377 N.C.—No. 2 Pages 97-219

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE 15, 2021

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 16 APRIL 2021

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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

CURLEE v. JOHNSON

[377 N.C. 97, 2021-NCSC-32]

RICKY CURLEE, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, KARINA BECERRA, AND KARINA BECERRA, INDIVIDUALLY
v.
JOHN C. JOHNSON, III, RAYMOND CRAVEN, AND STACEY TALADO

No. 238A20

Filed 16 April 2021

Animals—dog attack—landlord liability—prior knowledge of dangerous nature—summary judgment

A landlord was not liable for injuries caused in an attack by a dog owned by the landlord's tenants where there was no evidence that the landlord had any actual knowledge of prior attacks by the dog or otherwise knew the dog posed a danger. Although the tenants took certain precautions by keeping the dog on a chain and posting "Beware of Dog" signs, this evidence, standing alone, was not sufficient to demonstrate that the landlord had constructive notice that his tenant harbored a dog with dangerous propensities.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 270 N.C. App. 657, 842 S.E.2d 604 (2020), affirming an order of summary judgment entered on 10 April 2019 by Judge Stephan R. Futrell in Superior Court, Johnston County. Heard in the Supreme Court on 16 February 2021.

The Law Office of Michael D. Maurer, P.A., by Michael D. Maurer, and Burton Law Firm, PLLC, by Jason Burton, for plaintiff-appellants.

Simpson Law, PLLC, by George L. Simpson, IV, and Denaa J. Griffin, for defendant-appellee John C. Johnson, III.

NEWBY, Chief Justice.

¶ 1 In this case we decide whether a landlord is liable for harm caused by his tenants' dog. A landlord owes no duty of care to third parties harmed by a tenant's animal unless, prior to the harm, the landlord (1) knew the animal posed a danger and (2) retained sufficient control to remove the animal from the premises. The landlord here had no knowledge that his tenants' dog posed a danger to visitors. As such, he is not liable for plaintiff's injuries. The decision of the Court of Appeals is affirmed.

¶ 2 Defendants Raymond Craven and Stacie Talada[1] (collectively, tenants) rented a single-family residential property from defendant John C. Johnson III (landlord). Tenants lived at the property with their children and their dog, Johnny. On 13 October 2014, a minor, P.K., visited the property to play with tenants' children. While all of the children were wrestling and playing with Johnny, the top of P.K.'s head collided with Johnny's mouth, causing "a little nick . . . about the size of [a] pinkie nail."

¶ 3 Chad Massengill, director of Johnston County Animal Services (JCAS), investigated the P.K. incident and characterized it as "a minor bite." Massengill concluded that Johnny did not satisfy the definition of either a "dangerous dog" or a "potentially dangerous dog" under N.C.G.S. § 67-4.1 (2019). Though not required by JCAS, tenants purchased three "Beware of Dog" signs and placed Johnny on a chain when children would come to play on the property.

¶ 4 Seven-year-old plaintiff Ricky Curlee Jr. lived with his parents, Karina Becerra and Ricky Curlee Sr., in a house near the end of tenants' driveway. On 17 March 2015, plaintiff visited the property to play with tenants' children. When it came time for plaintiff to return home, he walked inside the radius of Johnny's chain, and Johnny bit plaintiff's face, causing severe injuries.

¶ 5 Plaintiff, by and through his guardian *ad litem*, Becerra, and Becerra, individually, filed a complaint against tenants and landlord to recover for plaintiff's injuries.[2] When tenants, proceeding *pro se*, failed to file answers to the complaint, the Johnston County Clerk of Court entered a default judgment against them.[3] Despite the entry of default, Talada[4] provided the following unsworn, handwritten answers to plaintiff's requests for admission (RFAs):

> 9. Please admit that you owned a pit bull mix named Johnny which you kept on the property you leased at 132 Gower Circle ("the property").

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1. Stacie Talada was incorrectly identified as "Stacey Talado" during the early stages of this matter, which is why her name appears incorrectly in the caption.

2. Becerra is also a plaintiff in this action in addition to serving as Curlee Jr.'s guardian *ad litem*. For ease of reading, we refer to Curlee Jr. as "plaintiff."

3. Tenants did not appeal.

4. Craven failed to answer plaintiff's RFAs because he mistakenly believed Talada was responding on his behalf. Talada handwrote her responses directly onto the original RFA document that was served on 8 March 2018.

> **RESPONSE:** never owned a pit bull
>
> 10. Please admit that this pit bull attacked ("the attack") and injured a child ("the child") on or about October 13, 2014 on the property.
>
> **RESPONSE:** never owned a pit bull
>
> . . . .
>
> 12. Please admit that you informed [landlord] of the attack, shortly after the attack.
>
> **RESPONSE:** yes

¶ 6 Talada, however, provided sworn testimony that refuted her unsworn, *pro se* answer in RFA 12. During Talada's deposition on 5 April 2017, landlord's counsel asked, "prior to [the 17 March 2015 bite], did you ever tell [landlord] about the incident with [P.K.]?" Talada responded, "[n]o, I did not." In another deposition on 7 August 2018, Talada stated "I never informed [landlord] of [the P.K. incident]." Further, all other relevant materials of record indicate that tenants did not inform landlord of the P.K. incident prior to the 17 March 2015 bite. In his deposition on 26 July 2018, Craven provided the following testimony:

> [LANDLORD'S COUNSEL:] When this incident occurred with [P.K.], did you call [landlord] and alert him to the situation?
>
> [CRAVEN:] No, I didn't.
>
> [LANDLORD'S COUNSEL:] Are you aware of whether or not anyone else notified [landlord] about this incident?
>
> [CRAVEN:] No, I'm not.

Landlord provided the following testimony during his deposition:

> [PLAINTIFF'S COUNSEL:] How did you come to learn about [the 17 March 2015 bite] from the get go?
>
> [LANDLORD:] I first learned there was an incident when I had been on vacation, I don't remember even where it was, I had gotten back and [Talada] had either texted me or called me and said she had the rent. This was sometime a week or two after the [17 March 2015 bite]. When I went to get the rent she said

> oh, by the way there was an incident, a dog bite, it has been taken care of. That was her exact words.
>
> . . . .
>
> [LANDLORD'S COUNSEL:] Were you aware at the time of the [17 March 2015] bite incident of any prior problems with any dogs owned by [tenants]?
>
> . . . .
>
> [LANDLORD:] There has never been an incident to my knowledge, anything.

¶ 7 Plaintiff's parents could not produce any evidence showing that landlord had been informed of the P.K. incident prior to the 17 March 2015 bite. Specifically, Becerra admitted that she did not have "any information or evidence to suggest [landlord] was notified by the sheriff or by Animal Control or by anybody else about the [P.K. incident]." Additionally, Curlee Sr. admitted that he had "no proof or evidence that [landlord] knew about the [P.K. incident]."

¶ 8 Landlord moved for summary judgment, arguing that he did not breach any duty owed to plaintiff. The trial court decided that there was no genuine issue of material fact and thus granted summary judgment in landlord's favor.

¶ 9 A divided panel of the Court of Appeals affirmed. *Curlee v. Johnson*, 270 N.C. App. 657, 666, 842 S.E.2d 604, 611 (2020). The Court of Appeals cited the following rule:

> In order to hold a landlord liable for injuries caused by a tenant's dog to a visitor, "a plaintiff must specifically establish both (1) that the landlord had knowledge that a tenant's dog posed a danger; and (2) that the landlord had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party."

Id. at 661, 842 S.E.2d at 608 (quoting *Stephens v. Covington*, 232 N.C. App. 497, 500, 754 S.E.2d 253, 255 (2014) (citing *Holcomb v. Colonial Assocs., L.L.C.*, 358 N.C. 501, 504, 508, 597 S.E.2d 710, 712–13, 715 (2004))). The Court of Appeals reasoned that "within this context, 'posed a danger' is not a generalized or amorphous standard, but ties directly back to our common-law standard for liability in dog-attack cases: 'that the landlord had knowledge of the dogs' previous attacks and dangerous

propensities.' " *Curlee*, 270 N.C. App. at 661, 842 S.E.2d at 608 (quoting *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255 (citing *Holcomb*, 358 N.C. at 504, 597 S.E.2d at 712–13)). The Court of Appeals held

> [a] review of the admissible evidence presented at the motion hearing and before this Court points merely to [landlord's] knowledge that his tenants owned a dog, while they were staying on the [p]roperty. A refuted, unsworn, *pro se* and inadmissible statement does not create a genuine issue of material fact.

Curlee, 270 N.C. App. at 665, 842 S.E.2d at 610. As such, the Court of Appeals concluded that plaintiff failed to present "a genuine issue of material fact admissible at trial to satisfy the first prong of *Stephens* to prove 'the landlord had knowledge that a tenant's dog posed a danger.' " *Id.* (quoting *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255).

¶ 10 The dissent, however, asserted that landlord would not be entitled to summary judgment because a genuine issue of material fact exists as to whether landlord knew Johnny posed a danger. *Curlee*, 270 N.C. App. at 674, 842 S.E.2d at 615 (Brook, J., dissenting). In addition to addressing landlord's knowledge, the dissent would have reached the control element. Specifically, the dissent opined that "[landlord] has not met his burden of establishing that no genuine issue of material fact exists regarding his control over [tenants'] dog." *Id.* at 673, 842 S.E.2d at 615. Plaintiff appealed to this Court based upon the dissenting opinion at the Court of Appeals.

¶ 11 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). "A genuine issue of material fact 'is one that can be maintained by substantial evidence.' " *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 335, 777 S.E.2d 272, 278 (2015) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' and means 'more than a scintilla or a permissible inference.' " *Ussery*, 368 N.C. at 335, 777 S.E.2d at 278–79 (citation omitted) (quoting *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977)). "The summary judgment standard requires the trial court to construe evidence in the light most favorable to the nonmoving party." *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 482, 843 S.E.2d 72, 76 (2020). In a premises liability action, however, summary judgment

for the defendant is proper when "the pleadings, affidavits, and other materials of record fail to establish that [the defendant] owed [the] plaintiff a legal duty . . . ." *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 67, 376 S.E.2d 425, 427 (1989).

¶ 12 To prevail on an ordinary negligence claim, a plaintiff must present sufficient evidence to prove

> (1) that there has been a failure to exercise proper care in the performance of some legal duty which [the] defendant owed to [the] plaintiff under the circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of the injury.

Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 232, 311 S.E.2d 559, 564 (1984). A landlord has no duty to protect third parties from harm caused by a tenant's animal unless, prior to the harm, the landlord (1) "had knowledge that a tenant's dog posed a danger," and (2) "had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party." *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255 (citing *Holcomb*, 358 N.C. at 504, 508, 597 S.E.2d at 712–13, 715).

¶ 13 In *Holcomb* we considered "whether a landlord can be held liable for negligence when [a] tenant's dogs injure a third party." *Holcomb*, 358 N.C. at 503, 597 S.E.2d at 712. There the landlord knew of two prior incidents where a tenant's dogs injured third parties on the property. *Id.* at 504, 597 S.E.2d at 712–13. According to the relevant lease, the landlord had the authority to "remove any pet . . . within forty-eight hours of written notification from the landlord that the pet, in the landlord's sole judgment, creates a nuisance or disturbance or is, in the landlord's opinion, undesirable." *Id.* at 503, 597 S.E.2d at 712 (alteration in original). The plaintiff argued the landlord

> failed to use ordinary care by failing to require the [tenant] to restrain his Rottweiler dogs, or remove them from the premises when [the landlord] knew, or in the exercise of reasonable care, should have known, *from the dogs' past conduct*, that they were likely, if not restrained, to do an act from which a reasonable person in the position of [the landlord] could foresee that an injury to the person of another would be likely to result.

Id. at 507, 597 S.E.2d at 715 (emphasis added). We held the landlord, who knew from the two prior attacks that the dogs posed a danger, could be liable for a subsequent dog-caused injury because he "retain[ed] control over [the] tenant's dogs" through a provision of the lease. *Id.* at 508–09, 597 S.E.2d at 715.

¶ 14 In *Stephens* the landlord knew his tenants were keeping a dog on the property. *Stephens*, 232 N.C. App. at 498, 754 S.E.2d at 254. As a precaution, the tenants kept the dog in a fenced area with "Beware of Dog" and "No Trespassing" signs posted. *Id.* The plaintiff, who was eight years old, visited the property to play with the tenants' children. *Id.* When the plaintiff entered the fenced area, the dog bit him on his leg and shoulder, leading to the plaintiff's suit. *Id.* Unlike the landlord in *Holcomb*, however, the landlord in *Stephens* had no knowledge of any prior attacks by the dog. *Id.* at 500, 754 S.E.2d at 255. The Court of Appeals stated:

> [P]ursuant to *Holcomb* and the cases cited therein, a plaintiff must specifically establish both (1) that the landlord had knowledge that a tenant's dog posed a danger; and (2) that the landlord had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party.

Id. (citing *Holcomb*, 358 N.C. at 504, 508, 597 S.E.2d at 712–13, 715). Accordingly, the Court of Appeals held the trial court correctly granted the landlord's motion for summary judgment because "[i]n the light most favorable to [the] plaintiff, the evidence fail[ed] to show that [the landlord] knew that [the dog] had dangerous propensities prior to his attack on [the] plaintiff." *Stephens*, 232 N.C. App. at 501, 754 S.E.2d at 256.

