 by Judge Lori I. Hamilton in Superior Court, Rowan County. Heard in the Supreme Court on 11 December 2019.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellee.

Jarvis John Edgerton IV for defendant-appellant.

MORGAN, Justice.

This appeal involves a criminal defendant's contention that the passage of time between the issuance of the indictments for the offenses that he was alleged to have committed and his trial for these alleged offenses was so lengthy that it constituted a violation of defendant's right to a speedy trial as provided by the Constitution of the United States and the North Carolina Constitution. In applying the pertinent constitutional provisions, the salient principles which prescribe a criminal defendant's right to a speedy trial which were established by the Supreme Court of the United States in *Barker v. Wingo*, 407 U.S. 514 (1972), and the controlling considerations which govern an alleged offender's right to a speedy trial which were determined by this Court pursuant to *Barker*,

we hold that the scheduling and procedural circumstances existent in the present case, albeit unsettling, do not constitute an infringement upon defendant's constitutional right to a speedy trial.

Factual Background and Procedural History

The evidence at defendant's trial tended to show the following facts. On 8 March 2012, four-year-old "Savannah"[1] was allegedly molested by defendant—her step-grandfather—while Savannah was visiting the home shared by her grandmother and defendant. Savannah's grandmother was married to defendant at this time. On the date of the alleged offenses, Savannah was playing outside of her grandmother's home with members of her family when she asked to go inside for a snack. Defendant volunteered to take Savannah inside in order to get an apple. However, when defendant carried Savannah into the home, he did not take her to the kitchen but instead took Savannah into the master bedroom. Savannah was lying on the bed and defendant removed Savannah's clothing and touched her genitals.

After a while, Savannah's grandmother felt that the amount of time that defendant and Savannah had been inside the home was "odd," and upon entering the residence and going to the kitchen, the grandmother did not see either Savannah or defendant. Upon hearing his wife enter the home, defendant hastily pulled up Savannah's underwear and shorts, leaving them twisted. Savannah's grandmother noticed that the door to the master bedroom was ajar, and when she investigated, she saw Savannah lying on her back on the bed in the master bedroom and noticed that the child's "pants weren't right." Savannah got off of the bed while continuing to pull up her underwear and asked her grandmother to hold her. Defendant rushed out of the room without making eye contact with his wife. Originally, Savannah explained that her underwear had gotten disarranged because she had been jumping on the bed. Savannah gave her grandmother this explanation because it was the version of the story that defendant had instructed Savannah to say. However, on the ride home with her mother from the grandmother's residence later in the day, Savannah told her mother that defendant had touched Savannah's genital area. Savannah's mother contacted the Rowan County Sheriff's Office. It began an investigation into the matter which led to the arrest of defendant on 24 April 2012. At his first appearance in court on 26 April 2012 following his arrest, defendant received court-appointed

1. The name "Savannah" is a pseudonym which has been utilized throughout appellate review of this case to protect the identity of the minor child and to facilitate the ease of reading.

counsel. On 7 May 2012, defendant was indicted on charges of first-degree sex offense with a child and indecent liberties with a child.

Defendant waived arraignment on 24 May 2012 and 5 November 2012. On 15 July 2013, defendant filed a motion requesting a bond hearing to reduce his bond, a motion for funds for a private investigator, and notice of his intent to request expert funds. On 29 July 2013, the trial court allowed defendant's motion for funds for a private investigator; however, defendant's bond hearing was not calendared. On 21 January 2014, defendant filed another notice of his intent to request expert funds and a motion for funds for an expert analyst, and the motion was heard and allowed without objection by the State on the following day of 22 January 2014. Defendant did not meet with any of the experts whom he had retained until 5 March 2014.

Defendant's trial was scheduled to start on 30 January 2017; however, counsel for defendant and the State agreed to continue the case and to reschedule it for the 17 July 2017 trial session of court. On 6 March 2017, defendant filed a motion for a speedy trial and asked the trial court either to dismiss the charges or to schedule the trial for an immovable court date by way of a peremptory setting. Defendant additionally filed a motion to dismiss on 11 July 2017, alleging a violation of the right to a speedy trial as established by the Constitution of the United States. In his motion to dismiss, defendant stated that he had maintained "the same counsel throughout the life of [the] case."

The speedy trial motion came before the Honorable Lori I. Hamilton, who conducted the hearing regarding defendant's motions on 17 July 2017 during the trial session of Superior Court, Rowan County, during which defendant's criminal trial was rescheduled. At the hearing, defendant called Rowan County Assistant Clerk of Court Amelia Linn to testify concerning the allegedly unconstitutional delay in bringing defendant to trial following his indictment. Linn testified that her office was the keeper of legal records in Rowan County and that she was the supervisor of the criminal records division. Linn also represented that no fewer than sixty-five trial sessions had occurred during the period of time between defendant's 7 May 2012 date of indictment and the 17 July 2017 trial date. Within this time period, defendant's case had no trial activity from a calendared date of 9 May 2012 to the 30 January 2017 trial session of court, according to Rowan County court records which were introduced into evidence at the hearing.

After reviewing the evidence which was introduced and hearing the arguments which were made by both parties, the trial court applied

the factors established in *Barker* to assess whether defendant's constitutional right to a speedy trial had been violated. The trial court determined that defendant's right to a speedy trial had not been violated; accordingly, defendant's motion to dismiss was denied and the matter proceeded to trial.

During trial, the evidence regarding the series of events which allegedly occurred on 8 March 2012 involving Savannah and defendant along with the purported actions and circumstances which followed was presented as described above. In addition, defendant's niece testified that defendant had sexually molested her in the late 1970s and early 1980s when the niece was between the ages of five and nine years old. The State offered that the lengthy period of time which elapsed between the alleged incidents involving defendant's activity with the niece and with Savannah was explained, at least in part, by defendant's lengthy imprisonment for two counts of murder in 1983, resulting from defendant's killing of his previous wife and his eight-year-old daughter. Defendant did not offer any evidence at trial. On 20 July 2017, the jury returned verdicts finding defendant guilty as charged of first-degree sex offense with a child and indecent liberties with a child. Thereupon, the trial court entered consecutive sentences totaling 338 months to 476 months with credit given to defendant for time served while awaiting trial. Defendant gave oral notice of appeal in open court.

The Court of Appeals Decision

In the Court of Appeals, defendant argued that the trial court erred by denying defendant's motion to dismiss the charges against him. Defendant contended that the State violated his constitutional right to a speedy trial by failing to calendar his trial date for approximately five years following the issuance of the indictments against him. *See State v. Farmer*, 262 N.C. App. 619, 822 S.E.2d 556 (2018).[2] The majority of the panel of the lower appellate court acknowledged that the five-year delay during which defendant waited to proceed to trial on the charges against him was "significantly long." *Id.* at 621–22, 822 S.E.2d at 559; *see State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003) (noting that a delay between indictment and trial of one year is presumptively prejudicial). However, after reviewing all of the *Barker* factors, the Court of Appeals majority ultimately held that there was no speedy trial violation based on the specific facts of this case and therefore affirmed the trial

2. Defendant did not specifically challenge any of the trial court's findings of fact in the Court of Appeals or in his appellant's new brief, so the findings of fact are binding on appeal before this Court. Similarly, the dissenting opinion of the Court of Appeals in this case did not take issue with any of the lower court's findings.

court's denial of defendant's motion to dismiss. *Farmer*, 262 N.C. App. at 625, 822 S.E.2d at 561.

The Court of Appeals majority cited in its authored opinion our decision in *State v. McKoy*, 294 N.C. 134, 240 S.E.2d 383 (1978), for the proposition that

> [t]he right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not per se prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

Farmer, 262 N.C. App. at 622, 822 S.E.2d at 559 (quoting *McKoy*, 294 N.C. at 140, 240 S.E.2d at 388). Under *Barker*, the factors to be considered in making the difficult and highly fact-specific evaluation of whether a possible speedy trial violation has occurred include "(1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting from the delay." *State v. Groves*, 324 N.C. 360, 365, 378 S.E.2d 763, 767 (1989) (citation omitted).

After observing that the length of the delay was constitutionally problematic, the Court of Appeals majority next addressed the reason for the lapse of "nearly 63 months—approximately five years, two months and twenty-four days—before [defendant's] case was tried," noting that a "defendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution." *Farmer*, 262 N.C. App. at 622, 822 S.E.2d at 559 (quoting *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255). The lower appellate court perceived that defendant himself was responsible for some part of this delay, in that "defendant was still preparing his trial defense as of late 2014 when he requested funds to obtain expert witnesses." *Farmer*, 262 N.C. App. at 623, 822 S.E.2d at 560. The majority of the Court of Appeals panel further recognized that it was "undisputed that the primary cause for defendant's delayed trial was due to a backlog of pending cases in Rowan County and a shortage of staff of assistant district attorneys to try cases." *Id.* The majority of the panel decided that "defendant did not establish a prima facie case that the delay was caused by neglect or willfulness of the prosecution." *Id.*

As for the third *Barker* factor, the Court of Appeals majority emphasized that defendant only asserted his right to a speedy trial in a formal fashion with the filing of his motion on 6 March 2017, almost five years after he was arrested. *Farmer*, 262 N.C. App. at 624, 822 S.E.2d at 560. The lower appellate court calculated that within four months of defendant's assertion of his right to a speedy trial, his case was calendared and tried. *Id.* In this regard, the panel's majority expressly concluded that "[g]iven the short period between defendant's demand and his trial, defendant's failure to assert his right sooner weighs against him in balancing this *Barker* factor." *Id.*

Lastly, to establish a violation of the right to a speedy trial "[a] defendant must show actual, substantial prejudice." *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257. Here, the prevailing judges of the panel rejected defendant's contention that he was prejudiced by the delay between his indictment and his trial because the witnesses' memories could have deteriorated over time, to defendant's detriment. *Farmer*, 262 N.C. App. at 624–25, 822 S.E.2d at 561. The majority in the Court of Appeals noted that Savannah, who was four years old at the time of the alleged offenses, was able to testify about facts relevant to the incident itself, even though she had trouble remembering some details about what had occurred before and after the incident. *Id.* at 625, 822 S.E.2d at 561. Other witnesses, including Savannah's grandmother were able, however, to testify fully and clearly regarding the events of the day at issue. *Id.* In addition, defendant had access, for the preparation of his case and for impeachment purposes, to all of the witnesses' interviews and statements obtained during the initial investigation of the matter. *Id.* The lower appellate court also expressed that it was "inclined to believe" that defendant "had hoped to take advantage of the delay in which he had acquiesced." *Id.* (citing *Barker*, 407 U.S. at 535). For all of these reasons, the Court of Appeals majority held that defendant's ability to defend his case was not prejudiced and that defendant "failed to demonstrate that his constitutional right to a speedy trial was violated." *Farmer*, 262 N.C. App. at 625, 822 S.E.2d at 561. Therefore, the Court of Appeals affirmed the trial court's denial of defendant's motion to dismiss.

The dissenting judge of the Court of Appeals panel agreed with the majority that the delay of over five years to provide defendant with a trial after defendant's arrest was "presumptively prejudicial" and went on to determine that in "[a]nalyzing the factors to be applied, none of which support the State's position . . . defendant demonstrated that his constitutional right to a speedy trial was violated." *Farmer*, 262 N.C. App. at 626, 822 S.E.2d at 561 (Arrowood, J., dissenting). With regard to

the reason for the delay, the dissenting judge disagreed with the majority that defendant's request for expert funding in 2013 and 2014, defendant's acquiescence to the State's request to continue the case from the January 2017 calendar to the next trial session, and defendant's slowness to formally assert his right to a speedy trial were sufficient to show that defendant consented to the delay in bringing the case to trial. *Id.* at 627, 822 S.E.2d at 562–63. The dissenting judge further opined that any portion of the responsibility for the delay in bringing defendant's case to trial which could be attributed to "congested dockets" and insufficient staffing of the District Attorney's Office in that prosecutorial district "ultimately weighs against the State" because "the State has the responsibility to adequately fund the criminal justice system . . . to timely dispose of cases." *Id.* at 628–29, 822 S.E.2d at 563–64. The dissent viewed the factor of defendant's assertion of the right to a speedy trial as a consideration which "carries only minimal weight in defendant's favor" because "defendant asserted his right to a speedy trial four years and eleven months after he was arrested, and the case was called for trial less than four months later." *Id.* at 630, 822 S.E.2d at 564. As to the final factor of prejudice, the dissenting judge decided that it "weighs only slightly in defendant's favor" since, "absent a more concrete showing of actual prejudice," although "the majority determined defendant was not prejudiced because defendant's ability to defend his case was not impaired," nonetheless "defendant established the presumptive prejudice that naturally accompanies an extended pretrial incarceration." *Id.* at 630–31, 822 S.E.2d at 564.

On 7 January 2019, defendant filed his notice of appeal based upon the dissent in the Court of Appeals. Defendant did not specifically challenge any of the trial court's findings of fact, either in the Court of Appeals or in his brief to our Court; accordingly, those findings of fact are binding. Further, in matters heard by this Court on the basis of a dissenting opinion in the Court of Appeals, the only arguments considered are those where the dissent "diverges from the opinion of the majority" and not those where the "panel agreed." *State v. Hooper*, 318 N.C. 680, 682, 351 S.E.2d 286, 287 (1987).

Analysis

In considering defendant's argument that his constitutional right to a speedy trial was violated here, we must undertake the challenging task—just as the panel members of the lower appellate court did—of evaluating and weighing the following *Barker* factors: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting

from the delay." *Groves*, 324 N.C. at 365, 378 S.E.2d at 767. We must bear in mind the caution of the Supreme Court of the United States that

> none of the four factors identified above [are] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Barker, 407 U.S. at 533; *see also Spivey*, 357 N.C. at 119, 579 S.E.2d at 255. For this reason, "it is impossible to determine precisely when the right [to a speedy trial] has been denied." *McKoy*, 294 N.C. at 140, 240 S.E.2d at 388 (citing *Barker*, 407 U.S. at 514). "We follow the same analysis when reviewing such claims under Article I, Section 18 of the North Carolina Constitution." *State v. Grooms*, 353 N.C. 50, 62 540 S.E.2d 713, 721 (2000), *cert. denied*, 534 U.S. 838 (2001).

1. Length of the delay

The entire Court of Appeals panel agreed that the passage of time between the initiation of charges against defendant and the occurrence of his trial was too long. Before this Court, defendant argued that the extraordinarily long delay here—specified by both the Court of Appeals majority view and dissenting view as lasting for five years, two months, and twenty-four days—should weigh heavily against the State and in favor of defendant's speedy trial claim under *Barker*. *See Doggett v. United State*s, 505 U.S. 647, 652 (1992) ("[T]he presumption that pretrial delay has prejudiced the accused intensifies over time."). We agree that the prolonged time interval in the present case between the date the indictments against defendant were issued and his resulting trial is striking and clearly raises a presumption that defendant's constitutional right to a speedy trial may have been breached.

This first *Barker* factor itself consequently does not require our further consideration since all of the judges of the Court of Appeals panel agreed on the presumptive prejudice to defendant of his right to a speedy trial in light of the length of the delay here. Both the majority opinion and the dissenting opinion utilize identical language that the length of the delay "triggers an inquiry into the remaining *Barker* factors." *Farmer*, 262 N.C. App. at 267, 822 S.E.2d at 627. This joint assessment comports with the approach adopted by the Supreme Court of the United States in *Barker* regarding the operation of the "length of the delay" factor upon the determination of the factor's existence: "The length of the delay is

to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. In adhering to this guidance, upon the presumption of prejudice to defendant's constitutional right to a speedy trial by virtue of the length of the delay preceding the occurrence of his trial, we proceed to examine the other delineated *Barker* factors.

2. Reason for the delay

With regard to the reason for the length of a delay to bring a criminal defendant to trial where the observance of an accused's right to a speedy trial is challenged, the high court in *Barker* instructs the following:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as . . . overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

Barker, 407 U.S. at 531.

In implementing this *Barker* factor regarding the reason for the delay, we crafted the following evidentiary structure which we conveyed in our opinion in *Spivey*:

> defendant has the burden of showing that the delay was caused by the *neglect or willfulness* of the prosecution. Only after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence.

Spivey, 357 N.C. at 119, 579 S.E.2d at 255 (citations omitted).

Defendant contends that the State was both neglectful and willful in its delay to afford him a speedy trial. He depicts the failure of the State to calendar defendant's bond hearing upon the filing of his 15 July 2013 motion as indicative of neglect and the failure of the State to properly

proceed with the scheduling of defendant's trial as representative of willfulness. The State responds to defendant's endeavor to satisfy his burden by asserting that the reasons for the delay in bringing defendant to trial, which it offered into evidence at defendant's 17 July 2017 hearing on his motion to dismiss, included crowded criminal case dockets, older pending cases which were prioritized for resolution at the time, and limited prosecutorial resources. The State also claims that defendant's ongoing preparation for trial and his agreement, both express and tacit, to eventual scheduling of his trial contributed to the delay.

In applying the direction given by the Supreme Court of the United States on this *Barker* factor, we find that this circumstance modestly favors defendant. The nation's highest court is clear that, while different reasons for delay in a criminal trial's execution should be weighed in appropriate increments, a reason such as crowded criminal case dockets—expressly cited by the Supreme Court of the United States in *Barker* and offered as a reason for delay by the State in the instant case—while largely neutral and hence weighted less heavily against the State than a more intentional effort to prejudice a defendant with a delay, nonetheless must be borne by the State rather than by the defendant, since the State bears the responsibility for such a lag in time. We likewise consider here the State's discretion to call other pending criminal cases for trial prior to defendant's case and the State's limited resources for the resolution of criminal cases to weigh, mildly but definitively, against the State. Although defendant's passive and concessionary posture may have been a contributing element to the delay, it is engulfed by the State's more authoritative role in the delay.

While this Court will refrain from characterizing the State's prosecutorial backlog and usage of prosecutorial resources as being demonstrable of neglect or willfulness in its delay of scheduling defendant's trial, we recognize that we have repeatedly held that overcrowded dockets and limited court sessions are valid reasons excusing delay. *See*, *e.g.*, *Spivey*, 357 N.C. at 119–121, 579 S.E.2d at 255–56; *State v. Hill*, 287 N.C. 207, 212, 214 S.E.2d 67, 71 (1975); *State v. Hollars*, 266 N.C. 45, 53–54, 145 S.E.2d 309, 315 (1965); *State v. Brown*, 282 N.C. 117, 124, 191 S.E.2d 659, 664 (1972) ("Both crowded dockets and lack of judges or lawyers, and other factors, make some delays inevitable."). As a result and in light of our interpretation of *Barker* and our own Court's precedent, the second *Barker* factor as to the reason for delay slightly, but firmly, weighs in the favor of defendant.

3. Assertion of the right to a speedy trial

A defendant's belated assertion of his right to a speedy trial "does weigh against his contention that he has been denied his constitutional right to a speedy trial." *State v. Flowers*, 347 N.C. 1, 28, 489 S.E.2d 391, 407 (1997). In describing the third speedy trial factor in *Barker* to be scrutinized with regard to a criminal defendant's contention that his constitutional right was violated, the Supreme Court of the United States once again employed descriptive and straightforward language to illustrate the proper discernment of an accused's claim.

> The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Barker, 407 U.S. 514, 531–32.

By this measure, the third *Barker* factor of a defendant's assertion of the right to a speedy trial weighs significantly against the alleged offender in the case before us. We have noted that defendant was arrested on 24 April 2012, that he obtained court-appointed counsel on 26 April 2012, and that he was indicted on 7 May 2012. However, as the Court of Appeals majority pointed out in its decision, it was almost five years after defendant's arrest until his formal request for a speedy trial when his motion was filed on 6 March 2017. The dissenting judge in the lower appellate court, while acknowledging the existence of appellate case law which is contrary to defendant's stance on this *Barker* factor, viewed the factor to operate minimally in favor of defendant.

Through the operation of the high court's standard on this *Barker* factor that defendant's assertion of the right to a speedy trial is entitled to a strong evidentiary weight in determining whether defendant in the case sub judice was deprived of his constitutional right to a speedy trial, we find that this factor militates strongly against defendant. The difficulty of defendant to show that he was denied a speedy trial due to the emphasis of Supreme Court of the United States upon a defendant's failure to assert the right is heightened by the happenstance that defendant's case came on for trial four months and eleven days after his speedy trial motion was filed.

4. Prejudice to defendant resulting from the delay

The Supreme Court of the United States in its opinion in *Barker* outlined a final factor for speedy trial infringement evaluation, stating the following:

> A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. at 532. We embraced this approach in *State v. Webster*, 337 N.C. 674, 681, 447 S.E.2d 349, 352 (1994).

In examining the most serious component of the prejudice factor which was identified by our country's preeminent legal forum in *Barker*—the possibility that the defense will be impaired—this prospect did not manifest itself in the present case. There has been no contention by defendant that the presentation of his trial defense was impaired, nor any representation by defendant regarding such a compromise of his trial defense. Therefore, the most significant of the three prongs of the prejudice factor does not exist in this case. The first identified prong—the prevention of oppressive pretrial incarceration—inherently exists by virtue of the longevity of defendant's continuous confinement prior to his trial. The remaining feature of the prejudice components—the minimization of defendant's anxiety and concern—would also inherently exist as he awaited the occurrence of his trial which would resolve the charges against him. While we do not disregard nor diminish the deleterious effects of defendant's prolonged pretrial incarceration, as well as anxiety and concern, upon an accused such as defendant who is awaiting trial for an appreciable period of time, we nonetheless are bound to follow the *Barker* formula on prejudice in recognizing that there was no impairment of defendant's defense which was occasioned by the delay of the trial and the standard presence of the remaining two interests did not rise to a level which amounted to any prejudice to defendant's rights.

In assessing the identified interests which compose the prejudice factor established in *Barker*, we agree with the Court of Appeals majority that defendant did not suffer prejudice in this case stemming from

the delay of his trial. While the dissenting view of the Court of Appeals deems this fourth *Barker* factor to weigh slightly in favor of defendant without a demonstration of actual prejudice experienced by defendant, we determine that this final *Barker* factor of prejudice to defendant as a result of the trial's delay significantly weighs against defendant.

Conclusion

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Barker, 407 U.S. at 533.

After identifying and discussing the four factors in its decision in *Barker* which are established to facilitate and foster a trial court's determination of a defendant's claim that his or her constitutional right to a speedy trial has been violated, the Supreme Court of the United States next included the paragraph cited immediately above to serve as overarching direction in evaluating the factors. Our Court adopts these permeating principles in the instant case to aid our major and important task of deciding whether defendant's right to a speedy trial was violated under the facts and circumstances existent in this case. As we, in the words of the *Barker* Court, "engage in a difficult and sensitive balancing process," the Court ascertains that (1) the first *Barker* factor—the length of the delay—presumptively favors defendant; (2) the second *Barker* factor—the reason for the delay—slightly favors defendant; (3) the third *Barker* factor—defendant's assertion of the right to a speedy trial—strongly weighs against defendant; and (4) the fourth *Barker* factor—prejudice to defendant resulting from the delay—significantly weighs against defendant. *Id.* As we follow the guidance articulated by the Supreme Court of the United States, since the length of the delay was "presumptively prejudicial" which necessitated the inquiry into the other *Barker* factors and since "they are related factors and must be considered together with such other circumstances as may be relevant," we determine that the presumption of prejudice in defendant's case due

to the length of the delay has been sufficiently rebutted by the collective effect of the other *Barker* factors. *See Barker*, 407 U.S. at 533.

Upon engaging in the "difficult and sensitive balancing process" of weighing the *Barker* factors as they apply to the circumstances of this case, we hold that defendant's constitutional right to a speedy trial was not violated. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
BRUCE WAYNE GLOVER

No. 392A19

Filed 18 December 2020

1. Criminal Law—possession—jury instructions—acting in concert—alternative theory to constructive possession

In a trial for possession of multiple controlled substances, the trial court erred by giving jury instructions for the theory of acting in concert where the State failed to present any evidence of a common plan or purpose to possess the controlled substances. The State's evidence that the drugs were stored in defendant's personal area by his housemate, whom he previously did drugs with, could support a theory of constructive possession but failed to demonstrate a common plan or purpose between defendant and his housemate.

2. Criminal Law—jury instructions—unsupported instruction—harmless error analysis—prejudice

The trial court committed prejudicial error in a trial for possession of multiple controlled substances when it instructed the jury on both acting in concert and constructive possession because there was no evidence supporting a theory of acting in concert, there existed a strong possibility of confusing the jury by presenting both theories, and the evidence supporting constructive possession was in dispute and subject to questions regarding its credibility.

Justice NEWBY dissenting.

STATE v. GLOVER

[376 N.C. 420 (2020)]

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 267 N.C. App. 315, 833 S.E.2d 203 (2019), finding no error in part, and reversing and remanding in part, a judgment entered on 20 September 2017 by Judge W. Erwin Spainhour in Superior Court, Henderson County. Heard in the Supreme Court on 9 March 2020.

Joshua H. Stein, Attorney General, by Joseph Finarelli, Special Deputy Attorney General, for the State-appellee.

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

MORGAN, Justice.

The appeal in this drug possession case presents two questions for our consideration: First, whether the evidence adduced at defendant's trial was sufficient to support the trial court's instruction to the jury on the theory of acting in concert, and second, if the evidence presented was insufficient to support the instruction, whether the error was harmless. On the facts here, we conclude that the evidence did not support the trial court's instruction on acting in concert. Further, given the potential for confusion on the part of the jury between the theories of acting in concert and constructive possession as bases for the return of guilty verdicts on the possession of controlled substance charges against defendant, the erroneous instruction was not harmless. Accordingly, the trial court's judgment in this case must be vacated and the matter remanded to the trial court for a new trial.

Factual Background and Procedural History

The charges in this matter arose from controlled substances discovered on 29 September 2016 by officers with the Henderson County Sheriff's Office who were investigating complaints of drug activity at a home where defendant Bruce Wayne Glover lived with several people, including Autumn Stepp. Stepp was not at the group's residence when the officers arrived, having departed earlier in the day. Stepp, who regularly used controlled substances such as marijuana, heroin, and methamphetamine, kept materials that she collectively called her "hard time stash"—small amounts of heroin, cocaine, marijuana, methamphetamine, a few pills, and various items of drug paraphernalia—in a small yellow tin. Before her departure from the home on 29 September 2016, Stepp placed the yellow tin in the drawer of a dresser that was located in an alcove near defendant's bedroom, without telling defendant or any of her other housemates about this act.

When the officers knocked on the door of the home, defendant stepped outside to speak with them. During the discussion, a detective asked defendant whether defendant had any contraband in his bedroom. Defendant told the detective that defendant had used methamphetamine and prescription pills, admitting that the bedroom likely contained drug paraphernalia in the form of "needles and pipes." However, defendant stated that he did not think that officers would find any illegal substances in his personal space in the home. Defendant gave consent for the officers to search his bedroom as well as the alcove near defendant's bedroom which defendant stated that he considered to be part of his "personal space."

In defendant's bedroom, the detective found a white rectangular pill wrapped in aluminum foil inside a dresser drawer; scales, rolling papers, plastic bags, and glass pipes in a small black pouch; and a small bag containing marijuana in a small safe. Officers also discovered the small yellow tin in the drawer of the dresser in the alcove where Stepp had placed it without defendant's knowledge. Inside the tin, officers discovered three plastic bags with crystallized substances. Field tests on the contents of each bag "gave a positive indication for the presence of methamphetamine, cocaine[,] and heroin." At trial, a State Crime Laboratory analyst testified that the three bags collectively contained 0.18 grams of heroin, 2.65 grams of methamphetamine, and less than 0.1 gram of both methamphetamine and cocaine, respectively.

On 20 March 2017, the Henderson County grand jury indicted defendant on one count each of possession with the intent to sell and deliver methamphetamine, heroin, and cocaine, as well as one count of maintaining a dwelling house for the sale of controlled substances. On 24 July 2017, the grand jury indicted defendant for having attained the status of an habitual felon.

Defendant's case came on for trial at the 18 September 2017 criminal session of Superior Court, Henderson County. In her trial testimony, Stepp testified that the yellow tin containing heroin, methamphetamine, and cocaine was her personal "hard time stash" and that she had not informed defendant or anyone else that she had placed the tin in the dresser drawer before Stepp left the group's house on 29 September 2016. When asked during her testimony if she realized that she was admitting to her own possession of controlled substances, Stepp responded, "Yes. Yes." On cross-examination, Stepp admitted to having used drugs with defendant, but denied that defendant had sold her any controlled substances. When asked again during her testimony about ownership of the drugs discovered in the dresser, Stepp reiterated "if it was in the tin, it was mine."

At the close of the State's evidence, defendant moved to dismiss the charges against him for possessing the controlled substances with the intent to manufacture, sell, and deliver them, and for maintaining a dwelling for the purpose of selling and using controlled substances. The trial court dismissed all charges against defendant except for the charge of simple possession of heroin, methamphetamine, and cocaine. During the jury charge conference, the State requested a jury instruction on the theory of acting in concert in addition to the constructive possession instruction that the trial court had already decided to give to the jury. Defendant objected to the acting in concert instruction; and the trial court denied defendant's request to refrain from giving the instruction. At the end of the jury charge conference, defendant renewed his objection to the acting in concert instruction, which the trial court again overruled. The trial court thereafter gave instructions to the jury on both constructive possession and acting in concert as legal theories underlying the drug possession charges.

The jury began its deliberations at 3:47 p.m. on the day that the case was submitted to it. At 4:02 p.m. of the same day, the trial court brought the jury back in to the courtroom to address a note sent by the foreperson to the trial court, asking for a transcript of Stepp's testimony. The trial court denied the jury's request, and the jury resumed its deliberations. A short time later, the jury returned to the courtroom at 4:30 p.m. in order to render its verdict. The jury found defendant guilty of simple possession of methamphetamine, heroin, and cocaine. The jury subsequently determined that defendant had attained the status of an habitual felon. In its judgment, the trial court imposed two consecutive sentences of 50 to 72 months of imprisonment. Defendant gave notice of appeal in open court to the Court of Appeals.

In the Court of Appeals, defendant raised several issues including, *inter alia*, that the trial court erred in instructing the jury, over defendant's objection, that the jury could find defendant guilty of possession of the controlled substances at issue on the theory of acting in concert in addition to the theory of constructive possession.[1] The Court of Appeals panel divided on this issue: the majority rejected defendant's contention that the evidence produced at trial was insufficient to support an instruction on acting in concert, *State v. Glover*, 267 N.C. App. 315, 320, 833 S.E.2d 203, 207 (2019), while the dissenting judge concluded both

1. Along with his appellate brief, defendant filed a motion for appropriate relief in the Court of Appeals on 7 September 2018. Matters pertaining to the motion for appropriate relief are not before the Court.

that the evidence was insufficient to support the instruction and that the erroneous instruction was not harmless error, thus entitling defendant to a new trial. *Id.* at 329, 833 S.E.2d at 213 (Collins, J., dissenting).

The entire Court of Appeals panel agreed on the pertinent case law applicable to the resolution of defendant's argument regarding the acting in concert jury instruction. "[I]t is error for the trial judge to charge on matters which materially affect the issues when they are not supported by the evidence." *State v. Jennings*, 276 N.C. 157, 161, 171 S.E.2d 447, 449 (1970). The charge at issue here was possession of drugs, which requires proof that the defendant knowingly possessed a controlled substance. *State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015). In turn,

> [w]here the state seeks to convict a defendant using the principle of concerted action, that this defendant did some act forming a part of the crime charged would be strong evidence that he was acting together with another who did other acts leading toward the crimes' commission. . . . It is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Joyner, 297 N.C. 349, 356–57, 255 S.E.2d 390, 395 (1979). Thus, in the case at bar, a jury instruction on possession of controlled substances under the theory of acting in concert was proper only if sufficient evidence was produced at defendant's trial showing that defendant acted together with Stepp pursuant to a common plan or purpose to possess the contraband found in the yellow tin. *See id.* at 356, 255 S.E.2d at 395.

In the view of the majority, in this case there

> was sufficient evidence from which the jury could have . . . determined that [d]efendant acted in concert to aid . . . Stepp's constructive possession of the controlled substances found in the metal tin. Specifically, [d]efendant called . . . Stepp, who testified that *she* placed the metal tin in the dresser in [d]efendant's personal space, that the drugs therein were *hers*, that she intended to come back later to use them, and that she and [d]efendant had taken

> drugs together in the past. This testimony is evidence that . . . Stepp possessed (constructively) the drugs in the metal tin. Further, based on . . . Stepp's testimony along with the State's evidence, the jury could have found that [d]efendant was aware of the presence of the drugs in the metal tin: (1) he admitted to the detective to having just used methamphetamine, and the only methamphetamine found in the house was in the metal tin; *and* (2) he admitted to the detective to having just ingested prescription pills, and a pill found in his bedroom matched a pill found in the metal tin. And the evidence was sufficient to support findings that (1) [d]efendant facilitated . . . Stepp's constructive possession by allowing her to keep her drugs in a place where they would be safe from others; (2) [d]efendant did not intend to exert control over the disposition of those remaining drugs, as they belonged to his friend, . . . Stepp, and that she controlled their disposition; and (3) [d]efendant was actually present when the drugs were in . . . Stepp's constructive possession.

Glover, 267 N.C. App. at 319–20, 833 S.E.2d at 207.

The dissenting judge on the Court of Appeals panel noted that

> [a]lthough [d]efendant was present when the narcotics were found in the dresser drawer, and was thus present at the scene of the crime, there is no evidence that [d]efendant was present when the tin containing the narcotics was placed in the dresser drawer. Moreover, . . . Stepp admitted on the stand to her possession of the narcotics. . . . Stepp testified that the tin was hers and that the last place she had it was at Southbrook Drive, where she and [d]efendant used to live amongst other people. When asked where she last left the tin, . . . Stepp answered,
>
> > I put it inside a drawer. I want to say I tried to put something over it. But I didn't intend—I wasn't there. I wasn't arrest[ed] that day, because I had just left. I didn't intend to be gone long. But I didn't get back as quickly as I would like to, and I didn't tell anybody it was there, because I didn't think it was relevant.

Id. at 331, 833 S.E.2d at 214 (Collins, J., dissenting). The dissenting judge opined that the jury instruction on acting in concert was erroneous

because the dissenter could discern no evidentiary support for the majority's conclusion that defendant facilitated Stepp's constructive possession by allowing her to keep her drugs in a place where they would be safe from others, surmising that "the acting in concert theory of possession has become confused with the constructive theory of possession in this case, which is precisely why the acting in concert theory is not generally applicable to possession offenses." *Id.* at 331–32, 833 S.E.2d at 214 (Collins, J., dissenting) (extraneity omitted). Citing our recent decision in *State v. Malachi*, 371 N.C. 719, 821 S.E.2d 407 (2018), the dissent then conducted a harmless error analysis, under which a defendant bears the burden of demonstrating that "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." N.C.G.S. § 15A-1443(a) (2019). Because "the evidence of [d]efendant's constructive possession was not exceedingly strong" and because "Stepp admitted to possession of the controlled substances," the dissenting judge concluded that "there is certainly a 'reasonable possibility' that the jury elected to convict [d]efendant on the basis of the unsupported legal theory of acting in concert to possess the controlled substances." *Glover*, 267 N.C. App. at 333, 833 S.E.2d at at 215 (Collins, J., dissenting). For this reason, the dissent would have vacated defendant's convictions and remanded the matter to the trial court for a new trial. *Id.* (Collins, J., dissenting). On 8 October 2019, defendant filed notice of appeal to this Court on the basis of the dissent.

Analysis

[1] A jury charge serves several critical purposes: "clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence." *State v. Jackson*, 228 N.C. 656, 658, 46 S.E.2d 858, 859 (1948). As such, "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). In the present case, the jury was instructed that it could find defendant guilty of possessing the controlled substances in the yellow tin under the theory of constructive possession or the theory of acting in concert.

"Constructive possession of contraband material exists when there is no actual personal dominion over the material, but there is an intent and capability to maintain control and dominion over it." *State v. Brown*, 310 N.C. 563, 568, 313 S.E.2d 585, 588 (1984). "Although it is not necessary to show that an accused has exclusive possession of the premises where contraband is found, where possession of the premises

is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *Id.* at 569, 313 S.E.2d at 589. As noted in both the majority and the dissenting opinions of the Court of Appeals in this matter, in order to support a jury instruction on the theory of acting in concert, mere presence at the scene of a crime—a fact undisputed in the case at bar—is insufficient; the State must also produce evidence that the defendant acted together with another who did the acts necessary to constitute the crime *pursuant to a common plan or purpose to commit the crime*. *Joyner*, 297 N.C. at 356–57, 255 S.E.2d at 395; *see also State v. Wilkerson*, 363 N.C. 382, 424, 683 S.E.2d 174, 200 (2009).

All of the judges on the panel of the lower appellate court agreed that sufficient evidence supported a jury instruction on constructive possession by defendant of the drugs in the yellow tin. In the view of the Court of Appeals majority, the evidence presented at defendant's trial also supported a conclusion that defendant did not intend to exercise control over the contents of Stepp's "hard time stash," but that he did "facilitate[ ] . . . Stepp's constructive possession by allowing her to keep her drugs in a place where they would be safe from others." *Glover*, 267 N.C. App. at 320, 833 S.E.2d at 207. Upon our careful review of the evidence presented at trial, we agree with the view of the Court of Appeals dissent that there was no evidence that defendant acted together with Stepp pursuant to any common plan or purpose regarding the controlled substances in the yellow tin; therefore, the trial court erred in giving a jury instruction on the theory of acting in concert. The evidence at trial tended to show that the yellow tin containing illegal drugs and drug paraphernalia was discovered in a dresser drawer in an area of a shared home that defendant considered his "personal area." Although this fact could indicate defendant's "capability to maintain control and dominion over" the tin, *Brown*, 310 N.C. at 568, 313 S.E.2d at 588, and thereby support the theory of constructive possession, nonetheless the location of the tin, standing alone, does not shed light on any common plan or purpose which was devised between defendant and Stepp regarding the controlled substances in the yellow tin. Likewise, while the testimonial detail that a pill was discovered in defendant's bedroom that was similar to pills found in the yellow tin could suggest that defendant had obtained the pill from the tin at issue, this circumstance would indicate, at most, defendant's intent and capability to control the drugs in the tin—again, constructive possession—instead of a common plan or purpose in which defendant acted in concert with Stepp to protect her "hard time stash." Defendant acknowledged both having used illegal drugs on the day of the search and having used such drugs with Stepp in the past.

While these admissions could potentially serve as "other incriminating circumstances" under a theory of constructive possession, *id.* at 569, 313 S.E.2d at 589, neither of them demonstrates the existence of a common plan or purpose between defendant and Stepp to possess the controlled substances in the yellow tin.

Lastly, with regard to the evidence adduced at trial, defendant denied any knowledge that the tin was in the dresser in his personal area. Consistent with defendant's unequivocal denial, Stepp testified that the yellow tin and its contents were hers alone and that she had not told defendant that she had placed the tin in the dresser drawer shortly before the search by law enforcement officers took place. This evidence does not support either of the theories of defendant's guilt presented by the State of constructive possession of the drugs by defendant or acting in concert with Stepp pursuant to a common plan or purpose. Therefore, in reviewing all of the evidence at trial and determining the jury instructions which were correctly available for the trial court to deliver to the jury here, only a jury instruction premised on the theory of constructive possession properly qualifies, because the evidence is insufficient to support a jury instruction of acting in concert. *State v. Hargett*, 255 N.C. 412, 415, 121 S.E.2d 589, 592 (1961) (holding that instructing the jury on aiding and abetting was error where the evidence at trial did not show that the defendant aided another person in committing the crime, but rather showed that the defendant "was either guilty as the perpetrator or not guilty at all"). Accordingly, we agree with the dissenting judge of the Court of Appeals on this issue of the trial court's erroneous jury instruction on defendant's criminal culpability on the theory of acting in concert. In doing so, we find plausibility in the dissent's view that the ability to conflate the theory of acting in concert and the theory of constructive possession with facts such as those presented in this case is tenable, as this confusion appears to plague the dissenting opinion of this Court.

[2] We next consider whether the trial court's error was harmless; that is, whether there is a reasonable possibility that, absent the erroneous instruction, the jury would have reached a different verdict. N.C.G.S. § 15A-1443(a); *Malachi*, 371 N.C. at 738, 821 S.E.2d at 421. In this Court's decision in *Malachi*, we emphasized that instructional errors like the one in the instant case are "exceedingly serious" and require "close scrutiny" to ensure that "there is no 'reasonable possibility' that the jury convicted the defendant on the basis of such an unsupported legal theory." 371 N.C. at 738, 821 S.E.2d at 421. Here, the heightened scrutiny referenced in *Malachi* is particularly important in light of the inherent

likelihood of potential confusion between the theories of constructive possession and possession by acting in concert. *See*, *e.g.*, *State v. Diaz*, 155 N.C. App. 307, 314, 575 S.E.2d 523, 528 (2002) ("The acting in concert theory is not generally applicable to possession offenses, as it tends to become confused with other theories of guilt."); *State v. Cotton*, 102 N.C. App. 93, 97–98, 401 S.E.2d 376, 379–80 (1991) ("An acting in concert theory is not generally applied to possession offenses, as it tends to confuse the issues."); *State v. James*, 81 N.C. App. 91, 97, 344 S.E.2d 77, 81 (1986) ("We note that the acting in concert theory has not been frequently applied to possession offenses, as it tends to become confused with other theories of guilt.").

As we discussed upon determining the erroneous nature of the employment of the instruction on acting in concert here, there was some evidence at trial that would permit a jury to find defendant guilty under a theory of constructive possession: the yellow tin was secreted in an area of the shared home that defendant considered his personal area, defendant had a pill in his bedroom that was similar to pills found in the tin, and defendant admitted to being a user of at least one of the types of controlled substances found in the tin. On the other hand, there was also the trial evidence that defendant denied any knowledge of the yellow tin or its location in the dresser in his personal area, Stepp consistently admitted that the yellow tin contained her "hard time stash," Stepp placed the tin and its illegal contents in the dresser drawer shortly before the tin's discovery, and Stepp had not told defendant of the tin's placement by her in defendant's "personal space." In *Malachi*, we observed that

> in the event that *the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions*, it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory.

Malachi, 371 N.C. at 738, 821 S.E.2d at 421 (emphasis added). Here, the State's evidence supporting the theory of constructive possession was both "in dispute" and "subject to serious credibility-related questions" and, while certainly sufficient to warrant a jury instruction, was controverted and not "exceedingly strong." *Id.* Given this circumstance, coupled with the recognized prospect of confusion presented by proceeding upon the theory of possession by acting in concert in conjunction with the theory of constructive possession, we conclude that there is a "reasonable possibility that, had the [trial court not instructed on acting

in concert], a different result would have been reached." As a result, we also agree with the dissenting position of the lower appellate court in evaluating the extent of the trial court's error.

Conclusion

In light of our determination that the trial court committed prejudicial error in its instruction to the jury on the theory of acting in concert as a basis upon which to find defendant guilty, we reverse the decision of the Court of Appeals, vacate defendant's convictions and resulting judgments against him, and determine that defendant is entitled to a new trial.

REVERSED.

Justice NEWBY dissenting.

The evidence must be viewed in the light most favorable to the State when considering whether it was sufficient to warrant a jury instruction, much like when reviewing a motion to dismiss based on the sufficiency of the evidence. *See State v. Taylor*, 337 N.C. 597, 608, 447 S.E.2d 360, 367–68 (1994) (considering the evidence in the light most favorable to the State when reviewing whether an acting-in-concert instruction was supported by the evidence). Under a sufficiency of the evidence standard, "the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982).

Here the majority does not consider the evidence in the light most favorable to the State but rather relies on Ms. Stepp's statements of exclusive ownership. By doing so, it singles out certain evidence for consideration rather than reviewing the totality of the evidence, including that defendant admitted to having just used the specific drugs that were later found only in the yellow tin, under the proper standard. Considering Ms. Stepp's statements in the light most favorable to the State, I agree with the Court of Appeals that there

> was sufficient evidence from which the jury could have . . . determined that [d]efendant acted in concert to aid Ms. Stepp's constructive possession of the controlled substances found in the metal tin. Specifically, [d]efendant called Ms. Stepp, who testified that she placed the metal

> tin in the dresser in [d]efendant's personal space, that the drugs therein were hers, that she intended to come back later to use them, and that she and [d]efendant had taken drugs together in the past. This testimony is evidence that Ms. Stepp possessed (constructively) the drugs in the metal tin. Further, based on Ms. Stepp's testimony along with the State's evidence, the jury could have found that [d]efendant was aware of the presence of the drugs in the metal tin: (1) he admitted to the detective to having just used methamphetamine, and the only methamphetamine found in the house was in the metal tin; and (2) he admitted to the detective to having just ingested prescription pills, and a pill found in his bedroom matched a pill found in the metal tin. And the evidence was sufficient to support findings that (1) [d]efendant facilitated Ms. Stepp's constructive possession by allowing her to keep her drugs in a place where they would be safe from others; (2) [d]efendant did not intend to exert control over the disposition of those remaining drugs, as they belonged to his friend, Ms. Stepp, and that she controlled their disposition; and (3) [d]efendant was actually present when the drugs were in Ms. Stepp's constructive possession.

State v. Glover, 267 N.C. App. 315, 319–20, 833 S.E.2d 203, 207 (2019). The jury could reasonably find from the evidence presented that a common plan or purpose existed between defendant and Ms. Stepp to possess the controlled substances in the yellow tin. When viewed in the light most favorable to the State, the evidence presented was sufficient to support the trial court's instruction; the jury resolves any contradictions and discrepancies in the evidence. Thus, the trial court properly instructed the jury on the theory of possession by acting in concert. Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JACK HOWARD HOLLARS

No. 324A19

Filed 18 December 2020

Constitutional Law—due process—competency to stand trial—mental illness—duty to conduct a competency hearing sua sponte

In a prosecution for various sexual offenses, substantial evidence existed creating a bona fide doubt as to defendant's competency to stand trial, and therefore the trial court's failure to conduct a competency hearing sua sponte violated defendant's due process rights. Specifically, in addition to a lengthy history of mental illness (including periods of incompetence to stand trial), a five-month gap between trial and defendant's last competency hearing, and warnings from physicians that defendant's mental health could deteriorate, defense counsel expressed concerns on the third day of trial about defendant's competency because defendant suddenly did not know what was going on and seemingly did not know who defense counsel was.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 266 N.C. App. 534, 833 S.E.2d 5 (2019), remanding the case for a hearing on defendant's competency based on judgments entered on 12 January 2018 by Judge William H. Coward in Superior Court, Watauga County. Heard in the Supreme Court on 31 August 2020.

Joshua H. Stein, *Attorney General*, *by Matthew W. Sawchak*, *Solicitor General*,[1] *Ryan Y. Park*, *Deputy Solicitor General*, *and Nicholas S. Brod*, *Assistant Solicitor General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Anne M. Gomez*, *Assistant Appellate Defender*, *for defendant-appellee.*

1. On 30 March 2020, we allowed a motion by Matthew W. Sawchak to withdraw as counsel for the State of North Carolina.

MORGAN, Justice.

Defendant was arrested on 10 February 2012 for allegedly sexually assaulting his stepdaughter for a period consisting of the late 1970s and early 1980s. He was brought to trial on 8 January 2018 for three counts each of second-degree sexual offense and taking indecent liberties with a child following almost six years of fluctuating determinations of defendant's competency to stand trial. At the end of the third day of the trial, defense counsel apprised the trial court of a brief conversation which the attorney had just had with defendant and, based on concerns that the exchange raised with defense counsel, he asked the trial court to inquire into defendant's competency. No inquiry of defendant was performed by the trial court at the time, the trial was recessed for the day shortly thereafter, and the trial court stated that the matter would be addressed on the next morning. During the inception of the trial proceedings on the following day and upon the trial court's inquiry to defense counsel about any more information or arguments about defendant's capacity, defense counsel replied that there were no existing concerns. The trial resumed, and upon its conclusion, the jury returned verdicts of guilty on all six charges on 12 January 2018. Defendant appealed to the Court of Appeals, arguing that the events on the third day of trial combined with defendant's lengthy history of mental illness, which included periods of incompetence to stand trial, created a duty upon the trial court to inquire sua sponte into the competency of defendant to stand trial. *See State v. Hollars*, 266 N.C. App. 534, 537–38, 833 S.E.2d 5, 7–8 (2019). The Court of Appeals held that substantial evidence existed before the trial court to create a bona fide doubt as to defendant's competency, and therefore the trial court's failure to make inquiry into defendant's competency at trial violated his due-process rights. *Id.* at 542, 833 S.E.2d at 10. The State appeals to our Court based on the dissent of a member of the Court of Appeals panel in which the dissenting judge opined that there was no bona fide doubt as to defendant's competency, and therefore defendant's due-process rights were not implicated by the trial court's lack of inquiry into the matter. *See id.* at 545, 833 S.E.2d at 11–12 (Berger, J., dissenting). We agree with the conclusion of the Court of Appeals majority that substantial evidence existed so as to create a bona fide doubt about defendant's competency. As a result, we affirm the decision of the lower appellate court which includes remanding the matter to the trial court pursuant to the instructions contained within the Court of Appeals majority opinion.

Factual and Procedural Background

In January 2012, the alleged victim in this case—a female minor—reported to the Watauga County Sheriff's Office that for a period of time spanning the late 1970s and early 1980s, when she was between twelve and fifteen years of age, defendant sexually assaulted the minor on virtually a weekly basis. Defendant was initially arrested and charged with a single count of statutory sexual offense on 10 February 2012. Subsequently, a grand jury indicted defendant on three counts of second-degree sexual offense and three counts of taking indecent liberties with a child. Following his arrest, defendant initially waived his right to court-appointed counsel at his first appearance on 23 February 2012, but the trial court nevertheless appointed counsel to defendant two months later, citing its observation that defendant was unresponsive to questioning by the trial court at defendant's probable cause hearing on 23 April 2012. Defendant's appointed counsel met with defendant while defendant was in custody in the Watauga County Jail on 1 May 2012. Defense counsel reported to the trial court three days later that defendant had presented a scattered and random thought process and had made multiple paranoid statements concerning God and the effects of exposure to chemicals on his brain during defendant's tenure in the Marine Corps. On 4 May 2012, the trial court ordered Daymark Recovery Services to complete a forensic evaluation of defendant to determine his competency to stand trial. This assessment of defendant became the first in a series of seven evaluations which are pertinent to this appeal.[2]

Dr. Hawkinson with Daymark Recovery Services completed his evaluation report on 9 May 2012, which noted that defendant appeared "psychotic and delusional" with a "limited ability to cooperate in even basic discussion of his case." Based on his observations, Dr. Hawkinson concluded that defendant was incompetent to stand trial. Following the receipt and review of the Hawkinson 5/9/2012 report, the trial court ordered that defendant be committed to the custody of Central Regional Hospital in Butner, North Carolina, or another designated facility for further evaluation and safekeeping. Once in the custody of Central Regional Hospital, another competency evaluation report was authored by Dr. Bartholomew on 9 August 2012. While the Bartholomew 8/9/2012 report agreed with the Hawkinson 5/9/2012 report that defendant was incompetent to proceed to trial, Dr. Bartholomew also noted that defendant "may

2. In order to facilitate ease of reading and for reference to each of the competency evaluations, this opinion refers to each evaluation by the healthcare provider who completed the evaluation and the date upon which the evaluation report is signed by the provider.

gain capacity if he receives mental health treatment." Upon review of the Bartholomew 8/9/2012 report, the trial court entered an order finding defendant incapable to proceed and ordered defendant to be committed to Broughton Hospital in Morganton, North Carolina.

During his time at Broughton Hospital, defendant responded well to his provider's efforts to have defendant engage in mental health treatment, medication, and vocational occupations like exercise classes and work duties. Seven months after defendant's commitment to Broughton Hospital, Dr. Bartholomew again evaluated defendant for his capacity to stand trial and detailed the results of the evaluation in a report dated 14 May 2013. The Bartholomew 5/14/2013 report concluded that, due in part to defendant's adherence to a medication regimen, defendant "demonstrated an adequate understanding of the nature of criminal legal processes" and was "able to assist in his defense in a rational and reasonable manner." Dr. Bartholomew considered defendant to be capable to proceed to trial at this juncture. On 3 September 2013, a Watauga County grand jury handed down a first set of indictments, charging defendant with four counts each of statutory sex offense and taking indecent liberties with a child; correspondingly, the trial court appointed new trial counsel to represent defendant. Superseding indictments were issued on 4 May 2015 which charged defendant with three counts each of second-degree sexual offense and taking indecent liberties with a child.

On 15 December 2014, defendant was transported from Broughton Hospital to the Watauga County Jail to discuss a plea offer with his appointed counsel. While defendant first appeared to understand his circumstances in his initial discussions with counsel upon defendant's arrival at the jail, defense counsel noted that when he met with defendant on the following day and defendant was "unable to discuss plea or trial options and insisted his millionaire sister would spend thousands" on his defense, despite the fact that defendant had no sisters with such resources. Defense counsel relayed this information to the trial court in open court on 2 March 2015, upon which the trial court granted the request of defense counsel for another competency evaluation of defendant. Pursuant to the trial court's order, Dr. Bartholomew conducted another evaluation of defendant. Dr. Bartholomew's report of 14 April 2015 again concluded that defendant was competent to proceed to trial, while explaining that defendant's confusing statements at the Watauga County Jail were likely attributable to a temporary decomposition of his mental faculties due to the change in his sleeping arrangements. However, Dr. Bartholomew predicated his determination that defendant was competent to stand trial at the time that Dr. Bartholomew signed

the Bartholomew 4/14/15 report on two caveats: first, Dr. Bartholomew advised that defendant should be housed at Broughton Hospital and transported to court each day for the duration of the trial in order to prevent a similar change in mental state as witnessed by defense counsel in December 2014; and second, Dr. Bartholomew noted that defendant's "condition may deteriorate with the stress of trial so vigilance is suggested if his case proceeds to trial."

Dr. Bartholomew testified about the predications and conclusions in his report at a competency hearing held by the trial court on 5 May 2015. At the close of the hearing, the trial court acknowledged Dr. Bartholomew's determination of defendant's competency but advised that the conditions asserted in the Bartholomew 4/14/2015 report required "the [c]ourt to give [defendant] special treatment which is not normally considered in other criminal actions." Concerned about the conditional nature of Dr. Bartholomew's determination of defendant's competency, on 27 July 2015 the trial court ordered an additional independent forensic evaluation to be completed by Dr. Bellard. Following his completion of an evaluation of defendant which was conducted pursuant to the trial court's order, Dr. Bellard issued a report on 4 November 2015 in which the examiner concluded that, while defendant experienced improved mental capacity while housed at Broughton Hospital, defendant's "difficulty relating to defense counsel" and general inability to tolerate the stress of waiting for trial rendered defendant incompetent to stand trial. Dr. Bellard also chronicled that defendant had recently had the antipsychotic medications prescribed to him by defendant's providers at Broughton Hospital cut in half and opined that defendant "could improve to a position where he was competent to stand trial if the medications were taken back" to their original levels. In accepting the report of Dr. Bellard, the trial court instructed defense counsel to prepare an order to be entered which found defendant to lack capacity to stand trial.

During his continued commitment at Broughton Hospital, defendant was evaluated by Dr. Bartholomew on two more occasions, once in December 2016 and once in August 2017. Citing the success of defendant's continued treatment, Dr. Bartholomew concluded in a report dated 8 December 2016 that defendant was capable of proceeding to trial and assisting in his own defense. Dr. Bartholomew was joined by Dr. Utterback in conducting a final evaluation of defendant in August 2017. In their joint report dated 24 August 2017, Dr. Bartholomew and Dr. Utterback advised that "given the stability of [defendant's] mental status and functioning for the last year or more at Broughton Hospital,

we believe it is reasonable to assume he will maintain this functioning in the foreseeable future and during trial." Thus, Dr. Bartholomew and Dr. Utterback concluded that defendant was capable of proceeding to trial. At a competency hearing held on 5 September 2017, the State proffered to the trial court for consideration this final report jointly generated by Dr. Bartholomew and Dr. Utterback and advised the trial court that Dr. Bartholomew was in the courtroom and available to be called as a witness if necessary. Defense counsel concurred with the State that defendant was capable of proceeding to trial at that point, adding that defense counsel's agreement was due in part to a conference with Dr. Bellard earlier on the morning of the hearing. According to defense counsel, Dr. Bellard had reported to the courtroom for the competency hearing, had engaged in dialogue with defendant prior to the hearing's commencement, and had advised defense counsel that he agreed with the determination by Dr. Bartholomew and Dr. Utterback that defendant had the capacity to proceed on 5 September 2017.

The trial court reviewed the Bartholomew and Utterback 8/24/2017 report before finding that defendant was competent to stand trial and before setting defendant's trial date for 2 October 2017. Four days before the trial was scheduled to begin, however, defense counsel filed a motion to continue the trial because a recent death in the attorney's family necessitated his presence in another state on the date of the trial. More than four months passed between the last discussion of defendant's competency to stand trial and the first day of defendant's rescheduled trial on 8 January 2018. In the meantime, defense counsel filed several pretrial motions which referenced defendant's complex and fluctuating mental health history.

The trial proceedings began with a hearing on several of defendant's pretrial motions on 8 January 2018; the State called its first witness to render testimony at the trial on the afternoon of 10 January 2018. The State's first witness was the alleged victim. She testified about the first episodes of sexual abuse that she alleged that defendant committed upon her. Defense counsel lodged an objection to this testimony, arguing that the acts to which the alleged victim was testifying fell outside of the offense date ranges of the indictments. Outside of the presence of the jury, the trial court discussed with the parties the prospect that the alleged victim's testimony could be treated as "404(b) evidence," referring to Rule 404(b) of the North Carolina Rules of Evidence which governs circumstances concerning the admissibility or inadmissibility of other crimes, wrongs, or acts committed by the defendant. N.C. R. Evid. 404(b) (2019).

Upon its completion of the discussion of the cited evidentiary rule with the parties, the trial court brought the jurors back into the courtroom and administered a Rule 404(b) instruction before allowing the State to continue with its direct examination of the victim. Just before 5:00 p.m. on the afternoon of 10 January 2018, defense counsel made another objection to the alleged victim's testimony. The trial court sustained the objection before deciding to recess the proceedings for the evening. The trial court then instructed the State and defense counsel to be prepared to discuss the Rule 404(b) evidence issue on the following morning. The trial court recessed at 5:03 p.m. before coming back on the record less than a minute later. At that time, defense counsel advised the trial court of the following:

> Your Honor, . . . I just had a brief conversation with [defendant] during which I began to have some concerns about his capacity and I would ask the Court to address him regarding that.
>
> . . . .
>
> . . . I've been asking him how he's doing and if he knows what's going on. And up until just now he's been able to tell me what's been going on. He just told me just a few minutes ago that he didn't know what was going on.

The trial court responded that "when we start throwing around [Rule] 404(b) and [Rule] 403, you'd have to have graduated from law school to have any inkling of what we're talking about." The trial court then asked defense counsel for further specificity as to his concerns. In response, defense counsel reiterated the following:

> I asked him if he understood what was going on. He said, no, he didn't know what she was talking about. And that has not been the way he has been responding throughout this event, either yesterday or earlier today. And in light of the history with him, I just want to make sure. I just—I feel we need to make sure. And I'm not asking for an evaluation. I would just ask for the Court to query him quickly to make sure that I'm just not—make sure I'm seeing something that is not there.

The trial court decided to address this matter as well on the following morning, surmising that the source of defendant's confusion was the previous discussion of the potential Rule 404(b) evidence. The trial court conjectured that "[w]e could take a poll around here of non-lawyers

and see if they understood [Rule 404(b)]. I doubt many of them would." The trial court stated that if it determined in the morning that defendant understood what was happening during the trial, "then I would say that the capacity situation hasn't changed any." Upon the resumption of court proceedings on the following morning on 11 January 2018, the trial court did not address defendant directly as defense counsel had requested toward the end of the previous day's trial session; instead, the trial court queried defense counsel as to whether defense counsel had "any more information or arguments" that he wanted to make concerning defendant's capacity. Defense counsel responded with the following:

> No, Your Honor. When he came in this morning he greeted me like he has other mornings. I interacted with him briefly and he interacted like he has been interacting every morning. And I've not had any questions about his capacity this morning. I just had some yesterday evening because he kind of looked at me and the look in his face was like he had no idea who I was.

The trial court once again associated defendant's expressed confusion and vacant expression which concerned defense counsel on the previous day with the discussion between the trial court and the parties regarding the Rule 404(b) evidence. The trial court stated "[y]eah, well, any time you get to—like I said, any time you get to talking about [Rule] 404(b) and [Rule] 403 everybody in the courtroom is going to look like that." The trial court then allowed the State to resume the presentation of its case-in-chief without further inquiry into defendant's capacity to proceed.

On 12 January 2018, the jury returned verdicts of guilty on three counts of taking indecent liberties with a child and three counts of second-degree sexual offense. The trial court sentenced defendant to a total of 150 years in prison: ten years for each offense of taking indecent liberties with a child and forty years for each offense of second-degree sexual offense, with the terms of incarceration to run consecutive to one another. Defendant appealed to the Court of Appeals.

A majority of the Court of Appeals panel agreed with defendant's contention, as framed in the lower appellate court's opinion, that "the trial court erred by failing to conduct *sua sponte* a competency hearing either immediately before or during the trial because substantial evidence existed before the trial court that indicated [d]efendant may have been incompetent." *Hollars*, 266 N.C. App. at 541, 833 S.E.2d at 9. The Court of Appeals majority summarized its reasons for concluding

that "the trial court was presented with substantial evidence raising a bona fide doubt as to [d]efendant's competency to stand trial" in the following manner:

> In light of [d]efendant's extensive history of mental illness, including schizophrenia, schizoaffective disorder, bipolar disorder, and mild neurocognitive disorder, his seven prior forensic evaluations with divergent findings on his competency, the five-month gap between his competency hearing and his trial, the concerns expressed by physicians and other trial judges about the potential for [d]efendant to deteriorate during trial and warning of the need for vigilance, the concerns his counsel raised to the trial court regarding his conduct and demeanor on the third day of trial, and the fact that the trial court never had an extended colloquy with [d]efendant, we conclude substantial evidence existed before the trial court that raised a bona fide doubt as to [d]efendant's competency to stand trial. Therefore, the trial court erred in failing to institute *sua sponte* a competency hearing for [d]efendant.

Id. at 542–43, 833 S.E.2d at 10–11.

With this outcome, the majority decided that the appropriate remedy here would be to "remand to the trial court for a determination of whether a meaningful retrospective hearing can be conducted on the issue of [d]efendant's competency at the time of his trial." *Id.* at 544, 833 S.E.2d at 11. As guidance to the trial court regarding the focus and the direction of the proceedings upon remand, the Court of Appeals instructed that

> if the trial court concludes that a retrospective determination is still possible, a competency hearing will be held, and if the conclusion is that the defendant was competent, no new trial will be required. If the trial court determines that a meaningful hearing is no longer possible, defendant's conviction must be reversed and a new trial may be granted when he is competent to stand trial.

Id. (quoting *State v. McRae*, 139 N.C. App. 387, 392, 533 S.E.2d 557, 561 (2000)).

The dissenting judge of the Court of Appeals panel viewed the issues of the case in the following regard:

> There was no *bona fide* doubt as to [d]efendant's competence to stand trial, and there was not substantial evidence before the trial court that [d]efendant was incompetent. Thus, the trial court did not err when it began [d]efendant's trial, and proceeded with the trial, without undertaking another competency hearing . . . .

Id. at 545, 833 S.E.2d at 11–12 (Berger, J., dissenting). Specifically, the dissenting judge opined that the record did not contain any evidence "of irrational behavior or change in demeanor by [d]efendant at trial." *Id.* at 545, 833 S.E.2d at 12 (Berger, J., dissenting). The dissenting judge considered the examiners' opinions that were contained in the evaluation reports, that the stability of defendant's mental status and functioning would be maintained in the foreseeable future and during a trial, were sufficient to indicate there was "nothing in the record that would have required the trial court to conduct another pre-trial hearing." *Id.* at 547, 833 S.E.2d at 13 (Berger, J., dissenting). As for the majority's determination that, as described in the dissenting opinion, "the trial court erred by failing to intervene *sua sponte* following an exchange between defense counsel and the trial court," *id.*, the dissenting judge disagreed by noting that "[t]he 'brief conversation' by [d]efendant and defense counsel [during trial on 10 January 2018] did not produce '*substantial evidence before the court* indicating that the accused may be mentally incompetent' " because "there was [a] very real probability that [d]efendant did not understand the intricacies of 404(b) testimony, and that he had in fact heard and understood the victim's testimony," *id.* at 550, 833 S.E.2d at 15 (Berger, J., dissenting). The dissenting judge concluded that there was no bona fide doubt as to defendant's competence, that there was not substantial evidence before the trial court that defendant was incompetent, and that the trial court did not err when it began defendant's trial and proceeded with the trial without undertaking another competency hearing. *Id.* at 551, 833 S.E.2d at 15 (Berger, J., dissenting).

The State's appeal of the decision of the Court of Appeals majority in this case brings the matter to us for consideration.

Analysis

The Due Process Clause of the Constitution of the United States shields criminal defendants who are incompetent to stand trial for charges levied against them by the State from being compelled to do so while they remain incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). In order to possess the competence necessary to stand trial, a defendant must have the "capacity to understand the nature and object

of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). While "a competency determination is necessary only when a court has reason to doubt the defendant's competence," *Godinez v. Moran*, 509 U.S. 389, 401 n.13 (1993), North Carolina criminal courts have a "constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (quoting *State v. King*, 353 N.C. 457, 467, 546 S.E.2d 575, 585 (2001)).

Substantial evidence which establishes a bona fide doubt as to a defendant's competency may be established by considering "a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." *Drope*, 420 U.S. at 180. While this Court has determined that some evidence of mental health treatment for issues unrelated to the defendant's competency does not constitute the substantial evidence necessary to trigger the trial court's duty to hold a competency hearing, *King*, 353 N.C. at 467, 546 S.E.2d at 585, the presence of any one of the factors cited above from *Drope* has the potential to give rise to a bona fide doubt as to the defendant's competency in some circumstances. *See Drope*, 420 U.S. at 180. Regardless of the circumstances that constitute substantial evidence of a defendant's incompetence, the relevant period of time for judging a defendant's competence to stand trial is "at the time of trial." *State v. Cooper*, 286 N.C. 549, 565, 213 S.E.2d 305, 316 (1975), *overruled in part on other grounds by State v. Leonard*, 300 N.C. 223, 266 S.E.2d 631 (1980). As a result, the trial court must remain on guard over a defendant's competency; even when the defendant is deemed competent to stand trial at the commencement of the proceedings, circumstances may arise during trial "suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope*, 420 U.S. at 181.

The State argues that following the trial court's determination that defendant was competent to stand trial at the 5 September 2017 competency hearing, defendant presented no substantial evidence raising a bona fide doubt as to his competency. Thus, the State contends that the trial court's determination which was made four months prior to trial that defendant was competent to stand trial served to suppress any duty on the part of the trial court to conduct another competency hearing either immediately preceding the start of the trial or after the events of the trial's third day. The Court of Appeals majority disagreed with this argument, opining that "[g]iven the temporal nature of [d]efendant's

mental illness, the appropriate time to conduct a competency hearing was immediately prior to trial." *Hollars*, 266 N.C. App. at 542, 833 S.E.2d at 10. The lower appellate court found it "significant" that "[d]efendant's prior medical records disclosed numerous concerns about the potential for [d]efendant's mental stability to drastically deteriorate over a brief period of time and with the stress of trial." *Id.* Consequently, the lapse of several months between the trial court's 5 September 2017 determination of defendant's competency to stand trial and the 8 January 2018 inception of defendant's trial required the conduction of another competency hearing immediately before trial. *Id.* at 542–43, 833 S.E.2d at 10. The Court of Appeals characterized the events of the afternoon of the trial's third day and the morning of the trial's fourth day as "additional support for this conclusion" because the basis for defendant's expressed confusion which was also detected and confirmed by defense counsel operated to reinforce the need for vigilance on the part of the trial court. *Id.* at 543, 833 S.E.2d at 10–11.

Adherence to the principles espoused by the Supreme Court of the United States in its decisions rendered in *Cooper*, *Godinez*, and the progenitor case *Drope*, along with our Court's precedent established in *Badgett*, *King*, and *Cooper*, support the determinations reached by the Court of Appeals in the present case. Although the trial court was required to initiate an inquiry into the competency of defendant to stand trial only in the event that there was reason to doubt the accused's competency, there was substantial evidence existent before the trial court which indicated that defendant might be mentally incompetent to stand trial. We have already recounted the panoply of matters and circumstances which the majority of the lower appellate court properly considered in concluding that there was a sufficient amount of evidence—contrary to the dissenting judge's view—to constitute a bona fide doubt concerning defendant's competency to stand trial. Therefore, the trial court was obligated to protect the due-process rights of defendant by initiating, *sua sponte*, a competency hearing in order to ensure that defendant possessed the capacity to understand the nature and object of the proceedings against him, to consult with his counsel, and to assist in the preparation of his defense.

Even assuming, *arguendo*, that the State's contention bears some merit that there was not substantial evidence existent at the outset of the trial that raised a bona fide doubt concerning defendant's competency due to the "near-dispositive weight" which the Court of Appeals gave to "three psychiatric evaluations that found [defendant] incompetent" and that "the court's reliance on outdated evaluations caused it to overlook

more recent, probative record evidence that refuted any need to hold another competency hearing before the trial" which included "evidence from three different psychiatrists, who unanimously agreed that [defendant] was competent . . . [and a]n evaluation admitted at the [same 5 September 2017] hearing also stated that [defendant] was likely to maintain his competency throughout the trial," this depiction by the State of defendant's perceived competency to proceed at the outset of the trial is significantly eroded by the occurrences which transpired on the third day of the trial. Despite defense counsel's unequivocal concerns on the trial's third day about defendant's capacity, defense counsel's articulated basis for these concerns which centered upon defendant's representation that defendant "didn't know what was going on" after being able to tell defense counsel just prior to that juncture "what's been going on," and "in light of the history with him," the trial court refrained from conducting a competency hearing even after defense counsel's recapitulation of his concern, which was described to the trial court on the next day of trial, that during the transpiration of events on the trial's previous day, "the look in [defendant's] face was like [defendant] had no idea who [defense counsel] was." While the State and the dissenting judge below attribute defendant's apparent confusion, as did the trial court, to defendant's unfamiliarity with the intricacies of the admissibility or inadmissibility into evidence of other crimes, wrongs, or acts committed by him, nonetheless, such a potentially logical explanation for the apparent confusion of a defendant who has a documented history of mental illness and resulting multiple determinations of an incapacity to stand trial must yield to the necessity of the criminal justice system to ensure that a defendant's due-process rights are protected from a demand to stand trial at a time when the defendant is incompetent. To this end, under the facts and circumstances presented in the instant case, we hold that the trial court committed prejudicial error by failing to conduct a competency hearing for defendant in light of the existence of substantial evidence which was sufficient to raise a bona fide doubt regarding defendant's competency to stand trial.

Conclusion

Based upon the foregoing statements, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice NEWBY dissenting.