¶ 15 The Court of Appeals' decision in *Stephens* provides an instructive framework for the present analysis. Like in *Stephens*, the question here is whether a genuine issue of material fact exists regarding landlord's prior knowledge of Johnny's alleged dangerous propensities. The record evidence clearly and consistently indicates that landlord had no prior knowledge of the P.K. incident. Tenants both provided sworn testimony that they never informed landlord of the P.K. incident; landlord testified that he had no prior knowledge of the P.K. incident; and plaintiff's parents admitted they had no proof that landlord was ever informed of the P.K. incident. Further, Talada's RFA 12 response and Craven's failure to answer the RFAs do not constitute admissible evidence against landlord to present a genuine issue of material fact. These "admissions" are hearsay, made by parties unrelated to landlord that meet no exception to the hearsay rule. *See Rankin v. Food Lion*, 210 N.C. App. 213, 218, 706 S.E.2d

310, 314 (2011) ("Thus, '[h]earsay matters . . . should not be considered by a trial court in entertaining a party's motion for summary judgment.' " (alterations in original) (quoting *Moore v. Coachmen Indus., Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 776 (1998))). Therefore, there is no genuine issue of material fact as to whether landlord had actual knowledge of the P.K. incident before the 17 March 2015 bite.

¶ 16 Moreover, we find unpersuasive plaintiff's argument that landlord should have known Johnny posed a danger based upon the "Beware of Dog" signs and chain in tenants' yard. To support this contention, plaintiff relies solely on the following deposition testimony from a property management expert, Daryl Greenberg:

> [A] landlord that sees a tenant sign that says "Beware of Dog" is a flashing red light to the landlord that they've got a potential problem there, a negligence problem, a risk problem of harm, and that they have a duty to inspect and take additional steps under the area of safety.

Plaintiff's theory, however, has no basis in our case law. Unlike the landlord in *Holcomb*, landlord here had no actual knowledge of any prior attacks by Johnny. Rather, like the landlord in *Stephens*, landlord only knew that his tenants kept a dog on the property and had taken the precautions of restraining the dog and posting "Beware of Dog" signs. Evidence of such precautions alone is not sufficient to give a reasonable landlord constructive notice that his tenant is harboring a dog with dangerous propensities. Landlord therefore had no reason to know Johnny posed a danger. Because we hold that plaintiff has not forecast sufficient evidence to establish landlord's knowledge, we need not address the control element.

¶ 17 Landlord has met his burden of showing through discovery that plaintiff cannot produce substantial evidence to support an essential element of his claim—i.e., that landlord knew Johnny posed a danger before the 17 March 2015 bite. Thus, plaintiff has failed to show that a genuine issue of material fact exists for trial. As such, landlord is entitled to judgment as a matter of law. The Court of Appeals' decision affirming the trial court's grant of summary judgment is affirmed.

AFFIRMED.

IN RE C.M.

[377 N.C. 105, 2021-NCSC-33]

IN THE MATTER OF C.M., K.S., J.S., M.A.S., AND K.S.

No. 436A20

Filed 16 April 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 848 S.E.2d 749 (2020), affirming an order entered on 13 May 2019 by Judge Wayne L. Michael in District Court, Davie County. Heard in the Supreme Court on 23 March 2021.

Holly M. Groce, for petitioner-appellee Davie County Department of Social Services.

Matthew D. Wunsche for appellee Guardian ad Litem.

Garron T. Michael, for respondent-appellant.

PER CURIAM.

AFFIRMED.

IN RE G.B.

[377 N.C. 106, 2021-NCSC-34]

IN THE MATTER OF G.B., M.B., AND A.O.J.

No. 438A19

Filed 16 April 2021

1. Termination of Parental Rights—grounds for termination—willful failure to make reasonable progress—incarceration

The trial court properly terminated respondent-father's parental rights to his children on the basis that he willfully failed to make reasonable progress to correct the conditions that led to the children's removal where the findings, supported by evidence, demonstrated that respondent, who was incarcerated throughout the pendency of the case, repeatedly made voluntary choices which delayed his release date, limited his options, and hindered his ability to comply with different aspects of his case plan.

2. Termination of Parental Rights—best interests of the child—incarcerated father—release imminent

The trial court did not abuse its discretion by determining that termination of respondent-father's parental rights was in the best interests of the children where respondent's only challenge to the determination was to emphasize that he was scheduled to be released from incarceration shortly after the completion of the termination hearing and had a strong desire to maintain his parental relationship with the children.

3. Termination of Parental Rights—best interests of the child—standard of review—abuse of discretion analysis

The Supreme Court reaffirmed that the standard of review for a best interest determination in a termination of parental rights proceeding is abuse of discretion, and upheld the trial court's conclusion, which was supported by specific findings that addressed the factors in N.C.G.S. § 7B-1110(a), that termination of respondent-mother's parental rights was in the best interests of her children.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 7 August 2019 by Judge Monica M. Bousman in District Court, Wake County. This matter was heard in the Supreme Court on 13 January 2021.

IN RE G.B.

[377 N.C. 106, 2021-NCSC-34]

Mary Boyce Wells, Office of the Wake County Attorney, for petitioner-appellee Wake County Human Services.

Michelle FormyDuval Lynch and Reginald O'Rourke for appellee guardian ad litem.

Robert W. Ewing for respondent-appellant mother.

Sean Paul Vitrano for respondent-appellant father.

MORGAN, Justice.

¶ 1 Respondent-mother and respondent-father appeal from the trial court's order terminating their parental rights to their minor children M.B. (Mark), who was born in November 2013, and G.B. (Gail), who was born in July 2016. Respondent-mother also appeals from the portion of the same order which terminated her parental rights to her minor daughter from a previous relationship, A.O.J. (Ann), who was born in December 2005.[1] Ann's father is not a party to this appeal. After careful review, we conclude that the trial court properly adjudicated at least one ground for termination and did not abuse its discretion in determining that termination of respondents' parental rights was in the children's best interests. Accordingly, we affirm the termination of parental rights order.

I. Factual Background and Procedural History

¶ 2 In November 2016, all three children were living with respondents. On 30 November 2016, respondent-father became incarcerated and remained in this capacity throughout the proceedings in this case. After respondent-father's incarceration, respondent-mother became involved in a romantic relationship with Deyonte Galloway, a nineteen-year-old with several felony convictions on his record.

¶ 3 In April 2017, officers with the Fuquay-Varina Police Department found Mark, who was three years old at the time, wandering outside alone and only wearing a diaper. After investigating this circumstance by going door-to-door in the neighborhood, the officers located respondent-mother's home. When questioned, respondent-mother responded that no one in the home had realized that Mark was outdoors. Between April

1. Pseudonyms are used to protect the identities of the juveniles and for ease of reading.

and June 2017, Mark experienced several injuries, including three black eyes and bruising that appeared to have been made by fingers. On 5 June 2017, Mark suffered a broken arm, but respondent-mother did not seek care for her son until two days later. After Mark received a cast for the broken limb on 7 June 2017, respondent-mother left Mark in the bathtub, causing the cast to get wet and requiring a new cast to be created for Mark's arm on the following day.

¶ 4 At some point, petitioner Wake County Human Services (WCHS) received reports that respondent-mother and Galloway had substance abuse issues and that they engaged in domestic violence in the presence of the children, including incidents that left holes in the walls of respondent-mother's home and other occasions during which Galloway damaged respondent-mother and Ann's cellular telephones to prevent them from contacting help. In August 2017, respondent-mother tested positive for cocaine and marijuana; in another instance, respondent-mother refused to provide a hair sample for a drug screen after having admitted that she had previously used urine obtained from Ann in order to favorably affect her drug screen results. WCHS also received reports that respondent-mother (1) had thrown a shoe at Mark, striking his head; (2) had been moving the children from hotel to hotel along with Galloway—a known gang member with multiple outstanding arrest warrants—in order to avoid Galloway's arrest; (3) was verbally abused by Galloway when she made telephone calls; and (4) failed to use a voucher that she received to obtain free eyeglasses for Ann, who is legally blind as a result of a degenerative eye disease.

¶ 5 On 13 October 2017, WCHS filed a petition alleging that Gail, Mark, and Ann were abused and neglected juveniles. A nonsecure custody order was entered by the trial court on the same date. On 20 October 2017, an amended petition was filed which added allegations regarding (1) a sexual assault committed against Ann by Galloway's brother and (2) respondent-mother's use of Ann to provide urine samples for respondent-mother's drug screen. Pursuant to the trial court's nonsecure custody order, Mark and Gail were placed with their paternal grandparents and Ann was placed in foster care. At an adjudication hearing held on 14 November 2017, respondents entered into a consent order in which they admitted that all three children were neglected juveniles and that Mark was an abused juvenile in that "the child's parent, guardian, custodian or caretaker has inflicted or allowed to be inflicted on the child a serious physical injury by other than accidental means and has created or allowed to be created a substantial risk of physical injury by other than accidental means."

¶ 6 Respondent-mother agreed to a case plan under which she would (1) have supervised visitation with the children for one hour per week, (2) obtain and maintain safe, stable housing for herself and her children, (3) not allow Galloway in the vicinity of her children, (4) obtain and maintain legal and sufficient income for herself and her children, (5) provide documentation to verify her income once a month, (6) complete a psychological evaluation and comply with any resulting recommendations, (7) complete a substance abuse assessment and comply with any resulting recommendations, (8) submit to random drug screens upon the request of WCHS and treatment providers, (9) complete a parenting education program and demonstrate skills and lessons learned, (10) complete a domestic violence assessment and any program or services which were recommended, and (11) successfully complete a non-offending caregiver program and demonstrate lessons learned. Under his own case plan, respondent-father agreed to (1) establish legal paternity of Mark, (2) complete a substance abuse assessment and comply with all resulting recommendations, (3) submit to random drug screens upon the request of WCHS and treatment providers, (4) complete a mental health assessment and comply with all resulting recommendations, (5) obtain and maintain safe, stable housing, and (6) maintain lawful income sufficient to meet the needs of his family and provide monthly verification of it to WCHS.

¶ 7 At a review hearing in February 2018, respondent-mother represented that she was living with an aunt in Holly Springs and that she was no longer in a relationship with Galloway. However, family members reported that respondent-mother had simply left her belongings with the aunt and was not actually staying in the aunt's home. In addition, respondent-father, who had been scheduled for release from incarceration in March 2018, had been charged with illegally possessing a cellular telephone while incarcerated, had received an additional 11-23 months of active time, and had subsequently lost his right to visitation with Mark and Gail. Furthermore, the children's maternal grandmother, with whom Mark and Gail had been living, had reported to WCHS that the grandmother needed medical treatment due to her cancer diagnosis and could not provide further care for the children at the time. Consequently, Mark and Gail were placed with foster parents. All three children were reported to be doing well in their respective foster placements.

¶ 8 At a subsequent permanency planning review hearing in August 2018, the trial court found that respondent-mother was unemployed and living with her mother. Respondent-mother had also been charged with possession of marijuana, possession of drug paraphernalia, and carry-

ing a concealed weapon after being discovered engaging in sexual activity in a car with Galloway in June 2018. When a WCHS social worker interviewed respondent-mother about the incident, respondent-mother was untruthful, stating that she had been pulled over in a friend's car while alone in the vehicle. Respondent-father had been transferred to Mountain View Correctional Institution (MVCI) in June 2018 upon having received six infraction reports while incarcerated at his previous penal facility, Franklin Correctional Center. Respondent-father was transferred again in August 2018, going to Avery-Mitchell Correctional Institution. While at this facility, he received numerous infractions for disobeying orders, obtaining tattoos, assaulting and threatening staff, and making false accusations.

¶ 9 At a February 2019 permanency planning review hearing, the trial court found that respondent-mother continued to test positive for the presence of impairing substances and continued to be involved with Galloway, who attended at least one visitation with the children in violation of the visitation agreement. The case's guardian ad litem (GAL) recommended that the primary plan become adoption because the children could not return to the care of respondents within a reasonable time, noting that since the previous permanency planning hearing, respondent-father had received twelve infractions while incarcerated and had advised the social worker that he was going "to continue to receive infractions." The trial court changed the children's primary plan to adoption.

¶ 10 On 22 March 2019, WCHS filed a motion to terminate the parental rights of both respondents, alleging the existence of the following grounds: (1) neglect, (2) that respondents "willfully left the juvenile[s] in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress had been made in correcting the conditions that led to the removal of the" children, and (3) that the children had been in the custody of WCHS during which respondents, for a period of six months preceding the filing of the motion, willfully failed for such period "to pay a reasonable portion of the cost of the care for the [children] although physically and financially able to do so." *See* N.C.G.S. § 7B-1111(1), (2), and (3) (2019). A hearing on the motion to terminate the parental rights of both respondents was held in June 2019, by which time the children had been in the custody of WCHS for more than eighteen months. After the hearing, the trial court found the existence of all three alleged grounds to terminate the parental rights of each respondent. The trial court went on to conclude that termination of both respondents' parental rights was in the best interests of the chil-

dren. Both respondents appeal from the order terminating their respective parental rights.

II. Standards of Review

¶ 11 When considering a petition to terminate parental rights, the trial court must first adjudicate the existence of the grounds for termination which have been alleged. *See* N.C.G.S. § 7B-1109 (2019). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5–6 (2019) (quoting N.C.G.S. § 7B-1109(f)). This Court reviews a trial court's adjudication of the existence of grounds to terminate parental rights in order "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). All findings of fact which are not challenged by a respondent are binding on appeal. *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97 (1991)). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 12 If the trial court finds that at least one ground to terminate parental rights under N.C.G.S. § 7B-1111(a) exists, "it then proceeds to the dispositional stage," *In re A.U.D.*, 373 N.C. at 6, at which it "determine[s] whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019). In making that determination, the trial

> court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id. § 7B-1110(a). In reviewing a trial court's dispositional determination, we evaluate the trial court's conclusion that a termination of parental

rights would be in the best interests of the child under an abuse of discretion standard. *In re E.H.P.*, 372 N.C. 388, 392 (2019). "Abuse of discretion results when 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." *In re Z.L.W.*, 372 N.C. 432, 435 (2019).

III. Respondent-father's Appeal

¶ 13 Respondent-father contends that the trial court erred both in finding the existence of at least one ground for the termination of his parental rights to Mark and Gail and in determining that the termination of his parental rights would be in the children's best interests. We disagree with both contentions.