This case asks whether the trial court was presented with substantial evidence that defendant was incompetent such that it was required to hold a competency hearing during trial. Defense counsel had a history of interacting with his client and was in the best position to assess his client's competency. While initially raising a concern, defense counsel subsequently assured the trial court that his client was competent. The trial court, after personally observing defendant's behavior and the courtroom circumstances, made its independent determination. Defendant's seeming confusion during a technical and complex explanation of the rules of evidence in light of all the other circumstances does not constitute substantial evidence of incompetence. Therefore, the trial court did not err when it decided that it would proceed without a competency hearing. The majority, however, takes one isolated incident, disregards the perspective of defense counsel and the trial court, and places its review of the cold record above the perspective of those actually present. Because these circumstances do not present substantial evidence of defendant's incompetency sufficient to trigger a hearing, I respectfully dissent.

Before trial, defendant had been extensively evaluated for years. Four months before the trial was to begin, defendant was deemed competent to stand trial by three doctors who had evaluated him multiple times in the past. The doctors' competency determinations were based on several factors, including that defendant was finally taking his medication consistently. The doctors' reports contained no suggestion of defendant's need for another evaluation before trial.

Defendant's trial began on 10 January 2018 at around 9:30 a.m. Jury selection took more than half the day until the jury was released for lunch at about 12:35 p.m. At that time, defense counsel had no concerns about defendant's competence. After lunch, the trial court resumed its session around 2:00 p.m. After the jury was impaneled shortly around 3:00 p.m., the trial court gave instructions to the jury and the State and defense gave opening statements. The State then called its first witness, who was the victim. The victim started testifying about incidents of sexual abuse that preceded the dates of those charged in the indictment. Defense counsel objected to this portion of the testimony and asked to be heard outside of the jury's presence. The jury left the courtroom at 4:27 p.m. The trial court and counsel discussed the possibility that the victim's testimony concerning incidents not alleged in the indictment could be admitted as evidence under Rule 404(b) of the North Carolina

Rules of Evidence, and the jury came back into the courtroom at 4:34 p.m. The trial court then gave a limiting instruction to the jury about how Rule 404(b) evidence may be considered by the jurors, and the State continued questioning the victim. The trial court then gave another instruction before the jury was released at 5:00 p.m., and the trial court took a very brief recess. At 5:03 p.m., the following exchange occurred:

> [DEFENSE COUNSEL]: . . . I just had a brief conversation with [defendant] during which I began to have some concerns about his capacity and I would ask the Court to address him regarding that.
>
> . . . .
>
> I asked him—I've been asking him how he's doing and if he knows what's going on. And up until just now he's been able to tell me what's been going on. He just told me just a few minutes ago that he didn't know what was going on.
>
> THE COURT: Well, when we start throwing around 404(b) and 403, you'd have to have graduated from law school to have any inkling of what we're talking about. So I'm not sure what it is you—I want you to be more specific.
>
> [DEFENSE COUNSEL]: He said—I asked him—he said—I asked him if he understood what was going on. He said no, he didn't know what she was talking about. And that has not been the way he has been responding throughout this event, either yesterday or earlier today. And in light of the history with him, I just want to make sure. I just—I feel we need to make sure. And I'm not asking for an evaluation I would just ask for the Court to query him quickly to make sure that I'm just not—make sure I'm seeing something that is not there.
>
> THE COURT: Well, I tell you what, it's been a long day, and I'd rather inquire of [defendant] in the morning and give everyone a chance to rest. Give you a chance to talk to him and try to explain to him what's going on, especially with all of these rule numbers. I don't know if anybody could explain that to a non-lawyer and have them understand it.
>
> We could take a poll around here of non-lawyers and see if they understood it. I doubt many of them would. But, you know, essentially what is going on is that the victim in this case has been telling everybody what he did,

> and that's about a simple concept as you can imagine. Now, if he surely does not understand that for some reason, not that he remembers it or not, or whether he can think of some defense or something, that is not the case.
>
> [DEFENSE COUNSEL]: I understand.
>
> THE COURT: But if the information coming from this woman about what he did, if he can understand that is what is happening, then I would say that the capacity situation hasn't changed any. We've got one, two—I counted them before, three, four, five, six, capacity evaluations. The latest one was August 15, 2017, and this latest one found him capable of proceeding. We'll talk about it in the morning.
>
> [DEFENSE COUNSEL]: Yes, sir.

The following day, as soon as the trial court reconvened, it noted that it must discuss and evaluate whether there was the need for "any further inquiry as to [defendant's] capacity." The trial court asked defense counsel whether he "ha[d] any more information or arguments [he] want[ed] to make as to [defendant's] capacity." Defense counsel responded as follows:

> No, Your Honor. When he came in this morning he greeted me like he has other mornings. I interacted with him briefly and he interacted like he has been interacting every morning. And I've not had any questions about his capacity this morning. I just had some yesterday evening because he kind of looked at me and the look in his face was like he had no idea who I was.

At that point, the trial court reemphasized the confusing nature of the Rule 404(b) discussion, which occurred immediately before defense counsel expressed his concern. Defense counsel reiterated that he no longer had any concerns. Thus, the trial court chose to proceed without a competency hearing.

"[A] conviction cannot stand where the defendant lacks capacity to defend himself." *State v. King*, 353 N.C. 457, 467, 546 S.E.2d 575, 585 (2001). Therefore, the "trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *Id.* (quoting *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977)). A trial court should consider evidence of "a defendant's

irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." *Drope v. Missouri*, 420 U.S. 162, 180, 95 S. Ct. 896, 908 (1975).

Here the proceedings, when taken as a whole, do not show substantial evidence of defendant's incompetence. The pretrial reports concluded defendant was competent. Though defense counsel raised a concern late in the day about defendant's competency after a technical evidentiary discussion, the next morning, defense counsel's concerns completely dissipated. His repeated assurances gave the trial court no reason to believe that defendant's brief confusion the evening before would be attributable to something other than the technical explanation of Rule 404(b) evidence relating to events that occurred outside the timeframe alleged in the indictments and the long day in court. Defense counsel was in the best position to observe any issues regarding competency as he interacted with his client. Additionally, the trial court, after presiding over an entire day of trial, observing defendant, and hearing the State's questioning of the victim, was well equipped to evaluate whether its explanation of Rule 404(b) would be confusing to a listener, including defendant. The trial court is in the best position to consider and weigh the facts and circumstances and to make the appropriate determination as to whether substantial evidence of incompetence exists to require a hearing.

The majority does not appear to take issue with the premise that the trial court acted within its authority to delay any potential competency hearing until the next day. Nonetheless, the majority believes that defense counsel's brief concern and defendant's mental history warranted a competency hearing. Despite the trial court's personal observations of defendant and the circumstances, the majority prefers its review of the cold record over the trial court's actual observation of the events and conversations that occurred on the day of trial. Trial courts, however, have institutional advantages unavailable to appellate courts which place them in a better position to judge a defendant's demeanor and the events that occur during trial. In short, the trial court is certainly best equipped, having observed defendant in that moment, to determine whether a competency hearing should be held. Moreover, the trial court had the repeated assurances of defense counsel that he no longer had concerns about defendant's competency to stand trial. As previously stated, defense counsel is in the best position to assess defendant's competency given his extensive interaction with his client.

The trial court is in a better position than an appellate court to determine whether there was substantial evidence of defendant's

incompetence. The trial court's view was supported by defense counsel's assurances, who is in the best position to appreciate if his client is having difficulty understanding the proceedings. The trial court proceeded appropriately here. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
CAROLYN D. "BONNIE" SIDES

No. 400A19

Filed 18 December 2020

Constitutional Law—right to be present at criminal trial—waiver—voluntariness—suicide attempt—need for competency hearing

In a prosecution for felony embezzlement, where defendant attempted suicide before the fourth day of trial and was involuntarily committed, the trial court erred by failing to conduct a competency hearing to determine whether defendant had the mental capacity to voluntarily waive her constitutional right to be present at trial. Substantial evidence created a bona fide doubt as to defendant's competency where her medical records and recent psychiatric evaluations showed she suffered from depression, a long-term mood disorder requiring medication, and suicidal thoughts; she was assessed at a "high" risk level for suicide; and she required further treatment and immediate psychiatric stabilization after her suicide attempt.

Justice MORGAN dissenting.

Justices NEWBY and ERVIN join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 267 N.C. App. 653 (2019), finding no error after appeal from judgments entered on 16 November 2017 by Judge Beecher R. Gray in Superior Court, Cabarrus County. Heard in the Supreme Court on 31 August 2020.

Joshua H. Stein, Attorney General, by Keith Clayton, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Wyatt Orsbon, Assistant Appellate Defender, for defendant-appellant.

Disability Rights North Carolina, by Susan H. Pollitt, Lisa Grafstein, and Luke Woollard, for Disability Rights North Carolina, North Carolina Psychiatric Association, and North Carolina Chapter of the National Alliance on Mental Illness, amici curiae.

DAVIS, Justice.

The defendant in this case attempted suicide one evening after her trial had recessed for the day and was thereafter involuntarily committed. The trial court declined to hold a competency hearing and determined that she had voluntarily waived her constitutional right to be present at her trial as a result of the suicide attempt. Because we hold that the trial court erred by failing to conduct a competency hearing under these circumstances, we reverse the decision of the Court of Appeals and remand for a new trial.

Factual and Procedural Background

Defendant was charged with four counts of felony embezzlement.[1] A jury trial began in Superior Court, Cabarrus County, on 6 November 2017. The State presented its case-in-chief the first three days of trial, during which time defendant was present in the courtroom. On the evening of 8 November 2017, defendant intentionally ingested 60 one-milligram Xanax tablets—thirty times her prescribed daily dose—in a suicide attempt at her home. She was found unresponsive and was taken to Carolinas HealthCare System NorthEast for treatment.

Defendant underwent medical evaluation that night by Dr. Kimberly Stover. Dr. Stover found that defendant "ha[d] been experiencing worsening depression and increased thoughts of self-harm" and sought defendant's immediate involuntary commitment, checking the box on the petition form stating that defendant was "mentally ill and dangerous to self or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." Dr. Stover also wrote that defendant "is not stable and for her safety will need further evaluation."

1. Prior to trial, one of the counts was dismissed by the State.

A magistrate found reasonable grounds to believe defendant required involuntary commitment and signed a commitment order, which provided for an initial period of commitment of twenty-four hours beginning on the morning of 9 November 2017. A separate evaluation was conducted later that day by a psychiatrist, Dr. Rebecca Silver, after which Dr. Silver noted that defendant "remains suicidal even today. She is not safe for treatment in the community and requires inpatient stabilization."

That morning, the trial court was informed of defendant's suicide attempt and hospitalization. The trial court told the attorneys that it would try to "salvage" the day "without committing an error that'd be reversible." Defense counsel responded that a decision to proceed without defendant could not be made "without more information." The following exchange then transpired:

> THE COURT: It might be useful to have her record for the last two years or something from the hospital if she has a record of depression and treatment and all that, but that would probably—we'd get to some point where we start to need a medical expert to interpret—
>
> [DEFENSE COUNSEL]: Yeah.
>
> THE COURT: —what all that means.

Defense counsel informed the trial court that he had "been advised that [defendant] ha[d] a number of medical conditions by her and her family" and offered to attempt to obtain more information from her doctors. The trial court asked the State whether it was "aware of any case law that would give us some guidance on whether this constitutes a voluntary absence or an involuntary [absence]." After the State responded that it had not looked into the issue, the trial court stated as follows:

> But I think we plan to be back here Monday depending on what her situation is maybe and whether this—this absence, if we find out that this would constitute a voluntary absence, we'd probably go right on through Monday if it's clear.
>
> . . . .
>
> . . . If it's questionable, that would be something else, and we don't know if she could show up here Monday or not at this point.

Defense counsel once again offered to seek additional information about her medical status and to conduct research on the issue of whether her absence should be deemed voluntary. The trial court characterized the information received up to that point—which was limited to the involuntary commitment documents—as "a bare-bones examination, clear description of findings about two sentences, and that's it." The trial court added that "[i]t takes more in depth when you get into the mental aspect, a lot more in depth." The State had prepared a draft order compelling production of certain portions of defendant's medical records to assist the trial court in determining how to proceed. Referencing that draft order, the State stated the following:

> But I'd assume, if that order were signed by the Court, that we could find out some information as to how she got there, you know, what she presented with, what, you know, past symptoms, medications that she could have been on. I think it would really open up a wealth of information that this Court could use in being well-informed to make a decision in this case.

A discussion ensued concerning the fact that the proposed order only sought information regarding defendant's condition on 8 and 9 November 2017. Defense counsel stated as follows:

> [Y]ou may want to expand the order a little bit, but I believe that what the order says is all information, complete documentation, complaint, diagnosis, treatment, prognosis, discharge and any other information that would assist the Court. I think that's rather complete, but it's the Court's order. But I think, you know, if you want to—if you want to put in including current updates to the date and time of the release or current updates through her discharge—

The trial court agreed, deciding that the order should be "comprehensive." The trial court then recessed the proceedings while the State drafted a revised order for the release of defendant's medical records and conducted research on whether the trial should continue.

When the proceedings resumed that afternoon, the State informed the trial court of its position that defendant had voluntarily waived her right to be present by choosing to ingest the excessive number of pills. Defense counsel expressed his belief that there was a need for more information regarding defendant's mental health status, noting that it was not clear whether "her intent was to end her life or to impede these proceedings." The trial court agreed to recess further trial proceedings

until the following Monday, at which time defendant would either be released from treatment or the trial court would have received the requested medical records. The trial court then stated the following:

> We don't know what her situation is going to be, but I want to take the position, unless something happens that shoots it down, that she voluntarily made herself absent from the trial and continue on Monday.

The trial court proceeded to release the jury until the following Monday and issued an order for defendant's arrest upon the expiration of her period of commitment. Later that afternoon, the trial court also entered an order for the release of defendant's medical records. The trial court mandated the production of "complete documentation of the Defendant's complaint, diagnosis, treatment, prognosis, discharge, and any other information that would assist the court in making a determination regarding how to proceed," but limited the temporal scope of the records to the "admittance date of November 8, 2017, and any days following this date for the continued treatment of [defendant]."

The proceedings resumed on 13 November 2017 at which time defendant remained in the hospital under the terms of the involuntary commitment order. The trial court informed counsel that it had received 89 pages of defendant's recent medical records over the weekend, which included reports containing the medical opinions of Dr. Silver and Dr. Stover, which both stated that defendant required further immediate inpatient psychiatric stabilization and that she remained suicidal. The records also noted that defendant had been assessed at a "high" risk level on the Columbia Suicide Severity Rating Scale. An evaluation by Dr. Silver stated, in part, that

> [s]he has been on trial for embezzlement . . . .
>
> . . . .
>
> The patient reported that the verdict for her trial was to be read out this morning, November 9. She states that last night she wrote goodbye letters to her grandchildren, and overdosed on 60 tablets of Xanax. She had stated "I'm not going to go to jail".
>
> . . . .
>
> . . . She states she continues to think about wishing she were dead reporting "I don't really have a will to live". . . .

. . . .

> . . . She denies any history of suicide attempts before last nights overdose on Xanax.

The medical records also reflected defendant's "history of a mood disorder" that she managed with daily medication but noted that she had "never been psychiatrically hospitalized." In addition, the medical records stated that defendant had been prescribed Haldol for agitation, as well as Vistaril for anxiety and Trazodone to help her sleep. She was ordered to continue her prescription of 100 milligrams of Zoloft daily.

The following exchange between the trial court and defense counsel then ensued:

> THE COURT: Up till the time that this matter occurred, [defense counsel], you have not observed anything of her that would indicate she lacked competency to proceed in this trial, would that be a fair statement?
>
> [DEFENSE COUNSEL]: That would be a fair statement.
>
> THE COURT: Okay. And then this intervention came along Wednesday?
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: And we are where we are now—
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: —she's being further evaluated?
>
> [DEFENSE COUNSEL]: That's correct, yes.
>
> THE COURT: All right. It's my intention this morning as I stated I think Thursday to proceed with the trial under the ruling that she has voluntarily by her own actions made herself absent from the trial at this point. How it may be in the future I'm not sure, depends on her situation how it all turns out, but I'm taking the position that she has by her voluntary actions and by implication made her presence unavailable for court.

Defense counsel then stated the following:

> Your Honor, I would indicate that we did review on Thursday an involuntary commitment document indicating that the doctor put on the record that she had

> voluntarily overdosed on Xanax by taking 60 milligrams. I contend that it is somewhat of a leap for us as lay people and not doctors to consider that her actions are for the purposes of avoiding jurisdiction of the court or avoiding trial. Ms. Sides has quite a number of other factors in her life that are very pressing and from which certain personalities may find overwhelming. I would just contend, Your Honor, that this may be the straw that broke the camel's back, but I don't know that her efforts—I think her efforts were to end her life, not to end her trial.
>
> And I would contend that we don't have evidence regarding whether or not she voluntarily absented herself from the trial. We know that she attempted to absent herself from life itself, but I would contend that there is some distinction of that, that she is in custody in a medical facility, and we have not investigated whether or not she chooses or would like to be here. And so we're making a leap by saying that she voluntarily absented herself from the trial, and we'd like to note our objection to that.

Over defense counsel's objection, the trial court ruled that the trial would proceed on the basis that defendant's absence was voluntary. The trial court admitted into evidence defendant's medical records and the involuntary commitment documents, noting that it had considered those documents. The trial then resumed without defendant being present, and the jury was instructed not to consider defendant's absence in weighing the evidence or determining the issue of guilt. At the close of the State's case-in-chief, defense counsel moved to dismiss the charges against her, and the trial court denied the motion. No evidence was offered on defendant's behalf. The trial court subsequently denied defense counsel's renewed motion to dismiss. That afternoon, the jury reached a verdict finding defendant guilty of all charges.

On 16 November 2017, defendant appeared in the courtroom for sentencing. The trial court sentenced her to consecutive sentences of 60 to 84 months imprisonment for the two Class C felonies and 6 to 17 months imprisonment for the Class H felony. The trial court suspended the latter sentence and imposed 60 months supervised probation. Finally, the trial court ordered defendant to pay $364,194.43 in restitution. On 28 November 2017, defendant gave notice of appeal.

Before the Court of Appeals, defendant argued that the trial court was required to conduct a competency hearing prior to proceeding

with the trial in her absence. Relying on its prior decision in *State v. Minyard*, 231 N.C. App. 605 (2014), the majority at the Court of Appeals rejected this contention, holding that when a defendant voluntarily absents herself from trial, she waives her constitutional right to be present and is not entitled to a competency hearing. *State v. Sides*, 267 N.C. App. 653, 658 (2019). The majority concluded that defendant's overdose was a voluntary act and that no competency hearing was required under the circumstances. *Id.* at 661.[2]

In a dissenting opinion, Judge Stroud stated her belief that a defendant must be found to be competent before she can be deemed to have voluntarily absented herself from trial and that substantial evidence had existed before the trial court casting doubt on defendant's competence. *Id.* at 664 (Stroud, J., dissenting). As a result, Judge Stroud expressed her view that the trial court was required to sua sponte conduct a competency hearing in this case. *Id.* at 666. On 18 October 2019, defendant appealed as of right to this Court based upon the dissent.

Analysis

This case requires us to reconcile the following four principles based on the facts of this case: (1) a criminal defendant cannot be tried unless she is competent to stand trial; (2) a defendant has a constitutional right to be present during her entire trial; (3) a defendant may voluntarily waive her constitutional right to be present; and (4) such a waiver is only valid if the defendant is competent. Stated succinctly, in this appeal we must resolve a classic "chicken and egg" dilemma regarding how a trial court must proceed when faced with a situation where a defendant intentionally engages in conduct harmful to herself that has the effect of absenting her from trial under circumstances that raise bona fide concerns about her capacity. In such cases, the issue is whether the trial court is required to conduct a competency hearing before proceeding to determine whether the defendant made a voluntary waiver of her right to be present, or, alternatively, whether it is permissible for the trial court to forego a competency hearing and instead assume a voluntary waiver of the right to be present on the theory that the defendant's absence was the result of an intentional act.

We conclude that by essentially skipping over the issue of competency and simply assuming that defendant's suicide attempt was a

2. The Court of Appeals also rejected defendant's additional argument that the trial court had erred by amending the judgments entered against her in her absence in order to reflect corrected offense dates. *See State v. Sides*, 267 N.C. App. 653, 663 (2019). That issue, however, is not before us in this appeal.

voluntary act that constituted a waiver of her right to be present during her trial, both the majority at the Court of Appeals and the trial court "put the cart before the horse." Once the trial court had substantial evidence that defendant may have been incompetent, it should have sua sponte conducted a competency hearing to determine whether she had the capacity to voluntarily waive her right to be present during the remainder of her trial.

We first address the State's contention that defendant failed to preserve her statutory right to a competency hearing. Subsection 15A-1001(a) of the General Statutes of North Carolina states that

> [n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C.G.S. § 15A-1001(a) (2019).

The issue of whether a defendant has the capacity to be tried "may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court." N.C.G.S. § 15A-1002(a) (2019). Our General Statutes provide that once a question is raised as to a defendant's capacity, "the court shall hold a hearing to determine the defendant's capacity to proceed." N.C.G.S. § 15A-1002(b)(1). Defendant contends that a competency hearing was required under this statute because both defense counsel and the trial court raised the issue of defendant's competency and defense counsel objected to the trial court's ultimate decision to allow the trial to proceed.

The State, conversely, argues that defendant's statutory right to a competency hearing pursuant to N.C.G.S. § 15A-1002(b) was waived because defense counsel neither actually requested such a hearing nor properly objected to the trial court's decision to proceed without one. In support of its argument, the State cites several decisions from this Court in which we held that a defendant's statutory right to a competency hearing was not properly preserved. *See State v. Badgett*, 361 N.C. 234 (2007); *State v. King*, 353 N.C. 457 (2001); *State v. Young*, 291 N.C. 562 (1977).

However, we need not resolve the parties' dispute regarding the preservation issue. Even assuming arguendo that the State is correct that defendant failed to preserve her *statutory* right to a competency

hearing as required under our prior decisions, we hold that defendant possessed a *constitutional* due process right to such a hearing.

The United States Supreme Court has held that a defendant is competent to stand trial if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him." *Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) (cleaned up). In situations where a trial court possesses information regarding a defendant that creates "sufficient doubt of his competence to stand trial to require further inquiry on the question," it must investigate the competency issue. *Drope v. Missouri*, 420 U.S. 162, 180 (1975). This Court has likewise recognized that "[a] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." *Young*, 291 N.C. at 568 (emphasis omitted) (citation omitted). Because questions of competency can arise for the first time during trial, "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope*, 420 U.S. at 181.

In addition, although a criminal defendant possesses a constitutional right to be present at all stages of her trial, *see Kentucky v. Stincer*, 482 U.S. 730, 745 (1987), the United States Supreme Court has also recognized the potential for a defendant in a non-capital case to waive that right.

> [W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

Taylor v. United States, 414 U.S. 17, 19 (1973) (alteration in original) (citation omitted).

The Supreme Court has made clear that in order to waive the right to be present, however, the defendant "must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away." *Id.* at 19 n.3 (citation omitted). In other words, in order to waive the right to be present, there

must be "an intentional relinquishment or abandonment" of that right. *Id.* at 19 (citation omitted). The Supreme Court has recognized that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate v. Robinson*, 383 U.S. 375, 384 (1966).

Here, the majority at the Court of Appeals reasoned that defendant waived her right to be present by voluntarily absenting herself from trial. *Sides*, 267 N.C. App. at 661. Specifically, the majority held that the trial court was not required to conduct a competency hearing because defendant waived her right to be present at trial by intentionally overdosing on medication, thereby resulting in her absence through her own willful conduct. *Id.* at 659–60.

We believe that the Court of Appeals erred by making that determination without first deciding whether there was substantial evidence before the trial court as to her lack of capacity to truly make such a voluntary decision. As the case law discussed above makes clear, a defendant cannot be deemed to have voluntarily waived her constitutional right to be present at her own trial unless she was mentally competent to make such a decision in the first place. Logically, competency is a necessary predicate to voluntariness. Accordingly, if there is substantial evidence suggesting that a defendant may lack the capacity to stand trial, then a sufficient inquiry into her competency is required before the trial court is able to conclude that she made a voluntary decision to waive her right to be present at the trial through her own conduct. Thus, the majority at the Court of Appeals erred by simply assuming that defendant's suicide attempt was necessarily a voluntary act.

Although the majority's analysis was flawed in this respect, the question remains whether it nevertheless ultimately reached the correct result. In order to answer that question, we must determine whether a bona fide doubt actually existed as to defendant's lack of competency that required the trial court to sua sponte conduct a competency hearing before allowing the trial to resume in her absence.

In addressing this issue, we deem it instructive to review prior decisions of this Court that address the question of whether the trial court was constitutionally required to initiate a competency hearing sua sponte. In *Young*, the defendant was convicted of first-degree murder and sentenced to death. *Young*, 291 N.C. at 565. Before trial, defense counsel raised concerns about the defendant's competency. *Id.* at 566. The trial court ordered that the defendant be committed to Dorothea Dix Hospital to undergo psychiatric examination. *Id.* at 566. The resulting

diagnostic report and psychiatric opinions identified no evidence of incompetency. *Id.* at 566–67. On appeal to this Court, the defendant contended that the trial court had erred by not holding a competency hearing, citing both his statutory and due process rights. We concluded that the defendant waived his statutory right to such a hearing as there was "no indication that the failure to hold a hearing under G.S. 15A-1002(b)(3) . . . was considered or passed upon by the trial judge." *Id.* at 567–68. We further held that defendant was not constitutionally entitled to such a hearing because where "the defendant has been committed and examined relevant to his capacity to proceed, and all evidence before the court indicates that he has that capacity, he is not denied due process by the failure of the trial judge to hold a hearing subsequent to the commitment proceedings." *Id.* at 568.

The defendant in *State v. Heptinstall*, 309 N.C. 231 (1983), was convicted of first-degree murder. Prior to trial, the trial court conducted an inquiry into his competency and reviewed evidence of his "significant history of mental illness," including a diagnosis of paranoid schizophrenia. *Heptinstall*, 309 N.C. at 233. Family members and a forensic psychiatrist testified to the defendant's bizarre behavior, but the trial court found him competent and proceeded with trial. *Id.* at 233–34. The defendant contended on appeal that the trial court should have conducted another competency hearing after his "bizarre and incoherent" testimony. *Id.* at 235.

We rejected this argument, stating that the defendant's testimony "became nonsensical and bizarre when the subject turned to matters of morality and religion" but that otherwise "[a]lmost all of his testimony during the guilt phase indicates that defendant was accurately oriented regarding his present circumstances." *Id.* at 236. We concluded that "the testimony would not have suggested to the trial court that defendant then lacked capacity to proceed. There was, therefore, no duty of the trial court on its own motion to reopen this question." *Id.* at 237.

In *King*, the defendant was convicted of first-degree murder for killing his estranged wife, and he was sentenced to death. *King*, 353 N.C. at 461. He argued on appeal that the trial court erred by not conducting a competency hearing prior to trial. *Id.* at 465. This Court held that the defendant waived his statutory right to a competency hearing and was not constitutionally entitled to such a hearing because there was not substantial evidence suggesting that he may have been incompetent. *Id.* at 466–67. We noted that the record did "not indicate that either defendant or defense counsel raised any questions about defendant's capacity to proceed at any time during defendant's trial and capital sentencing

proceeding." *Id.* at 467. Although the defendant offered some evidence of past "precautionary treatment for depression and suicidal tendencies," we concluded that this alone did not constitute substantial evidence that the defendant lacked the capacity to proceed and that, as a result, the trial court did not have a duty to sua sponte conduct a competency hearing. *Id.*

The defendant in *Badgett* was sentenced to death for first-degree murder. *Badgett*, 361 N.C. at 239. On appeal to this Court, he argued that the trial court erred by not sua sponte conducting a competency hearing in light of doubts as to his competency. *Id.* at 258. After being charged with first-degree murder, the defendant had sought counseling and was found by psychiatrists to suffer from irritability, anger management problems, and depression. *Id.* at 241–42. On appeal, the defendant attempted to rely on evidence that he had written letters to the trial court asking for a speedy trial resulting in a death sentence, impliedly asked the jury to sentence him to death, and engaged in an emotional outburst during sentencing. *Id.* at 259–60.

This Court rejected the defendant's argument that he was statutorily entitled to a competency hearing because nothing in the record indicated that questions of competency were raised at any point during trial. *Id.* at 259. With regard to the question of whether he had a constitutional right to a competency hearing, we noted that he had "interact[ed] appropriately with his attorneys during the trial. . . . conferred with them . . . . followed their advice . . . . [and] responded directly and appropriately to questioning." *Id.* at 260. Furthermore, the transcript revealed that the defendant "demonstrated a strong understanding of the proceedings against him" and treated the trial court with deference. *Id.* at 260. Moreover, although he did, in fact, have an "outburst during the state's closing arguments," he apologized afterward and "calmly and rationally" explained why he was upset. *Id.* at 260–61. Finally, we recognized that three experts testified about defendant's psychological history and none of them suggested that his mental status rendered him incompetent to stand trial. *Id.* at 261. For these reasons, we concluded that no competency hearing was required. *Id.* at 260.

While our holdings in *Young*, *Heptinstall*, *King*, and *Badgett* provide useful guidance on the basic legal principles that govern the present case, we believe several decisions of the federal courts—including two from the United States Supreme Court—are more directly relevant to our analysis. In *Drope*, on the second morning of trial for a rape charge, the defendant shot himself in the stomach in an attempt to commit suicide and was hospitalized. *Drope*, 420 U.S. at 166–67. The remainder of

the trial proceeded in his absence with the trial court ruling that his absence was voluntary in light of evidence that he had stated he would "rather be . . . dead than to go to trial for something he didn't do." *Id.* at 167. The jury found the defendant guilty, and the trial court sentenced him—after he finally appeared in court after a three-week hospital stay—to life in prison. *Id.*

The defendant argued on appeal that the trial court denied him his right to due process by failing to conduct a competency hearing in light of the circumstances surrounding his absence from trial. *Id.* at 163–64. The Supreme Court noted that the defendant "was absent for a crucial portion of his trial," which prevented the trial court from observing his behavior, *id.* at 180–81, and that "the record reveal[ed] a failure to give proper weight to the information suggesting incompetence which came to light during trial." *Id.* at 179. The defendant's wife had testified to her "belief that her husband was sick and needed psychiatric care" and that he tried to choke and kill her the night before trial. *Id.* at 166.

The Supreme Court recognized that "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required" but noted there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed." *Id.* at 180. The Supreme Court determined that it "was sufficiently likely that, in light of the evidence of [the defendant's] behavior including his suicide attempt, and there being no opportunity without his presence to evaluate that bearing in fact, the correct course was to suspend the trial until such an evaluation could be made." *Id.* at 181. The Supreme Court concluded that "when considered together with the information available prior to trial and the testimony of [the defendant's] wife at trial, the information concerning [the defendant's] suicide attempt created a sufficient doubt of his competence to stand trial to require further inquiry on the question." *Id.* at 180. The Supreme Court therefore reversed the judgment and remanded the case for a new trial. *Id.* at 183.

In *Pate*, the defendant was convicted of murdering his wife and was sentenced to life imprisonment. *Pate*, 383 U.S. at 376. At trial, defense counsel asserted the defense of insanity and contended that the defendant was incompetent to stand trial, but the trial court did not conduct a competency hearing. *Id.* The United States Supreme Court held that the defendant "was constitutionally entitled to a hearing on the issue of his competence to stand trial." *Id.* at 377. The Supreme Court cited testimony from four witnesses regarding the defendant's "history of

disturbed behavior," including instances of erratic conduct and paranoia. *Id.* at 378–79. In addition, the Supreme Court noted that the trial court had heard evidence of the defendant's prior psychiatric hospitalizations and a hospitalization resulting from an attempted suicide by gunshot to the head. *Id.* at 380–81. The Supreme Court acknowledged evidence that the defendant had exhibited "mental alertness and understanding" in his exchanges with the trial court, but it observed that even though the defendant's "demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." *Id.* at 385–86. The Supreme Court ultimately concluded that based on the record, the defendant's "present sanity was very much in issue" during the proceedings, thereby raising a " 'bona fide doubt' as to [the] defendant's competence to stand trial" such that he was entitled to a competency hearing. *Id.* at 384–85.

The United States Court of Appeals for the Ninth Circuit addressed a similar issue in *United States v. Loyola-Dominguez*, 125 F.3d 1315 (9th Cir. 1997). In that case, the defendant attempted suicide in his jail cell the night before trial. *Id.* at 1316. The next morning, defense counsel requested that the defendant undergo a psychiatric evaluation and a competency hearing, citing some additional mental health difficulties that the defendant had experienced during his incarceration. *Id.* The trial court briefly questioned the defendant, asking him whether he would like to undergo psychiatric evaluation or continue with trial. *Id.* At one point, the trial court asked the defendant the following: "Well, do you feel—do you know what's going on? Do you know what's going on at the trial?" The defendant replied: "I don't know. I've never been here like this, so I don't know." *Id.* at 1317. The trial court then inquired as to whether the defendant felt that he was "competent to understand what's going on," and the defendant asked: "How long would it take? Because I just can't stand anymore, the way they have me there. I feel desperate." *Id.* The trial court ultimately ordered that the trial proceed without a competency hearing. *Id.*

In holding that the trial court had erred by failing to hold a competency hearing, the Ninth Circuit stated that "[w]hile we do not believe that every suicide attempt inevitably creates a doubt concerning the defendant's competency, we are persuaded that, under the circumstances of this case, such a doubt existed." *Id.* at 1318–19. The Ninth Circuit determined that the trial court's inquiry was insufficient to assess the defendant's competency, particularly "the fact that the trial court did not elicit adequate information, from either defense counsel or [the defendant], that would have dispelled the concerns that would ordinarily arise

regarding competency." *Id.* at 1319. The Ninth Circuit further explained that the defendant's responses to the trial court's questions suggested that he did not fully understand the nature and consequences of the proceedings. *Id.* Although the trial court noted that the defendant "had always seemed fine in the past," the Ninth Circuit concluded that the defendant's recent suicide attempt along with the surrounding circumstances "raised significant doubts regarding his competency to stand trial" such that a competency hearing was constitutionally required. *Id.*

Based on our thorough review of the record in the present case, we believe the trial court was presented with substantial information that cast doubt on defendant's competency. To be sure, defendant's suicide attempt itself "suggests a rather substantial degree of mental instability contemporaneous with the trial." *Drope*, 420 U.S. at 181. But her suicide attempt does not stand alone in our assessment. *See id.* In our view, the facts before the trial court—when taken as a whole—were clearly sufficient to trigger the need for a competency hearing.

On the morning of 9 November 2017, the trial court was made aware that defendant had been hospitalized after a suicide attempt and that a magistrate had determined that grounds existed to issue an order for her involuntary commitment. The trial court reviewed two psychiatric opinions regarding defendant's mental health issues. Dr. Stover, the doctor who sought defendant's immediate involuntary commitment, found that defendant "ha[d] been experiencing worsening depression and increased thoughts of self-harm" and checked the box on the form stating that defendant was "mentally ill and dangerous to self or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." Dr. Stover wrote that defendant "is not stable and for her safety will need further evaluation." Dr. Silver conducted another evaluation of defendant later that day and noted that defendant "remains suicidal even today. She is not safe for treatment in the community and requires inpatient stabilization."

Upon receiving this information, the trial court issued an order for the release of additional medical records—albeit only those records from 8 November 2017 onward. These records, which were reviewed by the trial court, shed additional light on defendant's mental health issues, showing that defendant had a "history of a mood disorder" that she managed with daily medication. In the meantime, defendant remained suicidal and was assessed at a "high" risk level on the Columbia Suicide Severity Rating Scale, and she told Dr. Silver that she did not "really have a will to live." As part of her inpatient treatment, she was prescribed

Haldol along with Vistaril and Trazodone. Defendant was also instructed to continue her daily dose of 100 milligrams of Zoloft.

It is clear that the trial court recognized the existence of an issue as to defendant's competency. For this reason, the trial court took the initial steps of recessing trial proceedings, conferring with counsel, and ordering the production of defendant's most recent medical records. But instead of ordering a hearing on defendant's competency, the trial court at that point abruptly ended further consideration of the issue, simply assuming—like the Court of Appeals majority—that her overdose was a voluntary action and that no further competency analysis was required. Simply put, the trial court started down the road of addressing defendant's competency but abandoned the journey midway.

In arguing that no competency hearing was required, the State points to evidence in the record suggesting that defendant's ingestion of pills was a voluntary attempt by her to avoid incarceration upon being convicted. The State supports this argument, for example, by citing a statement she made to medical providers during her hospitalization that she is "not going to go to jail."

By making this argument, however, the State is conflating the separate issues of (1) whether substantial evidence existed as to defendant's lack of competency so as to require a sua sponte competency hearing, and (2) what the ultimate result of such a competency hearing would be. But the latter issue is not before us. Rather, the sole question that we must decide is whether there was substantial evidence before the trial court to trigger the need for a sua sponte competency hearing in the first place. After hearing all of the relevant evidence as to defendant's competency at such a hearing, the trial court would then have been tasked with weighing the respective evidence—including those facts that the State highlights in its brief before this Court—and making a competency determination. Assuming defendant was found to be competent, then—and only then—would the trial court have been able to make a determination as to whether defendant's absence from the trial proceedings was the result of a voluntary act on her part.[3]

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3. In its analysis, the Court of Appeals majority relied largely on that court's prior decision in *State v. Minyard*, 231 N.C. App. 605 (2014). In *Minyard*, the Court of Appeals held, in part, that a defendant who had ingested a large quantity of intoxicating substances at the end of his trial had voluntarily waived his right to be present during the jury's deliberations. *Id.* at 626–27. To the extent the Court of Appeals' analysis on that issue is inconsistent with our holding today, that portion of *Minyard* is overruled.

We wish to emphasize that the issue of whether substantial evidence of a defendant's lack of capacity exists so as to require a sua sponte competency hearing requires a fact-intensive inquiry that will hinge on the unique circumstances presented in each case. Our holding should not be interpreted as a bright-line rule that a defendant's suicide attempt automatically triggers the need for a competency hearing in every instance. Rather, our decision is based on our consideration of all the evidence in the record when viewed in its totality.

* * *

The only remaining issue before us is to determine the appropriate remedy on remand. The two potential remedies are for the trial court to conduct either a new trial or a retrospective competency hearing.

The United States Supreme Court has recognized "the difficulty of retrospectively determining an accused's competence to stand trial." *Pate*, 383 U.S. at 387. Where a retrospective hearing would require the trial court to assess the defendant's competency "as of more than a year ago," the Supreme Court has suggested that such a hearing is not an appropriate remedy. *Dusky v. United States*, 362 U.S. 402, 403 (1960).

Here, a retrospective hearing would require an evaluation of defendant's competency more than three years ago. Because of the "inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances," *Drope*, 420 U.S. at 183, we do not believe such an undertaking would be feasible. We conclude that defendant is entitled to a new trial—"assuming, of course, that at the time of such trial [defendant] is competent to be tried." *Id.*

Conclusion

For the reasons stated above, we reverse the decision of the Court of Appeals and remand for a new trial.

REVERSED AND REMANDED.

Justice MORGAN dissenting.

While I agree with my learned colleagues in the majority that "the sole question that we must decide is whether there was substantial evidence before the trial court to trigger the need for a *sua sponte* competency hearing," I disagree with their evaluation of defendant's mental health history as constituting a determination that "the trial court had substantial evidence that defendant may have been incompetent." I am

also in accord with the majority's approach in a case such as the current one that "the issue of whether substantial evidence of a defendant's lack of capacity exists so as to require a *sua sponte* competency hearing requires a fact-intensive inquiry that will hinge on the unique circumstances presented in each case," although I do not consider the particular features of this case to compel the need for the trial court to hold a competency hearing. The majority's tendency here to embellish aspects of defendant's mental history and capacity, plus its tendency to diminish aspects of defendant's pre-trial and trial behavior, artificially create a specter of substantial evidence which I do not perceive in this case. As a result, I dissent.

The Due Process Clause of the United States Constitution protects criminal defendants who are incompetent to stand trial for charges levied against them by the State from being compelled to stand trial while they remain incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). In order to possess the competence necessary to stand trial, a defendant must have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). While "a competency determination is necessary only when a court has reason to doubt the defendant's competency," *Godinez v. Moran*, 509 U.S. 389, 401 n.13 (1993), North Carolina criminal courts have a "constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (quoting *State v. King*, 353 N.C. 457, 467, 546 S.E.2d 575, 585 (2001)). Substantial evidence which establishes a bona fide doubt as to a defendant's competency may be established by considering "a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." *Drope*, 420 U.S. at 180. Indeed, as the majority quotes from *Drope*, a suicide attempt "suggests a rather substantial degree of mental instability contemporaneous with trial." *Id.* at 181.

The majority in the present case recounts defendant's mental health history prior to trial and delineates her unfortunate and sobering background of agitation, anxiety, and depression, and her "history of mood disorder." In its analysis, the majority sees fit to equate such circumstances as those which existed in *Drope*, in which the majority here cites the Supreme Court of the United States' emphasis on the testimony of the defendant's wife that she believed that defendant " 'was sick and needed psychiatric care' and that he tried to choke and kill her

the night before trial," as well as those in *Pate v. Robinson*, 383 U.S. 375 (1966), wherein the majority here cites the Supreme Court of the United States' emphasis on the defendant's " 'history of disturbed behavior,' including instances of erratic conduct and paranoia . . . [and] defendant's prior psychiatric hospitalizations and a hospitalization resulting from an attempted suicide by gunshot to the head," with defendant's circumstances in the case sub judice in order to substantiate the majority's conclusion here that there was a bona fide doubt about defendant's competency to stand trial so as to require the trial court to conduct a *sua sponte* competency hearing. The breadth and depth of the mental health challenges experienced by defendants in *Drope* and *Pate* were at a more extreme level than those mental health challenges experienced by defendant in the present case, although the majority stretches the magnitude of defendant's circumstances to qualify for the application of the competency hearing requirement articulated by the nation's highest court.

As my distinguished colleagues in the majority magnify the significance of defendant's mental health history to elevate it to the reaches of the *Drope* and *Pate* principles governing the existence of substantial evidence to require a trial court's *sua sponte* competency hearing to be conducted, they simultaneously bolster the perception of the presence of substantial evidence that defendant may have been incompetent by providing scant recognition of defendant's behavior that detracts from a determination of substantial evidence. The information gathered by the trial court in conjunction with defendant's apparent drug overdose showed that defendant had "never been psychiatrically hospitalized," that defendant herself denied any history of suicide attempts prior to her apparent drug overdose, and that defendant reported that she took the drugs in an effort to kill herself following the end of the third day of her trial because defendant was aware that "the verdict for her trial was to be read out this morning" and defendant had stated "I'm not going to jail." The majority's expansive reading of defendant's limited mental health history, combined with her singular suicide attempt brought on by a professed desire to avoid incarceration, does not appear to sufficiently demonstrate, in my view, defendant's inability "to understand the nature and object of the proceedings against [her], to consult with counsel, and to assist in preparing [her own] defense," which is the standard for competency as instructed by the Supreme Court in *Drope*. *Drope*, 420 U.S. at 171. Substantial evidence of a defendant's incapacity to stand trial is inadequately shown where generalized mental health issues, rather than the *Drope* delineation of factors, is shown to exist. I do not consider the standard articulated by *Drope* to have been met in the present case.

With the dearth of any information to signify that defendant was incompetent and defendant's unequivocal statement that her apparent drug overdose was a singular suicidal event to avoid the prospect of incarceration, the trial court determined that defendant's absence from trial was accomplished by her voluntary actions which constituted a waiver of defendant's constitutional right to be present at her criminal trial. The modest attention which the majority has given to these core considerations of the trial court and the Court of Appeals in those forums' respective and compatible determinations that defendant was not entitled to a competency hearing under the totality of these circumstances, while bolstering the specter of the existence of substantial evidence to require the trial court to conduct a *sua sponte* competency hearing, unfortunately decreases the standard for establishment of such substantial evidence and increases the myriad of situations in which a trial court must interrupt a criminal trial to conduct a *sua sponte* competency hearing when a defendant creates a voluntary absence from trial.

The majority mistakenly conflates defendant's *willingness* to participate in her criminal trial with her *ability* to do so. In light of this and the additional aforementioned reasons, I respectfully dissent.

Justice NEWBY and Justice ERVIN join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
JEFF DAVID STEEN

No. 141A19

Filed 18 December 2020

1. Homicide—felony murder—jury instruction—attempted murder with a deadly weapon—hands and arms as "deadly weapons"

Under North Carolina law, an adult's hands and arms can, depending on the circumstances, qualify as "deadly weapons" for purposes of the statutory felony murder rule (N.C.G.S. § 14-17(a)). Therefore, at defendant's trial for his grandfather's murder and the attempted murder of his mother, the trial court did not err by instructing the jury that it could convict defendant of murdering his grandfather under the felony murder rule if it found—as the predicate felony under the "continuous transaction" doctrine—that defendant attempted to murder his mother using his hands and arms as deadly weapons.

2. Homicide—felony murder—jury instruction—attempted murder with a deadly weapon—prejudicial error

In a murder prosecution where the trial court instructed the jury that it could convict defendant of murdering his grandfather under the felony murder rule if it found—as the predicate felony—that defendant attempted to murder his mother (who could only recall being strangled) using either his hands and arms or a garden hoe as a deadly weapon, the trial court committed prejudicial error by including the garden hoe in its instruction. Given defendant's denials of guilt, the lack of DNA evidence linking him to the crime scene, and his mother's conflicting statements about her attacker's identity, there was a reasonable probability that, absent the instruction mentioning the garden hoe, the jury might not have convicted defendant of murdering his grandfather under a felony murder theory.

Justice NEWBY concurring in part and dissenting in part.

Justice MORGAN joins in this opinion concurring in part and dissenting in part.

Justice EARLS concurring in result only in part and dissenting in part.

Chief Justice BEASLEY joins in this opinion concurring in the result only in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 264 N.C. App. 566, 826 S.E.2d 478 (2019), finding no error in judgments entered on 1 February 2017 by Judge Nathaniel J. Poovey in Superior Court, Rowan County, based upon defendant's convictions for first-degree murder, robbery with a dangerous weapon, and attempted first-degree murder. On 11 June 2019, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court on 4 November 2019.

Joshua H. Stein, *Attorney General*, *by Mary Carla Babb*, *Assistant Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Amanda S. Zimmer*, *Assistant Appellate Defender*, *for defendant-appellant.*

ERVIN, Justice.

The issues before us in this case arise from defendant's conviction for the first-degree murder of his grandfather on the basis of the felony-murder rule using the attempted murder of his mother with a deadly weapon as the predicate felony. After the conclusion of all of the evidence and the arguments of counsel, the trial court instructed the jury that it could find defendant guilty of the first-degree murder of his grandfather in the event that it found beyond a reasonable doubt that he killed his grandfather as part of a "continuous transaction" during which he also attempted to murder his mother using either his hands and arms or a garden hoe as a deadly weapon. On appeal, we have been asked to resolve the questions of whether an adult's hands and arms can ever qualify as a deadly weapon for purposes of the felony-murder provisions of N.C.G.S. § 14-17(a) (providing that a defendant can be guilty of first-degree murder on the basis of the felony-murder rule using any "other felony committed or attempted with the use of a deadly weapon" as the predicate felony) and whether the trial court's erroneous jury instruction that the jury could find that defendant attempted to murder his mother using a garden hoe as a deadly weapon prejudiced defendant's chances for a more favorable outcome at trial. *See* N.C.G.S. § 14-17(a) (2019). After careful consideration of the record in light of the applicable law, we affirm the decision of the Court of Appeals, in part; reverse the Court of Appeals' decision, in part; and remand this case to the Superior Court, Rowan County, for a new trial with respect to the issue of defendant's guilt of the murder of his grandfather.

I. Factual Background

A. Substantive Facts

On the evening of 5 November 2013, defendant repaired a ceiling fan at the home of his mother, Sandra Steen, and his grandfather, J.D. Furr. After working on the fan, defendant's mother handed defendant the bill for a loan that she had secured on his behalf; in response, defendant stated that he would "take care of it." Defendant had a history of borrowing money from his mother and grandfather, both of whom had recently told defendant that they would not lend him any more money. As of 5 November 2013, defendant owed his mother between $4,000 and $6,000, owed his grandfather approximately $500, and had a checking account balance of only $3.64.

As his mother went outside to retrieve certain items from her automobile, defendant, who had followed behind her, told her he was leaving to go to work. After defendant announced his intention to depart, defendant's mother walked to a storage shed behind the house, where she remained for approximately five to ten minutes. At trial, defendant's mother testified

that she had no memory of hearing defendant enter his own vehicle or hearing the vehicle leave the premises. While she was in the shed, defendant's mother thought that she heard raised voices. As a result, defendant's mother left the shed for the purpose of checking on her father.

As defendant's mother walked toward the house, she felt someone grab her around her neck with his or her right arm. During her trial testimony, defendant's mother stated that the arm in question felt like defendant's arm and that she had initially assumed that defendant was playing a trick upon her. However, as the grip around her neck tightened, defendant's mother thought, "[n]o[, t]his is somebody trying to kill me." As defendant's mother fought back, "trying to punch or grab whatever [she] could," her attacker placed his or her left hand over her nose and mouth, at which point everything went black. The next thing that defendant's mother remembered, according to her trial testimony, was that someone was opening her eyelid as she lay on the ground and that she saw defendant's face. At that point, defendant's mother believed that defendant was there for the purpose of helping her.

A number of neighbors testified that they did not see any unfamiliar persons or vehicles in the area that night. After working an 11:00 p.m. to 7:00 a.m. shift, defendant returned to the family home on the following morning. Upon his arrival, defendant approached his mother, whom he realized had been attacked. As a result, defendant called for emergency assistance and laid on the ground with her until paramedics arrived.

At the time that defendant's mother was discovered on the ground, she was suffering from hypothermia and extensive injuries. After being taken to the hospital, defendant's mother was diagnosed with a skull fracture, hemorrhaging of the brain, a mild traumatic brain injury, hypothermia, a cervical neck injury, a collapsed lung, multiple rib fractures, and facial trauma.

According to the paramedics who responded to defendant's call for emergency assistance, defendant's grandfather was dead at the time that they arrived. The paramedics found defendant's grandfather in a face down position near the back door, covered in blood and with a large pool of blood around his head. A garden hoe covered in defendant's grandfather's blood was recovered next to his body. According to the medical examiner, defendant's grandfather died as the result of blunt force injuries to his head and neck that could have been inflicted using the garden hoe. Defendant's grandfather's wallet, which had blood on it, was found near his body and did not contain the money that was usually kept there. Nothing else appeared to be missing from the property.

Although defendant denied any involvement in the assault upon his mother and the murder of his grandfather both in statements that he made to investigating officers and during his trial testimony, the officers who responded to the scene noticed the presence of scratches upon defendant's arm. Initially, defendant claimed that his mother had scratched him as he lay on the ground beside her while they waited for the paramedics to arrive. As the investigation continued, however, defendant gave ten different explanations concerning the manner in which he had obtained the scratches that had been observed by the investigating officers. Among other things, defendant, at different times, attributed these scratches to his cat, to an injury that he had sustained at work, and to the performance of chores.

The DNA evidence developed from items found at the scene did not connect defendant to the crime. More specifically, the record reflects that defendant's DNA was not found on his grandfather's wallet, in scrapings taken from under his mother's fingernails, or on the garden hoe.

On the day following the assault and murder, while she was still hospitalized, heavily medicated, and just beginning to recover from her traumatic brain injury, defendant's mother spoke with investigating officers. At that time, defendant's mother told the investigating officers that defendant had left the farm before she was attacked, that the perpetrator "couldn't be [defendant]" because he was taller than her assailant, and that she had been assaulted by someone wearing a ski mask. On the following day, defendant's mother told investigating officers that, "if you're thinking about [defendant as a suspect], then you're barking up the wrong tree," since she did not believe that defendant was capable of committing the assault that had occurred.

After talking with a traumatic brain injury counselor, however, defendant's mother came to the conclusion that defendant had attacked her and testified at trial that that was "when [she] was able to put into place that was [defendant]'s arm coming around [her] neck, that was [defendant] choking [her], and then it was [defendant] knocking [her] out. And then when [her] left eyelid was raised up, that was [defendant]'s face in front of [her]." In addition, defendant's mother told the jury that "[t]here was no [ski] mask" and that she "had been dreaming all kind of crazy dreams laying up there in ICU." Defendant's mother explained during her trial testimony that she had not initially wanted to believe that her son was capable of attacking her and that she had had difficulty remembering specific details about the assault as a result of the brain injury that she had sustained.

B. Procedural History

On 9 December 2013, a Rowan County grand jury returned bills of indictment charging defendant with the first-degree murder of his grandfather, the attempted first-degree murder of his mother, and robbing his grandfather with a dangerous weapon. The charges against defendant came on for trial before the trial court and a jury at the 9 January 2017 criminal session of the Superior Court, Rowan County.

At the jury instruction conference, the State requested the trial court to instruct the jury concerning four separate theories on the basis of which defendant could be convicted of first-degree murder: (1) malice, premeditation, and deliberation; (2) felony-murder based upon the predicate felony of robbery with a dangerous weapon; (3) felony-murder based upon the predicate felony of the attempted first-degree murder of defendant's mother; and (4) lying in wait. In support of this request for the delivery of the third of these instructions, the State relied upon the "continuous transaction" doctrine, under which "the [predicate] felony, in this case, which would be attempted first-degree murder occurs before, during, or soon after the murder victim's death as long as that felony, which is the attempted first-degree murder of [defendant's mother], form[s] one continuous transaction" with the actual killing. In objecting to the delivery of the State's requested instructions, defendant's trial counsel argued that the record evidence did not suffice to support defendant's conviction on the basis of either the felony-murder rule or lying in wait. After recognizing that the attempted murder of defendant's mother had to have been committed using a deadly weapon in order for it to qualify as a predicate felony for purposes of N.C.G.S. § 14-17(a), the State asserted that this "deadly weapon" requirement had been satisfied in this case given that "defendant's use of his hands, possibly feet based on the injuries that [defendant's mother] sustained, and possibly also the use of the garden tool or some other object where she believed she was hit in the back of the head with something hard would constitute a deadly weapon." In response, defendant's trial counsel argued that the record did not contain sufficient evidence to support a jury finding that the garden hoe had been used in connection with the attack upon defendant's mother in light of the fact that, even though the blood of defendant's grandfather had been found on the garden hoe, that object bore no trace of defendant's mother's DNA. In addition, defendant's trial counsel argued that the record did not contain sufficient evidence to support a determination that defendant's hands and arms had been used as a deadly weapon against defendant's mother. During closing arguments, the State asserted that "[w]e know the garden tool is

what killed [defendant's grandfather]," but did not mention the possible use of the garden hoe in the attempted murder of defendant's mother.

During its instructions to the jury, the trial court allowed that body to consider all four of the theories of defendant's guilt of first-degree murder that the State had mentioned during the jury instruction conference. In instructing the jury with respect to the issue of defendant's guilt of first-degree murder on the basis of the felony-murder rule using the attempted murder of defendant's mother as the predicate felony, the trial court stated, in pertinent part, that

> to find the defendant guilty of first-degree murder under the first-degree felony-murder rule based upon the underlying felony of attempted first-degree murder, the State must prove four things beyond a reasonable doubt:
>
> First, that the defendant committed the offense of attempted first-degree murder. . . .
>
> Second, that while committing attempted first-degree murder against [his mother], the defendant killed [his grandfather] with a deadly weapon such that it would constitute one continuous transaction.
>
> Third, that the defendant's act was a proximate cause of [his grandfather's] death. . . .
>
> And fourth, that the attempted first-degree murder was committed with the use of a deadly weapon. *The State contends and the defendant denies that the defendant used his hands and/or arms, and or a garden hoe as a deadly weapon.*
>
> A deadly weapon is a weapon which is likely to cause death or serious bodily injury. In determining whether the instrument is a deadly weapon, you should consider its nature, the manner in which it was used and the size and strength of the defendant as compared to the victim.

On 1 February 2017, the jury returned verdicts finding defendant guilty of (1) robbery with a dangerous weapon, (2) the attempted first-degree murder of his mother, and (3) the first-degree murder of his grandfather on the basis of the felony-murder rule using the attempted first-degree murder of his mother as the predicate felony. On the other hand, the jury declined to find defendant guilty of the first-degree murder of his grandfather on the basis of (1) malice, premeditation, and

deliberation; (2) the felony-murder rule using robbery with a dangerous weapon as the predicate felony; and (3) lying in wait. After accepting the jury's verdicts and arresting judgment in the case in which defendant had been convicted of the attempted murder of his mother, the trial court entered judgments sentencing defendant to a term of life imprisonment without the possibility of parole based upon his conviction for first-degree murder and to a consecutive term of 64 to 89 months imprisonment based upon his conviction for robbery with a dangerous weapon. Defendant noted an appeal from the trial court's judgments to the Court of Appeals.

C. Court of Appeals' Decision

In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the trial court had committed prejudicial error by (1) instructing the jury that it could convict defendant of first-degree murder on the basis of the felony-murder rule using the attempted murder of his mother as the predicate felony on the grounds that the record did not contain sufficient evidence to permit the jury to find that defendant had used a garden hoe in the course of attempting to murder his mother; (2) instructing the jury that it could convict defendant of first-degree murder on the basis of the felony-murder rule using the attempted murder of his mother as the predicate felony on the grounds that hands and arms did not constitute a deadly weapon for purposes of N.C.G.S. § 14-17; and (3) excluding expert testimony concerning a medical condition that might have affected the credibility of defendant's mother's testimony that defendant had been her assailant.[1] In rejecting the second of defendant's challenges to the trial court's judgments, the Court of Appeals held that the trial court did not err by instructing the jury that defendant's hands and arms could constitute a deadly weapon for purposes of N.C.G.S. § 14-17(a). In reaching this conclusion, the Court of Appeals pointed out that it had "repeatedly held that hands, arms, and feet can constitute deadly weapons in certain circumstances 'depending upon the manner in which they were used and the relative size and condition of the parties,' " citing, among other decisions, *State v. Allen*, 193 N.C. App. 375, 378, 667 S.E.2d 295, 298 (2008), and that this Court had "held that the offense of felony child abuse could serve as the predicate felony for felony-murder where the defendant used his hands as a deadly weapon in the course of committing the abuse," *see State v. Pierce*, 346 N.C. 471, 488, S.E.2d 576, 589 (1997) (stating that,

1. As a result of the fact that the third of defendant's three challenges to the trial court's judgments was unanimously rejected by the Court of Appeals and is not before this Court, we will refrain from discussing it in any detail in this opinion.

"[w]hen a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons"). *State v. Steen*, 264 N.C. App. 566, 579, 826 S.E.2d 478, 487 (2019). The Court of Appeals further concluded that, given the differences between defendant's size and strength and that of his mother, a reasonable jury could have found that defendant used his hands and arms as deadly weapons in attempting to murder her.[2] In reaching this result, the Court of Appeals "decline[d] [d]efendant's invitation to extend the holding of [this Court in *State v. Hinton*, 361 N.C. 207, 639 S.E.2d 437 (2007),] beyond the parameters of the particular context in which it was decided," finding no evidence of any legislative intent to limit the type of weapons that would qualify as deadly weapons for purposes of N.C.G.S. § 14-17(a). *Steen*, 264 N.C. App. at 580, 826 S.E.2d at 487.

In addressing the first of defendant's challenges to the trial court's judgments, the Court of Appeals began by noting that, "although the evidence plainly established that the garden hoe was used to murder [defendant's grandfather], no evidence was presented specifically linking the garden hoe to" the attack upon defendant's mother, so that "evidence was presented in support of only one of the deadly weapon theories instructed on by the trial court — that is, the theory that [d]efendant attempted to murder Sandra with his hands and arms." *Id.* at 582, 826 S.E.2d at 489. On the other hand, acting in reliance upon this Court's decision in *State v. Malachi*, 371 N.C. 719, 821 S.E.2d 407 (2018), the Court of Appeals held that, even if "the reference to the garden hoe was unsupported by the evidence," "any error resulting from this instruction was harmless" given that the State "present[ed] exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions," quoting *Malachi*, 371 N.C. at 738, 821 S.E.2d at 421, with this evidence including defendant's mother's identification of defendant as her attacker, her extensive injuries, and the jury's "full and fair opportunity to evaluate the reliability of [defendant's mother's] testimony." *Steen*, 264 N.C. App. at 582, 826 S.E.2d at 488–89. As a result of its inability to "see how the brief reference to the garden hoe in the jury instructions could have affected the jury's determination as to the credibility of [defendant's mother]'s identification of [d]efendant

2. According to the Court of Appeals, "[d]efendant was 40 years old and [his mother] was 62 years old" at the time of the attack. In addition, the Court of Appeals noted that defendant "was 5 feet, 11 inches tall and weighed 210 pounds while [defendant's mother] was 5 feet, four inches tall and weighed 145 pounds." *State v. Steen*, 264 N.C. App. 566, 579, 826 S.E.2d 478, 487 (2019).

and, therefore, its verdict," the Court of Appeals found that defendant was not prejudiced by the trial court's erroneous reference to the use of a garden hoe in its instructions concerning the extent to which the jury was allowed to find that defendant had attempted to murder his mother using a deadly weapon. *Id.* at 583, 826 S.E.2d at 489.

In a separate, concurring opinion, Judge Berger opined that "the instruction provided by the trial court regarding the garden hoe was supported by the evidence" produced at trial and was not, for that reason, erroneous. *Steen*, 264 N.C. App. at 583, 826 S.E.2d at 489 (Berger, J., concurring). In Judge Berger's view, the fact that the record contained evidence tending to show that the blows inflicted upon defendant's mother had caused her to suffer a skull fracture and a loss of consciousness meant that the jury could "reasonably infer that [defendant's mother's] injuries were inflicted with a blunt force object" such as the garden hoe. *Id.* at 584, 826 S.E.2d at 490.

In a separate opinion in which he concurred with the Court of Appeals' decision, in part, and dissented from the Court of Appeals' decision, in part, Judge Hunter expressed the opinion that the trial court's erroneous decision to instruct the jury that it could find that defendant attempted to murder his mother with a deadly weapon on the basis of his alleged use of the garden hoe constituted prejudicial error. *Id.* (Hunter, J., concurring, in part, and dissenting, in part). Arguing in reliance upon our decision in *Malachi*, 371 N.C. at 738, 821 S.E.2d at 421, Judge Hunter noted that reviewing courts are more likely to find an error such as the one at issue here to be harmless in the event that the State presents "strong evidence of [defendant's] guilt" while stating that the State's evidence was "far from conclusive as to [d]efendant's guilt." *Id.* at 584–85, 826 S.E.2d at 490. Among other things, Judge Hunter concluded that defendant's mother's credibility was subject to serious question given that she had provided "widely conflicting" statements concerning the circumstances surrounding the attack that had been made upon her during the course of the investigation. *Id.* In addition, Judge Hunter opined that the testimony of defendant's mother identifying defendant as the perpetrator of the assault that had been committed upon her was of substantial importance to the State's case given the absence of any DNA evidence linking defendant to the attempted murder of his mother and the murder of his grandfather. *Id.* at 585, 826 S.E.2d at 490. As a result, Judge Hunter believed that defendant was entitled to a new trial with respect to the murder charge. *Id.*

Defendant noted an appeal to this Court based upon Judge Hunter's dissent. On 11 June 2020, we allowed defendant's petition seeking

discretionary review with respect to the additional issue of whether the trial court erred by allowing the jury to treat hands and arms as a deadly weapon for purposes of N.C.G.S. § 14-17.

II. Substantive Legal Analysis

A. Hands and Arms as a Deadly Weapon

[1] In seeking to persuade this Court to overturn the Court of Appeals' decision that hands and arms can be a deadly weapon for purposes of N.C.G.S. § 14-17(a), defendant asserts that "[a]llowing hands and arms to be a deadly weapon under N.C.G.S. § 14-17(a) vastly and improperly expands the circumstances which could support a conviction for felony-murder" under North Carolina law. In support of this argument, defendant points out that "not all crimes can be aggravated based on the alleged use of hands and/or arms as a deadly weapon," *citing Hinton*, 361 N.C. at 211–12, 639 S.E.2d at 440 (reasoning that "the General Assembly intended to require the State to prove that a defendant used an external dangerous weapon before conviction under the [robbery with a dangerous weapon] statute is proper"). As a result, defendant argues that, given the General Assembly's decision in 1977 to amend N.C.G.S. § 14-17(a) for the purpose of limiting the reach of the felony-murder rule so that it only encompassed certain enumerated felonies and other felonies perpetrated with the "use of a deadly weapon," the legislative intent would be "thwarted by not requiring an external dangerous weapon" as a prerequisite for a conviction under the "catch-all" provision of the statute. In addition, defendant contends that hands and arms are inherently different than an external deadly weapon on the theory that a perpetrator would not receive the same "boost of confidence" from the use of his own appendages that he would receive by carrying a firearm or some other external weapon. Finally, defendant argues that our prior decision in *Pierce* should either be overruled or limited to cases in which felonious child abuse serves as the predicate felony for purposes of the felony-murder rule.

In seeking to persuade us to uphold the Court of Appeals' decision with respect to the issue of whether hands and arms can serve as deadly weapons for purpose of the statutory version of the felony-murder rule embodied in N.C.G.S. § 14-17(a), the State begins by noting North Carolina's lengthy history of leaving the issue of whether a particular weapon qualifies as "deadly" for the jury's consideration. *See State v. Joyner*, 295 N.C. 55, 64–65, 243 S.E.2d 367, 373 (1978) (holding that an instrument's "allegedly deadly character" is a question "of fact to be determined by the jury"). In addition, the State cites decisions, such as

State v. Brunson, 180 N.C. App. 188, 636 S.E.2d 202 (2006), *aff'd per curiam*, 362 N.C. 81, 653 S.E.2d 144 (2007), for the proposition that this Court has long "recognized that under certain circumstances, hands and other body parts may be deadly weapons for purposes of proving the deadly weapon element of assault offenses perpetrated with a deadly weapon." The State argues that this Court should reject defendant's invitation to overrule *Pierce* on the grounds that it "is now well-established [law] in our appellate courts' jurisprudence," citing four subsequent cases that rely, in part, upon the reasoning utilized in *Pierce*. *See*, *e.g.*, *State v. Jones*, 353 N.C. 159, 168, 538 S.E.2d 917, 925 (2000). In the State's view, this Court's holding in *Pierce* is not limited to cases in which the predicate felony for felony-murder is child abuse; instead, the State contends that the logic of *Pierce* is applicable in any case in which the weapon "is something not inherently deadly," in which event the issue of whether a particular item constitutes a deadly weapon is a question for the jury "based upon the manner of usage and a victim's characteristics—age, size, etc.—relative to the defendant's." *See State v. Lang*, 309 N.C. 512, 525–26, 308 S.E.2d 317, 324 (1983) (holding that the trial court did not err by instructing the jury that it could find the defendant's hands or feet to be deadly weapons in a case in which two adult males kicked an adult female victim with their feet, hit her with their hands and a bat, and cut her with a knife).

The proper resolution of the issue of whether the term "deadly weapon" as contained in N.C.G.S. § 14-17(a) includes an adult defendant's hands, arms, fists, or feet when used against another adult requires us to decide an issue of statutory construction. In attempting to ascertain the meaning of a particular statutory provision, "we look first to the language of the statute itself." *Walker v. Bd. of Trs. of N.C. Loc. Gov'tal Emps. Ret. Sys.*, 348 N.C. 63, 65, 499 S.E.2d 429, 430 (1998) (quoting *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996)). In the event that the relevant statutory language is unambiguous, the statute should be interpreted in accordance with its plain meaning. *See Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988). On the other hand, in the event that the relevant statutory language is ambiguous, "judicial construction must be used to ascertain the legislative will," which must be carried out "to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136–37 (1990). "As with any other statute, the legislative intent controls the interpretation of a criminal statute." *State v. Jones*, 358 N.C. 473, 478, 598 S.E.2d 125, 128 (2004).

"[W]hen the General Assembly fail[s] to intervene in light of a long-standing judicial practice," the principle of legislative acquiescence becomes

relevant. *Id.* at 483, 598 S.E.2d at 131 (finding that, had the General Assembly wished to change the crime of possession of cocaine from a felony to a misdemeanor, "it could have addressed the matter during the course of these many years" and that, in light of its failure to do so, "it is clear that the legislature has acquiesced in the practice of classifying the offense of possession of cocaine as a felony"). Although legislative inaction should not, standing alone, be treated as dispositive, "[t]he failure of a legislature to amend a statute which has been interpreted by a court is some evidence that the legislature approves of the court's interpretation." *Young v. Woodall*, 343 N.C. 459, 462–63, 471 S.E.2d 357, 359 (1996).

This Court and the Court of Appeals have a lengthy history of using the doctrine of legislative acquiescence in interpreting criminal statutes. In *State v. Gardner*, for example, this Court held that the crimes of breaking or entering and felonious larceny were separate offenses in light of the fact that the appellate courts in North Carolina had long treated them as distinct, 315 N.C. 444, 462, 340 S.E.2d 701, 713 (1986), on the theory that, if "punishment of both crimes in a single trial [had] not been intended by our legislature, it could have addressed the matter during the course of these many years," *id.* at 462–63, 340 S.E.2d at 713. The same logic supports the conclusion that hands, arms, feet, and other appendages can be deadly weapons for purposes of the statutory felony-murder rule embodied in N.C.G.S. § 14-17(a).

As a general proposition, a "deadly weapon" as that term is used in North Carolina jurisprudence is one that is "likely to produce death or great bodily harm under the circumstances of its use," with the issue of whether a particular weapon is or is not deadly being "one of fact to be determined by the jury" in the event that it "may or may not be likely to produce [death], according to the manner of its use, or the part of the body at which the blow is aimed." *Joyner*, 295 N.C. at 64–65, 243 S.E.2d at 373 (citations omitted). A defendant's hands, arms, feet, or other appendages may well, under certain circumstances, be "likely to produce death or great bodily harm," as this Court and the Court of Appeals have held in a number of different contexts.[3]

3. As we understand defendant's brief, he has not contended before this Court that, in the event that hands, arms, legs, and other appendages can ever serve as a deadly weapon for purposes of the statutory felony-murder rule set out in N.C.G.S. § 14-17(a), the evidence fails to support a finding that his hands and arms were deadly weapons in light of the manner in which they were used during his alleged attempt to murder his mother. For that reason, the only issue before us at this time is the extent to which, in the abstract, hands and arms can constitute a deadly weapon for purposes of North Carolina's current version of the felony-murder rule rather that whether the evidence supported a finding that his hands and arms as used at the time of his alleged assault upon his mother were deadly weapons as a matter of fact.

In *Pierce*, for example, this Court upheld a defendant's conviction for first-degree murder on the basis of the felony-murder rule using felonious child abuse as the predicate felony in a case in which the defendant caused a child's death by shaking her with his hands. 346 N.C. at 493, 488 S.E.2d at 589 (stating that, "[w]hen a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons"). Similarly, the Court of Appeals has held, in the felony-murder context, that a defendant's hands, arms, feet, and other appendages can be a deadly weapon, with the issue of whether the weapon in question was or was not actually deadly being a question of fact for the jury. *State v. Frazier*, 248 N.C. App. 252, 261, 790 S.E.2d 312, 319 (2016) (holding that the trial court did not err by allowing the jury to determine whether the "killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon," which, in that instance, was his hands); *State v. Krider*, 145 N.C. App. 711, 712, 550 S.E.2d 861, 862 (2001) (upholding a defendant's conviction for first-degree murder based upon the felony-murder rule in a case in which the defendant caused the death of a child in the course of "committing felonious child abuse with the use of her hands as a deadly weapon").