A. Adjudication

¶ 14 **[1]** Respondent-father first challenges the trial court's conclusion that the ground existed to terminate his parental rights to Mark and Gail based upon his willful failure to make reasonable progress in correcting the circumstances that led to their removal from respondent-mother's home. *See* N.C.G.S. § 7B-1111(a)(2) ("The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile."). We conclude that the trial court did not err in finding the existence of this ground for the termination of respondent-father's parental rights.

¶ 15 Respondent-father argues that the trial court erroneously considered the circumstance of his incarceration in two ways: by finding that his incarceration was a factor that caused his children to be placed in foster care and by failing to take into account the limitations that incarceration imposed upon respondent-father's ability to comply with his case plan. Respondent-father notes that he was incarcerated at the time that the children were taken into WCHS custody and asserts that the conditions which led to the children being taken into the custody of WCHS were substance abuse, domestic violence, and failure to address medical needs—conditions created or caused by respondent-mother and Galloway, and thus unrelated to respondent-father's incarceration. Respondent-father further contends that "the court was obligated to consider the limitations the incarceration imposed on his ability to comply with the case plan, as well as other relevant factors."

¶ 16 We do not subscribe to respondent-father's view of these considerations. To the contrary, our review of the case reveals that the trial

court carefully considered evidence about respondent-father's ability to achieve his case plan requirements despite his incarceration, as well as the impact of respondent-father's acts and decisions while incarcerated, in making its findings of fact and ultimately in determining that respondent-father had failed to make reasonable progress.

¶ 17 While "[a] parent's incarceration is a circumstance that the trial court must consider in determining whether the parent has made reasonable progress toward correcting those conditions which led to removal of the juvenile," *In re C.W.*, 182 N.C. App. 214, 226 (2007) (quotation marks omitted), "incarceration, standing alone, neither precludes nor requires finding the respondent willfully left a child in foster care." *In re Harris*, 87 N.C. App. 179, 184 (1987). Here, the trial court observed that respondent-father was incarcerated when the children were removed from respondent-mother's home and recognized it as an occurrence which resulted in the children's placement in foster care. However, the trial court did not rely upon the fact of respondent-father's incarceration, standing *alone*, to conclude that the children needed to be placed in foster care or that respondent-father had failed to make reasonable progress. Concomitantly, the trial court did not ignore the impact of respondent-father's incarceration in assessing his ability to follow his case plan and to make reasonable progress through compliance with it.

¶ 18 In our view, the trial court properly considered evidence regarding respondent-father's initial incarceration at the time that the children were removed from the home and properly evaluated areas in which respondent-father made some progress on his case plan—such as his attenuated attendance at Narcotics Anonymous meetings and his attainment of several negative drug screens—along with respondent-father's unfortunate choices and actions while incarcerated which were demonstrably detrimental to respondent-father's ability to complete his case plan. Such choices and actions resulted in a lengthy delay in respondent-father's projected release date from incarceration and significantly limited his access to classes, programs, services, and employment which directly related to his case plan. For example, the trial court specifically found that:

- respondent-father, at the time of the filing of the petition, "was housed in a local facility" and had a projected release date within three to four months;
- respondent-father had the opportunity to work in a job at the sign plant which would have allowed him to earn money to aid in the care of his children and which would have earned

him "gain time" to push forward his release date, but despite the ability to do the job, respondent-father chose to forego the opportunity because he did not want the job;

- respondent-father "received nineteen infractions during his incarceration" and "was placed in restricted confinement six times" as a result;
- respondent-father, having been relocated to a different correctional facility due in some measure to his infractions of penal rules, was unable to enroll in desired classes, which would have reduced the period of incarceration which he was required to serve;
- respondent-father, at the time of the termination hearing, was held in solitary confinement by his own request following the stabbing of respondent-father by gang members;
- respondent-father had tattoos identifying him as a gang member although he denied being actively involved in a gang;
- respondent-father's "lengthy incarceration limited his ability to participate in the services necessary to put him in a position to reunify with his children";
- respondent-father illegally obtained a cellular telephone while incarcerated which resulted in an additional sentence, extending his potential release date; and
- respondent-father's "repeated criminal activity and other decision making" in prison "resulted in his absence from his children's lives for at least sixteen months longer than anticipated at the time of adjudication."

¶ 19 The dissent prefers to cast a view which diminishes the harmful impact upon the children of the last two cited findings of fact which the trial court made regarding the elongation of respondent-father's time of incarceration due to the parent's voluntary choices. The dissent endeavors to buttress this stance by isolating respondent-father's cellular telephone offense to the exclusion of respondent-father's other deleterious decisions, while incorrectly elevating the role of this conviction among the plentiful considerations which resulted in the termination of respondent-father's parental rights. However, "the best interests of the juvenile are of paramount consideration by the court and . . . when it is not in the juvenile's best interest to be returned home, *the juvenile will be placed in a safe, permanent home within a reasonable amount of*

time." N.C.G.S. § 7B-100(5) (emphasis added); *see also In re N.G.*, 374 N.C. 891, 907 (2020).

¶ 20 In his appeal to this Court, respondent-father has acknowledged the negative effect of his relocation from Franklin Correctional Center—a facility where he was able to receive drug screens, participate in Narcotics Anonymous, and have access to an approved parenting program in pursuit of the satisfactory completion of his case plan—to MVCI, the facility to which he was transferred upon his aggregation of infractions and where the above-referenced opportunities were either unavailable or more difficult to obtain. Also, respondent-father did not complete a mental health assessment, which was another element of his case plan, in part because once he was transferred to MVCI respondent-father was "mostly in isolation" and often could not receive visits, even from a mental health professional. Further, the trial court disapproved of visits between respondent-father and the children at MVCI because of the distance that the children would have to travel.

¶ 21 We agree with respondent-father that his ability to comply with his case plan was hampered by his movement to certain penal institutions and the limited options offered by those institutions to fulfill his case plan, as opposed to those more plentiful resources which were available at the facilities to which he was previously assigned. There were also restrictions on programs made available to respondent-father due to his specific incarceration status. However, the evidence in this case shows that respondent-father chose to engage in activities during his incarceration which created these obstacles for him and also decided to reject beneficial opportunities which were made available to him. Respondent-father himself constructed the very barriers to the achievement of his case plan goals about which he now complains. Accordingly, we determine that there is no error in the trial court's findings of fact regarding respondent-father's failures in accomplishing his case plan, most of which resulted from circumstances for which respondent-father was responsible.

¶ 22 In sum, respondent-father repeatedly elected to engage in behaviors which significantly extended his incarceration, greatly limited his options, and frequently eliminated his opportunities, thus rendering him unavailable as a potential placement for Mark and Gail and also eradicating his prospect of visits with the children. These findings of fact which are supported by the evidence in turn support the ultimate determination by the trial court that respondent-father failed to make reasonable progress on his case plan. As such, we affirm the trial court's conclusion that the ground existed to terminate respondent-father's parental

rights for failure to make reasonable progress under the circumstances in correcting the conditions that led to removal pursuant to N.C.G.S. § 7B-1111(a)(2). Because the existence of only one ground as identified by N.C.G.S. § 7B-1111 is required to support termination of parental rights, we do not address respondent-father's arguments as to the remaining two additional grounds for termination of his parental rights which were found by the trial court.

B. Disposition

¶ 23 **[2]** Respondent-father argues that the trial court abused its discretion in determining that termination of respondent-father's parental rights was in the best interests of the juveniles Mark and Gail. Specifically, respondent-father asserts that "in light of [his] imminent completion of his sentence, the skills he had acquired in prison, his ability and desire to support the children, and his interest in remaining their father, termination was contrary to their best interests." This assertion is unpersuasive.

¶ 24 The dissenting view takes sweeping liberties to construct its conclusion that this Court affirms the trial court's order which terminates the parental rights of respondent-father merely because he is incarcerated. In creating this narrative, the dissent has devised propositions that are conclusory, deduced theories that are illusory, and ultimately developed positions that are contradictory. Although the opposing opinion characterizes our decision as being premised solely upon respondent-father's incarceration, a deeper analysis demonstrates that respondent-father's voluntary failure to fulfill the requirements of his case plan and his repeated unwillingness to engage in identified available opportunities consistent with his case plan are the overarching components in his failure to make reasonable progress under the circumstances in correcting the conditions that led to removal of the children from the home.

¶ 25 Due to being riveted by respondent-father's incarceration, and combined with this Court's determination that the ground of failure to make reasonable progress was sufficiently proven to exist at the trial level, so as to lead to termination of respondent-father's parental rights, the dissent unfortunately conflates its perceived view that termination of respondent-father's parental rights occurred *because* he was incarcerated with our actual view that respondent-father failed to make reasonable progress and the trial court concluded that it was in the children's best interests to terminate respondent-father's parental rights *because* he consistently engaged in activities on a voluntary basis while incarcerated which inhibited his ability to satisfy his case plan and consequently

experienced negative consequences for his negative behavior which further compromised his opportunities to fulfill his case plan. Although respondent-father happened to be incarcerated as these circumstances were transpiring, his lack of freedom did not uniquely distinguish him from parents with court-ordered case plans who are not incarcerated who likewise consistently engage in activities on a voluntary basis which inhibit their abilities to satisfy their respective case plans, consequently experience negative consequences for their negative behavior, and ultimately have their parental rights terminated as a result.

¶ 26 "Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re M.A.W.*, 370 N.C. 149, 153 (2017) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10 (2005), *aff'd per curiam*, 360 N.C. 360 (2006)) (citation omitted); *see also In re T.N.H.*, 372 N.C. at 412; *see also In re S.D.*, 374 N.C. 67, 75 (2020). While the dissent attempts to cast our decision to affirm the trial court's order terminating respondent-father's parental rights as an outcome which utilizes respondent-father's incarceration as a sword against him, it is ironic that the dissent in the present case trumpets the employment of respondent-father's incarceration alone as a shield to protect him from the adverse consequences of his failure to satisfactorily complete his case plan.

¶ 27 As noted previously, a trial court's decision to terminate parental rights is reviewed only for abuse of discretion. Respondent-father does not take issue with the analysis employed here by the trial court but only accentuates that he was scheduled to be released shortly after the end of the termination of parental rights hearing, that he had plans for housing and employment upon his release, and that he had a strong desire to maintain his relationship with his children. While we acknowledge respondent-father's desire to retain his parental rights, he has not demonstrated that the trial court's disposition was "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *In re Z.L.W.*, 372 N.C. at 435. Therefore, we affirm the trial court's order terminating respondent-father's parental rights.

IV. Respondent-mother's Appeal

¶ 28 **[3]** Respondent-mother challenges only the trial court's dispositional determination that termination of her parental rights was in the children's best interests. Specifically, she notes that "this Court stated in a . . . recent opinion that the abuse of discretion standard of review applies on appeal when determining if termination of parental rights is in the best interests of the child," citing *In re D.L.W.*, 368 N.C. 835, 842 (2016). However, respondent-mother contends that "this Court [should] apply a

de novo standard of review for the legal conclusion that termination of parental rights is in a child's best interest since a trial court is required to make certain written findings of fact to support its conclusion of law." We disagree with this assertion.

¶ 29 Respondent-mother cites our decision in *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517 (2004) for the proposition that "[c]onclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal." She then asserts that because N.C.G.S. § 7B-1110 was amended in 2011 to require trial courts at the disposition stage to consider the criteria enumerated in N.C.G.S. § 7B-1110(a), which we previously referenced, and to make written findings regarding those criteria that are relevant in any case, an appellate court should conduct de novo review of a trial court's best interests determination instead of utilizing an abuse of discretion standard. However, respondent-mother cites no authority to support her argument and further fails to address any of the numerous cases decided by this Court in which we have applied an abuse of discretion standard at the disposition stage of a termination of parental rights case. *See, e.g.*, *In re D.L.W.*, 368 N.C. at 842; *In re L.M.T.*, 367 N.C. 165, 171 (2013). Decades ago, this Court in *In re Montgomery* designated the trial court's determination at the disposition stage of a termination of parental rights hearing as discretionary. 311 N.C. 101, 108 (1984) ("[W]here there is a reasonable hope that the family unit within a reasonable period of time can reunite and provide for the emotional and physical welfare of the child, the trial court is given *discretion* not to terminate rights." (emphasis added)). At no point during this interim time period, including the 2011 amendment raised by respondent-mother, has the Legislature chosen to amend the pertinent statute to alter our holding in *In re Montgomery* by explicitly establishing a de novo standard of review at the disposition stage of a termination of parental rights proceeding. *See Raeford Lumber Co. v. Rockfish Trading Co.*, 163 N.C. 314, 317 (1913) (holding that we presume that the Legislature acts with full knowledge of prior and existing law and its construction by the courts.).

¶ 30 More recently, in *In re C.V.D.C.*, 374 N.C. 525 (2020), we considered and rejected the exact argument advanced here by respondent-mother "regarding the appropriate standard of appellate review for a disposition entered under N.C.G.S. § 7B-1110(a)." *Id.* at 528–29 (discussing but declining to accept a respondent-parent's assertion that de novo review is appropriate at the disposition stage based upon the respondent-parent's contention that "our deferential posture [is] a vestige of such decisions as *In re Montgomery*, . . . which predate the amendments to N.C.G.S.

§ 7B-1110(a) enacted by the legislature in 2005 and 2011 to safeguard the rights of parents"). *See also In re Z.L.W.*, 372 N.C. at 435 ("The trial court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion."). As in that case, "we again reaffirm our application of the abuse of discretion standard when reviewing the trial court's determination of 'whether terminating the parent's rights is in the juvenile's best interest' under N.C.G.S. § 7B-1110(a)." *In re C.V.D.C.*, 374 N.C. at 529; *see also In re K.S.D-F.*, 375 N.C. 626, 636 (2020) (citing *In re C.V.D.C.* for the proposition that an "argument that each of the N.C.G.S. § 7B-1110(a) factors weighs against termination in this matter when reviewed under a de novo standard cannot prevail").