In the same vein, the Court of Appeals has repeatedly held, unlike appellate courts in other states, that a defendant's hands and feet can be deadly weapons sufficient to support a defendant's conviction for assault with a deadly weapon in violation of N.C.G.S. § 14-32. *See Allen*, 193 N.C. App. at 378, 667 S.E.2d at 298 (2008) (holding that a defendant's "hands may be considered deadly weapons . . . depending upon the manner in which they were used and the relative size and condition of the parties"); *State v. Harris*, 189 N.C. App. 49, 59–60, 657 S.E.2d 701, 708–709 (2008) (holding that the issue of whether "an assailant's hands and feet are used as deadly weapons is a question of fact to be determined by the jury"); *State v. Rogers*, 153 N.C. App. 203, 211, 569 S.E.2d 657, 663 (2002) (holding that hands and fists "may be considered deadly weapons, given the manner in which they were used and the relative size and condition of the parties involved"); *State v. Hunt*, 153 N.C. App. 316, 319, 569 S.E.2d 709, 710–11 (2002) (holding that the jury "was properly allowed to determine the question of whether defendant's hands and feet constituted deadly weapons"); *State v. Grumbles*, 104 N.C. App. 766, 769, 411 S.E.2d 407, 409 (1991) (describing "this [as] a case where defendant's fists could be considered deadly weapons"); *State v. Jacobs*, 61 N.C. App. 610, 611, 301 S.E.2d 429, 430 (1983) (holding that, in a case in which a 210 pound male defendant hit a sixty-year-old female victim with his fists, "defendant's fists could have been a deadly weapon").

As a result, given the virtually uninterrupted line of appellate decisions from this Court and the Court of Appeals interpreting the reference to a "deadly weapon" in N.C.G.S. § 14-17(a) to encompass the use of a defendant's hands, arms, feet, or other appendages, so that the language used in the relevant statutory provision has an established meaning in North Carolina law, and the fact that the General Assembly has not taken any action tending to suggest that N.C.G.S. § 14-17(a) should be interpreted in a manner that differs from the interpretation deemed appropriate in this line of decisions, it would be reasonable to assume that, given the use of an expression that has an established meaning and the fact that the General Assembly has failed "to intervene in light of [this] longstanding judicial practice," *Jones*, 358 N.C. at 483, 598 S.E.2d at 131, the General Assembly intended for the language of the statutory felony-murder rule set forth in N.C.G.S. § 14-17(a) to be interpreted in the manner deemed to be appropriate by the Court of Appeals in this case.

In seeking to persuade us to reach a different result in this case, defendant argues, among other things, that our decision in *Pierce* should either be overruled or, in the alternative, that it should be limited to situations involving the abuse of small children. In support of this argument, defendant asserts that there is a categorical difference between child and adult victims, with the former being peculiarly susceptible to serious injury or death as a result of the use of hands, arms, feet, or other appendages while the latter are not. Aside from the fact that acceptance of defendant's argument would be inconsistent with the manner in which this Court has defined the expression "deadly weapon" for many years, *see, e.g.*, *Joyner*, 295 N.C. at 64–65, 243 S.E.2d at 373; *State v. Hales*, 344 N.C. 419, 426, 474 S.E.2d 328, 332 (1996); *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985), and the absence of any basis for the making of such a distinction in either the relevant statutory language or in the decisions, such as *Pierce*, allowing the jury to find that a deadly weapon had been used in cases in which an adult defendant used his or her hands, arms, feet, or some other appendage in the course of assaulting a smaller or weaker adult, *see Allen*, 193 N.C. App. at 378, 667 S.E.2d at 298; *Harris*, 189 N.C. App. at 59–60, 657 S.E.2d at 708–09; *Rogers*, 153 N.C. App. at 211, 569 S.E.2d at 663; *Hunt*, 153 N.C. App. at 318–19, 569 S.E.2d at 710–11; *Grumbles*, 104 N.C. App. at 770, 411 S.E.2d at 410; *Jacobs*, 61 N.C. App. at 611, 301 S.E.2d at 430, we see no reason to overrule *Pierce* or to adopt the restrictive interpretation of that decision for which defendant advocates. As a result, we decline defendant's invitation to limit the logic of *Pierce* to felony-murder cases arising from the commission of felonious child abuse using the defendant's hands, arms, legs, or another appendage as the necessary deadly weapon.

Similarly, defendant argues that the logic of our decision in *Hinton*, 361 N.C. at 207, 639 S.E.2d at 437, shows that the expression "deadly weapon" can mean different things when used in different statutory provisions and that we should adopt a felony-murder-specific interpretation of N.C.G.S. § 14-17(a) in this case. In *Hinton*, we held that the reference to "any firearms or other dangerous weapon, implement or means" as used in N.C.G.S. § 14-87(a) did not encompass the use of a defendant's hands, *id.* at 210, 639 S.E.2d at 439, with the Court having reached this result on the grounds that N.C.G.S. § 14-87 was intended to provide a "more severe punishment when the robbery is committed with the 'use or threatened use of firearms or other dangerous weapons' " than when the defendant committed common law robbery, which did not involve the use of such implements. *Id.* at 211–12, 639 S.E.2d at 440. We are not, however, persuaded that the logic upon which the Court relied in *Hinton* has any application to this case given that we have been unable to identify anything in the language in or legislative intent underlying N.C.G.S. § 14-17(a) that tends to suggest that its reference to a "deadly weapon" should be treated any differently than the way in which that expression has normally been treated in North Carolina criminal jurisprudence.

Finally, the construction of the relevant statutory language that we believe to be appropriate in this case does not create a risk that every killing perpetrated with the use of a the defendant's hands, arm, legs, or other appendages will necessarily come within the ambit of the statutory felony-murder rule set out in N.C.G.S. § 14-17(a) or otherwise thwart the General Assembly's attempt to limit the scope of the felony-murder rule by confining the availability of the felony-murder rule to unenumerated felonies committed with the use of a deadly weapon. On the contrary, under the established law in North Carolina, the extent to which hands, arms, legs, and other appendages can be deemed deadly weapons depends upon the nature and circumstances of their use, including, but not limited to, the extent to which there is a size and strength disparity between the perpetrator and his or her victim. Similarly, the fact that something more than a killing with hands, arms, legs, or other bodily appendages must be shown in order to satisfy the requirements of the felony-murder rule set out in N.C.G.S. § 14-17(a) shows that the decision that we make in this case will not have the effect of undoing the limitations upon the availability of the felony-murder rule that the General Assembly intended when it enacted the current version of the relevant statutory language, particularly given its consistency with the established definition of that term contained in our decisions and those of the Court of Appeals.

As a result, given that this Court and the Court of Appeals have held that bodily appendages such as a defendant's hands and arms can, depending upon the manner in which and the circumstances under which they are used, constitute deadly weapons in applying a wide variety of statutory provisions and given that, if the General Assembly intended to exclude hands, arms, feet, and other bodily appendages from the definition of "deadly weapon" used for purposes of N.C.G.S. § 14-17(a), it has had ample opportunity to do so without ever having acted in that manner, we hold that there is no reason for the statutory reference to a "deadly weapon" contained in N.C.G.S. § 14-17(a) to have anything other than its ordinary meaning. On the contrary, a decision excluding arms, hands, feet, and other appendages from the definition of a "deadly weapon" for purposes of the statutory felony-murder rule enumerated in N.C.G.S. § 14-17(a) would create unnecessary confusion in our State's criminal law. As a result, we affirm the Court of Appeals' decision that the trial court did not err by instructing the jury that it could find that defendant attempted to murder his mother with a deadly weapon based upon the use of his hands and arms.

B. Prejudicial Effect of the Garden Hoe Instruction

[2] In seeking to persuade us that the trial court's instruction that the jury was entitled to find that defendant attempted to murder his mother using a garden hoe as a deadly weapon constituted prejudicial error,[4] defendant begins by noting that, in order to demonstrate the prejudicial nature of the trial court's error, he needed to show the existence of a "reasonable possibility" that "a different result would have been reached at the trial" in the absence of that error. *Malachi*, 371 N.C. at 738, 821 S.E.2d at 421. Defendant contends that he made the necessary showing of prejudice given that defendant's DNA had not been found on the garden hoe, on his grandfather's wallet, or in the scrapings taken from beneath his mother's fingernails and that no blood had been found in defendant's car or on any item of his clothing.[5] In addition, defendant

4. As an aside, we note that the issue of the correctness of the Court of Appeals' determination that the trial court's instruction that the jury could find that defendant attempted to murder his mother using the garden hoe lacked sufficient evidentiary support is not before us given that the State did not seek review by this Court of the Court of Appeals' decision with respect to that issue.

5. In addition, defendant claims that an allele associated with a third party was found in fingernail scrapings taken from his mother. However, since the undisputed record evidence tended to show that the DNA analyst who testified on behalf of the State was unable to determine whether the allele came from a third party or was simply an artifact produced by the DNA amplification process and that it would have been possible for DNA

contends that, "given the various widely conflicting pre-trial statements that [his mother] gave—all but one of which flatly denied that [d]efendant was her assailant—her testimony clearly raised . . . the sort of serious credibility questions contemplated by the Supreme Court in *Malachi*" quoting *Steen*, 264 N.C. App. at 584–85, 826 S.E.2d at 490 (Hunter, J., dissenting). In defendant's view, the Court of Appeals erred by determining that the identification testimony provided by his mother constituted "exceedingly strong evidence" of his guilt given the absence of any physical evidence linking him to the commission of the crimes with which he had been charged and the existence of serious concerns about the credibility of the identification testimony provided by his mother.

The State, on the other hand, argues that the "challenged jury instruction" did not constitute prejudicial error given that "[t]he instruction as given simply stated two of the possible implements, used alone or in combination, the State was contending defendant used as a deadly weapon" and that the challenged instruction correctly asserted "that the State was contending defendant used his hands and/or arms and or a garden hoe as a deadly weapon." In addition, the State contends that, even if the trial court's reference to the garden hoe was erroneous, "the evidence at trial overwhelming[ly] established defendant used a deadly weapon in perpetrating the predicate felony," so that the jury would have reached the same conclusion in the absence of the challenged jury instruction. As support for this assertion, the State relies upon the testimony of defendant's mother and the evidence concerning the extensive injuries that she sustained during the assault that was made upon her.

In addition, the State contends that the Court of Appeals correctly applied *Malachi* to the facts of this case. According to the State, the application of the traditional harmless error test that this Court deemed to be appropriate in *Malachi* necessitates a conclusion that defendant had failed to show the existence of a reasonable possibility that the jury would have reached a different result in the absence of the delivery of the unsupported instruction relating to the garden hoe given that "the identity of the perpetrator was the most contested issue at trial" and, in the face of conflicting evidence, "the jury believed [defendant's mother] when she identified defendant as the person who attacked her." In addition, the State argued that it had elicited strong evidence of defendant's

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evidence derived from a paramedic or another similar individual to be found in the fingernail scrapings taken from defendant's mother, we do not consider this aspect of defendant's argument in our prejudice analysis.

guilt at trial, with this evidence including the fact that defendant's mother ultimately, and reluctantly, testified against him in spite of the fact that she had initially refused to believe that her own son was capable of attacking her; the inconsistent explanations that defendant gave for the scratches on his arms; and the fact that defendant had both an opportunity and a motive for attacking his mother and his grandfather.

As a result of the fact that the State does not dispute defendant's contention that he properly preserved his challenge to the trial court's instruction that the jury could consider the use of the garden hoe in determining whether defendant attempted to murder his mother with a deadly weapon,[6] we evaluate the prejudicial effect of the delivery of this instruction using our traditional harmless error standard, *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012), which requires "the defendant [to] show '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.' " *Id.* at 513, 723 S.E.2d at 331 (quoting N.C.G.S. § 15A-1443(a) (2009)). In conducting the required prejudice analysis, a reviewing court "should not find the error harmless" if it is unable to conclude "that the jury verdict would have been the same absent the error." *State v. Bunch*, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010) (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999)).

In *Malachi*, we upheld the use of traditional harmless error analysis in evaluating the extent to which the defendant's case was prejudiced by the delivery of an erroneous jury instruction which allowed the jury to convict the defendant of possession of a firearm by a felon on the basis of both actual and constructive possession despite the fact that the record contained no evidence that the defendant constructively possessed the firearm in question. 371 N.C. at 721-22, 731, 821 S.E.2d

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6. We are not persuaded by the State's suggestion that the trial court's deadly weapon instruction simply listed possible choices for the identity of the deadly weapon that the jury had to find in order to convict defendant of the first-degree murder of his grandfather on the basis of the felony-murder rule using the attempted murder of defendant's mother as the predicate felony. After informing the jury that it had to find that defendant attempted to murder his mother using a deadly weapon in order to find defendant guilty of the first-degree murder of his grandfather, the trial court indicated that the State contended that the deadly weapon that defendant used in attempting to murder his mother was either his own hands and arms or the garden hoe. Taken in context, we believe that the jury could have only used the trial court's reference to the use of defendant's hands and arms or a garden hoe as a recitation of the available bases for a finding that defendant attempted to murder his mother using a deadly weapon rather than the mere statement of a non-exclusive list of possible deadly weapons.

at 410, 416. In holding that the trial court's unsupported constructive-possession instruction constituted harmless error, we stated that:

> instructional errors like the one at issue in this case are exceedingly serious and merit close scrutiny to ensure that there is no 'reasonable possibility' that the jury convicted the defendant on the basis of such an unsupported legal theory. However, in the event that the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions, it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory.

Id. at 738, 821 S.E.2d at 421. As a result, the prejudice analysis that we are required to conduct in this case must focus upon the relative strength of the State's case in light of the strength of the countervailing evidence available to defendant, including both any substantive evidence that defendant may have elicited and any credibility-related weaknesses that may exist in the evidence tending to show defendant's guilt, with the ultimate question being whether there is a "reasonable possibility" that the outcome at trial would have been different in the event that the trial court's error had not been committed.

After carefully reviewing the record, we conclude that there is a reasonable possibility that the jury would have refrained from convicting defendant of the first-degree murder of his grandfather on the basis of the felony-murder rule using the attempted murder of his mother with a deadly weapon as the predicate felony in the absence of the trial court's erroneous instruction referring to the garden hoe as a deadly weapon. In order to avoid reaching this conclusion, we would be required to hold that the State's evidence that defendant killed his grandfather as part of a continuous transaction in which he also attempted to murder his mother using his hands and arms as a deadly weapon was so sufficiently strong that no reasonable possibility exists under which the jury would have done anything other than convict defendant of first-degree murder on the basis of that legal theory. We are unable to make such an inference given the facts contained in the present record.

As an initial matter, we note that the evidence concerning the issue of whether defendant was the actual perpetrator of the assault upon his mother and the killing of his grandfather was in sharp dispute, a fact that the jury's eventual verdict does nothing to change. Aside from the

fact that defendant consistently denied having committed the offenses with which he had been charged in his conversations with investigating officers, he maintained his innocence when he took the witness stand and testified at trial. Defendant's denials of guilt were bolstered by the fact that the record was devoid of any physical evidence tending to support the contention that he was the perpetrator of the crimes that he had been charged with committing. Finally, the conflicting nature of the statements that defendant's mother made to investigating officers concerning her ability to identify the person who had assaulted her provided an adequate basis for a reasonable jury to discount the credibility of the identification that she delivered at trial. As a result, while the record does, as the State contends, contain substantial evidence tending to show that defendant was guilty of attempting to murder his mother and killing his grandfather, including substantial evidence of his motive to commit the crimes in question and his inconsistent explanations for the scratches on his arms, we are unable to say that the State's evidence with respect to the issue of defendant's identity as the perpetrator of the murder of his grandfather was so strong that a reasonable jury could not have reached a contrary conclusion.

Even more importantly, the evidence concerning the extent to which defendant's hands and arms, as used during the alleged killing of his mother, constituted a deadly weapon was in significant dispute as well. As we noted earlier in this opinion, the trial court did not peremptorily instruct the jury that defendant's hands and arms were deadly weapons per se; instead, the trial court required the jury to make this determination based upon the nature and manner of their use and the other relevant surrounding circumstances. Although the size and strength differential between defendant and his mother was, as the Court of Appeals found, sufficient to permit a determination that defendant's hands and arms constituted a deadly weapon for purposes of this case, the differences in size and strength between defendant and his mother as revealed in the record evidence were not so stark as to preclude a reasonable jury from concluding that defendant's hands and arms were not deadly weapons. In the same vein, the nature and extent of the injuries that were inflicted upon the mother does not suffice to support a finding of harmlessness given that such a determination overlooks the necessity for the State to show a disparity in size and strength between the killer and the victim in addition to the infliction of fatal injuries and given that a contrary determination would effectively render hands and arms a deadly weapon in all instances in which death results as a result of their use. In the event that the jury decided to conclude, as we believe that it reasonably could have, that defendant's hands and arms were not used

as a deadly weapon during his alleged attempt to murder his mother, it would have been compelled to refrain from finding that defendant was guilty of the first-degree murder of his grandfather on the basis of the felony-murder rule even if it found that he was the perpetrator of that killing. As a result, we hold that the trial court's instruction concerning the use of the garden hoe as a deadly weapon during defendant's alleged attempt to murder his mother constituted prejudicial error necessitating a new trial in the case in which defendant was convicted of murdering his grandfather.[7]

III. Conclusion

Thus, for the reasons set forth above, we hold that the Court of Appeals correctly held that the trial court did not err by instructing the jury that, in light of the surrounding facts and circumstances, it could find that defendant's hands and arms constituted a deadly weapon for purposes of the felony-murder provisions of N.C.G.S. § 14-17(a). On the other hand, we also hold that there was a reasonable possibility that, had the trial court refrained from instructing the jury in such a manner as to allow it to conclude that defendant attempted to murder his mother using the garden hoe as a deadly weapon, the outcome at defendant's trial for the murder of his grandfather would have been different and that the Court of Appeals erred by reaching a contrary result. As a result, the Court of Appeals' decision is affirmed, in part, and reversed, in part, with this case being remanded to the Court of Appeals for further remand to the Superior Court, Rowan County, for a new trial in the case in which defendant was convicted of murdering his grandfather.

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED.

Justice DAVIS did not participate in the consideration or decision of this case.

Justice NEWBY concurring in part and dissenting in part.

While I agree with the majority that defendant's hands and arms constitute deadly weapons in this case, I disagree that the instruction

7. In view of the fact that defendant has not contended that the trial court's erroneous instruction concerning the jury's ability to find that defendant's alleged use of a garden hoe in attempting to murder his mother had no bearing upon the appropriateness of defendant's conviction for the attempted murder of his mother or the robbery of his grandfather, the trial court's judgment in the robbery case and the jury's verdict in the attempted murder case remain undisturbed.

regarding the garden hoe resulted in prejudicial error. At trial the State's evidence clearly established that the garden hoe was used to murder the grandfather, but the evidence did not specifically link the garden hoe to the attack on Sandra, defendant's mother. Rather, the State's theory was that defendant used his hands and arms in an attempt to murder his mother. As stated by the Court of Appeals,

> Sandra testified that her attacker grabbed her from behind and tightly wrapped his right arm around her neck before placing his left hand over her nose and mouth. A struggle then ensued between Sandra and her attacker until she lost consciousness. The injuries Sandra sustained included a skull fracture, multiple rib fractures, and a collapsed lung. Such testimony clearly constitutes substantial evidence to support an instruction that hands and arms were used as weapons during the attack on her.

State v. Steen, 264 N.C. App. 566, 582, 826 S.E.2d 478, 489 (2019). The evidence of skull and rib fractures supports the theory that the attacker used a weapon, like the garden hoe; however, there was no specific evidence linking the garden hoe to the attack. As determined by the Court of Appeals, the evidence presented supported only one of the deadly weapon theories the trial court instructed on—hands and arms as deadly weapons—but that theory was amply supported by the evidence. *See id.* "[I]t is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory," *State v. Malachi*, 371 N.C. 719, 738, 821 S.E.2d 407, 421 (2018), even though the jury instructions included both the garden hoe and hands and arms as deadly weapons for the attempted murder charge of Sandra. As a result, the instruction given on garden hoe, even if erroneous, did not prejudice defendant.

The real issue at trial was the identity of the perpetrator, not which weapon caused which of the injuries. Sandra identified defendant as her attacker, and the jury evaluated the reliability of her testimony in light of all the evidence. When the jury found defendant guilty it found credible Sandra's identification of defendant as the attacker. Because the ultimate issue at trial concerned defendant's identity as the perpetrator, the reference to the garden hoe in the jury instructions did not influence the jury's decision to find Sandra's testimony credible. Even if the garden hoe instruction represented a different theory of the underlying crime of attempted murder, any error resulting from it was harmless because that theory was not supported by the evidence at trial. Defendant cannot show a reasonable possibility that the jury would have reached a

different result absent the erroneous instruction, and his convictions should be upheld. I respectfully concur in part and dissent in part.

Justice MORGAN joins this opinion.

Justice EARLS concurring in result only in part and dissenting in part.

To find Mr. Steen guilty of felony murder on the theory adopted by the jury, they were required to conclude that the evidence proved he attempted to murder his mother using a deadly weapon. The jury was instructed that it could find that he used either a garden hoe or his hands and arms as deadly weapons. There was no evidence presented at trial from which a jury could conclude that Mr. Steen used a garden hoe to harm his mother. *State v. Steen*, 264 N.C. App. 566, 582, 826 S.E.2d 478, 489 (2019). The majority holds today that (1) a jury can properly consider a person's hands, arms, feet, or other body parts to be deadly weapons for purposes of the felony murder statute, but (2) that the inclusion of the garden hoe instruction was not harmless error and warrants a new trial. With regard to the second holding, while I do not concur in the majority's analysis relying on our decision in *State v. Malachi*, 371 N.C. 719, 821 S.E.2d 407 (2018), I do agree that the instruction regarding the garden hoe was error warranting a new trial.

However, in its first holding the Court abdicates its role as a steward of this state's law and turns upside down the principle of stare decisis. Ignoring our own precedents and disregarding every reliable indicator of legislative intent, the majority decides to follow precedent from the Court of Appeals because, without intervention from either this Court or the General Assembly, the Court of Appeals has continued to follow its own precedent. Because I read the felony murder statute's deadly weapon requirement not to include a defendant's hands and arms, I respectfully dissent.

Subsection 14-17(a) of the General Statutes of North Carolina defines felony murder, punishable by death or life imprisonment without parole, as a murder that is "committed in the perpetration or attempted perpetration of" certain enumerated felonies or "other felony committed or attempted with the use of a deadly weapon." N.C.G.S. § 14-17(a) (2019). Our General Statutes do not define the term "deadly weapon." Rather, the definition derives from this Court's case law. A "deadly weapon" is "any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301,

283 S.E.2d 719, 725 (1981). While the Court has held that other generally innocuous items may be considered deadly weapons depending on "the relative size and condition of the parties and the manner in which [they are] used," *State v. Archbell*, 139 N.C. 537, 538, 51 S.E. 801, 801 (1905), and we have held that an adult defendant's hands used against a child victim may be considered deadly weapons, *State v. Pierce*, 346 N.C. 471, 488 S.E.2d 576 (1997), we have never specifically addressed whether an adult's hands or other body part, wielded against another adult, may be considered deadly weapons for purposes of the felony murder rule.

The felony murder rule derives from English common law and was inherited by American courts. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 458 (1985) [hereinafter Roth & Sundby, *The Felony Murder Rule*]. Since its inception in the United States, the felony murder rule remains in existence, although subject to modern limitations. 2 Wharton's Criminal Law § 147 (15th ed.). The rule originally punished defendants by requiring the imposition of the death penalty for any death that resulted during the attempted or successful perpetration of a felony. Roth & Sundby, *The Felony Murder Rule* at 450.

However, as the death penalty began to be eliminated for most felonies, revisions to felony murder statutes were made, ultimately leading to fewer crimes that constitute predicate offenses for a conviction under the felony murder rule. 2 Wharton's Criminal Law § 149. Eventually, England eliminated the felony murder rule, and jurisdictions within the United States began to place limitations on the application of the rule. *Id.* However, today, most states' felony murder rules contain the same pattern as the 1794 Pennsylvania felony murder statute, which states that "[a]ll murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary shall be deemed murder in the first degree." 2 Wharton's Criminal Law § 147 (second alteration in original) (citation omitted).

The doctrine of felony murder includes unintended homicides that occur during the commission of a felony, the purpose of which is to protect innocent lives by deterring the commission of felonies in a dangerous or violent manner. Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide: I*, 37 Colum. L. Rev. 701, 714–15 (1937). The rationale behind the felony murder rule is that certain crimes carry a cognizable risk that death may occur from their commission. *Id.* Therefore, if death does result during such a crime, the perpetrator is responsible for the death because the death was a reasonably foreseeable consequence of the action. *Id.*

A killing is considered to have occurred during the perpetration of a felony if it occurred within the "res gestae" of the felony. *State v. Squire*, 292 N.C. 494, 512, 234 S.E.2d 563, 573 (1977) (quoting 58 A.L.R.3d 851 (originally published in 1974)). This means that the killing was close in time and distance to the felony and without a break in the chain of events from the perpetration of the felony to the time of the homicide. *See State v. Ray*, 149 N.C. App. 137, 146, 560 S.E.2d 211, 217–18 (2002). Commonly, the felony murder statute contains certain enumerated felonies in which a homicide that occurs during its perpetration would result in first-degree murder. 2 Wharton's Criminal Law § 148. Usually, these enumerated felonies involve an element of danger or violence that implies malice, and that malice may be transferred to an unintended homicide. *Id.* "Consistent with this thinking, most courts require, for the felony-murder rule to be applicable in the case of an unenumerated felony, that the felony be inherently dangerous." *Id.*

In North Carolina, prior to 1977, any inherently dangerous felony could support a conviction under the felony murder rule. *See State v. Streeton*, 231 N.C. 301, 305, 56 S.E.2d 649, 652 (1949) (discussing the previous felony murder rule, which defined felony murder as a homicide resulting from the commission or attempted commission of certain enumerated felonies or any other inherently dangerous felony). However, the General Assembly revised this state's felony murder statute in 1977 to limit the felony murder rule's application to the felonies enumerated in the statute and unenumerated felonies only when perpetrated with the use of a deadly weapon. N.C.G.S. § 14-17(a) (2019). Thus, today in North Carolina, when the felony murder rule is applied to an unenumerated felony, that felony must have been committed with the use of a deadly weapon. *See State v. Wall*, 304 N.C. 609, 614, 286 S.E.2d 68, 72 (1982) ("[T]he unambiguous language of the 1977 revision makes it clear that felonies 'committed or attempted with the use of a deadly weapon' will support a conviction of first-degree murder under the felony-murder rule.").

"In matters of statutory construction the task of the Court is to determine the legislative intent, and the intent is ascertained in the first instance 'from the plain words of the statute.' " *N.C. Sch. Bds. Ass'n v. Moore*, 359 N.C. 474, 488, 614 S.E.2d 504, 512 (2005) (quoting *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). "[U]ndefined words are accorded their plain meaning so long as it is reasonable to do so." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (alteration in original) (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290

(1998)). If the legislature's intent is not apparent from the plain language of the statute, the Court then considers the legislative history, meaning "the spirit of the act and what the act seeks to accomplish." *Id.* "[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921).

"A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." *Sturdivant*, 304 N.C. at 301, 283 S.E.2d at 725. This is consistent with the definition contained in *Black's Law Dictionary*, which defines a deadly weapon as "[a]ny firearm or other device, instrument, material, or substance that, from the manner in which it is used or is intended to be used, is calculated or likely to produce death." *Deadly Weapon*, *Black's Law Dictionary* (11th ed. 2019). Neither of these definitions is consistent with defining "deadly weapon" to include a person's own hands and arms because a person's hands and arms are not an "article," "instrument," "substance," "device," or "material" as those words are used in the definitions above. The plain language of the statute, then, suggests that hands and arms are not "deadly weapons" that would lead to criminal liability for felony murder.

To the extent that the statutory language here is ambiguous, we are then required to ascertain legislative intent to determine the meaning of a statute. *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 730, 843 S.E.2d 207, 210 (2020). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018) (quoting *State v. Langley*, 371 N.C. 389, 395, 817 S.E.2d 191, 196 (2018)).

Here, the legislative history and spirit of the act clearly demonstrate that the "deadly weapon" requirement refers to an external instrument, not a defendant's hands, feet, or other body parts. Subsection 14-17(a), our first-degree murder statute, draws a distinction between the enumerated felonies, which may always serve as a predicate felony under the felony murder rule, and "other felon[ies]," which may serve as a predicate felony only when committed or attempted with the use of a deadly weapon. N.C.G.S. § 14-17(a). As discussed previously, this distinction did not exist prior to 1977. *See Streeton*, 231 N.C. at 305, 56 S.E.2d at 652. Instead, any "other felony" could serve as a predicate for felony murder. *State v. Davis*, 305 N.C. 400, 423, 290 S.E.2d 574, 588 (1982). However,

when it added the "deadly weapon" requirement in 1977, the General Assembly rejected the longstanding practice of our courts to construe felony murder "to include at least those killings committed during the commission of 'any other felony inherently dangerous to life' as murder in the first degree." *Id.* Thus, it cannot be the case that a "deadly weapon" includes a defendant's hands, feet, or other body parts. If that were true, then a defendant would be liable for first degree murder in any case where the defendant's commission of a felony results in a death, or where the "felony [is] inherently dangerous to life." *See Streeton*, 231 N.C. at 305, 56 S.E.2d at 652. However, this is precisely the outcome that the General Assembly rejected by adding the deadly weapon requirement in 1977. *Davis*, 305 N.C. at 423, 290 S.E.2d at 588 (acknowledging that "in apparent response to holdings such as in *Streeton*," the General Assembly amended the felony murder statute "to substitute for the phrase 'or other felony' the phrase 'or other felony committed or attempted with the use of a deadly weapon' "). A proper construction of subsection 14-17(a), given the purpose and historical context of the felony murder rule, would acknowledge that this delineation suggests that the spirit of the statute seeks to limit "deadly weapons" to items external to the human body that the perpetrator of a crime brings into the fray and thereby increases the violent nature of an already dangerous crime, elevating an unenumerated felony to the level of a predicate felony for purposes of the felony murder rule. *See* N.C.G.S. § 14-17(a).

The majority does not look to "the plain language of the statute, . . . the legislative history, the spirit of the act and what the act seeks to accomplish" to ascertain legislative intent and determine the statute's meaning. *See Rankin*, 371 N.C. at 889, 821 S.E.2d at 792. Instead, the majority chooses to rely on the principle of legislative acquiescence. However, the majority's approach is contrary both to our charge "to determine the meaning that the legislature intended *upon the statute's enactment*," *see id.* (emphasis added), and to the principle that "it is this Court's ultimate duty to construe statutes," *State v. Jones*, 358 N.C. 473, 483, 598 S.E.2d 125, 131 (2004).

The cases on which the majority relies do not support its analysis. For example, the majority relies on *State v. Gardner* for the proposition that we defer to the principle of legislative acquiescence whenever our "appellate courts" have engaged in a practice undisturbed by legislative intervention. *See State v. Gardner*, 315 N.C. 444, 462, 340 S.E.2d 701, 713 (1986). However, in *Gardner*, we noted that "this Court ha[d] uniformly and frequently . . . from as early as the turn of the century" engaged in the practice being challenged, in that case treating breaking

and/or entering and larceny as distinct crimes. *Id.* When reviewing the relevant cases, the Court in *Gardner* cited to only one case from the Court of Appeals. *Id.* This is, of course, because "precedents set by the Court of Appeals are not binding on this Court." *Mazza v. Med. Mut. Ins. Co.*, 311 N.C. 621, 631, 319 S.E.2d 217, 223 (1984). Similarly, in *Jones*, on which the majority also relies, we observed that "our judiciary . . . [had] universally adhered to the practice of classifying possession of cocaine as a felony" for nearly twenty-five years in the face of multiple clarifying amendments to the relevant statute that did not seek to change the practice when relying on the principle of legislative acquiescence. *Jones*, 358 N.C. at 483–84, 598 S.E.2d at 131–32. While the majority also relies on *Young v. Woodall*, that case rejected the canon of legislative acquiescence and noted that "legislative inaction is not necessarily evidence of legislative approval, and that the inquiry must focus on the statute itself." *Young v. Woodall*, 343 N.C. 459, 463, 471 S.E.2d 357, 359–60 (1996) (citing *DiDonato v. Wortman*, 320 N.C. 423, 435, 358 S.E.2d 489, 490 (1987)).

Having decided to proceed on this thin authority, the majority cites one case from this Court in which we held that a defendant's hands could be deadly weapons where an adult brutally assaults a small child.[1] *See State v. Pierce*, 346 N.C. 471, 493, 488 S.E.2d 576, 589 (1997). The majority also cites a number of cases from the Court of Appeals; however, "precedents set by the Court of Appeals are not binding on this Court." *Mazza*, 311 N.C. at 631, 319 S.E.2d at 223. Further, the majority cites no authority for the proposition that cases from the Court of Appeals, rather than cases from this Court, are relevant to the question of legislative acquiescence on a question of statutory interpretation.

In *Pierce*, the defendant was an adult male weighing approximately 150 pounds. *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589. His victim was his two-year-old niece, Tabitha. *Id.* at 479, 488 S.E.2d at 580. The defendant "admitted 'smacking' Tabitha ten times in the three weeks prior to her death, slapping Tabitha on the night she was taken to the hospital, and shaking her very hard on that night." *Id.* at 492, 488 S.E.2d at 588. Based on that and other evidence—which included evidence tending

1. The majority claims that accepting Mr. Steen's argument—that hands and arms are not deadly weapons in an assault by one adult on another—would be inconsistent with this Court's longstanding interpretation of the deadly weapon requirement. Tellingly, none of the cases cited by the majority involve the use of hands or feet. *See State v. Hales*, 344 N.C. 419, 426, 474 S.E.2d 328, 332 (1996) (fire); *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985) (glass vase); *State v. Joyner*, 295 N.C. 55, 64–65, 243 S.E.2d 367, 373–74 (1978) (soda bottle).

to show that he and another person shook Tabitha, beat her with their fists, beat her with a belt, beat her with a metal tray, beat her with a broken antenna, and beat her with a pair of tennis shoes, *id.*—a jury found the defendant guilty of first-degree murder by torture and by the felony murder rule, as well as felonious child abuse, *id.* at 479, 488 S.E.2d at 580. Felonious child abuse was the underlying felony for felony murder. *Id.* at 493, 488 S.E.2d at 589. Under those circumstances, we held that "[w]hen a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons." *Id.*

The situation before us today is quite different. While the assault on Sandra Steen was certainly terrible, she was not a small child. She was an able-bodied adult who actively worked on a farm. Mr. Steen was seven inches taller than her and outweighed her by sixty-five pounds. *Steen*, 264 N.C. App. at 579, 826 S.E.2d at 487. This is far different from the situation in *Pierce*, where the defendant was a 150-pound man who beat a two-year-old child to death. *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589.

Of particular concern is the majority's reliance on our decision in *State v. Peacock*. There, we considered whether a defendant's conviction of robbery with a dangerous weapon could stand where the defendant had used a glass vase to strike the victim's head. *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985). Central to our analysis was the fact that "[t]he evidence showed that defendant [was] a large man and that [the victim], an elderly female, weighed only seventy-three pounds." *Id.* However, we have since held that, for purposes of the robbery with a dangerous weapon statute, "a defendant's hands and feet may not be considered dangerous weapons." *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007). When determining a weapon's dangerousness for purposes of robbery with a dangerous weapon, we consider the relative size and strength of the defendant and victim. *Peacock*, 313 N.C. at 563, 330 S.E.2d at 196. Even so, it is still true that "a defendant's hands and feet may not be considered dangerous weapons" for purposes of that statute. *Hinton*, 361 N.C. at 211, 639 S.E.2d at 440. This totally belies the majority's claim that permitting hands and arms to be considered deadly weapons for purposes of the felony murder statute is necessary to maintain consistency with the manner in which this Court has defined the expression "deadly weapon" for many years.