¶ 31 In the present case, where the trial court made specific findings regarding the relevant criteria identified in section 7B-1110 and where respondent-mother has not argued that the dispositional determination of the trial court is not "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision," *In re Z.L.W.*, 372 N.C. at 435, we hold that the trial court did not abuse its discretion under N.C.G.S. § 7B-1110(a). We therefore affirm the order of the trial court terminating respondent-mother's parental rights.

AFFIRMED.

Justice EARLS dissenting.

¶ 32 Respondent-father was incarcerated and his two children were in the custody of their mother when the events occurred which led to the children being adjudicated abused and neglected and taken into care in October 2017. He was still incarcerated when the trial court held hearings on 5, 6 and 27 June 2019 on the petition for termination of parental rights, although the trial court made a finding that he was due to be released "in late July 2019." Publicly available records indicate respondent was indeed released from custody on 26 July 2019 and he was therefore no longer in prison by the time the trial court entered its order terminating his parental rights on 7 August 2019. The trial court's findings of fact as they relate to respondent-father do not support the conclusion that he failed to make reasonable progress in correcting the conditions that led to the children being taken into care and his parental rights should not be terminated on that basis. Instead, the majority makes its own findings. North Carolina is not a jurisdiction which provides for the termination of parental rights merely because a parent is incarcerated. The trial court's order should be reversed as to respondent-father.

¶ 33 States vary widely in how incarceration of a parent impacts the determination of whether a parent's rights to a child should be terminated. *See* Steven Fleischer, *Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 Seton Hall L. Rev. 312, 325 (1998) (categorizing state statutes). *See also* Stuart M. Jones, *Not Perfect, but Better than Most: South Carolina's TPR Process and Its Surprisingly Fair Treatment of Incarcerated Parents*, 62 S.C. L. Rev. 697, 700 (2011) ("By 2005, TPR statutes in thirty-six states listed a parent's incarceration as an element to be considered in a TPR proceeding. Twenty-five of these states use the length of the parent's prison sentence as a determining factor in whether incarceration is grounds for a TPR action. Some of these states specify exactly how long a parent must be imprisoned, while others speak in broader terms.").

¶ 34 Some states allow incarceration as a ground for the termination of parental rights. *See*, *e.g.*, Alaska Stat. § 47.10.080 (o)(1) (2020) (incarceration may be a sufficient ground for termination if the term of incarceration is "significant" in light of the child's age and need for adult supervision); Colo. Rev. Stat. § 19-3-604(b)(III) (2020) (permitting termination of parental rights if the parent will be incarcerated for more than six years from the date the child was adjudicated dependent or neglected); Ky. Rev. Stat. Ann. §§ 600.020(2)(b), 610.127(1) (2021) (reasonable efforts to reunify a child do not need to be made when parent will be incarcerated for more than a year beyond the date the child is taken into care); N.D. Cent. Code § 27-20-02 (2021) (reasonable efforts to reunify a family not necessary if a parent is incarcerated for a specific length of time measured by the child's age). Other states only allow incarceration for certain offenses to be a ground for termination of parental rights. *See*, *e.g.*, Ind. Code §§ 31-35-3, -4 (2021) (a conviction for certain crimes, including murder, involuntary manslaughter, or rape, can be grounds for termination of parental rights).

¶ 35 On the other end of the spectrum are states with statutes that specifically say that incarceration alone is not a basis for termination of parental rights. *See*, *e.g.*, Mass. Gen. Laws ch. 210, § 3(c)(xiii) (2021) ("Incarceration in and of itself shall not be grounds for termination of parental rights;"); Mo. Laws § 211.447(7)(6) (2020) (same); Neb. Rev. Stat. § 43-292.02(2)(b) (2021) (state shall not file petition for termination of parental rights if the sole basis for the petition is that the parent or parents are incarcerated). Other states have specifically created statutory exceptions to the general time limits on how long reasonable efforts must be made to reunify a family when a parent is incarcerated. *See*, *e.g.*, Colo. Rev. Stat. § 19-3-604(2)(k)(IV) (2020); N.M. Stat. Ann. § 32A-4-29(G)(9) (2021).

¶ 36 What matters for this case is that the North Carolina General Assembly has not provided for incarceration as a ground for termination of parental rights. Therefore it is inappropriate for this Court to create such a basis. Yet that is precisely what the majority opinion effectively accomplishes through the back door of basing termination here on respondent-father's decisions "to engage in behaviors which significantly extended his incarceration, greatly limited his options, and frequently eliminated his opportunities, thus rendering him unavailable as a potential placement for Mark and Gail and also eradicating his prospect of visits with the children." These statements are equally true of every parent who is incarcerated, and cannot, under North Carolina law, support a determination that the incarcerated parent should lose their parental rights.

¶ 37 This legal error is compounded by the majority's willingness to find its own facts where the trial court's order is deficient. Our task when reviewing a trial court's order terminating the rights of a parent to their child is "to determine whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law." *In re K.H.*, 375 N.C. 610, 612 (2020) (quoting *In re Z.A.M.*, 374 N.C. 88, 94 (2020)). The majority's opinion goes beyond this task and supplements the trial court's order with new factual findings. The trial court's findings do not support its ultimate conclusion that respondent-father willfully failed to make reasonable progress to correct the conditions leading to his children's removal from their home. As a result, this is not a legally permissible ground for termination of respondent's parental rights in this case.

¶ 38 Respondent-father was incarcerated on 30 November 2016. Almost a year later, while he was serving his sentence, Mark and Gail were removed from the home of respondent-mother and her boyfriend because, as the trial court found, "the children were exposed to domestic violence" perpetrated by the boyfriend against respondent-mother, respondent-mother's boyfriend had intentionally injured Mark, Mark's medical needs "were not being met in a timely manner," respondent-mother and her boyfriend "were engaged in substance abuse," and respondent-father was in prison. Plainly, the only circumstance identified by the trial court that pertained to respondent-father—rather than to respondent-mother and her abusive boyfriend—and resulted in the children's removal from the home was that respondent-father was incarcerated.

¶ 39 As the majority notes, respondent-father subsequently entered into a case plan with Wake County Human Services which required him to (1) establish legal paternity of Mark, (2) complete a substance abuse-

assessment and comply with recommendations, (3) submit to random urine and hair sample drug screens, (4) complete a mental health assessment and comply with any recommendations, (5) obtain and maintain safe, stable housing, and (6) obtain and maintain lawful income sufficient to meet the needs of his family and provide monthly verification of the same.

¶ 40 The trial court's findings do not establish that respondent-father failed to comply with this case plan. *See In re A.J.P.*, 375 N.C. 516, 525 (2020) ("[P]arental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2) . . . as long as the objectives sought to be achieved by the case plan" address the circumstances that resulted in the children's removal from the home.). Rather than finding that respondent-father did not comply with his case plan, the trial court's findings pertaining to respondent-father focus almost exclusively on the fact of his incarceration. Of eleven factual findings, one (Finding of Fact #31) addresses the fact that respondent-father established paternity of Mark, two (Findings of Fact #36 and #37) address the fact that respondent-father quit his job while in prison, and the remaining eight have to do with respondent-father being incarcerated.

¶ 41 In Finding of Fact #32, the trial court states that respondent-father does not make decisions that are in the best interests of his children, which appears to be a conclusory finding premised upon the findings which follow it. In Findings of Fact #33 and #34, the trial court states that respondent-father has been incarcerated since 30 November 2016, before the incidents which led to the children's removal from the home, and that he was convicted of illegally possessing a cellphone, which extended his release date. In Finding of Fact #35, the trial court states that respondent-father wanted to participate in classes that would reduce the amount of time that he was incarcerated, but that he "was unable to enroll in classes at the facilities where he was housed." In Findings of Fact #36 and #37, the trial court states that respondent-father was able to work, but chose not to, and that respondent-father might have had an earlier release date if he chose to work. The trial court stated in Finding of Fact #38 that respondent-father had received infractions while incarcerated and that he has been placed in solitary confinement "which he reports is by his choice for his own protection, as gang members stabbed him in March 2019, when he refused to carry out an assault as directed by a higher-ranking gang member in the prison." In Finding of Fact #39, the trial court found that respondent-father denied active involvement in a gang but acknowledged having gang tattoos. In Finding

of Fact #40, the trial court found that respondent-father had a limited ability to participate in services as a result of his lengthy incarceration. Finally, in Finding of Fact #41, the trial court found that respondent-father's decisions resulted in incarceration, and a resulting absence from his children's lives "for at least sixteen months longer than anticipated at the time of adjudication."

¶ 42 The trial court's order is devoid of findings related to respondent-father's completion of a substance abuse assessment and compliance with any recommendations, respondent-father's submission to random drug screens, respondent-father's completion of a mental health assessment and compliance with any recommendations, whether respondent-father had safe and stable housing prepared for his pending release from incarceration, or whether respondent-father had similarly made plans for obtaining lawful income sufficient to meet the needs of his family. The only trial court finding relating directly to respondent-father's case plan states that respondent-father established paternity of Mark, which suggests compliance with his case plan. The only other aspect of the case plan which might arguably be addressed in the trial court's findings is the requirement that respondent-father obtain and maintain lawful income sufficient to meet the needs of his family—the trial court found that respondent-father "would have earned some amount of money while working a job in prison," but does not find—and indeed, it is implausible to assume—that this would have been close to sufficient to meet the needs of respondent-father's children.

¶ 43 The trial court's findings also fail to establish that respondent-father failed to make "reasonable progress under the circumstances . . . in correcting those conditions which led to the removal of the juvenile[s]." N.C.G.S. § 7B-1111(a)(2) (2019). A parent need not "completely remediate the conditions that led to the children's removal" nor "render herself capable of being reunified with her children" to avoid termination of parental rights under N.C.G.S. § 7B-1111(a)(2). *In re J.S.*, 374 N.C. 811, 819–20 (2020). "Only reasonable progress in correcting the conditions must be shown." *Id.* at 819 (quoting *In re L.C.R.*, 226 N.C. App. 249, 252 (2013)). Further, a trial court "must consider" a parent's incarceration "in determining whether the parent has made 'reasonable progress' toward 'correcting those conditions which led to the removal of the juvenile.' " *In re A.J.P.*, 375 N.C. at 530 (quoting *In re C.W.*, 182 N.C. App. 214, 226 (2007)).

¶ 44 As noted previously, the children were removed from the home of respondent-mother and her boyfriend primarily because respondent-mother and her boyfriend exposed the children to domestic violence,

substance abuse, and physical abuse and failed to address the children's medical needs. However, a parent in a termination of parental rights action cannot be held responsible for the actions of others. Natural parents have a "fundamental liberty interest . . . in the care, custody, and management of their child" which "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). In recognition of this interest, this Court has long held that only the parent's "conduct inconsistent with the parent's protected status" or a finding that the parent is unfit will warrant application of the best interests of the child standard to award custody to a nonparent over the parent. *Price v. Howard*, 346 N.C. 68, 79 (1997); *see also Owenby v. Young*, 357 N.C. 142, 145 (2003). ("Therefore, unless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution."). This standard of conduct is lower than that warranting termination of parental rights pursuant to statute. *Price*, 346 N.C. at 79. It follows, then, that if a determination that a parent has acted inconsistently with his or her constitutionally protected status as a parent must be based on the conduct of that parent, the higher standard of conduct warranting termination of parental rights cannot be based on the conduct of another, for which the parent would be less culpable. *C.f. In re D.W.P.*, 373 N.C. 327, 339–40 (2020) (affirming trial court's decision to terminate the parental rights of a mother where the facts showed that her boyfriend likely caused a child's injuries because the mother reestablished a relationship with the boyfriend, hid the relationship from social services, and refused "to make a realistic attempt to understand how [the child] was injured or to acknowledge how her relationships affect her children's wellbeing"). Instead, a parent's progress, or lack thereof, in ameliorating the conditions which led to a child's removal must relate to the conditions for which the parent is responsible.

¶ 45 Even assuming that respondent-father could be held responsible for ameliorating the conditions which were caused by respondent-mother and her boyfriend, the trial court's findings do not, at any point, reference respondent-father's progress or lack thereof in addressing these circumstances. For example, the trial court's findings do not address respondent-father's plans for his children after his incarceration was to end—whether he planned to shield them from abuse by respondent-mother and her boyfriend, whether he had made progress toward being capable of addressing their medical needs, or whether he himself was engaging in substance abuse or domestic violence. As a result, the trial

court's findings do not at all address, with respect to respondent-father, what the trial court found to be the principal circumstances that led to the children's removal, even while the trial court's order terminates respondent-father's parental rights for failing to correct the conditions which led to the children's removal.

¶ 46 Taken together, the trial court's findings establish that respondent-father was incarcerated and, as a result, not present to care for his children, and that respondent-father possessed a cellphone while incarcerated, which lengthened his incarceration. The trial court describes this as "repeated criminal activity and other decision making [which] resulted in [respondent-father's] absence from his children's lives for at least sixteen months longer than anticipated at the time of adjudication." While it may be true that respondent-father's conduct in prison resulted in a longer period of incarceration, I fail to see the justice, much less the legal basis, for terminating a father's rights in his children because he possessed a contraband cellphone while incarcerated. In any case, a parent's incarceration does not by itself support a trial court's decision to terminate the parent's rights to a child. *In re S.D.*, 374 N.C. 67, 75 (2020) ("Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." (cleaned up)).