I believe this case should be controlled by our decision in *Hinton*. There, we held that hands could not be deadly weapons for purposes of robbery with a dangerous weapon. *Hinton*, 361 N.C. at 210–12, 639 S.E.2d

at 440–41. We concluded that the statute's use of the word "means" was ambiguous[2] and applied the rule of lenity, "which requires us to strictly construe the statute." *Id.* at 211, 639 S.E.2d at 440. We then concluded that "the General Assembly intended to require the State to prove that a defendant used an external dangerous weapon before conviction under the statute is proper." *Id.* at 211–12, 639 S.E.2d at 440. Here, to the extent that the term "weapon" is ambiguous, the same analysis would lead us to the conclusion that the term requires an external instrument.

Our holding in *Hinton* is consistent with the law in most other jurisdictions. *See United States v. Rocha*, 598 F.3d 1144, 1155 (9th Cir. 2010) ("Most states have determined that body parts cannot be considered a dangerous or deadly weapon."). A majority of jurisdictions have held that body parts are not deadly weapons because to hold otherwise would erase the distinction between crimes committed with deadly weapons and without. *See, e.g.*, *Rocha*, 598 F.3d at 1157 (holding that the mere use of a body part does not constitute use of a "dangerous weapon" because the statute separately punished assault by striking, beating, or wounding, indicating congressional intent that a defendant use a weapon or some other object to perpetrate the offense); *State v. LaFleur*, 307 Conn. 115, 140, 51 A.3d 1048, 1063 (2012) ("[T]he legislature intended the term 'dangerous instrument' to mean a tool, implement or device that is external to, and separate and apart from, the perpetrator's body."); *People v. Aguilar*, 16 Cal. 4th 1023, 1026–27, 945 P.2d 1204, 1206 (1997) (holding that a deadly weapon must be an object extrinsic to the human body); *State v. Gordon*, 161 Ariz. 308, 311, 778 P.2d 1204, 1207 (1989) (holding that the trial court erred by allowing the jury to find that fists were "dangerous instruments" for purposes of enhancing felony sentences); *People v. Vollmer*, 299 N.Y. 347, 350, 87 N.E.2d 291, 293 (1949) ("When the Legislature talks of a 'dangerous weapon', it means something quite different from the bare fist of an ordinary man."); *State v. Henderson*, 356 Mo. 1072, 204 S.W.2d 774 (1947) (finding no error in a judgment because the defendant used a broomstick when assaulting his wife and not his own hands and feet); *State v. Calvin*, 209 La. 257, 266, 24 So. 2d 467, 469 (1945) (holding that there must be proof of the use of some instrumentality in order to find a defendant guilty of assault with a dangerous weapon); *Bean v. State*, 77 Okla. Crim. 73, 138 P.2d 563 (1943) (holding that the jury instruction that the defendant could be found

2. The dangerous weapon element of the statute applies to any person "having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means." *State v. Hinton*, 361 N.C. 207, 209–10, 639 S.E.2d 437, 439 (2007) (quoting N.C.G.S. § 14-87(a) (2005)).

guilty of assault with a dangerous weapon if he was found to have only used his fists was error); *Wilson v. State*, 162 Ark. 494, 496, 258 S.W. 972, 972 (1924) ("[W]here one attacks another using no other weapon than by striking with his fist, or kicking, he does not use a deadly weapon in the sense of the statute.").

In Missouri, for example, the appellate courts have directly addressed whether fists may be considered an "instrument, article or substance," and thus a "dangerous instrument" under a definition of "deadly weapon" similar to our own. *State v. Evans*, 455 S.W.3d 452, 457 (Mo. Ct. App. 2014). Rather than forecasting the potential absurdity of categorizing a defendant's hands as deadly weapons, the Missouri appellate court took a linguistic approach, considering the most natural reading of the phrase "dangerous instrument." *Id.* at 258. In *Evans*, the Missouri appellate court concluded that "a reasoned and common-sense reading of the terms 'instrument, article or substance' . . . indicate an external object or item, rather than a part of a person's body." *Id.* at 458; *see* The Oxford College Dictionary 701 (2d ed. 2007) (defining "instrument" as "a tool or implement, esp. one for delicate or scientific work"). The court further noted that the "dangerous instrument" classification "indicates the legislature's intent to impose greater punishment on those individuals who choose to use an item or weapon to commit a crime than those who do not," going on to say that "[t]his is logical when considering that likely a majority of the time, the potential for greater harm is present when persons committing crimes hold sharp, heavy, or otherwise potentially harmful objects, than if they have only their own hands at their disposal." *Evans*, 455 S.W.3d at 459. Thus, the court concluded that the defendant there, who had used only his fists to perpetrate first-degree assault with a dangerous instrument, could not be found guilty because his fists could not be an "instrument, article or substance." *Id.* at 457–61.

I find the *Evans* reasoning persuasive. In regard to North Carolina's felony murder rule, our legislature's distinction between the enumerated felonies not requiring the use of a deadly weapon and the unenumerated felonies requiring the use of a deadly weapon also indicates a purpose to more greatly punish those who decide to use an additional item or weapon in the perpetration of a felony than those who do not. Similarly, this Court ought to decline to read the phrase "deadly weapon" to include parts of the human body outside of the limited context we have previously approved and conclude that the legislature intended to limit the application of the phrase "deadly weapon" to items external to the human body.

Requiring an external implement for the felony murder statute's deadly weapon requirement is consistent with our own precedents. Consider this Court's holding in *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985), that a defendant need not physically use the deadly weapon to commit the felony in order to be guilty of murder under the felony murder rule, rather "possession is enough." *Id.* at 199, 337 S.E.2d at 523 ("Even under circumstances where the weapon is never used, it functions as a backup, an inanimate accomplice that can cover for the defendant if he is interrupted."). Our description in *Fields* suggests that a deadly weapon is some additional, external object that a defendant carries for use during the commission of the crime. Further, in that case we wrote:

> We hold that possession is enough, and the defendant is guilty of felony murder, even if the weapon is not *physically* used to actually commit the felony. If the defendant has brought the weapon along, he has at least a psychological use for it: it may bolster his confidence, steel his nerve, allay fears of his apprehension. Even under circumstances where the weapon is never used, it functions as a backup, an inanimate accomplice that can cover for the defendant if he is interrupted.

Id. This description of the deadly weapon requirement is inconsistent with today's holding. If, as we held in *Fields*, the General Assembly intended to include felonies where the defendant obtained a "psychological use" benefit to having a deadly weapon—where the weapon "bolster[ed] his confidence, steel[ed] his nerve, allay[ed] fears of his apprehension"—it seems highly unlikely that the General Assembly contemplated that a defendant using only his hands would receive such a benefit.

While the majority claims to uphold legislative intent through the principle of legislative acquiescence, it actually subverts the legislature's intent as evidenced by the statute's history and structure and is inconsistent with our own precedent. With today's holding, the majority undoes the General Assembly's 1977 amendment to the statute in the name of vindicating a dimly perceived legislative intent divined by the doctrine of acquiescence to the Court of Appeals precedent.

I agree with the majority's contention that we are not called upon to reconsider our holding in *Pierce*, in which we concluded that an adult defendant's hands could be considered deadly weapons for the purposes of the felony murder rule when the predicate offense is felonious child abuse.

More than a century before our holding in *Pierce*, this Court held that

> [a]n instrument, too, may be deadly or not, according to the mode of using it, or the subject on which it is used. For example, in a fight between men, the fist or foot would not, generally, be regarded as endangering life or limb. But it is manifest, that a wilful [sic] blow with the fist of a strong man, on the head of an infant, or the stamping on its chest, producing death, would import malice from the nature of the injury, likely to ensue.

State v. West, 51 N.C. 505, 509 (1859); *see also State v. Lang*, 309 N.C. 512, 525–26, 308 S.E.2d 317, 324 (1983) ("[I]f an assault were committed upon an infant of tender years or upon a person suffering an apparent disability which would make the assault likely to endanger life, the jury could . . . find that the defendant's hands or feet were used as deadly weapons."). I would take this opportunity to provide clarity about seemingly inconsistent decisions from this Court and hold that a distinction between an adult victim and a child victim is consistent with this Court's prior holding that whether a weapon may be considered deadly is a question of whether it would or would not be likely to produce deadly results. Generally, most adults are far less vulnerable than children to an attack from an adult using only the attacker's hands. Children are generally likely to be much smaller and weaker than an adult attacker, and the adult attacker's hands would, therefore, be more dangerous when used against a child than when used against an adult.

As such, I do not believe this Court ought to join the small minority of jurisdictions that allow a defendant's hands and other body parts to be considered deadly weapons when used by an adult against an adult victim. It is worth repeating that today's holding renders meaningless the statute's distinction between the enumerated felonies and others and will invariably lead to absurd results encompassing situations beyond those intended by the General Assembly.

Fortunately, the majority has wisely limited its holding here to the felony murder context. As a result, it remains the case that a defendant's body parts may not be considered deadly weapons for purposes of robbery with a dangerous weapon. *See Hinton*, 361 N.C. at 210–12, 639 S.E.2d at 440–41. A convicted defendant who has used their hands to assault another person and inflict serious bodily injury remains, after today's decision, a Class F felon, *see* N.C.G.S. § 14-32.4(a) (2019) (criminalizing assault inflicting serious bodily injury), and not a Class E

felon, *see* N.C.G.S. § 14-32(b) (2019) (criminalizing assault with a deadly weapon inflicting serious bodily injury). This is because, as the majority notes, the question is one of statutory interpretation, and each statute must be interpreted on its own (as the majority does today by refusing to following our decision in *Hinton*) to effectuate the intent of the legislature. In future cases if this issue arises, no doubt this Court will effectuate the intent of the legislature and avoid collapsing distinct offenses into one another, as we did in *Hinton*.

The majority claims that today's pronouncement, that hands and arms may be considered deadly weapons for purposes of the felony murder statute, will avoid unnecessary confusion in the state's criminal law. In reality, the majority runs away from the considered holding of our decision in *Hinton* in order to reinstate a line of decisions that was firmly rejected by the General Assembly in 1977. In so doing, the majority creates a rule that runs counter to the ordinary meaning of the term "deadly weapon," risking criminal liability for first degree murder whenever a felony results in death. I disagree that our murder statute should be so far expanded. For all of these reasons, I respectfully concur in the result only, in part, and dissent, in part.

Chief Justice BEASLEY joins in this opinion concurring in the result only in part and dissenting in part.

STATE OF NORTH CAROLINA
v.
DAVID WILLIAM WARDEN II

No. 484A19

Filed 18 December 2020

Evidence—lay witness testimony—improper vouching for credibility of child sex abuse victim—admission plain error

The trial court committed plain error in a prosecution for sexual offense with a child by an adult, child abuse by a sexual act, and indecent liberties with a child by allowing an investigator with the Department of Social Services (DSS) to improperly vouch for the credibility of the minor child victim by testifying that DSS had substantiated the allegations against defendant when there was no physical evidence of sexual abuse and the jury's verdict depended entirely on their assessment of the victim's credibility.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 836 S.E.2d 880 (N.C. Ct. App. 2019), reversing a judgment entered on 12 September 2018 by Judge Gregory R. Hayes in Superior Court, Rockingham County. Heard in the Supreme Court on 17 June 2020.

Joshua H. Stein, Attorney General, by Margaret A. Force, Assistant Attorney General, for the State-appellant.

Mark Montgomery for defendant-appellee.

EARLS, Justice.

In this case, we consider whether the Court of Appeals correctly held that the trial court committed plain error when it admitted improper testimony by a Department of Social Services (DSS) Child Protective Services Investigator who, after explaining that DSS will "substantiate a case" if the agency "believe[s] allegations [of sexual abuse] to be true," testified that DSS had "substantiated sexual abuse naming [defendant] as the perpetrator." The Court of Appeals held that because the DSS investigator's testimony "improperly bolstered or vouched for the victim's credibility," and because "the credibility of the complainant was the central, if not the only, issue to be decided by the jury," the trial court committed plain error requiring a new trial. *State v. Warden*, 836 S.E.2d 880, 885 (N.C. Ct. App. 2019). Judge Young dissented. While agreeing with the majority that the DSS investigator's testimony was improper, Judge Young concluded that defendant had failed to prove that, absent the improper vouching testimony, the jury likely would have reached a different result. *Warden*, 836 S.E.2d at 885 (Young, J., dissenting).

We agree with the majority of the Court of Appeals and hold today that the trial court committed plain error by allowing the State to introduce the DSS investigator's inadmissible vouching testimony. Consistent with the precedent this Court established in *State v. Towe*, 366 N.C. 56, 732 S.E.2d 564 (2012), we hold that the trial court commits a fundamental error when it allows testimony which vouches for the complainant's credibility in a case where the verdict entirely depends upon the jurors' comparative assessment of the complainant's and the defendant's credibility. Accordingly, we affirm the decision of the Court of Appeals.

Background

Defendant is the father of two children, Virginia[1] and her younger brother. Defendant separated from Virginia's mother in 2011. Around Father's Day in 2017, fifteen-year-old Virginia had a conversation with her paternal grandfather regarding their plans for the upcoming holiday. Virginia told her grandfather that she did not want to spend the holiday with defendant. Her grandfather became angry. In frustration, he shouted "It's not like he molested y'all or anything." Virginia became quiet, then told her grandfather she loved him, and hung up the phone. Later that day, Virginia told her mother that, on one occasion when she was nine and two occasions when she was twelve, defendant sexually abused her. Virginia alleged that each assault followed a similar pattern. Defendant would summon Virginia to his bedroom, force Virginia to perform oral sex on him, and then pray for forgiveness after the assault was over. During each of the assaults, Virginia's younger brother was home but not present in the bedroom. Besides Virginia and defendant, there were no other direct witnesses to any of these incidents. Virginia testified that she did not report the assaults at the time they occurred because defendant "told me not to tell anybody" and she "was terrified of my dad."

The day after she first disclosed the assaults to her mother, Virginia's mother took her to the Rockingham County Sheriff's Office to file a report. In a statement she provided on 14 June 2017, Virginia described the three incidents of sexual abuse. After an investigation, defendant was indicted on 13 October 2018 on the charges of sexual offense with a child by an adult, child abuse by a sexual act, and indecent liberties with a child.

At trial, the State called nine witnesses. In addition to Virginia, the jury heard testimony from a Detective and a Deputy Sheriff with the Rockingham County Sheriff's Office who were involved in investigating Virginia's report, Virginia's mother, Virginia's maternal grandmother, Virginia's paternal grandfather, the DSS Child Protective Services Investigator assigned to Virginia's case, and the director of a child advocacy non-profit who conducted a forensic interview of Virginia. The jury also heard testimony from Virginia's aunt, defendant's sister, who testified that when she was around the age at which Virginia was allegedly abused by defendant, defendant sexually assaulted her in a manner that shared many similarities with Virginia's account of

1. We refer to the juvenile by the pseudonym used at the Court of Appeals.

defendant's conduct. This testimony was admitted pursuant to N.C.G.S. § 8C–1, Rule 404(b) (2009). Defendant was the only witness to testify on his behalf. The jury found defendant guilty on all three charges. He was sentenced to consecutive sentences of 300 to 369 months for the sexual offense with a child by an adult, 29 to 44 months for the child abuse by a sexual act, and 19 to 32 months for the indecent liberties with a child.

Standard of Review

Because defendant failed to object to the DSS investigator's testimony at trial, we review his challenge on appeal for plain error. *State v. Hammett*, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006). "[T]o establish plain error defendant must show that a fundamental error occurred at his trial and that the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Towe*, 366 N.C. at 62, 732 S.E.2d at 568 (quoting *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)). A fundamental error is one "that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (cleaned up). In determining whether the admission of improper testimony had a probable impact on the jury's verdict, we "examine the entire record" of the trial proceedings. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983).

Analysis

There is no disputing, and the State concedes, that the trial court erred in allowing the DSS Child Protective Services Investigator's testimony that

> part of our role is to determine whether or not we believe allegations to be true or not true. If we believe those allegations to be true, we will substantiate a case. If we believe them to be not true or we don't have enough evidence to suggest that they are true, we would un-substantiate a case. . . . We substantiated sexual abuse naming [defendant] as the perpetrator.

"In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266–67, 559 S.E.2d 788, 789 (2002) (per curiam). This rule permits the introduction of expert testimony only when the testimony is "based on the special expertise of the expert," who "because of his [or her] expertise is in a better

position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 568–69, 247 S.E.2d 905, 911 (1978); *see also State v. McGrady*, 368 N.C. 880, 889, 787 S.E.2d 1, 9 (2016). Thus, an expert witness's "definitive diagnosis of sexual abuse" is inadmissible unless it is based upon "supporting physical evidence of the abuse." *State v. Chandler*, 364 N.C. 313, 319, 697 S.E.2d 327, 331 (2010); *see also State v. Trent*, 320 N.C. 610, 614–15, 359 S.E.2d 463, 465–66 (1987). Because there was no physical evidence that Virginia was sexually abused, it was error to permit the DSS investigator to testify that sexual abuse had *in fact* occurred. In addition, it is typically improper for a party to "s[eek] to have the witnesses vouch for the veracity of another witness."[2] *State v. Robinson*, 355 N.C. 320, 334, 561 S.E.2d 245, 255 (2002); *see also State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (2008) ("[O]ur Supreme Court has determined that when one witness vouch[es] for the veracity of another witness, such testimony is an opinion which is not helpful to the jury's determination of a fact in issue and is therefore excluded." (alterations in original) (cleaned up)).

The only question for this Court to address is whether defendant has met his "burden of showing that [the] error rose to the level of plain error." *State v. Melvin*, 364 N.C. 589, 594, 707 S.E.2d 629, 633 (2010). Based on our precedents, we conclude that he has. In considering this question, the Court is bound by our prior cases. This Court considered the same legal question under similar factual circumstances in *Towe*. In that case, we held that the trial court committed plain error when it allowed the State to present inadmissible vouching testimony because, in the absence of physical evidence of abuse, the case "turned on the credibility of the victim, who provided the only direct evidence against defendant." 366 N.C. at 63, 732 S.E.2d at 568. The Court reached that conclusion notwithstanding the fact that the State had also presented evidence corroborating the complainant's testimony which supported the jury's conclusion that the defendant had committed the alleged criminal acts. *Id.*

The present case shares a core, determinative similarity with *Towe*. In both this case and in *Towe*, the "victim displayed no physical symptoms diagnostic of sexual abuse," *id.* at 62, 732 S.E.2d at 568, and the

2. The ultimate analysis of the appropriateness of a witness's opinion testimony regarding the credibility of another witness differs depending on whether the witness is a lay or expert witness. *Compare* N.C.G.S. § 8C-1, Rule 701 (2019) (providing the rule that applies to lay witness testimony) *with* N.C.G.S. § 8C-1, Rule 702 (2019) (providing the rule that applies to expert witness testimony).

jury's decision to find the complainant more credible than the defendant clearly formed the basis of its ultimate verdict, *id.* at 62–64, 732 S.E.2d at 568–69. As the prosecutor emphasized at trial in this case, a guilty verdict necessarily followed from the jury's determination that Virginia was credible and defendant was not:

> What this case comes down to is whether or not you believe [Virginia]. If you believe [Virginia], there's no reasonable doubt. It really doesn't matter if you fully believe [Virginia's mother], or if you fully believe [the DSS investigator], or if you fully believe the Defendant's father. Those are extra. Those are corroborating evidence. What matters is if you believe [Virginia]. If you believe what she says, then it happened. . . . Tell her you believe her. Tell her not to be afraid. Tell her not to be ashamed. Tell her that this Defendant is guilty of exactly what he did to her.

By the prosecutor's logic, the converse was also true. If the jury determined that defendant was more credible than the complainant, then the jury would have been overwhelmingly likely to acquit. Thus, "the case against defendant revolved around the victim's credibility." *Towe*, 366 N.C. at 61, 732 S.E.2d at 567.

The State attempts to evade *Towe* by pointing to other evidence presented to the jury in this case which, it contends, independently provided a basis for the jury's decision to find defendant guilty. But the State also presented similar evidence in *Towe*, which did not detract from the Court's holding that the trial court committed plain error. To be sure, other evidence presented in this case served to corroborate the victim's testimony. However, there was no other direct evidence of the abuse.[3] In *Towe*, as in this case, the State presented testimony from close family members "describing the behavior of the victim" around the time of the alleged assaults. *Id.* at 63, 732 S.E.2d at 568. In *Towe*, as in this case, the State offered testimony from the victim's aunt, admitted under N.C.G.S. § 8C–1, Rule 404(b), "describing a similar sexual assault on her by defendant," *Id.* Therefore, under these circumstances, the impermissible vouching testimony "stilled any doubts the jury might have had

3. The dissent contends that even if there is no direct evidence of the assault, "the statement about 'substantiation' was likely superfluous." We do not agree that, in the absence of any direct evidence of an alleged assault, testimony from a professional investigator employed by a county social services agency to investigate allegations of child sexual abuse is "superfluous" to the jury's ultimate determination of the complainant's credibility and defendant's guilt.

about the victim's credibility or defendant's culpability, and thus had a probable impact on the jury's finding that defendant is guilty." *Id.* at 64, 732 S.E.2d at 569. By contrast, in cases such as *Hammett* where this Court has held that impermissible vouching testimony did not rise to the level of plain error, it was because the jury's verdict "did not rest solely on the victim's credibility." 361 N.C. at 99, 637 S.E.2d at 523. Instead, the State also presented evidence regarding the victim's physical symptoms of abuse, as well as the defendant's admission that he had previously engaged in conduct of a sexual nature with the victim. *Id.*

Although there are some factual distinctions between this case and *Towe*, these factual distinctions do not alter our legal analysis. Our necessary review of the entire record convinces us that the State presented no evidence at trial supplying an alternative basis for the jury's conclusion that defendant was guilty besides the jury's determination that the complainant was more credible than defendant. Rather, the evidence the State presented at trial was primarily aimed at persuading the jury to find the complainant's allegations more credible than defendant's denials. For example, testimony from Virginia's maternal grandmother that her behavior changed around the time of the alleged abuse, and testimony from Virginia's paternal grandfather that "all [defendant has] done his whole life is lie and try to cheat people," provided jurors with evidence suggesting that Virginia was telling the truth and defendant was lying, not evidence supporting an independent conclusion that the alleged sexual assaults did or did not occur. Similarly, while jurors were free to draw inferences from testimony alleging that defendant encouraged Virginia to shave her legs at a young age, this evidence concerned an incident that was not inherently sexual in nature, and the State did not otherwise thoroughly impeach defendant's denials that his conduct had any sexual aspect. *Cf. Hammett*, 361 N.C. at 99, 637 S.E.2d at 523. Again, this is evidence that might lead a jury to conclude that the complainant was more credible than defendant, not independent proof that the alleged assaults occurred. Similarly, Virginia's consistent testimony throughout trial and the forensic examiner's testimony that Virginia exhibited behaviors indicating past abuse may have given the jury reason to believe Virginia's allegations, but did not constitute evidence independent from the jury's assessment of the complainant's and defendant's credibility. *Id.* (holding that admission of impermissible vouching testimony was not plain error because "*in addition to* [the victim's] consistent statements and testimony that defendant had abused her sexually, the jury was able to consider properly admitted evidence that [the victim] exhibited physical signs of repeated sexual abuse") (emphasis added). Accordingly, we hold that the admission of

the DSS investigator's improper vouching testimony was, in the absence of "overwhelming evidence" directly proving defendant's guilt at trial, plain error. *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 (per curiam).

Nothing in this decision dispossesses the jury of its authority to find a defendant guilty of sexual abuse in the absence of physical evidence, based entirely on the jurors' determination that a complainant is more credible than a defendant. Nor does our decision express any opinion about the probative value of the complainant's testimony in this case or in any case. Rather, our decision reflects, and helps preserve, the jury's fundamental "responsibility at trial" in our adversarial system to "find the ultimate facts beyond a reasonable doubt." *State v. White*, 300 N.C. 494, 503, 268 S.E.2d 481, 487 (1980) (quoting *Cty. Court of Ulster Cty., N.Y. v. Allen*, 442 U.S. 140, 156 (1979)). Of course, the State is entitled to submit to the jury any admissible evidence that it thinks will help convince jurors to believe a complainant and disbelieve a defendant. But concern for the fairness and integrity of criminal proceedings requires trial courts to exclude testimony which purports to answer an essential factual question properly reserved for the jury. When the trial court permits such testimony to be admitted, in a case where the jury's verdict is contingent upon its resolution of that essential factual question, then our precedents establish that the jury's verdict must be overturned.

Conclusion

Absent evidence supporting the jury's guilty verdict on a basis other than the jury's relative assessment of the complainant's and defendant's credibility, we do not believe that the outcome at trial would probably have been the same if the DSS investigator's inadmissible vouching testimony had been excluded. Accordingly, we hold that defendant has met his burden of showing that the trial court committed plain error. We affirm the decision of the Court of Appeals.

AFFIRMED.

Justice NEWBY dissenting.

When a defendant alleges on appeal that an error occurred at trial, but failed to properly object, that defendant must demonstrate that the outcome of the trial probably would have been different without the error. Holding that such prejudicial error occurred in this case, the majority seizes on one word uttered by one witness and decides that the State's entire case, which was supported by abundant evidence, is compromised. I respectfully dissent.

At trial, Virginia[1] testified at length that defendant, her father, forced her to perform oral sex on him multiple times. She explained that after these assaults, defendant would go to another room to pray, apologize to God, and promise never to do it again. At the time, defendant instructed Virginia not to tell anyone about what happened. Law enforcement, Virginia's mother, and two grandparents testified at trial for the State as well. Virginia's maternal grandmother testified that Virginia's behavior significantly changed around the time of the first assault. Virginia's mother and paternal grandfather testified that even though Virginia did not get along with her step-mother, she often went to work with her instead of remaining at home alone with her father.

Defendant's sister testified that multiple times when she was between the ages of seven and twelve, defendant forced her to perform various sexual acts with him. After each assault, just like with Virginia, he would express remorse and pray to God asking for forgiveness. She testified that she kept this a secret until the age of fourteen because defendant told her she would get in trouble and be taken from her mother if she brought it up. The Department of Social Services investigator testified that during her interviews Virginia's paternal grandfather, maternal grandmother, and mother's fiancé all indicated that they believed Virginia. A jury convicted defendant of sexual offense with a child by an adult, child abuse by sexual act, and indecent liberties with a child.

The majority decides that all of this evidence is not strong enough to support the guilty verdicts. It discards the verdicts because the DSS investigator also said that DSS "substantiated" Virginia's allegations.[2] The majority cites *State v. Towe*, 366 N.C. 56, 732 S.E.2d 564 (2012) to frame the question around whether the case turns on the victim's credibility. To the majority, the vouching testimony by DSS probably impacted the trial outcome because, in its view, this case turns on Virginia's credibility. It therefore holds that without the testimony that DSS substantiated Virginia's claims, the jury likely would not have believed Virginia and would have believed defendant instead.

The majority confuses evidence that is simply relevant with evidence that is essential to the outcome of the case. Of course, a witness stating that Virginia's claims were "substantiated" could enhance the credibility of her allegations. But that does not mean her allegations

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1. A pseudonym is used to protect the juvenile's identity.

2. All parties concede that this testimony was inappropriate. The question is whether it is probable that the admission of the testimony impacted the jury's finding that the defendant was guilty. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

would be unbelievable if they lacked the support of that one particular statement. Indeed, that notion is quite far from the truth in this case, where the statement about "substantiation" was likely superfluous. In context, the jury would have understood that statement simply to mean that DSS pursued the allegations, which was already obvious considering that a DSS investigator testified against defendant. Moreover, the DSS investigator explained that substantiation is for social work purposes, not trial purposes. She noted that in some cases DSS will substantiate but the government will not prosecute, or vice versa. With these careful qualifications, and the substantial additional evidence of Virginia's credibility and defendant's guilt, the majority's position that the word "substantiate" would have likely changed the outcome of the trial is hard to believe.

In addition to the explanation the jury heard about the term "substantiate," the jury heard extensive testimony from several other witnesses corroborating Virginia's consistent story—testimony of Virginia's behavior change, testimony from an expert witness regarding delayed disclosures, and testimony of defendant's demeanor during his denial of the events. Perhaps most significantly, the jury heard testimony from both Virginia and defendant's sister detailing defendant's similarly idiosyncratic behavior after each victim's sexual assaults. Defendant's modus operandi was well established.

Moreover, the majority misapplies our precedent from *Towe*. In *Towe* the challenged testimony came from an expert to whom multiple witnesses referred, likely leading the jury to place more value on that expert's testimony. 366 N.C. at 58, 732 S.E.2d at 565–66. But here no other witness emphasized the investigator's testimony, and the prosecution paid little attention to it during closing arguments. Further, unlike the victim in *Towe*, whose story was inconsistent, the victim in this case consistently recounted the traumatic events for the entire fifteen months from first disclosure until trial. Finally, unlike in *Towe*, where the defendant chose not to testify, here defendant did take the stand, allowing the jury to directly evaluate his credibility. The expert testimony in *Towe* that the victim was indeed sexually abused was pivotal to the prosecution because the State's evidence was weaker than here and the other witnesses relied on the contested expert testimony. In this case, the DSS investigator's testimony that Virginia's claims were "substantiated" was not nearly so critical. The rigorous plain error standard to which this Court has long adhered has not been met. The convictions should be upheld.

I respectfully dissent.

ZANDER v. ORANGE COUNTY

[376 N.C. 513 (2020)]

ELIZABETH ZANDER AND EVAN GALLOWAY
v.
ORANGE COUNTY, N.C. AND THE TOWN OF CHAPEL HILL

No. 426A18

Filed 18 December 2020

1. Class Actions—certification—impact fee ordinance—challenge to fees

The trial court did not abuse its discretion by certifying a class in an action challenging the legality of local development impact fees, which were imposed pursuant to an ordinance passed in 2008. Plaintiffs' claims were not time-barred by a provision in the enabling legislation, which required that any claim contesting the validity of the ordinance must be brought within nine months of the ordinance's effective date, because their claims included allegations that the fees themselves were illegal. Even if the time limitation constituted a bar, the repeal of the enabling legislation (after plaintiffs' suit was initiated) rendered moot any arguments to that effect.

2. Class Actions—certification—impact fee ordinance—action for refund of fees paid

The trial court did not abuse its discretion by certifying a class in an action to recover a portion of impact fees paid pursuant to an ordinance passed in 2008. Plaintiffs' claim was not time-barred by a provision in the enabling legislation stating that any claim to recover an impact fee must be brought within nine months after payment of the fee where the claim included the right to a partial refund with interest as provided by a subsequent ordinance passed in 2016. Even if the time limitation constituted a bar, the repeal of the enabling legislation (after plaintiffs' suit was initiated) rendered moot any arguments to that effect.

3. Appeal and Error—interlocutory appeal—discovery order

In an appeal from a trial court's order certifying two classes of plaintiffs whose suit challenged local development impact fees, defendants' additional appeal from an order compelling discovery of fee receipts was dismissed as interlocutory where defendants advanced no basis for appellate review.

Appeal pursuant to N.C.G.S. § 7A-27(a)(4) from an order on plaintiffs' motion allowing class certification and appointment of class counsel

entered on 3 August 2018 by Judge C. Winston Gilchrist in Superior Court, Orange County. Heard in the Supreme Court on 3 February 2020.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Robert J. King III, Daniel Smith, and Matthew B. Tynan, for plaintiffs.

Womble Bond Dickinson, by James R. Morgan, Sonny S. Haynes, and Patricia I. Heyen, for defendants.

MORGAN, Justice.

In this matter, we are asked to determine whether the Superior Court, Orange County abused its discretion in certifying two classes of plaintiffs who wish to recover impact fees assessed by defendants Orange County and the Town of Chapel Hill under a now-repealed statute which had been enacted to allow certain counties and municipalities to defray the costs for constructing public schools, among other public services. As discussed herein, we affirm the trial court's order regarding class certification. Defendants have also advanced arguments of error in a related discovery issue in the case, which we dismiss as interlocutory and not properly before this Court at this time.

Factual Background and Procedural History

Although the essence of this appeal lies in our review of the trial court's decision regarding class certification, in order to understand the origination of this case and the parties' appellate arguments, initially it is appropriate to engage in a brief review of the history of the impact fee legislation underlying plaintiffs' claims and hence the potential classes which plaintiffs seek to represent. In 1987, the North Carolina General Assembly passed "An Act Making Sundry Amendments Concerning Local Governments in Orange and Chatham Counties," authorizing Orange County to pass an ordinance providing "a system of impact fees to be paid by developers to help defray the costs to the County of constructing certain capital improvements, the need for which is created in substantial part by the new development that takes place within the County." 1987 N.C. Sess. Law 460. Among other types of capital improvements listed in the 1987 Session Law, Orange County was specifically authorized to collect impact fees for defraying the cost of public schools in the Town of Chapel Hill. The 1987 Session Law included the following provision:

> (i) Limitations on Actions.
>
> (1) Any action contesting the validity of an ordinance adopted as herein provided must be commenced

> not later than nine months after the effective date of such ordinance.
>
> (2) Any action seeking to recover an impact fee must be commenced not later than nine months after the impact fee is paid.

1987 N.C. Sess. Law 460, § 17(i).

In 1991, the General Assembly expanded Orange County's authority to permit the County to levy and collect impact fees for capital needs not only to benefit public schools in the Town of Chapel Hill, but also to defray costs of public schools throughout the entire county. 1991 N.C. Sess. Law 324, §§ 1, 2. The enabling legislation was further amended in 1993. 1993 N.C. Session Law 642, § 4(a)–(b).

Pursuant to the authority granted by the state's legislative body in these acts, to which we shall refer collectively as "the enabling legislation" for purposes of this decision, in 1993 the Orange County Board of Commissioners (the Board) adopted the "Orange County Educational Facilities Impact Fee Ordinance" and began collecting such fees from property owners seeking certificates of occupancy. The Town of Chapel Hill and the Town of Carrboro, acting on behalf of Orange County, also collected fees under the ordinance. In 2007, Orange County retained TischlerBise Inc., a company of "fiscal, economic and planning consultants" based in the state of Maryland, for assistance with a new impact fee schedule. TischlerBise prepared reports that purported to calculate the "maximum supportable impact fees" for new housing to be built in Orange County based on expected costs for land, school building construction, portable classrooms, support facilities, buses and other school vehicles, and consultant studies. Orange County adopted TischlerBise's fee values. On 11 December 2008, the Board adopted Orange County Ordinance 2008-114 (the 2008 Ordinance), which amended the Orange County Educational Facilities Impact Fee Ordinance. *See* 2008 Ordinance, §§ 30-31 to 80.[1] The 2008 Ordinance provided impact fee amounts which would become effective on the respective dates of 1 January 2009, 1 January 2010, 1 January 2011, and 1 January 2012. *Id.* § 30-33. The fee amounts prescribed by the 2008 Ordinance were determined by setting fees at varying percentages of the values in the reports produced by TischlerBise.

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1. Certified copies of the ordinances in question were provided in the supplemental record to this case, which can be viewed through the Court's electronic filing system.