¶ 47 The majority, in an attempt to shore up the trial court's thin basis for termination, posits that the trial court neither relied upon respondent-father's incarceration nor ignored it in reaching the determination that respondent-father's rights were subject to termination. The majority reaches this conclusion, however, by supplementing the trial court's order with its own facts. For example, the majority writes that the trial court "properly evaluated areas in which respondent-father made some progress on his case plan," referencing attendance at Narcotics Anonymous meetings and attaining several negative drug screens. However, neither those facts nor any evidence of their consideration appears in the trial court's order. The majority also states that respondent-father's "choices and actions . . . significantly limited his access to classes, programs, services, and employment which directly related to his case plan." Again, this does not appear in the trial court's order. Instead, the trial court found that respondent-father's "lengthy incarceration limited his ability to participate in the services necessary to put him in a position to reunify with his children." However, this conclusory statement does nothing to support a finding that respondent-father willfully failed to complete his case plan. Indeed, the trial court's order makes no reference to the substance abuse, mental health, housing, or income needs which were the subject of respondent-father's case plan. Moreover, while the majority

seems to have found as a fact that respondent-father was "relocated to a different correctional facility" without classes that would have reduced respondent-father's period of incarceration "due in some measure to his infractions of penal rules," such a finding is not contained in the trial court's order. In fact, the trial court's order does not even suggest, as the majority does, that respondent-father was responsible for his inability to participate in classes, stating only that respondent-father "wanted to participate in classes" but was "unable to enroll in classes at the facilities where he was housed."

¶ 48 Regardless of the majority's assertions to the contrary, the trial court here did not weigh all of the evidence and come to a reasoned conclusion that, taking into account the barriers imposed by respondent-father's incarceration, respondent-father nevertheless willfully failed to ameliorate the conditions which led to the children's removal from their home despite respondent-father's ability to do so. Rather, the trial court's findings clearly demonstrate that the trial court terminated respondent-father's parental rights because he was incarcerated and, while incarcerated, delayed his release by possessing a cellphone. The trial court made no reference to the substance abuse, domestic abuse, physical abuse, and lack of medical care that resulted in the children's removal, likely because those circumstances were not attributable to respondent-father. The trial court did not even make reference to respondent-father's case plan, except to note that he had entered into one.

¶ 49 The majority also relies upon "the best interests of the juvenile" in its defense of the trial court's determination that grounds existed to terminate respondent-father's parental rights, citing N.C.G.S. § 7B-100(5) (stating that one purpose of the "Abuse, Neglect, Dependency" subchapter of the Juvenile Code is to ensure "that the best interests of the juvenile are of paramount consideration by the court"). However, in termination of parental rights proceedings, the best interests of the juvenile are considered at the *dispositional* stage. N.C.G.S. § 7B-1110(a) (2019) ("After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest."). At the adjudicatory stage, the only question for the trial court is whether grounds exist to terminate the respondent's parental rights. N.C.G.S. § 7B-1109(e) (2019) ("The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent."). *See, e.g.*, *In re D.L.W.*, 368 N.C. 835, 842 (2016) ("The procedure for termination of parental rights involves a two-step

process. In the initial adjudication stage, the trial court must determine whether grounds exist pursuant to N.C.G.S. § 7B-1111 to terminate parental rights. If it determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." (citations omitted)). *See also In re Mashburn*, 162 N.C. App. 386, 396 (2004) (stating that it is improper for a trial court to consider "best interests" testimony during adjudication). It is contrary to the statutory scheme to insert the best interests determination into the adjudication of whether grounds exist to terminate respondent's parental rights.

¶ 50 In some circumstances, this Court remands for further factual findings when the trial court's findings are lacking. *See*, *e.g.*, *In re C.L.H.*, 2021-NCSC-1, ¶ 20 (vacating and remanding for further proceedings where the trial court's findings did not establish the existence of a child support order enforceable during the relevant period); *In re R.D.*, 376 N.C. 244, 264 (2020) (vacating and remanding for entry of a new dispositional order where the disposition was premised on a factual finding without record support); *In re N.K.*, 375 N.C. 805, 825 (2020) (remanding "for further proceedings" where the record did not indicate whether the trial court complied with the notice provisions of the Indian Child Welfare Act); *In re K.C.T.*, 375 N.C. 592, 602, (2020) (reversing and remanding for entry of a new order "containing proper findings and conclusions" where the trial court did not find willful intent on the part of a parent when terminating parental rights pursuant to N.C.G.S. § 7B-1111(a)(7)); *In re K.R.C.*, 374 N.C. 849, 865 (2020) (vacating and remanding for the entry of additional findings and conclusions where "the trial court erred in its failure to enter sufficient findings of ultimate fact and conclusions of law" to support its dismissal of a petition for termination of parental rights); *In re K.N.*, 373 N.C. 274, 284–85 (2020) (vacating and remanding for further proceedings, "including the entry of a new order containing appropriate findings of fact and conclusions of law on the issue of whether grounds exist to support the termination of respondent's parental rights" where the trial court's adjudicatory findings were insufficient but the record contained evidence that could have supported the trial court's conclusion that termination was appropriate); *In re N.D.A.*, 373 N.C. 71, 84 (2019) (same); *Coble v. Coble*, 300 N.C. 708, 714–15 (1980) (vacating and remanding for further evidentiary findings where findings did not establish that plaintiff was in need of financial assistance from the defendant but where evidence in the record could support such findings in an appeal from an order requiring defendant to provide partial child support); *see also In re K.H.*, 375 N.C.

610, 618 n.5 (2020) (suggesting that the proper disposition is reversal rather than remand where the Court does "not find such evidence in the record . . . that could support findings of fact necessary to conclude that" a respondent's parental rights are subject to termination under grounds identified by the trial court). The significance of these cases here is the strong precedent they set contrary to the notion that this Court can fill in the gaps when a trial court's order fails to make the required factual findings to support termination of parental rights.

¶ 51 The United States Supreme Court has recognized that parenting is a fundamental right. *See Troxel v. Granville*, 530 U.S. 57, 66–67 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). For that reason, due process requires that a "clear and convincing evidence" standard of proof is required in order to "strike[ ] a fair balance between the rights of the natural parents and the State's legitimate concerns." *Santosky*, 455 U.S. at 769. Here, the trial court did not make adequate findings of fact based on that standard of proof, and this Court should not make its own findings. Respondent-father should not, in North Carolina, have his parental rights terminated merely because of his incarceration. The instant case is not one in which the trial court's findings justify severing the constitutionally protected bond between parent and child. I respectfully dissent from the majority's decision to affirm the trial court's order as to respondent-father.

IN RE FORECLOSURE OF GEORGE

[377 N.C. 129, 2021-NCSC-35]

IN THE MATTER OF THE PROPOSED FORECLOSURE OF A CLAIM OF LIEN FILED ON CALMORE GEORGE AND HYGIENA JENNIFER GEORGE BY THE CROSSINGS COMMUNITY ASSOCIATION, INC. DATED AUGUST 22, 2016, RECORDED IN DOCKET NO. 16-M-6465 IN THE OFFICE OF THE CLERK OF COURT OF SUPERIOR COURT FOR MECKLENBURG COUNTY REGISTRY BY SELLERS AYERS DORTCH & LYONS, P.A., TRUSTEE

No. 77A19

Filed 16 April 2021

Real Property—foreclosure sale—deficient service—grossly inadequate sale price—good faith purchasers for value

In a case involving a non-judicial foreclosure based on a claim of lien for unpaid homeowners association fees (in the amount of $204.75), the trial court did not abuse its discretion when it concluded that two purchasers were not entitled to good faith purchaser for value status or protections allowed by N.C.G.S. § 1-108, because the initial purchaser paid a grossly inadequate price ($2,650.22 for a house that was sold to the second purchaser for $150,000) and there was evidence showing that both purchasers, who had a history of dealing in foreclosed properties with each other, had reason to be on notice that the homeowners had not received adequate notice of the foreclosure proceeding. The matter was remanded for the trial court to consider whether an award of restitution pursuant to section 1-108 would be appropriate.

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. 38 (2019), dismissing, in part; affirming, in part; and reversing and remanding, in part, an order entered on 15 March 2018 by Judge Nathaniel J. Poovey in Superior Court, Mecklenburg County. Heard in the Supreme Court on 12 January 2021.

Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin, for petitioner-appellants.

Derek P. Adler for intervenor-appellee National Indemnity Group.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, for intervenor-appellee KPC Holdings.

No brief for respondent-appellee Sellers, Ayers, Dortch & Lyons, P.A.

IN RE FORECLOSURE OF GEORGE

[377 N.C. 129, 2021-NCSC-35]

Legal Aid of North Carolina, Inc., by Celia Pistolis and Johnnie Larrie; Karen Fisher Moskowitz for Charlotte Center for Legal Advocacy; Jason A. Pikler for North Carolina Justice Center; and Maria D. McIntyre for Financial Protection Law Center, amici curiae.

ERVIN, Justice.

¶ 1 This case involves the issue of whether the trial court abused its discretion in concluding that two purchasers, the first of whom bought a tract of property at a non-judicial foreclosure sale and the second of whom purchased the property from the initial purchaser, were not good faith purchasers for value. After a hearing concerning the issues raised by the property owners' motion for relief from a foreclosure order, the trial court determined that the transfers to both subsequent purchasers should be declared null and void given that the court lacked jurisdiction over the person of one of the property owners as the result of insufficient notice and deficient service of process. After a separate hearing that was held for the purpose of addressing the purchasers' motion for relief from the order voiding the initial foreclosure order and the resulting property transfers, the trial court determined that the subsequent purchasers were not entitled to good faith purchaser for value status or to the benefit of the protections afforded to subsequent good faith purchasers for value by N.C.G.S. § 1-108. On appeal, the Court of Appeals held that, even though the initial foreclosure order had been invalid on the grounds of insufficient notice, the property owner had received constitutionally sufficient notice and that both of the subsequent purchasers were entitled to good faith purchaser for value status. After careful consideration of the record in light of the applicable law, we affirm the decision of the Court of Appeals, in part; reverse that decision, in part; and remand this case to the Superior Court, Mecklenburg County, for consideration of the extent, if any, to which an order of restitution should be entered pursuant to the applicable law.

¶ 2 Respondents Calmore George and his wife, Hygiena Jennifer George, owned a house in Charlotte that is located in the Crossings Community subdivision. The Georges decided to purchase the tract of property in question because their "daughters at that time were approaching college age and the first daughter decided that she wanted to come to North Carolina." After three of the Georges' younger daughters followed their older sister to North Carolina for their college education, the Georges

decided to buy a house in which their daughters could live while obtaining their degrees.

¶ 3 The Georges lived in St. Croix in the United States Virgin Islands, where Ms. George worked as a teacher and an accounting clerk while Mr. George performed various jobs, including property maintenance. The couple's combined adjusted gross income in 2016 was $26,420.00. Although the Georges were full-time residents of St. Croix, they typically visited their daughters at the Charlotte property approximately once or twice each year. More specifically, Ms. George would typically visit the Charlotte property for approximately one month during the summertime, when she was on break from her teaching responsibilities, while both Mr. and Ms. George would visit the property for a few weeks around Christmas. The members of the family who lived in the home full-time took care of paying the bills and addressing other issues relating to the property, including paying the water and energy bills that were mailed to the house.

¶ 4 On 22 August 2016, the Crossings Community Association, which served as the homeowners' association for the development in which the Georges' house was located, filed a claim of lien against the property relating to unpaid homeowners' association fees in the amount of $204.75. In its claim of lien, the Association stated that, if the outstanding fees remained unpaid, it would initiate foreclosure proceedings in accordance with the applicable provisions of North Carolina law. However, the Georges did not pay the outstanding homeowners' association fees.

¶ 5 On 11 October 2016, the trustee for the Association filed a notice of hearing stating that the Association intended to foreclose upon the property for the purpose of collecting the unpaid fees. The Association attempted to serve this notice of foreclosure upon the Georges in a variety of ways, including the use of both regular and certified mail, return receipt requested, directed to the St. Croix address listed on the deed by means of which the Georges had acquired the property and by both regular mail and certified mail directed to the address of the Charlotte property. However, the Association did not successfully effectuate service upon the Georges through the use of the mails because there was no mail receptacle at the St. Croix address and because the receipts for the mailings to the Charlotte address were never returned.

¶ 6 In addition, the Association attempted to effectuate personal service upon the Georges at the Charlotte property. On 12 October 2016, Deputy Sheriff Shakita Barnes of the Mecklenburg County Sheriff's Office personally served the notice of foreclosure upon a woman who

identified herself as Hygiena Jennifer George at the Charlotte property and completed returns of service in which she stated that she had personally served Ms. George and that she had served Mr. George by leaving copies with Ms. George, a person of suitable age and discretion who resided at Mr. George's dwelling house or usual place of abode. The person upon whom Deputy Barnes actually effectuated service was, however, the Georges' eldest daughter, Jeanine George, who had claimed to be Ms. George at the time that she was served with the notice of foreclosure by Deputy Barnes. On 13 October 2016, the trustee filed the returns of service completed by Deputy Barnes and an affidavit indicating that the Crossings Community Association had unsuccessfully attempted to serve the Georges by mail.

¶ 7 On 9 December 2016, the office of the Clerk of Superior Court, Mecklenburg County, entered an order permitting the nonjudicial foreclosure sale to go forward, and scheduling a foreclosure sale relating to the property for 12 January 2017. On 12 January 2017, KPC Holdings purchased the property at auction for $2,650.22. On 3 February 2017, the trustee executed a foreclosure deed transferring ownership of the property to KPC Holdings. On 21 March 2017, KPC Holdings executed a special warranty deed conveying the property to National Indemnity Group, an entity owned by Laura Schoening for property development purposes, with the sale of the property from KPC Holdings to National Indemnity having been secured by a promissory note and deed of trust in the amount of $150,000.00.

¶ 8 The Georges claimed to have had no notice of the unpaid homeowners' association fees and subsequent foreclosure proceeding until 10 March 2017, when one of their daughters called them for the purpose of reporting that they had been ordered to vacate the property. Upon receiving this information, Ms. George sent an e-mail to the Association's attorney in which she claimed that she and Mr. George did not understand why they were being dispossessed of their property and expressed the belief that she and Mr. George did not have any outstanding mortgage payments or owe any other debts associated with the property.

¶ 9 On 18 April 2017, the Georges filed a motion pursuant to N.C.G.S. § 1A-1, Rule 60(c), in which they sought to have the order of foreclosure and all other related proceedings and transactions declared null and void. In their motion for relief from judgment, the Georges claimed that they had not received the notice that was statutorily required in foreclosure proceedings, that the return of service completed by Deputy Barnes was erroneous, and that the order authorizing the foreclosure sale and the subsequent conveyances should be vacated. On 17 July

2017, the trial court entered an order allowing an intervention motion filed by National Indemnity and making both National Indemnity and KPC Holdings parties to this proceeding.

¶ 10 On 17 July 2017, the trial court held a hearing for the purpose of considering the issues raised by the Georges' motion for relief from judgment, at which it heard testimony from the Georges and Ms. Schoening, who testified that she had purchased the property from KPC Holdings after having driven past the property and having conducted online research that included an inspection of the applicable property tax payment and prior foreclosure records. Among other things, Ms. Schoening testified that she had learned from the public record that the Georges had purchased the property at a previous foreclosure sale for an amount in excess of $130,000.00 and that, at the time of the foreclosure that was at issue in this case, they owned the property free and clear of any indebtedness, with the exception of the $204.75 amount that was allegedly owed to the Association. In addition, Ms. Schoening testified that her purchase of the property had been secured by a note and deed of trust in the amount of $150,000.00 that was payable to KPC Holdings, that she had invested approximately $50,000.00 in the course of renovating the property as of the date of the hearing, and that she planned to sell the property for $240,000.00 after it had become "retail ready."

¶ 11 On 9 August 2017, the trial court entered an order concluding that Mr. George had not been properly served with the notice of foreclosure given that the property was not his dwelling or usual place of abode. In addition, the trial court further determined that the foreclosure sale had been allowed to proceed despite the lack of personal jurisdiction over Mr. George, so that the foreclosure sale and subsequent conveyances should be invalidated. As a result, the trial court granted the Georges' motion for relief from judgment and declared the deeds transferring the property from the trustee to KPC Holdings and from KPC Holdings to National Indemnity to be null and void. National Indemnity and KPC Holdings noted appeals to the Court of Appeals from the trial court's order granting the Georges' motion for relief from judgment.

¶ 12 On 3 November 2017, KPC Holdings and National Indemnity filed a motion for relief from judgment pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6), in which they requested the trial court to vacate the earlier order granting the Georges' motion for relief from judgment on the grounds that they were both good faith purchasers for value and that the Georges had received constitutionally sufficient service of the notice of foreclosure in accordance with the Court of Appeals' then-recent decision in *In re Ackah*, 255 N.C. App. 284 (2017), *aff'd per curiam*, 370 N.C.

594 (2018). On the same date, KPC Holdings and National Indemnity filed a motion with the Court of Appeals in which they requested that this case be remanded to the trial court for the purpose of permitting it to make an indicative ruling concerning whether their motion for relief from the trial court's earlier order should be allowed or denied. The Court of Appeals granted this remand motion on 22 November 2017. On 15 March 2018, the trial court entered an order concluding that neither KPC Holdings nor National Indemnity qualified as a good faith purchaser for value for purposes of N.C.G.S. § 1-108 and that their motion for relief from judgment was denied. KPC Holdings and National Indemnity noted appeals to the Court of Appeals from the trial court's indicative decision.

¶ 13 In seeking relief from the trial court's orders before the Court of Appeals, KPC Holdings and National Indemnity argued that the trial court had erred by failing to join the trustee under the deed of trust between the two of them,[1] by determining that the Georges had not received sufficient notice of the foreclosure sale, and by determining that neither KPC Holdings nor National Indemnity was a good faith purchaser for value. *In re George*, 264 N.C. App. 38, 41 (2019). In addressing the notice-related argument advanced by KPC Holdings and National Indemnity, the Court of Appeals began by recognizing that adequate notice must be provided to the record owners of a tract of property before a foreclosure is permissible and that, in the absence of such notice and "valid service of process, a court does not acquire personal jurisdiction over the [owner] and the [foreclosure] action must be dismissed." *Id.* at 45 (quoting *Glover v. Farmer*, 127 N.C. App. 488, 490 (1997)). The Court of Appeals noted that the valid methods for the service of a notice of foreclosure include the following:

> a. . . . [D]elivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.
>
> . . . .
>
> c. . . . [M]ailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

1. As a result of the fact that KPC Holdings and National Indemnity have not brought their claim relating to the trial court's failure to join the trustee as a party forward for our consideration, we will refrain from discussing that issue any further in this opinion.

In re George, 264 N.C. App. at 45–46 (third alteration in original) (quoting N.C.G.S § 1A-1, Rule 4(j)(1)(a), (c) (2017)), the Court of Appeals expressed agreement with the trial court's determination that the trustee had failed to properly serve the notice of foreclosure as required by N.C.G.S. § 1A-1, Rule 4, given that the attempted service "upon [Mr.] George by leaving a copy at the Mecklenburg County property was inadequate because the property was not his dwelling house or usual place of abode." *In re George*, 264 N.C. App. at 47. As a result, the Court of Appeals concluded that "the trial court correctly determined that the foreclosure sale was void due to lack of personal jurisdiction over [Mr.] George." *Id.* at 48.

¶ 14 At that point, the Court of Appeals turned to the argument advanced by KPC Holdings and National Indemnity that they both qualified as good faith purchasers for value entitled to the protections available pursuant to N.C.G.S. § 1-108. *Id.* The Court of Appeals recognized that, if "a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure[,] . . . such restitution may be compelled as the court directs," with "[t]itle to property sold under such judgment to a purchaser in good faith . . . not [being] thereby affected." *Id.* (quoting N.C.G.S § 1-108 (2017)). According to the Court of Appeals, a party qualifies as a good faith purchaser for value for purposes of N.C.G.S. § 1-108 when it "purchases without notice, actual or constructive, of any infirmity, and pays valuable consideration and acts in good faith," *id.* at 49 (quoting *Morehead v. Harris*, 262 N.C. 330, 338 (1964)), with this Court's decision in *Swindell v. Overton*, 310 N.C. 707, 713, (1984), serving to establish that a gross inadequacy of purchase price is insufficient, in and of itself, to support a determination that a subsequent purchaser of foreclosed-upon property did not act in good faith. *In re George*, 264 N.C. App. at 49.

¶ 15 In resolving this aspect of the challenge lodged by KPC Holdings and National Indemnity to the trial court's indicative decision, the Court of Appeals relied upon *In re Ackah*, 255 N.C. App. at 288, for the proposition that, even though a property owner cannot normally be divested of his or her property without sufficient notice, he or she can be deprived of the property in question as the result of a foreclosure sale if he or she had "constitutionally sufficient notice" of the pendency of the foreclosure proceeding and the subsequent purchaser was a good faith purchaser for value for purposes of N.C.G.S. § 1-108. *In re George*, 264 N.C. App. at 52. In the Court of Appeals' view, *In re Ackah* held that "constitutional due process does not require that the property owner receive *actual* notice" and that, "where notice sent by certified mail is returned 'unclaimed,' due process requires only that the sender must take *some* reasonable

follow-up measure to provide other notice where it is practicable to do so." *Id.* at 50 (quoting In re *Ackah*, 255 N.C. App. at 288).

¶ 16 A majority of the Court of Appeals applied these principles to the facts of this case by holding that KPC Holdings was a good faith purchaser for value and that the trial court had erred by vacating the foreclosure sale and subsequent transfer from the trustee to KPC Holdings.[2] *In re George*, 264 N.C. App. at 52. In concluding that KPC Holdings was entitled to good faith purchaser for value status, the Court of Appeals noted that:

> No record evidence exists that either KPC Holdings or National Indemnity had actual knowledge or constructive notice of the improper service of the foreclosure notice. No infirmities or irregularities existed in the foreclosure record that would reasonably put KPC Holdings or any other prospective purchaser on notice that service was improper. The sheriff's return of service indicated that personal service was made upon [Ms.] George and that substitute service was accomplished for Calmore George by leaving copies with [Ms.] George. KPC Holdings was entitled to rely upon that record in purchasing the property at the foreclosure sale.

Id. at 50–51. In addition, a majority of the Court of Appeals held that, "[w]hile [Mr.] George did not receive proper Rule 4 notice of the foreclosure sale of the property, as explained above, the Georges did receive constitutionally sufficient notice," noting the fact that the trustee had made multiple attempts to notify the Georges of the pendency of foreclosure proceeding, including attempted personal service, attempted service by certified mail, and e-mail exchanges. *Id.* at 52. Based upon these determinations, the Court of Appeals held that the trial court had abused its discretion by vacating the order authorizing the trustee to conduct a foreclosure sale and the subsequent deeds transferring the property from the trustee to KPC Holdings and from KPC Holdings to National Indemnity. *Id.*

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2. After determining that, given KPC Holdings' status as a good faith purchaser for value, the trial court had erred by invalidating the deed from the trustee to KPC Holdings, the Court of Appeals noted that it did not need to reach the issue of whether National Indemnity was a good faith purchaser for value as defined by N.C.G.S. § 1-108 in order to necessitate the reversal of the challenged trial court order. *In re George*, 264 N.C. App. 38, 51 (2019).

¶ 17 In a separate concurring opinion, Judge Dillon opined that the purchaser at a foreclosure sale need not pay "valuable consideration" in order to be entitled to the benefit of the protections afforded by N.C.G.S. § 1-108 and, on the contrary, merely needed to "believe[ ] in good faith that the sale was properly conducted." *Id.* at 55 (Dillon, J., concurring). Similarly, Judge Dillon noted that a low purchase price did not suffice, standing alone, to support a decision to overturn a foreclosure sale, citing *Swindell*, 310 N.C. at 713, and asserted that nothing in the record tended to show that KPC Holdings had not purchased the property in good faith. *In re George*, 264 N.C. App. at 55.

¶ 18 In a dissenting opinion, Judge Bryant opined that neither KPC Holdings nor National Indemnity qualified as good faith purchasers for value for purposes of N.C.G.S § 1-108. *Id.* at 55–56 (Bryant, J., concurring in part and dissenting in part). In reaching this conclusion, Judge Bryant recognized that a "gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties." *Id.* at 56 (quoting *Foust v. Gate City Sav. & Loan Ass'n*, 233 N.C. 35, 37 (1950)). According to Judge Bryant, the exceedingly low purchase price at which the property had been purchased from the trustee and the lack of proper notice to the Georges sufficed, when taken in combination, to support the trial court's decision to vacate the underlying foreclosure order and the resulting property transfers. *Id.* at 57. In support of her determination that KPC Holdings and National Indemnity had notice of the risk that the notice of foreclosure had not been properly served upon the Georges, Judge Bryant pointed to the fact that, while the record contained adequate evidence relating to the Association's claim of lien against the Georges, "KPC Holdings was on reasonable notice that there were no other liens when it placed a bid of $2,650.22" despite the fact that the property was worth approximately $150,000.00. *Id.* at 56–57. In addition, Judge Bryant noted the existence of "questionable evidence of wrongdoing" on the part of KPC Holdings and National Indemnity and stated that neither party had satisfied its burden of proving that it was an innocent purchaser for value given that KPC Holdings and National Indemnity "were colleagues, dealt with each other in the past, and both made a substantial profit with their respective conveyances of the property." *Id.* at 57. The Georges noted an appeal to this Court from the Court of Appeals' decision based upon Judge Bryant's dissent.

¶ 19 In seeking to persuade us to overturn the Court of Appeals' decision, the Georges have argued that the Court of Appeals majority had

erred by determining that the trial court had abused its discretion by concluding that KPC Holdings and National Indemnity were not good faith purchasers for value entitled to protection pursuant to N.C.G.S. § 1-108.[3] According to the Georges, the "trial court was in the best position to weigh the evidence, determine the credibility of witnesses — including [Ms.] Schoening — and the weight to be given the testimony of the witnesses." In the Georges' view, the information available to KPC Holdings and National Indemnity from an examination of the public records, which included the lack of any deed of trust or other encumbrance applicable to the property other than the Association's claim of lien, and the fact that the Georges did not contest the foreclosure proceeding, sufficed to put KPC Holdings and National Indemnity on constructive notice that the Georges did not know of the existence of the foreclosure proceeding. In addition, the Georges assert that it was "obvious to the trial court" that the owner of National Indemnity had failed to testify honestly and that an "appellate court should not override a trial court's credibility determination absent an abuse of discretion."

¶ 20 According to the Georges, KPC Holdings and National Indemnity are not entitled to the protections available pursuant to N.C.G.S. § 1-108 given that they did not purchase the property "without notice, actual or constructive, of any infirmity" and had not paid valuable consideration for it in good faith, quoting *Goodson v. Goodson*, 145 N.C. App. 356, 363 (2001). The Georges contend that the available public records, including the deed to their property, showed that the Georges had a St. Croix address and owned their property free and clear of any liens and encumbrances, with the exception of the Association's claim of lien, which amounted to only $204.75. In light of this publicly available information, the Georges claim that KPC Holdings and National Indemnity had ample basis for questioning the sufficiency of the service of the foreclosure notice on the grounds that "[s]omeone who otherwise owns a property free and clear of liens or encumbrances would not allow that property to be sold at a foreclosure sale for less than three thousand dollars unless there was a potential problem, e.g., with service," with this case being distinguishable from *In re Ackah* on the grounds that KPC Holdings and National Indemnity had failed to either pay valuable consideration or establish that they had acted in good faith.

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3. In addition, the Georges argue that the Court of Appeals had erred by distinguishing between constitutionally sufficient notice and sufficient notice for purposes of N.C.G.S. § 1A-1, Rule 4, and finding that they had received constitutionally sufficient notice of the foreclosure proceeding. In view of our determination that neither KPC Holdings nor National Indemnity were good faith purchasers for value entitled to the protections of N.C.G.S. § 1-108, we need not address the merits of the Georges' notice-related arguments.