On 25 September 2015, plaintiffs purchased a parcel of real property situated in the Town of Chapel Hill and consequently located in Orange County. Plaintiffs subsequently built a house on the land. The school impact fees at issue in this matter were levied against plaintiffs as authorized by the 2008 Ordinance, pursuant to which plaintiffs were assessed $11,423.00. Following an unsuccessful attempt to seek a waiver of the impact fees or an exemption from payment of the assessed impact fees, plaintiffs paid the impact fees to the Town of Chapel Hill on 4 May 2016. On 15 November 2016, the Board promulgated Orange County Ordinance 2016-034, titled "An Ordinance Amending Chapter 30, Article II - Educational Facilities Impact Fee of the Orange County Code of Ordinances" (the 2016 Ordinance), that included new fees based upon additional reports and calculations from TischlerBise. Plaintiffs would have paid a lower fee under the 2016 Ordinance's fee schedule. *See* 2016 Ordinance § 30-33. The 2016 Ordinance further provided that (1) any fees not expended within ten years "shall be refunded to the feepayer," 2016 Ordinance § 30-35(e)(1); (2) "[i]f the Schedule of Public School Impact Fees . . . is reduced . . . no refund of previously paid fees shall be made," but the "difference between the old and new fees shall be returned to the feepayer" under certain circumstances, *id.* § 30-35(e)(2); and (3) "[w]here an impact fee has been collected erroneously, or where an impact fee has been paid, and the feepayer subsequently files for and is granted an exception . . . the fee shall be returned to the feepayer," *id.* § 30-35(e)(3).

Plaintiffs commenced their putative class action by filing a class action complaint on 3 March 2017 asserting thirteen claims for relief against defendants, including, *inter alia*, claims premised upon an allegation that fees collected under the 2008 Ordinance were illegal and including claims seeking partial refunds as provided under the 2016 Ordinance. On 16 May 2017, the Board, recognizing that the General Assembly was considering the prospect of repealing the enabling legislation for the impact fees at issue and thereby revoking Orange County's impact fee authority, adopted an ordinance reinstating the fees which had been in effect from 1 January 2012 to 31 December 2016 for housing categories that had been included in the 2008 Ordinance's fee schedule. Despite this apparent attempt by Orange County to blunt any action by the General Assembly with regard to the County's powers to assess impact fees, on 20 June 2017 the General Assembly repealed the entirety of the enabling legislation, the 1987 Session Law, along with all of its amendments. *See* 2017 N.C. Session Law 36 (the Repeal Act).

In the meantime, the case at bar was proceeding through its initial discovery stage. On 16 April 2018, plaintiffs filed a "Motion to Certify Classes and Subclasses and Appoint Class Counsel" and a "Motion to Compel Discovery Responses," seeking from defendants, *inter alia*, the identities of prospective members of plaintiff's proposed classes and subclasses—other parties who had been assessed impact fees. The trial court heard arguments on both motions on 7 May 2018. Plaintiffs sought class certification only for claims against Orange County alleging that the impact fees were *ultra vire*s and that rebates were owed to the members of the classes pursuant to the 2016 Ordinance.[2] On 11 May 2018, before the trial court had issued its rulings on plaintiffs' motions, this Court issued its decision in *Quality Built Homes Inc. v. Town of Carthage*, 371 N.C. 60, 813 S.E.2d 218 (2018) (*Quality Built II*), which addressed the applicable statute of limitations for impact fee claims. In light of the new legal authority, defendants filed a "Notice of Subsequently Decided Controlling Authority," noting the *Quality Built II* decision without further reference.

On 25 May 2018, the trial court notified the parties that plaintiffs' Motion to Certify Classes and Subclasses and Appoint Class Counsel would be allowed and asked that plaintiffs prepare the order for the trial court to enter which formally allowed the motion. In satisfaction of the trial court's request, plaintiffs provided the trial court with a recommended order. The order narrowed the proposed classes in such a manner that plaintiffs only sought class certification with respect to claims against Orange County, and reduced the class claims for relief from thirteen to four claims. Defendants filed a Motion for Reconsideration on 12 June 2018. The trial court heard the motion to reconsider on 29 June 2018. On 3 August 2018, the trial court entered an order certifying a "Feepayer Class"—defined as "All persons who paid a fee in the amounts established in the 2008 Fee Ordinance during the period [of 3 March 2014 to 31 December 2016]"—and a "Refund Class"—defined as "All persons who paid a fee for a housing unit for which the corresponding fee [payable effective 1 January 2017] under the 2016 Amendment would have been less." The order provided that the Feepayer Class was certified as to the Third (fees alleged to be *ultra vires* as enforced by

2. At the hearing, defendants contended that plaintiffs' 16 April 2018 Motion to Certify Classes and Subclasses and Appoint Class Counsel did not clearly identify the specific claims for which plaintiffs sought class treatment. Defendants also argued that a proposed order submitted by plaintiffs on 7 May 2018 did not specify which claims were being certified and that any order should clarify "which class members can bring which claims." Plaintiffs' second proposed order submitted on 4 June 2018 more precisely identified the classes and claims discussed at the 7 May 2018 hearing.

the Town of Chapel Hill), Eleventh (request for declaratory judgment against both defendants that fees paid under the 2008 amendment to the Ordinance in order to obtain a certificate of occupancy were unlawful), and Thirteenth (request for attorney fees and costs to be taxed against defendants) Class Action Claims for Relief asserted in the class action complaint and that those claims would proceed only against Orange County. The order also provided that the Refund Class was certified only as to the Twelfth Class Action Claim for Relief (requested refund of fees pursuant to N.C.G.S. § 30-35(e)(2)) and that the claim would proceed only against Orange County.

Along the way, plaintiffs had served discovery requests upon defendants on 8 June 2017, which included a request for production of Orange County's fee payment receipts. The trial court allowed defendants an extension of time to respond until 14 August 2017. Orange County first responded on 18 August 2017 that the request was "overly broad and unduly burdensome." On 8 November 2017, Orange County served a supplemental response asserting a new objection based upon the perceived burdensome nature of plaintiffs' discovery requests. On 21 February 2018, Orange County produced some of the requested fee receipts. On 16 April 2018, plaintiffs filed a motion to compel production of the remainder of the requested fee receipts, on the basis that Orange County had waived its objections by failing to timely respond to the 8 June 2017 discovery requests. At the 7 May 2018 motions hearing, plaintiffs argued that Orange County had waived its objections to production of the fee receipts at issue by neglecting to seek an extension of time to serve its discovery responses or failing to request a protective order under N.C. R. Civ. P. 26(c) or 37(a)(2).

In addressing plaintiffs' Motion to Compel Discovery Responses, the trial court directed Orange County in the 3 August 2018 order to "produce all of the impact fee receipts in its possession, custody, or control for any fee paid on or after [3 June 2014], and all impact fee receipts in its possession, custody, or control, for any fee payment that would qualify the feepayer as a member of the refund class."

Defendants[3] timely filed a notice of appeal of the 3 August 2018 Order pursuant to N.C.G.S. § 7A-27 (2019) (providing that an appeal lies of right directly to the Supreme Court of a "trial court's decision

3. Although the certified claims are only against defendant Orange County and the discovery order is directed only to defendant Orange County, the appellant brief is styled as being filed on behalf of "defendants." For consistency and ease of reading, we adopt the plural phrase "defendants" and employ it throughout this opinion.

regarding class action certification under G.S. 1A-1, Rule 23"), and included in their appeal the portion of the 3 August 2018 Order that concerned plaintiffs' Motion to Compel Discovery Responses.

Analysis

I. Class certification order

Defendants' arguments regarding the trial court's class certification primarily rest upon defendants' position that there are time barriers to the claims asserted by plaintiffs. First, defendants assert that the "Feepayer Class" claims proposed by plaintiffs are barred by defendants' discernment of a "statute of repose" set forth in the enabling legislation: "Any action *contesting the validity of an ordinance* adopted as herein provided must be commenced not later than nine months after the effective date of such ordinance." 1987 N.C. Sess. Law 460, secs. 17(1)(1); 18(1)(1) (emphasis added). Defendants further contend that plaintiffs' Twelfth Class Action Claim on behalf of the proposed "Refund Class" is similarly circumscribed by the provision of the enabling legislation stating: "Any action seeking to recover an impact fee must be commenced not later than nine months after the impact fee is paid." 1987 N.C. Sess. Law 460 secs. 17(1)(2); 18(1)(2).

Although the enabling legislation which spawned this legal dispute was entirely repealed in 2017, this abolishment of the legislation occurred after plaintiffs initiated their action against defendants which prompted the trial court's order concerning class certifications and discovery rulings. Upon defendants' appeal of these components of the trial court's 3 August 2018 order to this Court, we address them with the mindfulness that our focus is limited to the trial court's treatment of the matters of class certification and discovery embodied in the subject order. We do not, in any way, address the merits of the case.

1. Standard of review

Under Rule 23 of the North Carolina Rules of Civil Procedure, a class exists "when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997) (quoting *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1987)). "Other prerequisites for bringing a class action [include] that . . . the named representatives must establish that they will fairly and adequately represent the interests of all members of the class. . . ." *Id.* (citing *Crow*, 319 N.C. at 282, 354 S.E.2d at

465). "If the prerequisites for a class action are established, it is within the discretion of the trial court as to whether the matter may proceed as a class action." *Id.* (citing *Crow*, 319 N.C. at 283, 354 S.E.2d at 466). Thus, a trial court's decision whether to certify the class as proposed by plaintiffs is reviewed for an abuse of discretion; that is, " 'whether a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.' " *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 338, 757 S.E.2d 466, 471 (2014) (quoting *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000)). In the present case, defendants argue that the trial court abused its discretion regarding the certification of classes in this lawsuit based upon defendants' view that all of plaintiffs' claims were barred by the statute of repose.

2. Application to defendants' appeal

[1] Defendants first argue that plaintiffs' claims on behalf of the Feepayer Class are time-barred by the provision in the enabling legislation which states: "Any action *contesting the validity of an ordinance* adopted as herein provided must be commenced not later than nine months after the effective date of such ordinance." 1987 N.L. Sess. Law 460, secs. 17(1)(1)–(2); 18(1)(1)–(2) (emphasis added). Defendants contend that this provision is a statute of repose. "The term 'statute of repose' is used to distinguish ordinary statutes of limitation from those that begin to run at a time unrelated to the traditional accrual of the cause of action." *Boudreau v. Baughman*, 322 N.C. 331, 339–40, 368 S.E.2d 849, 856 (1988). "Statutes of repose . . . create time limitations which are not measured from the date of injury." *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276–77 n.3 (1985). Thus, if a challenge is not brought within the period specified in a statute of repose, the would-be plaintiff "literally has *no* cause of action." *Boudreau*, 322 N.C. at 341, 368 S.E.2d at 857; *see generally Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982).

In the instant case, defendants contend that the primary claim brought by the Feepayer Class against Orange County—the Third Class Action Claim that the fees assessed are *ultra vires*—is "solely" a challenge to the *validity* of the 2008 Ordinance and therefore could only have been brought on or before 1 October 2009—within nine months of the 1 January 2009 effective date of the 2008 Ordinance. Defendants further contend that because plaintiffs' primary claim is prohibited due to its tardiness, plaintiffs' claim for declaratory judgment must fail as well. *State ex rel. Edmisten v. Tucker*, 312 N.L. 326, 338, 323 S.E.2d 294, 303 (1984) (holding that "jurisdiction under the Declaratory Judgment

Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute"). Likewise, defendants assert that where the primary underlying claim is foreclosed because it is untimely, plaintiffs' claim for attorney fees and costs also is not eligible to be considered. In sum, because all of the class claims advanced on behalf of the Feepayer Class by plaintiffs fail as a matter of law, defendants contend that the trial court abused its discretion in certifying the Feepayer Class.

In their response, plaintiffs begin by emphasizing that, in order to prevail, defendants must persuade this Court that the trial court abused its discretion by certifying the Feepayer Class. Plaintiffs submit that the trial court's approach to its considerations of the class certification issues indicates a reasoned basis for the forum's conclusions where it considered extensive arguments from the parties, including seven briefs; reviewed numerous documents and items of correspondence; conducted two hearings; and then reconsidered the matter after the issuance of this Court's decision in *Quality Built II*. As to the substance of defendants' argument that the 1987 enabling legislation contained a statute of repose, plaintiffs acknowledge that plaintiffs "pleaded, argued, and believe that the 2008 Ordinance was unlawful," but "also allege that the *fees themselves were illegal* and must be repaid, with interest, to those who paid them."[4] (Emphasis added). Plaintiffs underscore the assertions in their amended complaint that plaintiffs "have personal interests in the illegality of the fees" and that "[t]he illegality of the fees predominates" over other issues; "[t]he fee amounts established by the 2008 Amendment are *ultra vires* and illegal," in reference to the Third Class Action Claim; "all fees . . . required by [d]efendants . . . are unlawful," in reference to the Eleventh Class Action Claim; and "[d]efendants acted outside the scope of their legal authority in requiring class . . . members to pay the fees specified by the 2008 Ordinance," in reference to the Thirteenth Class Action Claim.

We agree with plaintiffs that they sought damages and further relief in their amended complaint on the basis that the fees assessed to plaintiffs and other potential class members were illegal. Thus, even assuming *arguendo* that there is a statute of repose in the enabling legislation governing impact fees which would bar plaintiffs' allegations that the

4. Plaintiffs correctly note that Rule 8 of the North Carolina Rules of Civil Procedure permits pleading parties to "set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses," provided that "the pleading is not made insufficient by the insufficiency of one or more of the alternative statements." N.C. R. Civ. P. 8(e)(2).

2008 Ordinance was invalid, plaintiffs' additional averments based upon the alleged illegality of fees collected would remain unaffected. For this reason, we hold that plaintiffs' claims here are not time-barred by any asserted statute of repose in the enabling legislation.

As we observed in *Quality Built II*, a claim to recover fees illegally imposed under an unlawful municipal ordinance is in essence a claim wherein "the nature of the wrongful conduct and harm alleged . . . rests upon the . . . collection of . . . fees rather than the adoption of the impact fee ordinances." 371 N.C. at 71–72, 813 S.E.2d at 227–28 (quotation omitted). We explained that such a claim "rest[ed] upon an alleged statutory violation that resulted in the exaction of an unlawful payment which plaintiffs had an inherent right to recoup." *Id.* at 73, 813 S.E.2d at 228. Likewise, in the case before us, even if defendants are shielded from claims that the 2008 Ordinance was invalid based upon the operation of a statute of repose, any claims sounding in an assertion that there was "the exaction of an unlawful payment" from those who were required to pay the assessed impact fees are not subject to any statute of repose. Consequently, there is no prohibition against plaintiffs and other parties recognized in the trial court's certification of classes, by virtue of a statute of repose, from proceeding with their proposed claims as the recognized Feepayer Class.

Moreover, the enabling legislation itself, including the supposed statute of repose, was entirely repealed under the Repeal Act while this matter was pending, thereby rendering moot the basis of defendants' arguments. Even if the nine-month limitation period referenced in the act authorizing the imposition and collection of impact fees could have been applicable here, the asserted class claims would still be able to be pursued because the presumed statute of repose would no longer be effective to halt the claims of plaintiffs and the other class members due to the elimination of the time limitation which was arguably included in the repealed enabling legislation. N.C. Session Law 2017-36 ("Repeal Act").

Since there is no existing authority for defendants' argument that the trial court's certification of the Feepayer Class was an abuse of discretion,[5] we find no error on the part of the trial court on this issue.

5. Plaintiffs additionally note that the provisions of the 2008 Ordinance setting the amount of the fees challenged by the Feepayer Class claims were repealed by Orange County effective 1 January 2017, a date prior to the filing of this lawsuit.

3. Application to the Refund Class

[2] Defendants also contest the trial court's certification of plaintiffs' Twelfth Class Action Claim for Relief, in which plaintiffs seek a determination that the "refunds required by Orange County Code Section 30-35(e)(2) are due and payable," on behalf of the Refund Class—"All persons who paid a fee under the schedule of fees enacted in the 2008 Fee Ordinance for a housing unit for which the corresponding fee payable effective January 1, 2017 under the 2016 Amendment would have been less."

Defendants contend that the "Twelfth Class Action Claim for Relief is fundamentally a claim to recover a portion of an impact fee already paid. . . . [and] clearly falls within the type of claims contemplated by Orange County's enabling legislation," citing 987 N.C. Sess. Law 460 secs. 17(1)(2); 18(i)(2) ("Any action seeking *to recover an impact fee* must be commenced not later than nine months after the impact fee is paid." (emphasis added)). Defendants note that plaintiffs and "a substantial majority" of the proposed members in the "Refund Class" paid their impact fees more than nine months prior to the filing of the complaint and are therefore barred from recovery by the nine-month statute of repose set forth in the enabling legislation.

However, as plaintiffs argue, the remaining Refund Class claim in this case does not attempt "to recover an impact fee" as set forth in the 1987 legislative act, but instead asserts the right to partial refunds with interest as set forth by section 30-35(e)(2) of the 2016 Ordinance as promulgated by defendant Orange County itself. Further, as we observed above, the enabling legislation upon which defendants rely has been repealed. We find merit in plaintiffs' submissions on this point and, consistent with our earlier determination on the operation of a perceived time limitation barring plaintiffs' action on behalf of a certified class that such a limitation would have been eliminated due to the repeal of the enabling legislation, we do not find the commission of error on this issue by the trial court.

II. Discovery order

[3] Along with their legal arguments to this Court, plaintiffs contemporaneously filed a "Motion to Dismiss Defendants' Appeal from Discovery Order." We agree with plaintiffs' position in their motion that defendants' effort to appeal the discovery ruling of the trial court contained in its 3 August 2018 Order is, at this stage in the litigation of the case, premature and hence must be dismissed for lack of appellate jurisdiction.

Defendants have cited no basis or authority for this Court to review the trial court's order wherein the trial court has compelled discovery regarding the production of fee receipts. *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999) ("An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment."). Accordingly, we dismiss defendants' appeal regarding the discovery portion of the trial court's 3 August 2018 Order.

Conclusion

We affirm the trial court's order regarding class certification and dismiss defendants' interlocutory appeal regarding the portions of the trial court's order which pertain to discovery matters. All defenses which defendants may choose to employ at the trial level regarding plaintiffs' claims are expressly reserved.

AFFIRMED IN PART; DISMISSED IN PART.

JAMES CUMMINGS AND WIFE, CONNIE CUMMINGS	)	
	)	
v.	)	BRUNSWICK COUNTY
	)	
ROBERT PATTON CARROLL; DHR SALES CORP. D/B/A RE/MAX COMMUNITY BROKERS; DAVID H. ROOS; MARGARET N. SINGER; BERKELEY INVESTORS, LLC; KIM BERKELEY T. DURHAM; GEORGE C. BELL; THORNLEY HOLDINGS, LLC; BROOKE ELIZABETH RUDD GAGLIE F/K/A BROOKE ELIZABETH RUDD; MARGARET RUDD & ASSOCIATES, INC.; AND JAMES C. GOODMAN	)	

NO. 216A20

ORDER

Defendants Berkeley Investors, L.L.C. and George C. Bell's petition for discretionary review under N.C.G.S. § 7A-31 is allowed.

Accordingly, the new briefs of the appellants shall be filed with this Court not more than 30 days from the date of certification of this order. The remaining briefs of the parties shall be submitted to this Court within the times allowed and in the manner provided by the North Carolina Rules of Appellate Procedure.

By order of the Court in conference, this the 15th day of December 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of December 2020.

s/Amy Funderburk
AMY FUNDERBURK
Clerk of the Supreme Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	WAKE COUNTY
	)	
ROGELIO ALBINO DIAZ-TOMAS	)	

No. 54A19-3

ORDER

Defendant's petition for discretionary review as to additional issues is allowed as to issues I–V, VIII–IX, XII–XIV. Except as to the issues specified, defendant's petition for discretionary review as to additional issues is denied.

By order of this Court in Conference, this 15th day of December, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of December, 2020.

s/Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

STATE v. PABON

[376 N.C. 527 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cabarrus County
	)	
RAFAEL ALFREDO PABON	)	

No. 467A20

ORDER

Defendant's petition for discretionary review of additional issues is denied except as to Issue II, as to which the petition is allowed.

By order of the Court in Conference, this the 15th day of December, 2020.

s/Davis, J.
For the Court

Accordingly, the new brief of the Defendant shall be filed with this Court not more than 30 days from the date of certification of this order.

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of December, 2020.

s/Amy Funderburk
AMY FUNDERBURK
Clerk of the Supreme Court

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

18 DECEMBER 2020

3A20	State v. Bryan Xavier Johnson	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent 4. Def's Motion for Extension of Time to File Reply Brief 5. Def's Motion to Deem Reply Brief Timely Filed	1. Allowed **01/07/2020** 2. Allowed **06/03/2020** 3. --- 4. Allowed **11/23/2020** 5. Allowed **11/23/2020**
7P20	State v. Marlene Johnson	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
12P20	State v. Robert Louis Quinn	Def's PDR Under N.C.G.S. § 7A-31	Denied
17P13-4	State v. Ca'sey R. Tyler	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/28/2020** **Ervin, J., recused**
17P13-5	State v. Ca'sey R. Tyler	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **11/10/2020** **Ervin, J., recused**
31PA19	Eve Gyger v. Quintin Clement	Def's Motion to Waive Court Costs	Denied **10/06/2020**
35P20	State v. Kenneth Pierre	Def's PDR Under N.C.G.S. § 7A-31	Denied
42P04-11	State v. Larry McLeod Pulley	Def's Pro Se Motion for Discretionary Review	Dismissed
43P20	State v. Quintin Sinclair Wright	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recuse**d
45P20	State v. Troshawn N. Williams	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied

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50P20	Davis & Taft Architecture, P.A. v. DDR-Shadowline, LLC, Deeds Realty Services, LLC, and Shadowline Partners, LLC	1. Def's (Shadowline Partners, LLC) PDR Under N.C.G.S. § 7A-31	1. Denied
		2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	2. Dismissed as moot
54A19-3	State v. Rogelio Albino Diaz-Tomas	1. Def's Motion for Temporary Stay	1. Allowed **04/21/2020**
		2. Def's Petition for Writ of Supersedeas	2. Allowed **06/03/2020**
		3. Def's Notice of Appeal Based Upon a Dissent	3. ---
		4. Def's PDR as to Additional Issues	4. Special Order
		5. Def's Conditional Petition for Writ of Certiorari to Review Order of the COA	5. Allowed
		6. Def's Conditional Petition for Writ of Certiorari to Review Order of District Court, Wake County	6. Allowed
		7. Def's Conditional Petition for Writ of Mandamus	7.
		8. Def's Motion to Expedite the Consideration of Defendant's Matters	8. Dismissed as moot
		9. Def's Motion to Proceed *In Forma Pauperis*	9. Allowed
		10. Def's Motion to Take Judicial Notice	10. Dismissed as moot
		11. Def's Motion for Leave to Amend Notice of Appeal	11. Allowed
		12. Def's Motion for Summary Reversal	12. Dismissed
		13. Def's Motion to Supplement Record on Appeal	13. Allowed
		14. Def's Motion to Consolidate Diaz-Tomas and Nunez Matters	14. Allowed **06/30/2020**
		15. Def's Motion to Clarify the Extent of Supersedeas Order	15. Dismissed
		16. Def's Motion in the Alternative to Hold Certiorari and Mandamus Petitions in Abeyance	16. Allowed
		17. Def's Motion to File Memorandum of Additional Authority	17. Dismissed **07/08/2020**
		18. Def's Motion for Petition for Writ of Procedendo	18. Dismissed
		19. Def's Motion for Printing and Mailing of PDR on Additional Issues	19. Dismissed

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		20. Def's Motion for the Production of Discovery Under Seal	20. Denied
		21. Def's Motion to Amend Certificate of Service	21. Allowed
		22. Def's Motion to Amend Motion for Petition for Writ of Procedendo	22. Dismissed as moot
55P18-2	State v. James Howard Terrell, Jr.	1. Def's Pro Se Motion to Appeal Judgment of the Trial Court and Any Conditions of Post-Conviction Release	1. Dismissed **12/03/2020**
		2. Def's Pro Se Motion for Trial Court Date	2. Dismissed **12/03/2020**
56P20	William Everett Copeland IV and Catherine Ashley F. Copeland, Co-Administrators of the Estate of William Everett Copeland v. Amward Homes of N.C., Inc.; Crescent Communities, LLC; and Crescent Hillsborough, LLC	1. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed
		2. Plts' Conditional PDR Under N.C.G.S. § 7A-31	2. Allowed
63P16-2	State v. Michael Anthony York	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA	1. Denied
		2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	2. Allowed
69P18-4	State v. Nell Monette Baldwin	1. Def's Pro Se Motion to Consolidate the Civil Cases and Criminal Cases	1. Dismissed
		2. Def's Pro Se Motion to Proceed Without Prepaying Costs	2. Dismissed
		3. Def's Pro Se Motion to Suspend Appellate Rules to Expedite Review in the Public Interest	3. Dismissed
		4. Def's Pro Se Petition for Writ of Certiorari	4. Dismissed
		5. Def's Pro Se Motion to Add Supplemental Certificate of Service	5. Dismissed
		6. Def's Pro Se Motion to Strike the Civil Plaintiff's Response	6. Dismissed
		7. Def's Pro Se Motion to Amend the Motion for Appropriate Relief	7. Dismissed

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		8. Def's Pro Se Petition for Writ of Habeas Corpus	8. Denied **07/10/2020** **Beasley, C.J., recused;** **Morgan, J., recused**
69P98-2	State v. Spencer Edward Springs	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
70P20	Kanish, Inc. v. Kay F. Fox Taylor and Calvin Taylor	1. Plt's Motion for Temporary Stay 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/20/2020** Dissolved **12/15/2020** 2. Denied 3. Denied
77P20	State v. Christopher Tyree Johnson	Def's Pro Se Motion for Appropriate Relief Jurisdiction of Subject Matter	Dismissed
90P19-2	State v. Orlando Cooper	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **11/06/2020** 2.
95P20	State v. Carlos Espinosa and State v. Bardomiano Martinez	1. Def's (Bardomiano Martinez) Pro Se Notice of Appeal Based Upon a Constitutional Question 2. Def's (Bardomiano Martinez) Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's (Bardomiano Martinez) Pro Se Petition in the Alternative for Writ of Certiorari to Review Decision of the COA 4. Def's (Carlos Espinosa) Pro Se PDR Under N.C.G.S. § 7A-31 5. Def's (Carlos Espinosa) Pro Se Motion to Proceed *In Forma Pauperis* 6. Def's (Carlos Espinosa) Pro Se Motion to Appoint Counsel	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot 4. Denied 5. Allowed 6. Dismissed as moot
97A20-2	State v. Antiwuan Tyrez Campbell	1. Def's Notice of Appeal Based Upon a Dissent 2. Def's PDR as to Additional Issues	1. --- 2. Allowed

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103P20	State v. Reginald Tremaine Wilson	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Motion to Amend PDR	1. Denied 2. Allowed
109P16-2	State v. Curtis Joel Smith	Def's Pro Se Motion for Appeal	Dismissed
113A19	Orlando Residence, LTD., Plaintiff v. Alliance Hospitality Management, LLC, Rolf A. Tweeten, Axis Hospitality, Inc., and Kenneth E. Nelson, Defendants Kenneth E. Nelson, Crossclaim Plaintiff v. Alliance Hospitality Management, LLC, Rolf A. Tweeten, and Axis Hospitality, Inc., Crossclaim Defendants	1. Def's (Kenneth E. Nelson) Pro Se Motion for Relief from Rule 31 Requirement of Certificates and Memorandum in Support Thereof 2. Def's (Kenneth E. Nelson) Pro Se Motion for Rehearing	1. Dismissed as moot **09/30/2020** 2. Denied **09/30/2020** **Morgan, J., recused**
120P20	State v. Timothy Winston Hall	Def's PDR Under N.C.G.S. § 7A-31	Denied
121P20	Kimberly Mims v. Darrell D. Parker, Sr., Lori Walker Parker	Plt's PDR Under N.C.G.S. § 7A-31	Denied
130P20	Jimmy Allen Roberts v. Daniel M. Horne, Jr., Clerk, North Carolina Court of Appeals	1. Def's Pro Se Motion for Notice of Appeal 2. Def's Pro Se Motion for Judicial Notice 3. Def's Pro Se Motion for Appointment of Counsel	1. Dismissed 2. Dismissed as moot 3. Dismissed as moot **Ervin, J., recused**
131P04-4	State v. Shan Edward Carter	Def's Pro Se Motion for an Investigation	Dismissed **Ervin, J., recused**
131P16-15	State v. Somchai Noonsab	1. Def's Pro Se Motion to Take Jurisdiction 2. Def's Pro Se Motion for Objection 3. Def's Pro Se Motion to Dismiss	1. Dismissed 2. Dismissed 3. Dismissed

		4. Def's Pro Se Petition for Writ of Mandamus	4. Dismissed
		5. Def's Pro Se Motion to Vacate Conviction - Sentence	5. Dismissed
		6. Def's Pro Se Motion for Jurisdiction to M.A.R.	6. Dismissed
		7. Def's Pro Se Motion for Jurisdiction to Certiorari	7. Dismissed
		8. Def's Pro Se Motion for Immediate Release	8. Dismissed
		9. Def's Pro Se Motion for Payment of Monetary – Declaratory Relief	9. Dismissed
		10. Def's Pro Se Motion to Expunge all Records with Prejudice	10. Dismissed
		11. Def's Pro Se Motion for Writ of Rights Jurisdiction 1	11. Dismissed
		2. Def's Pro Se Motion for Appropriate Relief Writ of Rights Jurisdiction of Subject Matters Certiorari	12. Dismissed
		13. Def's Pro Se Motion for Jurisdiction of Subject Matter	13. Dismissed
		14. Def's Pro Se Motion for Jurisdiction of Subject Matters, False Imprisonment	14. Dismissed
		15. Def's Pro Se Motion for Appropriate Relief of Jurisdiction of Subject Matter DNA Testing	15. Dismissed
		16. Def's Pro Se Motion for Jurisdiction of Chp 14-7B G.S. 14-27.7 False Imprisonment	16. Dismissed
		17. Def's Pro Se Motion to Prosecute	17. Dismissed
		18. Def's Pro Se Motion for DNA Testing	18. Dismissed
		19. Def's Pro Se Motion for Relief	19. Dismissed
		20. Def's Pro Se Motion for Immediate Release	20. Dismissed
		21. Def's Pro Se Motion for Tolling	21. Dismissed
		22. Def's Pro Se Motion for Verified Complaint	22. Dismissed
		23. Def's Pro Se Motion for Verified Complaint Re: Entrapment - Ex Post Facto Laws, False Imprisonment	23. Dismissed
		24. Def's Pro Se Motion for False Imprisonment Relief Based on Fruit of the Poisonous Tree	24. Dismissed

		25. Def's Pro Se Motion to Vacate Conviction Pursuant to Rule of Leniency - Multiplicity - Variance	25. Dismissed
		26. Def's Pro Se Motion for Immediate Release - Implied Acquittal	26. Dismissed
		27. Def's Pro Se Motion for Verified Complaint - 5th Amendment Violation	27. Dismissed
		28. Def's Pro Se Motion for Immediate Release - Mandatory Relief and Expungement of Records	28. Dismissed
		29. Def's Pro Se Motion for Double Jeopardy Analysis and Blockburger Test	29. Dismissed
		30. Def's Pro Se Motion for Appropriate Relief Based on Newly Discovered Jurisdiction	30. Dismissed
		31. Def's Pro Se Motion to Compel	31. Dismissed
		32. Def's Pro Se Motion to Compel - False Imprisonment	32. Dismissed
		33. Def's Pro Se Motion to Compel State's False Imprisonment	33. Dismissed
		34. Def's Pro Se Motion to Compel - False Imprisonment	34. Dismissed
		35. Def's Pro Se Motion for Verified Complaint - Motion to Compel	35. Dismissed
		36. Def's Pro Se Motion for Immediate Release – Monetary Relief	36. Dismissed
		37. Def's Pro Se Motion to Compel - Double Jeopardy Analysis - Blockburger Elements Test - Rule of Leniency - Duplicative, Multiplicity, Variance, Ex Post Facto Laws	37. Dismissed
		38. Def's Pro Se Motion for Remedy for Relief	38. Dismissed
		39. Def's Pro Se Motion to Compel - False Imprisonment	39. Dismissed
		40. Def's Pro Se Motion to Vacate	40. Dismissed
		41. Def's Pro Se Motion for Double Jeopardy	41. Dismissed
		42. Def's Pro Se Petition for Writ of Mandamus	42. Dismissed
		43. Def's Pro Se Petition for Writ of Mandamus	43. Dismissed

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132PA18-2	Beth Desmond v. The News and Observer Publishing Company, McClatchy Newspapers, Inc., and Mandy Locke	1. Defs' (The News and Observer Publishing Company and Mandy Locke) Petition for Rehearing 2. Plt's Petition for Rehearing	1. Denied **10/14/2020** 2. Denied **10/14/2020**
136P20	Patricia Barnard, on behalf of herself and others similarly situated v. Johnston Health Services Corporation d/b/a Johnston Health, and Accelerated Claims, Inc.	Plt's PDR Under N.C.G.S. § 7A-31	Denied
141P20	The Cherry Community Organization, a North Carolina non-profit corporation, and Stonehunt, LLC v. Stoney D. Sellars, Midtown Area Partners Holdings, LLC, and Midtown Area Partners II, LLC	Plt's (The Cherry Community Organization) PDR Under N.C.G.S. § 7A-31	Allowed
143P10-2	State v. Andre Pertiller	Def's Pro Se Motion for PDR	Denied
143P20-4	James B. Henderson v. James Vaughn	1. Petitioner's Pro Se Motion for Objection to the Amended Order 2. Petitioner's Pro Se Motion to Respond	1. Dismissed 2. Dismissed **Ervin, J., recused**
144P20	Nanny's Korner Day Care Center, Inc. v. North Carolina Department of Health and Human Services, Division of Child Development	Plt's Petition for Writ of Certiorari to Review Decision of the COA	Denied **Ervin, J., recused; Davis, J., recused**
145P20	State v. Cory Wilson	Def's PDR Under N.C.G.S. § 7A-31	Denied
154P20	State v. Monolito Finney	Def's Pro Se Motion for PDR from Full Panel of Judges	Dismissed
157P13-2	State v. Master Maurice Alston	Def's Pro Se Motion for Application of Notice and Awareness and for Release	Denied **09/29/2020**

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157P20	William Allen Cale v. Cleveland Atkinson, Jr., in his official capacity as Sheriff of Edgecombe County	1. Petitioner's Petition for Writ of Certiorari to Review Decision of the COA 2. Petitioner's Motion to Suspend Rules	1. Denied 2. Denied
163P16-3	State v. Arkeem Hakim Jordan	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused**
177P20	Dominique Ford v. North Carolina General Assembly; Cabarrus County Government; Concord Police Department; Kannapolis Police Department; Carolinas Healthcare Systems Northeast, US Food and Drug Administration; Drug Enforcement Administration; US Federal Government; and Federal Reserve System	1. Plt's Pro Se Motion for Notice of Appeal 2. Plt's Pro Se Motion for Notice of Appeal	1. Dismissed *ex mero motu* 2. Dismissed *ex mero motu*
183P19-3	State v. Coriante Pierce	1. Def's Pro Se Motion to Appeal Designation as Exceptional Case 2. Def's Pro Se Motion for Notice of Appeal of Denial of Motion to Exclude Photographs (Amended)	1. Denied 2. Denied
183P20	Michael Stacy Buchanan v. North Carolina Farm Bureau Mutual Insurance Company, Inc.	Plt's PDR Under N.C.G.S. § 7A-31	Denied
185P20	State v. Kenneth J. Fields	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied

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187P18-3	Edward Smith, Jr. v. Supt. Morris Reid, et al.	1. Petitioner's Pro Se Motion for PDR 2. Petitioner's Pro Se Motion to Appoint Counsel	1. Denied 2. Dismissed as moot **Davis, J., recused**
187P20	State v. Shanna Cheyenne Shuler	Def's PDR Under N.C.G.S. § 7A-31	Allowed
189P20	State v. Thomas Darius Jackson	Def's Petition for Writ of Certiorari to Review Order of the COA	Denied
199P20	State v. Antwan Yelverton	Def's Pro Se Motion for PDR	Dismissed **Ervin, J., recused**
204A20	James C. McGuine, Employee v. National Copier Logistics, LLC, Employer, and Travelers Insurance Company of Illinois, Carrier, and/or NCL Transportation, LLC, Employer, Non-Insured and The North Carolina Industrial Commission v. NCL Transportation, LLC, Non-Insured Employer, and Thomas E. Prince, individually	Plt's Motion to Dismiss Appeal	Denied
205P20	Shirley Valentine, Administrator of the Estate of Shanye Janise Roberts, Deceased v. Stephanie Solosko, PA-C; Nextcare Urgent Care; Nextcare, Inc.; Nextcare, Inc. d/b/a Nextcare Urgent Care; Matrix Occupational Health, Inc.; and Matrix Occupational Health, Inc. d/b/a Nextcare Urgent Care	Defs' PDR Under N.C.G.S. § 7A-31	Denied

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206P20	State v. Marques Raman Brown	1. Def's PDR Under N.C.G.S. § 7A-31 2. State's Motion to Deem Response to PDR Timely Filed	1. Denied 2. Allowed
207P20	State v. Darne Nicholas Brown	1. Def's PDR Under N.C.G.S. § 7A-31 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
209P20	State v. Jonathan Conlanges Boykin	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
216A20	James Cummings and wife, Connie Cummings v. Robert Patton Carroll; DHR Sales Corp. d/b/a Re/Max Community Brokers; David H. Roos; Margaret N. Singer; Berkeley Investors, LLC; Kim Berkeley T. Durham; George C. Bell; Thornley Holdings, LLC; Brooke Elizabeth Rudd-Gaglie f/k/a Brooke Elizabeth Rudd; Margaret Rudd & Associates, Inc.; and James C. Goodman	1. Defs' (Brooke Elizabeth Rudd-Gaglie f/k/a Brooke Elizabeth Rudd, Margaret Rudd & Associates, Inc., and James C. Goodman) Notice of Appeal Based Upon a Dissent 2. Defs' (Berkeley Investors, LLC and George C. Bell) PDR Under N.C.G.S. § 7A-31 3. Defs' (Robert Patton Carroll and DHR Sales Corp d/b/a Re/Max Community Brokers) Notice of Appeal Based Upon a Dissent 4. Defs' (Berkeley Investors, LLC and George C. Bell) Motion to Stay Briefing Schedule and Set Briefing Deadlines	1. --- 2. Special Order 3. --- 4. Allowed **06/18/2020**
219P17-4	Courtney NC, LLC d/b/a Oakwood Raleigh at Brier Creek v. Monette Baldwin a/k/a Nell Monette Baldwin	1. Def's Pro Se Motion to Consolidate the Civil Cases and Criminal Cases 2. Def's Pro Se Motion to Proceed Without Prepaying Costs 3. Def's Pro Se Motion to Disqualify 4. Def's Pro Se Motion to Proceed without Paying Costs 5. Def's Pro Se Motion for the Bifurcation of Review Issues 6. Def's Pro Se Motion for Petition (Complaint) for Judicial Disciplinary Action 7. Def's Pro Se Petition for Writ of Certiorari 8. Plt's Motion for Sanctions 9. Plt's Motion to Strike and Seal Portions of Defendant's Filings	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Denied 9. Denied

		10. Def's Pro Se Motion to Strike All of Plaintiff's Responses and Motions 11. Def's Pro Se Motion for Leave to File Directly to the Honorable Supreme Court 12. Def's Pro Se Motion to Suspend the Rules 13. Def's Pro Se Motion to Amend Motion for Leave to File Directly to Add a Memorandum 14. Def's Pro Se Motion for Leave to Amend Petition for Writ of Certiorari 15. Def's Pro Se Motion to Supplement the Record 16. Def's Pro Se Motion to Suspend the Rules 17. Def's Pro Se Motion to Withdraw Exhibit Summary 18. Def's Pro Se Petition for Writ of Certiorari	10. Dismissed 11. Dismissed 12. Dismissed 13. Dismissed 14. Dismissed 15. Dismissed 16. Dismissed 17. Dismissed 18. Dismissed **Beasley, C.J., recused; Morgan, J., recused**
219P20-2	State v. Justin Marqui Caldwell	Def's Pro Se Motion for Case Review	Dismissed
222P20	State v. Kenneth Alexander Shaw	1. Def's Pro Se Motion to Dismiss Indictment 2. Def's Pro Se Motion in the Alternative for Hearing on the Motions 3. Def's Pro Se Motion to Dismiss Indictment	1. Dismissed 2. Dismissed 3. Dismissed
228P20	State v. Bradley W. Burgess	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
233A20	State v. Johnathan Ricks	Def's Motion to Extend the Time to File Defendant's New Brief and to Deem Brief Timely Filed	Allowed **10/22/2020**

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234PA20	State v. Kelvin Alphonso Alexander	1. Def's PDR 2. Innocence Network's Motion for Leave to File Amicus Brief 3. Amicus Curiae's Motion to Admit Evan J. Ballan Pro Hac Vice 4. Amicus Curiae's Motion to Admit Kelly M. Dermody Pro Hac Vice	1. Allowed **08/12/2020** 2. Allowed **10/30/2020** 3. Allowed **10/30/2020** 4. Allowed **10/30/2020**
236P20	State v. Garry Aritis Yarborough	Def's PDR Under N.C.G.S. § 7A-31	Denied
244P20	State v. Edward Bickerton Lane, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Alleghany County 3. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed 3. Dismissed as moot
250P17-3	State v. Justin Lee Perry	Def's Pro Se Motion for PDR	Denied **11/05/2020**
250P20	State v. Michael Shane Wells	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
254P18-5	State v. Jimmy A. Sevilla-Briones	1. Def's Pro Se Motion for Appointment of Counsel 2. Def's Pro Se Motion for Objection/ Appeal to Prejudices 3. Def's Pro Se Motion for Petition for Full Record Review 4. Def's Pro Se Motion for Remedy 5. Def's Pro Se Motion for Clarity of Order Entry Without Relief 6. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed
254P20	State v. Nadine D. Stubbs	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/03/2020** Dissolved **12/15/2020** 2. Denied 3. Denied
255P20	State v. Edgardo Gandarilla Nunez	1. Def's PDR Prior to a Determination of the COA 2. Def's Motion to Amend PDR	1. Allowed 2. Allowed

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257P20	Mamoun Ali Mohammad Hamdan v. Nafiseh Ali Asad Freitekh	1. Petitioner's PDR Under N.C.G.S. § 7A-31 2. Respondent's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
261A18-3	North Carolina State Conference of the National Association for the Advancement of Colored People v. Tim Moore, in his official Capacity, Philip Berger, in his official capacity	1. Plt's Joint Motion for Extended Briefing Schedule 2. North Carolina Professors of Constitutional Law's (Enrique Arminjo, Joseph Blocher, John Charles Boger, Guy-Uriel Charles, Donald Corbett, Michael Kent Curtis, April G. Dawson, Walter E. Dellinger, III, Malik Edwards, Shawn E. Fields, Sarah Ludington, William P. Marshall, Gene R. Nichol, Wilson Parker, Jedediah Purdy, and Theodore M. Shaw) Motion for Leave to File Amicus Brief 3. Democracy North Carolina's Motion for Leave to File Amicus Brief 4. North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief 5. North Carolina Legislative Black Caucus' Motion for Leave to File Amicus Brief 6. American Civil Liberties Union of North Carolina's Motion for Leave to File Amicus Brief 7. Governor Roy Cooper's Motion for Leave to File Amicus Brief	1. Allowed **10/21/2020** 2. Allowed **12/03/2020** 3. Allowed **12/03/2020** 4. Allowed **12/03/2020** 5. Allowed **12/03/2020** 6. Allowed **12/03/2020** 7. Allowed **12/03/2020**
263PA18-2	State v. Cedric Theodis Hobbs, Jr.	1. Def's Motion for Supplemental Briefing 2. Def's Motion for Extension of Time to File Brief 3. Social Scientists' Motion for Leave to File Amicus Brief 4. Def's Motion to Supplement the Record	1. Allowed **08/26/2020** 2. Allowed **10/07/2020** 3. Allowed **11/16/2020** 4. Allowed
264P20	State v. Terry Glenn Kluttz	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Stanly County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed

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265P20	State v. Wesley Evay Westbrook	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
266P20	State v. Johnny Sanders	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied
267P20	State v. William Joseph McCullen	Def's PDR Under N.C.G.S. § 7A-31	Denied
269P19	Elizabeth Luke as Guardian *ad Litem*, for Jane Doe (a minor) v. Woodlawn School, J. Robert Shirley individually and as Agent for Woodlawn School, and the Woodlawn School Board of Trustees	1. Plt's PDR Under N.C.G.S. § 7A-31 2. Defs' Motion for Substitution of Counsel	1. Denied 2. Allowed
269P20	Julie Berke v. Fidelity Brokerage Services, the Estate of Gary Ian Law, and Aman Masoomi, individually and as sole heir and Executor of the Estate of Sharon Lee Day	Def's (Aman Masoomi) PDR Under N.C.G.S. § 7A-31	Denied
277P20	State v. James Edsal Baker	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/19/2020** Dissolved **12/15/2020** 2. Denied 3. Denied
279A20	State v. Demon Hamer	Def's Motion to Amend Record on Appeal	Allowed
281P20	In the Matter of B.W.B.	Juvenile's PDR Under N.C.G.S. § 7A-31	Denied
283P20	State v. Mark Anthony Chamberlain	Def's PDR Under N.C.G.S. § 7A-31	Denied
288P20	State v. Robert Randolph Hughes	Def's PDR Under N.C.G.S. § 7A-31	Denied

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289A20	In the Matter of L.R.L.B.	Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Yancey County	Allowed
290PA15-3	State v. Jeffrey Tryon Collington	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/13/2020**
295P20	State v. Scott Edward Sasek	Def's PDR Under N.C.G.S. § 7A-31	Denied
298P18	Randall L. and Carolyn M. Henion v. County of Watauga, North Carolina, Johnny and Joan Hampton, Maymead Materials, Inc., and JW Hampton Company	1. Petitioners' PDR Under N.C.G.S. § 7A-31 2. Respondents' (Johnny and Joan Hampton, Maymead Materials, Inc., and JW Hampton Company) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
304P20	Clyde Junior Meris v. Guilford County Sheriff's Office, et al.	Plt's Pro Se Motion for Civil Action	Dismissed
305P97-9	Egbert Francis, Jr. v. State of North Carolina	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **11/12/2020**
306P18-3	Hunter F. Grodner v. Andrzej Grodner (now Andrew Grodner)	Def's Pro Se Second Motion to Disqualify Opposing Counsel and to Correct Court's Fundamental and Fatal Error	Dismissed
307P18-2	Common Cause, Dawn Baldwin Gibson, Robert E. Morrison, Cliff Moone, T. Anthony Spearman, Alida Woods, Lamar Gibson, Michael Schacter, Stella Anderson, Mark Ezzell, and Sabra Faires v. Daniel J. Forest, in his official capacity as President of the North Carolina Senate; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate	Plts' PDR Under N.C.G.S. § 7A-31	Denied

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307PA20	Marisa Mucha v. Logan Wagner	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. Counsel's Motion for Leave to Participate as Amicus Curiae 4. Amicus Curiae's Motion for Extension of Time to File Brief 5. Amicus Curiae's Motion to Waive Costs 6. Plt's Motion for Extension of Time to File Brief	1. Retained **09/23/2020** 2. Allowed **09/23/2020** 3. Dismissed as moot **11/10/2020** 4. Dismissed as moot **11/10/2020** 5. Dismissed as moot **11/10/2020** 6. Allowed **11/10/2020**
309P20	Nancy Keller, by and through her attorney-in-fact, Leslie Ann Keller v. Deerfield Episcopal Retirement Community, Inc. and Jeffrey Todd Earwood	Plt's PDR Under N.C.G.S. § 7A-31	Denied
311A20	In the Matter of the Appeal of Harris Teeter, LLC, from the Decision of the Mecklenburg County Board of Equalization and Review	1. Taxpayer's Notice of Appeal Based Upon a Dissent 2. County's Petition for Writ of Certiorari to Review Decision of the COA	1. --- 2. Denied
313P20	State v. Zaccaeus Lamont Anthony	Def's PDR Under N.C.G.S. § 7A-31	Denied
316P20	State v. Christopher C. Williams	1. Def's Pro Se Motion for Notice of Dismissal 2. Def's Pro Se Motion for Blue Ribbon Jury 3. Def's Pro Se Motion for Release of Names	1. Dismissed 2. Dismissed 3. Dismissed

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324A19	State v. Jack Howard Hollars	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues 5. Def's Motion for Extension of Time to File Response 6. Def's Motion for Appropriate Relief 7. State's Motion for Extension of Time to File Response to Motion for Appropriate Relief	1. Allowed **08/21/2019** 2. Allowed **10/04/2019** 3. --- 4. Denied **10/30/2019** 5. Allowed **09/19/2019** 6. Dismissed as moot 7. Allowed **03/16/2020**
324P20	State v. Joseph Levi Grantham	Def's PDR Under N.C.G.S. § 7A-31	Denied
326PA19	Cheryl Lloyd Humphrey Land Investment Company, LLC v. Resco Products, Inc. and Piedmont Minerals Company, Inc.	Amicus Curiae's Motion for Leave to Participate in Oral Argument	Allowed **11/30/2020**
326P20	Robert E. Monroe, as Administrator of the Estate of Naka Hamilton v. Rex Hospital, Inc. d/b/a Rex Hospital, Rex Healthcare, UNC Rex Hospital, UNC Rex Healthcare, UNC Rex Hematology Oncology Associates, and Henry Cromartie,III, M.D.	1. Plt's PDR Under N.C.G.S § 7A-31 2. Plt's Motion to Admit Stuart Edward Scott, Pro Hac Vice 3. Plt's Motion to Admit Jeremy Aaron Tor, Pro Hac Vice 4. Def's (Henry Cromartie, III, M.D.) Motion for Madeleine M. Pfefferle to Withdraw as Counsel	1. Denied 2. Dismissed as moot 3. Dismissed as moot 4. Allowed **08/21/2020**
327P20	State v. Rameen Swindell	Def's Pro Se Motion to Appeal Decision of the COA	Dismissed

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330A19-2	State v. Jesse James Tucker	1. State's Motion for Temporary Stay	1. Allowed **07/02/2020**
		2. State's Petition for Writ of Supersedeas	2. Denied **07/08/2020**
		3. Def's Motion to Dissolve Temporary Stay	3. Allowed **07/08/2020**
		4. Def's Motion to Dismiss Petition for Writ of Supersedeas	4. Dismissed as moot **07/08/2020**
		5. State's PDR Under N.C.G.S. § 7A-31	5. Denied
330P20	State v. Gurelle Demar Wyatt	Def's PDR Under N.C.G.S. § 7A-31	Denied
334PA19-2	State v. Tenedrick Strudwick	1. State's Motion for Temporary Stay	1. Allowed **10/26/2020**
		2. State's Petition for Writ of Supersedeas	2. Allowed **11/10/2020**
334P20	In the Matter of K.L., J.A. II	1. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Denied
		2. Petitioner's Motion to Amend PDR	2. Allowed
335P20	Tony Ray Simmons, Jr. v. John Lee Wiles	1. Def's Motion for Temporary Stay	1. Allowed **07/22/2020** Dissolved **12/15/2020**
		2. Def's Petition for Writ of Supersedeas	2. Denied
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	4. Dismissed as moot
336P20	State v. Damian Maurice Gore	1. Def's Notice of Appeal Based Upon a Constitutional Question	1. ---
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed
		4. Counsel's Motion to Withdraw	4. Allowed
		5. Counsel's Motion to Direct Appellate Defender to Appoint Substitute Counsel	5. Allowed

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341P20	State v. Tymik Daijon Lasenburg	1. Def's Petition for Writ of Certiorari to Review Order of the COA	1. Denied **10/23/2020**
		2. Def's Petition for Writ of Certiorari to Review Decision of District Court, Wake County	2. Denied **10/23/2020**
		3. Def's Petition for Writ of Habeas Corpus	3. Denied **07/28/2020**
		4. Def's Petition for Writ of Mandamus (or Prohibition)	4. Denied **10/23/2020**
		5. Def's Motion to Submit Treatises	5. Allowed **10/23/2020**
		6. Def's Motion for Temporary Stay	6. Denied **08/18/2020**
		7. Def's Petition for Writ of Supersedeas	7. Denied **10/23/2020**
		8. Def's Motion to Suspend Appellate Rules	8. Denied **10/23/2020**
		9. Def's Motion for Leave of Court to Submit Transcript and Recording	9. Denied **10/23/2020**
		10. Def's Motion to Amend Certificates of Service	10. Allowed **10/23/2020**
		11. Def's Motion to Submit Compact Disc	11. Denied **10/23/2020**
		12. Def's Motion to Substitute Motion to Suspend the Rules	12. Denied **10/23/2020**
		13. Def's Petition for Writ of Habeas Corpus	13. Denied **09/15/2020**
		14. Def's Motion to Remove Filing from Electronic Document Library	14. Denied **10/23/2020**
		15. Def's Motion to Submit Certified Transcript	15. Allowed **10/23/2020**
		16. Def's Motion to Proceed *In Forma Pauperis* and to Waive Incurred Costs	16. Allowed **10/23/2020**
345PA19	Crazie Overstock Promotions, LLC v. State of North Carolina, et al.	Defs' Motion to Seal State's New Brief	Allowed **10/19/2020**
347A20	In the Matter of I.J.W.	1. Guardian *ad Litem*'s Motion to Withdraw Appellee Brief	1. Allowed **10/19/2020**
		2. Guardian *ad Litem*'s Motion to File Corrected Brief	2. Allowed **10/19/2020**
		3. Guardian *ad Litem*'s Motion to Deem Corrected Brief Timely Filed	3. Allowed **10/19/2020**

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349P19	State v. Frederick Eugene Sullivan	1. Def's Pro Se Motion for Appeal 2. Def's Pro Se Motion to Appoint Counsel	1. Denied 2. Dismissed as moot
349P20-2	State v. Clorey Eugene France	Def's Pro Se Motion to Provide Documents Without Cost	Denied
351A20	In the Matter of G.D.H., J.X.W.	Respondent-Mother's Conditional Petition for Writ of Certiorari to Review Order of District Court, Wake County	Allowed **10/05/2020**
352P19-2	State v. Kenneth Russell Anthony	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **12/04/2020** 2.
354P20-2	State v. Tracy Wright Hakes	Petitioner's Pro Se Motion to Dismiss Pending Case	Dismissed
355P20	State v. Edward A. Wright	Def's Pro Se Motion to Assist in Own Defense	Dismissed
358P20	Joanne Kathleen McDowell v. Steven Clark Buchman	Plt's PDR Under N.C.G.S. § 7A-31	Denied
363A20	In the Matter of T.T.	1. Petitioner's Motion to Deem the Brief Timely Filed 2. Guardian *ad Litem*'s Motion to Deem Brief Timely Filed	1. Allowed **11/16/2020** 2. Allowed **11/16/2020**
368A20	Reynolds American Inc. v. Third Motion Equities Master Fund Ltd., et al.	Plt's Motion to Admit Gary A. Bornstein Pro Hac Vice	Allowed **10/12/2020**
369P20	State v. Maurice Jaquan Byers	Def's Pro Se Motion for Notice of Appeal	Dismissed
371A20	In the Matter of S.C.L.R.	Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Cleveland County	Allowed **10/19/2020**
372P20	State v. Antonio Raynal Hunter Gray	Def's PDR Under N.C.G.S. § 7A-31	Denied
374P20	State v. Michaelangelo Re	Def's PDR Under N.C.G.S. § 7A-31	Dismissed
375P20	State v. Shyheim Fitzhugh Millsaps	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Denied

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376A19	State v. Ervan L. Betts	Plt's Motion to Hold Remote Oral Argument in February	Allowed **12/01/2020**
378P19	State v. James Earl Satterwhite	1. Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 2. Def's Pro Se Motion for Petition for Motion for En Banc Rehearing	1. Denied 2. Dismissed **Davis, J., recused**
386P19	State v. Gary Lynn Johnson	Def's Pro Se Motion for Notice of Appeal	Dismissed
387A20	In the Matter of J.T.C.	Respondent-Father's Motion to File Corrected Briefs	Allowed **10/27/2020**
388P20	State v. Jerry Ryan Echols	Def's PDR Under N.C.G.S. § 7A-31	Denied
389P20	State v. Gordon Hendricks, Jr.	1. Def's Pro Se Motion to Get Back into Court 2. Def's Pro Se Motion to Compel Superior Court Judge to Hold M.A.R. Hearing on Defendant 3. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed
391P20	State v. Allen Maurice Morrison	Def's PDR Under N.C.G.S. § 7A-31	Denied
393P20	In the Matter of L.N.H.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 2. Respondent-Mother's Conditional PDR 3. Petitioner and Guardian *ad Litem*'s Motion for Temporary Stay 4. Petitioner and Guardian *ad Litem's* Petition for Writ of Supersedeas	1. 2. 3. Allowed **10/14/2020** 4.
395P20	State v. Michael Anthony Sheridan	1. Def's Pro Se Motion for Release to Raise Money 2. Def's Pro Se Motion for Appropriate Relief	1. Dismissed 2. Dismissed
396A19	In re J.M.	1. Respondent's Motion for Extension of Time to File Appellant Brief 2. Petitioner's Motion to Release Recording of Hearing	1. Allowed **11/06/2019** 2. Allowed **09/22/2020** **Davis, J., recused**

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396P20	State v. Norman Eugene Satterfield	Def's Pro Se Motion for Dismissal for Exoneration Under *Brady v Maryland*	Dismissed
398P20	The Broad Street Clinic Foundation v. Orin Weeks, Jr., individually and as Trustee of the Orin H. Weeks, Jr., Revocable Living Trust, Plantation Venture, LLC, Izorah, LLC, Edward Hill, LLC, Robert H., LLC, and Carteret-Craven Electric Membership Corporation	Plt's PDR Under N.C.G.S. § 7A-31	Denied
400P20	XPO Logistics, Inc. v. Bruno Sanzi	1. Plt's Petition for Writ of Certiorari to Review Order of the COA 2. Plt's Motion to Dissolve Stay	1. Denied **10/08/2020** 2. Denied **10/08/2020**
401P20	State v. William A. McClelland	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Iredell County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
405P20	Sherly Francois Bradley v. Union County Department of Social Services	Petitioner's Pro Se Motion for Notice of Appeal	Dismissed
406P20	State v. Justin Darnell Gillespie	Def's Pro Se Motion for Sex-Offender Registry Termination	Dismissed
407P20	Archie M. Sampson v. Erik Hooks, Secretary of Department of Public Safety	Petitioner's Pro Se Motion for False Imprisonment Complaint Against Secretary of Department of Public Safety	Dismissed
409P20	Luon Nay, Employee v. Cornerstone Staffing Solutions, Employer, and Starnet Insurance Company, Carrier (Key Risk Management Services, Administrator)	1. Defs' Motion for Temporary Stay 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **09/24/2020** 2. 3.

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410P20	State v. David Lemus, Defendant, and 1st Atlantic Surety Company, Surety	1. Granville County Board of Education's PDR Under N.C.G.S. § 7A-31 2. 1st Atlantic Surety Company's Conditional PDR Under N.C.G.S. § 7A-31 3. Granville County Board of Education's Motion to Consolidate Petitions for Discretionary Review	1. Denied 2. Dismissed as moot 3. Dismissed as moot
413P20	State v. Miron Hosea Cameron	Def's Pro Se Motion for Case Review	Dismissed
414P20	State v. Jason S. Horning	Def's Pro Se Motion for Speedy Trial	Dismissed
415P19-2	State v. Scott Randall Reich	1. Def's Pro Se Motion for Notice of Intent to Appeal 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 3. Def's Pro Se Motion to Proceed *In Forma Pauperis* 4. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Allowed 4. Dismissed as moot **Davis, J., recused**
415P20	State v. Lemont Adams	Def's Pro Se Motion to Dismiss or Vacate Allegations	Dismissed
416A20	In the Matter of Z.M.T.	Respondent-Mother's Petition for Writ of Certiorari to Review Decision of District Court, Beaufort County	Allowed **11/09/2020**
417P20	Anthony B. Fairley v. North Carolina Department of Transportation	1. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question 2. Petitioner's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
418A20	In the Matter of A.P.W., A.J.W., H.K.W.	Respondent-Parent's Petition for Writ of Certiorari to Review Order of District Court, Wilkes County	Allowed
419P20	D C Custom Freight, LLC v. Tammy A. Ross & Associates, Inc.	Plt's PDR Under N.C.G.S. § 7A-31	Denied
421P20	Clarence D. Huneycutt and Doris Huneycutt v. Walter Kevin Ayers	Plaintiffs' Pro Se Motion for Notice of Appeal - Constitutional Issue	Dismissed

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425P12-2	Derrick M. Allen, Sr. v. Durham Co. District Attorney Office, State of North Carolina, et al.	1. Petitioner's Pro Se Motion for Notice of Appeal 2. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA 3. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Durham County 4. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis* 5. Petitioner's Pro Se Motion for Appointment of Counsel on Appeal	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed 4. Allowed 5. Dismissed as moot **Ervin, J., recused**
425P20	Bilal K. Rasul v. Erik Hooks, North Carolina Department of Public Safety	Petitioner's Pro Se Motion for PDR Under N.C.G.S. § 7A-31	Denied
426A18	Elizabeth Zander and Evan Galloway v. Orange County, NC and the Town of Chapel Hill	Plts' Motion to Dismiss Appeal	Dismissed as moot
426P20	State v. Jerry Lee McDaniel	1. Def's Pro Se Motion for District Attorney to Obey Court Orders 2. Def's Pro Se Motion to Dismiss All Charges 3. Def's Pro Se Motion to Appoint Different Counsel	1. Dismissed 2. Dismissed 3. Dismissed
427P20	Carl Womack v. Merrimon Oxley	Plt's Pro Se Motion for Notice of Appeal	Dismissed **10/15/2020**
428P20	State v. Charles Edward Hickman	1. Def's Pro Se Motion for Notice of Appeal 2. Def's Pro Se Motion for PDR	1. Dismissed 2. Dismissed
429A19	In the Matter of E.B.	1. Respondent-Father's Petition for Writ of Mandamus 2. Respondent-Father's Amended Petition for Writ of Mandamus	1. Dismissed as moot **10/23/2020** 2. Denied **10/23/2020**
431P20	State v. Natividad Aguirre	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cabarrus County	Dismissed

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434P20	Endasia Mahagony East v. United States of America, Gabriel J. Diaz	1. Petitioner's Pro Se Motion for Right to Petition Government for the Redress of Deprivation 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
435P15-4	State v. Sulyaman Alislam Wasalaam	1. Def's Pro Se Motion for Review 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed **11/13/2020** 2. Allowed **11/13/2020**
435P20	State v. Jordan Dewey Ownby	1. Def's PDR Under N.C.G.S. § 7A-31 2. Counsel's Motion to Withdraw 3. Counsel's Motion to Direct Appellate Defender to Appoint Substitute Counsel	1. Denied 2. Dismissed as moot 3. Dismissed as moot
436A19	Window World of Baton Rouge, LLC, et al. v. Window World, Inc., et al.	Plts' Motion for Leave to File Brief Under Seal	Allowed **10/15/2020**
437P20	State v. Peter Waweru Mwangi, Defendant, and 1st Atlantic Surety Company, Surety	1. Granville County Board of Education's PDR Under N.C.G.S. § 7A-31 2. Granville County Board of Education's Motion to Consolidate Petitions for Discretionary Review 3. 1st Atlantic Surety Company's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot 3. Dismissed as moot

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440P20	North Carolina Alliance for Retired Americans; Barker Fowler; Becky Johnson; Jade Jurek; Rosalyn Kociemba; Tom Kociemba; Sandra Malone; and Caren Rabinowitz, Plaintiffs v. the North Carolina State Board of Elections; and Damon Circosta, Chair of the North Carolina State Board of Elections, Defendants Philip E. Berger in his official capacity as President Pro Tempore of the North Carolina Senate; and Timothy K. Moore in his official capacity as Speaker of the North Carolina House of Representatives, Intervenor-Defendants and Republican National Committee; National Republican Senatorial Committee; National Republican Congressional Committee; Donald J. Trump for President, Inc; and North Carolina Republican Party, Intervenor-Defendants	1. Intervenor-Defendants' (Philip E. Berger and Timothy K. Moore, in their official capacities) Motion for Temporary Stay 2. Intervenor-Defendants' (Philip E. Berger and Timothy K. Moore, in their official capacities) Petition for Writ of Supersedeas 3. Intervenor-Defendants' (Republican National Committee, et al.) Motion for Temporary Stay 4. Intervenor-Defendants' (Republican National Committee, et al.) Petition for Writ of Supersedeas 5. Intervenor-Defendants' (Republican National Committee, et al.) Motion to Suspend the Rules of Appellate Procedure and Supplement the Record 6. Intervenor-Defendants' (Republican National Committee, et al.) Motion for Immediate Action on Request for Temporary Stay Pending Review of Petition for Writ of Supersedeas	1. Denied **10/23/2020** 2. Denied **10/26/2020** 3. Denied **10/23/2020** 4. Denied **10/26/2020** 5. Allowed **10/26/2020** 6. Allowed **10/23/2020** **Beasley, C.J., recused;** **Newby, J., recused;** **Davis, J., recused**
442P20	State v. James Ryan Kelliher	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31 5. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **10/23/2020** 2. 3. 4. 5.

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447P20	State v. James G. Moskos	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	Denied **10/27/2020**
451A20	In the Matter of J.L.F.	Respondent's Motion to File Corrected Record on Appeal	Allowed **11/30/2020**
454P20	Nafis Akeem-Alim Abdullah-Malik a/k/a Akeem A. Malik v. State of North Carolina	1. Defendant's Pro Se Motion for Return of Pro Se Filings 2. Defendant's Pro Se Petition for Writ of Habeas Corpus 3. Defendant's Pro Se Motion for Blank Subpoena Forms	1. Dismissed **11/06/2020** 2. Denied **11/06/2020** 3. Dismissed **11/06/2020**
454P20-2	Nafis Akeem-Alim Abdullah-Malik aka Akeem A. Malik v. State of North Carolina	1. Def's Pro Se Motion to Recall Order/ Mandate 2. Def's Pro Se Motion for Rehearing En Banc	1. Dismissed **11/25/2020** 2. Dismissed **11/25/2020**
455A18-2	John Tyler Routten v. Kelly Georgene Routten	Def's Pro Se PDR Under N.C.G.S. § 7A-31	Dismissed as moot
455P20	State v. Michael Ray Waterfield	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/06/2020** 2. 3.
457P20	State v. Khalil Abdul Farook	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/06/2020** 2. 3.
458A20	In the Matter of L.G.G., L.G., and L.J.G.	Respondent-Father's Motion to Accept Record on Appeal as Timely Filed	Allowed. Respondent-Father's Brief will be filed within 30 days from 2 November 2020 to Retain the Original Briefing Schedule **11/16/2020**
460P19-2	Guy Unger v. Heather Unger	Plt's Petition for Writ of Certiorari to Review Decision of the COA	Denied
464P20	State v. Ronald Lee Ennis, Jr.	Def's PDR Under N.C.G.S. § 7A-31	Denied

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467A20	State v. Rafael Alfredo Pabon	1. Def's Notice of Appeal Based Upon a Dissent 2. Def's PDR as to Additional Issues	1. --- 2. Special Order
476P20	Timothy Omar Hankins, Sr. v. Sardia M. Hankins, Officers of the Court, Wake County District Court	1. Petitioner's Pro Se Motion for Emergency Petition for Review 2. Petitioner's Pro Se Petition for Writ of Mandamus	1. Denied **11/17/2020** 2. Denied **11/17/2020**
479P20	State v. Marie Elizabeth Butler	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/18/2020** 2. 3.
481P20	State v. Nathaniel D. Rice	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion for Appeal	1. Denied **11/20/2020** 2. Dismissed **11/20/2020**
482P20	Iris Pounds, Carlton Miller, Vilayuan Sayaphet-Tyler, and Rhonda Hall, on behalf of themselves and all others similarly situated v. Portfolio Recovery Associates, LLC	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Motion to Consolidate Appeals	1. Allowed **11/24/2020** 2. 3.
483P20	Shari Spector v. Portfolio Recovery Associates, LLC	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Motion to Consolidate Appeals	1. Allowed **11/24/2020** 2. 3.
484P20	Tigress McDaniel v. CMBOE, et al.	1. Plt's Pro Se Motion for Relief from Gatekeeper Order 2. Plt's Pro Se Motion to Vacate Gatekeeper Order	1. Dismissed 2. Dismissed
488P04-2	State v. Berkley Eugene Hairston	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **11/23/2020** 2. Allowed **11/23/2020**

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490P20	State v. Islam Jabari	1. Def's Petition for Writ of Certiorari to Review Orders of the COA and Superior Court, Wake County 2. Def's Motion for Temporary Stay 3. Def's Petition for Writ of Supersedeas	1. Denied **12/01/2020** 2. Denied **12/01/2020** 3. Denied **12/01/2020**
507P20	State v. Michael Ray Waterfield	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/11/2020** 2. 3.
576P07-6	State v. Moses Leon Faison	Def's Pro Se Motion for Rehearing	Dismissed
580P05-18	In re David Lee Smith	1. Def's Pro Se Motion to Remand Case with Instructions to Liberally Construe Pro Se Petitioner's Complaint as Emergency Request to Expunge Convictions Pursuant to 2nd Chance Act 2. Def's Pro Se Emergency Petition for Writ of Mandamus 3. Def's Pro Se Motion for Independent Order for Release Pending Appeal	1. Dismissed **11/23/2020** 2. Denied **11/23/2020** 3. Denied **11/23/2020** **Ervin, J., recused**
580P05-19	In re David Lee Smith	1. Def's Pro Se Motion to Remand Court Record with Instructions for Superior Court to Docket Bond Hearing for the Week of December 7, 2020 at 10:00 a.m. 2. Def's Pro Se Motion for Wake County Sheriff's Department to Transport Appellant to Make Appearance at Hearing on Date Requested 3. Def's Pro Se Motion for Immediate Release on Written Promise Pending U.S. Supreme Court Decision on his Appeal	1. Dismissed **12/02/2020** 2. Dismissed **12/02/2020** 3. Denied **12/02/2020** **Ervin, J., recused**
592P97-2	Denver W. Blevins v. Kenneth Diggs, et al.	1. Petitioner's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **09/25/2020** 2. Allowed **09/25/2020**

RUFFIN PORTRAIT REMOVAL

IN THE MATTER OF A PORTRAIT OF)
CHIEF JUSTICE THOMAS RUFFIN)

ADMINISTRATIVE ORDER

On 25 October 2018, this Court established an Advisory Commission on Portraits to consider matters related to portraits of former justices of the Supreme Court of North Carolina and directed the Commission to promulgate a report and recommendation to the Court. On 14 December 2020, the Commission published its report and recommendation.

Having considered the issues raised in the report and having thoroughly discussed the Commission's recommendations, and with gratitude to the members of the Commission for their diligence and their thoughtful work, the Court adopts the following recommendations of the Commission:

- The large portrait of Chief Justice Thomas Ruffin will be removed from the Supreme Court courtroom.
- A large seal of the Supreme Court will be hung in the space currently occupied by the Ruffin portrait.

By order of the Court, this the 22nd day of December, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of December, 2020.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
~~Assistant~~ Clerk, Supreme Court of
North Carolina

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