¶ 21 In seeking to persuade us to uphold the Court of Appeals' decision, KPC Holdings argues that, when a purchaser lacks actual notice of a defect in the underlying foreclosure proceeding, it "may rely on the facial validity of the record in determining that there are no defects in title to the land in question," citing *Goodson*, 145 N.C. App. at 363. In addition, KPC Holdings asserts that a foreclosure proceeding, including service of process, should be presumed effective when "the return shows legal service by an authorized officer, nothing else appearing," quoting *Harrington v. Rice*, 245 N.C. 640, 642 (1957). In view of the fact that the return of service completed by Deputy Barnes indicated that the notice of foreclosure had been personally served upon Ms. George, KPC Holdings argues that it "was entitled to rely on the record's facial validity to purchase the Property with the highest bid at the nonjudicial foreclosure sale." On the other hand, KPC Holdings claims that the Georges' argument that neither KPC Holdings nor National Indemnity are entitled to innocent purchaser for value status "because [the Georges] had too much equity in the Property for which KPC Holdings purportedly bid too little at the sale . . . contravenes applicable precedent." Finally, KPC Holdings claims that acceptance of the Georges' contention that it and National Indemnity had constructive notice that the Georges did not know of the existence of the proceeding "would mean that no one could ever bid on real property in a nonjudicial foreclosure proceeding initiated in this State to satisfy a lien constituting a fraction of the property's value" and would "defy the General Assembly's intent behind Chapter 45 of the North Carolina General Statutes and subvert basic economic and free-market principles."

¶ 22 Similarly, National Indemnity argues that it was a good faith purchaser for value such that its title to the property cannot be disturbed by means of an order granting a motion for relief from judgment. National Indemnity asserts that, even if this Court determines that KPC Holdings was not a good faith purchaser entitled to the protections available pursuant to N.C.G.S. § 1-108, "KPC Holdings' designation as a good faith purchaser is irrelevant where National Indemnity Group was a subsequent good faith purchaser that paid valuable consideration" and National Indemnity "took no part in the foreclosure sale and purchased the property for a $150,000 note secured by a recorded deed of trust." In National Indemnity's view, the Georges' argument "ask[s] bidders at foreclosure sales to perform greater due diligence than the foreclosing entity and the Sheriff." Finally, National Indemnity contends that N.C.G.S. § 1-108, as interpreted in *In re Ackah*, "constrains the court from undoing good faith conveyances" and claims that the Georges have failed to direct the Court's attention to any instance in which a subse-

quent conveyance was invalidated in the absence of an allegation and proof of fraud.

¶ 23 N.C.G.S. § 1A-1, Rule 60(b), allows a party to obtain relief from a final judgment or order on a number of different grounds, including instances in which "[t]he judgment is void" or "[a]ny other reason justifying relief from the operation of the judgment" exists. N.C.G.S § 1A-1, Rule 60(b)(4), (6) (2019). The authority granted to a trial judge by N.C.G.S. § 1A-1, Rule 60(b) "is equitable in nature and authorizes the trial court to exercise its discretion in granting or denying the relief sought." *Howell v. Howell*, 321 N.C. 87, 91 (1987) (citing *Kennedy v. Starr*, 62 N.C. App. 182 (1983)). "[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion," *Sink v. Easter*, 288 N.C. 183, 198 (1975), with such an abuse of discretion having occurred only when the trial court's determinations are "manifestly unsupported by reason," *Davis v. Davis*, 360 N.C. 518, 523 (2006) (quoting *Clark v. Clark*, 301 N.C. 123, 129 (1980)). As a result, "[a] ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Davis*, 360 N.C. at 523 (quoting *White v. White*, 312 N.C. 770, 777 (1985)).

¶ 24 N.C.G.S. § 1-108 provides that

> [i]f a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected.

N.C.G.S. § 1-108 (2019). A "purchaser in good faith" or an "innocent purchaser" is a person who "purchases without notice, actual or constructive, of any infirmity, and pays valuable consideration and acts in good faith." *Morehead*, 262 N.C. at 338 (quoting *Lockridge v. Smith*, 206 N.C. 174, 181 (1934)). An innocent purchaser lacks notice of any infirmity or defect in the underlying sale when "(a) he has no actual knowledge of the defects; (b) he is not on reasonable notice from recorded instruments; and (c) the defects are not such that a person attending the sale exercising reasonable care would have been aware of the defect[s]." *Swindell*, 310 N.C. at 714–15 (quoting Osborne, Nelson & Whitman, Real Estate Finance Law § 7.20 (1st ed. 1979)). "The burden of proof of the 'innocent

purchaser' issue is upon those claiming the benefit of this principle. . . ." *Morehead*, 262 N.C. at 338 (citing *Hughes v. Fields*, 168 N.C. 520 (1915)).

¶ 25 Although this Court has clearly held that "mere inadequacy of the purchase price realized at a foreclosure sale, standing alone, is not sufficient to upset a sale, . . . where there is an irregularity in the sale, gross inadequacy of purchase price may be considered on the question of the materiality of the irregularity." *Foust*, 233 N.C. at 37. In *Williams v. Chas. F. Dunn & Sons Co.*, 163 N.C. 206, 213 (1913), the purchaser at a foreclosure sale bought the tract of property in question at approximately one-eighth of its actual value following a sale that was affected by several deficiencies and irregularities. In that instance, we determined that the discrepancy between the purchase price and the value of the relevant property was "calculated to cause surprise and to make one exclaim: 'Why, he got it for nothing! There must have been some fraud or connivance about it,' " *id.* (quoting *Worthy v. Caddell*, 76 N.C. 82, 86 (1877)), and held that "[s]uch an apparently unfair sale should not be permitted to stand unless the strict right of the purchaser, under the law, requires us to sustain it," *Williams*, 163 N.C. at 213.

¶ 26 Similarly, in *Swindell*, 310 N.C. 707, the prior property owners challenged the validity of the sale of the relevant property in connection with a foreclosure proceeding by alleging that the sale had resulted from an upset bid of $47,980.00 in spite of the fact that the property had a fair market value that was closer to $70,000.00. In addition, the prior property owners argued that the trustee had failed to properly conduct the resulting foreclosure sale given that the trustee had sold the multi-tract parcel as a single entity even though higher bids would have resulted from a decision to sell each tract separately. *Id.* at 713–14. In analyzing this set of circumstances, we stated that

> [a]llegations of inadequacy of the purchase price realized at a foreclosure sale which has in all other respects been duly and properly conducted in strict conformity with the power of sale will not be sufficient to upset a sale. *Foust* stands for the proposition that it is the materiality of the irregularity in such a sale, not mere inadequacy of the purchase price, which is determinative of a decision in equity to set the sale aside. Where an irregularity is first alleged, gross inadequacy of purchase price may then be considered on the question of the materiality of the irregularity.

Id. at 713 (citations omitted), before holding that the "defect in [the] foreclosure sale render[ed] the sale voidable," *id.* at 714, and stating that the purchaser of the property was not entitled to good faith purchaser for value status given that he or she "had notice of the significant defect in the proceeding" based upon the fact that the "advertisement of sale itself disclosed separate debts secured by two separate deeds of trust on two separate tracts of land," *id.* at 715.

¶ 27 A careful analysis of our prior decisions relating to the issue of when a party to a foreclosure sale is and is not entitled to good faith purchaser for value status demonstrates that, in order for a subsequent purchaser to be denied access to the benefits that are otherwise available to good faith purchasers for value, the record must show the existence of some additional irregularity or defect in the proceedings leading to the challenged foreclosure sale in addition to an inadequacy of the price that was paid by the purchaser. Although KPC Holdings and National Indemnity argue that no such additional procedural defect exists in this instance given that they were entitled to rely on the facial validity of the return of service completed by Deputy Barnes, which indicated that service had been effectuated upon the Georges by personal service upon Ms. George and that the trial court had no justification for concluding that either subsequent purchaser had actual or constructive notice of any other irregularity or defect in the sale, we do not find these arguments persuasive.

¶ 28 In the order granting the motion for relief from judgment filed by KPC Holdings and National Indemnity, the trial court found as a fact that

> 6. The Property was not encumbered by any other liens or mortgages at the time the Association conducted the foreclosure sale.
>
> 7. . . . [T]he January 12, 2017 non-judicial foreclosure sale occurred without proper service on Mr. George.
>
> 8. KPC Holdings purchased the Property for $2,650.22 at the January 12, 2017 non-judicial foreclosure sale.
>
> . . . .
>
> 10. The respective principals of KPC Holdings and National Indemnity Group are colleagues that have known each other for several years and have had transactions in the past. . . .

> 11. The consideration National Indemnity Group provided to KPC Holdings for the conveyance of the Property was a $150,000.00 promissory note. . . .
>
> 12. National Indemnity Group planned to sell the Property for $240,000.00.

According to the record developed before the trial court upon which these findings of fact rested, Ms. Schoening testified that she had viewed the "special proceedings file" in this case, which indicated that the property was not encumbered by any lien or mortgage other than the Association's claim of lien before agreeing to purchase the property from KPC Holdings. At the conclusion of the hearing, the trial court stated that

> I have a hard time believing [Ms. Schoening]. When she was asked questions about the terms of this Note she couldn't—she couldn't remember. I don't believe that one minute. It has, in fact, cast[ ] a cloud over her entire testimony. I'm not sure if I would believe her if she said it were daylight right now outside. So this notion that she's innocent, this notion that she's not being treated fairly, I have a hard time swallowing that pill.

In addition, the trial court noted that it did not believe Ms. Schoening's testimony regarding the nature and extent of her relationship with the owner of KPC Holdings or her statement that she could not recall how many properties she had purchased. In reaching this conclusion, the trial court opined that, "[w]hen it was an answer that would potentially benefit her it was right out," but when the answer would not benefit her, Ms. Schoening would claim an inability to remember the relevant facts.

¶ 29 A careful examination of the trial court's findings of fact and the evidence contained in the record satisfies us that the trial court did not abuse its discretion in determining that KPC Holdings and National Indemnity were not entitled to good faith purchaser for value status. In spite of the fact that the trial court did not explain in so many words why it concluded that KPC Holdings and National Indemnity did not qualify as good faith purchasers for value entitled to protection pursuant to N.C.G.S. § 1-108, the record provides ample support for this conclusion.

¶ 30 Although the return of service completed by Deputy Barnes indicated that Mr. George had been served when a copy of the notice of fore-

closure was delivered to a person of suitable age and discretion at his "dwelling house or usual place of abode," the deed by which the Georges obtained title to the property showed that they resided in St. Croix. In addition, the affidavit that the trustee executed for the purpose of establishing that valid service had been effectuated upon the Georges indicated that, even though copies of the notice of foreclosure had been sent to them using both regular and certified mail, return receipt requested, at their St. Croix address, neither of these mailings had reached their designated recipients. Thus, there was ample basis upon the face of the record for questioning whether the delivery of a copy of the notice of foreclosure to someone other than Mr. George at the Charlotte property constituted valid service upon Ms. George.

¶ 31 In addition, an inspection of the information available on the public record showed that the Georges owned the property free and clear of any encumbrance other than the $204.75 amount that they owed to the Association. After testifying that she was familiar with the foreclosure process and that she had purchased property at foreclosure sales "[m]any times" in the past, Ms. Schoening asserted that she typically performed online research relating to the relevant properties before agreeing to purchase them in foreclosure proceedings, with her research having typically included an examination of the relevant property tax and prior foreclosure records, and that she had conducted such research prior to purchasing the Georges' property from KPC Holdings. In addition, Ms. Schoening acknowledged that she could have gleaned from the record that the Georges had previously purchased the home for more than $100,000.00 and had allowed it to be foreclosed upon without opposition based upon an apparent failure to pay the relatively small amount of $204.75. Finally, Ms. Schoening testified that the owner of KPC Holdings was someone whom she considered a "colleague," that she had periodically purchased property that had been foreclosed upon from KPC Holdings, that she considered the owner of KPC Holdings to be a "respected real estate professional," and that it was possible that she had sold properties to him in the past but she could not recall. As we understand the record, the testimony before the trial court clearly suggests that a grossly inadequate price had been paid for the property at the hearing and that KPC Holdings and National Indemnity had a history of dealing in foreclosed upon properties together. The nature of the prior dealings between KPC Holdings and National Indemnity, the fact that the Georges appeared to have "lost" the property over $204.75, and Ms. Schoening's lack of credibility provide further indication that KPC Holdings and National Indemnity had reason to question the sufficiency of the notice that the Georges had received.

¶ 32 As a result, a careful review of the record shows that the trial court had a rational basis for concluding that KPC Holdings paid a grossly inadequate price to purchase the property from the trustee and that both KPC Holdings and National Indemnity had ample reason to question the sufficiency of the notice of the pendency of the foreclosure proceeding that the Georges had received. In light of this state of the record, we are unable to say that the trial court's decision to find that KPC Holdings and National Indemnity were not good faith purchasers for value entitled to the protections enunciated in N.C.G.S. § 1-108 lacked any reasonable basis. As a result, we hold that, while the Court of Appeals correctly affirmed the trial court's determination that proper service of process had not been effectuated upon Mr. George, *In re George*, 264 N.C. App. at 47, it erred by concluding that the trial court had abused its discretion by determining that KPC Holdings and National Indemnity were not good faith purchasers for value entitled to the protections available pursuant to N.C.G.S. § 1-108. On the other hand, however, the trial court did err by failing to consider the issue of whether, given its decision to invalidate the results of the foreclosure proceeding and the resulting property transfers between the trustee, KPC Holdings, and National Indemnity, an order requiring the payment of restitution as authorized by N.C.G.S. § 1-108 should have been entered. As a result, for all of these reasons, the decision of the Court of Appeals is affirmed, in part, and reversed, in part, and this case is remanded to the Court of Appeals for further remand to the Superior Court, Mecklenburg County, for consideration of the issue of whether an award of restitution as authorized by N.C.G.S. § 1-108 would be appropriate and the entry of an appropriate order embodying its resolution of that issue.

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED.

IN RE BROOKS

[377 N.C. 146, 2021-NCSC-36]

IN RE INQUIRY CONCERNING A JUDGE, NO. 19-225
WILLIAM F. BROOKS, RESPONDENT

No. 480A20

Filed 16 April 2021

Judges—misconduct—serving as executor for non-relatives' estates—failure to report substantial extra-judicial income —suspension

The Supreme Court suspended a district court judge from office for one month where he violated Canons 1, 2A, 5D, and 6C of the Code of Judicial Conduct by serving as executor for the estates of two former clients who were not members of his family, collecting substantial fees as a result, and failing to properly report that extra-judicial income. The Court held that the judge's conduct constituted willful misconduct that was prejudicial to the administration of justice and that brought the judicial office into disrepute.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 27 October 2020 that respondent William F. Brooks, a Judge of the General Court of Justice, District Court Division, Judicial District Twenty-Three, be censured for conduct in violation of Canons 1, 2A, 5D, and 6C; and for conduct prejudicial to the administration of justice and for willful misconduct in office in violation of N.C.G.S. § 7A-376. Heard in the Supreme Court on 17 February 2021 without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No counsel for Judicial Standards Commission or Respondent.

ORDER OF SUSPENSION

¶ 1 The Judicial Standards Commission has unanimously recommended that this Court should censure Judge William F. Brooks for violations of Canons 1, 2A, 5D, and 6C amounting to conduct that was prejudicial to the administration of justice and that constituted willful misconduct in office. Pursuant to N.C.G.S. § 7A-376 and -377, it is our duty first to independently review the record to determine whether the Commission's findings of fact are supported by clear and convincing evidence and whether the findings support the conclusions of law; and then to exercise our independent judgment to consider whether the Commission's proposed sanctions are appropriate. *See In re Murphy*, 376 N.C. 219, 235 (2020) (citing *In re Badgett*, 362 N.C. 202, 207 (2008)).

¶ 2 On 17 January 2020, Counsel for the Commission filed a Statement of Charges against respondent alleging that he engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute and willful misconduct in office "by serving as executor for the estates of two former clients that were not members of respondent's family, collecting substantial fees or commissions for such service, and failing to properly report that income." The Commission charged that these actions in general violated Canons 1 and 2A of the North Carolina Code of Judicial Conduct. The Commission further charged that respondent's actions in serving as executor of the estates for people not members of his family violated Canon 5D and that his failure to report extra-judicial income in excess of $2,000 violated Canon 6C.

¶ 3 Respondent filed a response on 5 March 2020 admitting that he served as a personal representative for the estates of two former family friends, who were clients, not members of his family; that he collected fees for such service; and that he inadvertently failed to disclose the receipt of said fees on his 2016 Judicial Income Report and his Statement of Economic Interest for the same year. On 13 May 2020, Counsel for the Commission and Counsel for respondent filed a Stipulation and Agreement for Stated Disposition which contained the following stipulated facts:

> 1. On or about April 3, 2009, Respondent, prior to his appointment as District Court Judge and while still in engaged in the private practice of law, prepared and executed wills for two clients, Robert and Mary Grace Crawford. Each will also designated the Respondent as the executor of the respective will. Respondent had no familial relationship with either Robert or Mary Grace Crawford.
>
> 2. On or about October 2, 2013, Respondent was appointed to serve as a District Court Judge in Judicial District 23. Respondent received a copy of the Code of Judicial Conduct and ethics training during Orientation for New District Court Judges in early December 2013.
>
> 3. On or about March 9, 2014, Robert Crawford passed away. Mary Grace Crawford subsequently died on November 29, 2014. While serving as District Court Judge, Respondent also served as executor of both wills. In that capacity,

Respondent admitted both wills to probate and filed inventories and accountings with Wilkes County Clerk of Superior Court until both estates were closed in 2017.

4. At the time Respondent carried out his functions as the executor of the Crawford estates, Respondent knew or should have known that the Code of Judicial Conduct prohibited him from serving as the executor or any type of fiduciary for individuals other than members of Respondent's family. Respondent had known the Crawfords for many years and considered them to be like family, but acknowledges he was not related to them by blood or marriage.

5. During the week of March 14, 2016, Respondent was compensated with a $2,550 commission for serving as executor of Robert Crawford's estate and a $85,320.77 commission for serving as executor of Mary Grace Crawford's estate.

6. Respondent failed to disclose the extra-judicial income he earned from serving as the executor for Robert Crawford and Mary Grace Crawford in 2016 on his Canon 6 Extra-Judicial Income report for the 2016 calendar year and on his Statement of Economic Interest (SEI) filed with the State Ethics Commission for the 2016 calendar year.

7. Respondent knew or should have known that he was required to report the extra-judicial income he received from serving as an executor on both his Canon 6 and SEI disclosures. Respondent has now amended both his Canon 6 and Extra-judicial Income Report and SEI for 2016 calendar year to reflect his additional income.

8. The parties stipulate that the foregoing findings are established by clear and convincing evidence and agree that the factual and evidentiary stipulations shall constitute the entire evidentiary record in this matter for consideration by the

hearing panel and that no other evidence will be introduced at the disciplinary recommendation hearing by either party.

The parties further made the following Stipulations of Violations of the Code of Judicial Conduct:

1. Respondent acknowledges that the factual stipulations contained herein are sufficient to prove by clear and convincing evidence that he violated the following provisions of the North Carolina Code of Judicial Conduct:

    a. he failed to personally observe appropriate standards of conduct to ensure that integrity of judiciary is preserved in violation of Canon 1 of the North Carolina Code of Judicial Conduct;

    b. he failed to respect and comply with the law and conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A North Carolina Code of Judicial Conduct;

    c. he served as executor, administrator, trustee, guardian, or other fiduciary for estates of people who were not a member of Respondent's family in violation of Canon 5D of the North Carolina Code of Judicial Conduct; and

    d. he failed to report extra-judicial income in excess of $2,000 in violation of Canon 6C of North Carolina Code of Judicial Conduct.

2. Respondent further acknowledges that the stipulations contained herein are sufficient to prove by clear and convincing evidence that his actions constitute willful misconduct in office and that he willfully engaged in misconduct prejudicial to the administration of justice which brought the judicial office in disrepute in violation of N.C. Gen. Stat.§ 7A-376.

¶ 4 The Judicial Standards Commission held a hearing in this matter on 11 September 2020 at which the above stipulations were read into the record by the Commission's counsel. Respondent, who was present and represented by counsel, made a brief statement accepting responsibility for his actions, acknowledging they were wrong, and apologizing for his actions while also explaining that "I just did not realize for whatever reason that this could not be done."

¶ 5 The Commission issued its Recommendation of Judicial Discipline on 27 October 2020. Based on the stipulated facts and the associated exhibits, the Commission made findings of fact that include verbatim the stipulated facts as well as additional detail about respondent's completion of the required Canon 6 Report and SEI. Specifically, the Commission found that in his Canon 6 Report, respondent "affirmatively indicated 'None' in the column asking him to identify any source of extra-judicial income of more than $2,000 for 2016. On his SEI "No Change Form" for the calendar year 2016, respondent "affirmatively acknowledged that he read and understood N.C.G.S. § 138A-26 regarding concealing or failing to disclose material information and further acknowledged that knowingly concealing or failing to disclose information that is required to be disclosed is a Class I misdemeanor."

¶ 6 Based on these findings of fact, the Commission made the following Conclusions of Law:

> 1. Canon 5D of the Code of Judicial Conduct expressly prohibits judges from serving as "the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of the judge's judicial duties." The Commission concludes that Respondent violated Canon 5D by serving as the executor of the two Crawford estates notwithstanding that fact that he knew or should have known that such service was expressly prohibited.
>
> 2. Canon 6C of the Code of Judicial Conduct requires judges to make a public report each year of "the name and nature of any source or activity from which the judge received more than $2,000 in income during the calendar year for which the report is filed." Canon 6C ensures "transparency in a judge's financial and remunerative activities outside of the judicial

office to ascertain potential conflicts of interest, avoid corruption and maintain public confidence in the impartiality, integrity and independence of the state's judiciary." *In re Mack*, 369 N.C. 236, 242, 794 S.E.2d 266, 270 (2016) (adopting the Commission's findings and conclusions). The Commission concludes that Respondent violated Canon 6C by affirmatively representing on his Canon 6 Report that he had no outside income to report for 2016 when he knew that he had received nearly $90,000 in outside income due to his service as the executor of the Crawford estates.

3. Canon 2A of the Code of Judicial Conduct requires that "[a] judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." As a judge of the General Court of Justice, Respondent is a "covered person" under the State Government Ethics Act and is required to file a Statement of Economic Interest (SEI) with the State Ethics Commission by April 15 of each year. *See* N.C.G.S. §138A-3(21), § 138A-22. In executing his SEI "No Change Form" on March 31, 2017 under penalty of perjury, Respondent affirmatively represented that he had no changes in income to report for 2016, acknowledged that he read and understood N.C.G.S. §138A-26 regarding concealing or failing to disclose material information and further acknowledged that knowingly concealing or failing to disclose information that is required to be disclosed is a Class 1 misdemeanor. At the time Respondent made those representations, he knew he had earned nearly $90,000 in additional income in 2016. By failing to disclose his outside income on the SEI as required by state law, Respondent failed to "respect and comply with the law" and further failed to conduct himself "in a manner that promotes public confidence in the integrity . . . of the judiciary" and therefore violated Canon 2A of the Code of Judicial Conduct.

4. Canon 1 of the Code of Judicial Conduct requires that a judge must "participate in establishing,

maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved." The Commission concludes that Respondent violated Canon 1 because he failed to observe appropriate standards of conduct to preserve the integrity of the judiciary when he failed to disclose his significant outside income in 2016 on both his Canon 6 Form and SEI when he knew that such reporting was required under the Code of Judicial Conduct and state law, respectively.

5. The Preamble to the Code of Judicial Conduct provides that a "violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina." In addition, Respondent has stipulated not only to his violations of the Code of Judicial Conduct, but also to a finding that his conduct amounted to conduct prejudicial to the administration of justice and willful misconduct in office. The Commission in its independent review of the stipulated facts and exhibits and the governing law also concludes that Respondent's conduct rises to the level of conduct prejudicial to the administration of justice and willful misconduct in office.

6. The Supreme Court defined conduct prejudicial to the administration of justice in *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976) as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office." *Id.* at 305, 226 S.E.2d at 9. As such, rather than evaluate the motives of the judge, a finding of conduct prejudicial to the administration of justice requires an objective review of "the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers." *Id.* at 306, 226 S.E.2d at 9 (internal citations

and quotations omitted). Respondent's objective conduct in impermissibly serving as an executor for the Crawford estates, collecting nearly $90,000 in fees for such service and then affirmatively representing on his Canon 6 Report that he had no outside income to report, as well as his action in affirmatively filing a "No Change Form" with the State Ethics Commission that concealed his income, constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Such conduct could reasonably be perceived as an attempt to hide from public scrutiny the significant income he received from engaging in an activity expressly prohibited by the Code of Judicial Conduct.

7. The Supreme Court in *In re Edens* defined willful misconduct in office as "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, dishonesty, or corruption, those elements need not necessarily be present." 290 N.C. at 305, 226 S.E.2d at 9. As further set forth by the Supreme Court in *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977), a judge's "specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith." 293 N.C. at 248, 237 S.E.2d at 255 (internal citations omitted). The undisputed facts at issue in this matter establish that Respondent's conduct was the result of more than a mere error of judgment or act of negligence. Even assuming Respondent did not act in bad faith in violating Canon 5D (notwithstanding his admission that he received a copy of the Code of Judicial Conduct and attended training on it as a new judge), Respondent without question knew that as a judge of the General Court of Justice, the duties of his judicial office required him to file annual reports that would disclose for public scrutiny his sources of outside income. Despite earning nearly $90,000 in extra income in 2016, Respondent

> in his capacity as a judicial officer affirmatively and knowingly represented in public financial disclosure that he had no new reportable income. Such conduct amounts to willful misconduct in office.

As mitigating factors, the Commission found that respondent cooperated, admitted error and showed remorse. Additionally, as the Commission found, the conduct at issue here appears to be a single event and not a pattern of recurring misconduct. Subsequent to the Statement of Charges, Respondent amended the public reports at issue to reflect his outside income for 2016. The Commission found as aggravating factors the fact that the amount of outside income was large, making his failure to disclose it particularly egregious, and the fact that the income came from activity expressly prohibited in Canon 5D of the Code of Judicial Conduct. In light of the findings of fact and conclusions of law, and taking into account the mitigating and aggravating factors, the Commission recommended that respondent be censured.

¶ 7 In this matter, we proceed as a court of original jurisdiction rather than an appellate court. *In re Clontz*, 376 N.C. 128, 140 (2020) (citing *In re Hill*, 357 N.C. 559, 564 (2003)). We are not bound by the Commission's recommendations, but rather must exercise our own independent judgment when considering the evidence. *Id.* (citing *In re Nowell*, 293 N.C. 235, 244 (1977)). Here, the Commission's findings were based on stipulated facts and exhibits, and they are uncontested. After reviewing the full record, we conclude that the Commission's findings of fact are supported by clear and convincing evidence, and we adopt them as our own without exception.

¶ 8 We also adopt the Commission's conclusions of law as appropriately supported by those facts. Both the prohibition on serving as a personal representative for the estate of a non-family member and the reporting requirements for extra-judicial income are explicit in the relevant governing authorities and respondent's failure to abide by them constitutes "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." N.C.G.S. § 7A-376(b).

¶ 9 Where we depart from the Commission is in the determination of an appropriate resolution. We agree with the Commission that a public reprimand is not appropriate because the misconduct in this matter is not "minor." *See* N.C.G.S. § 7A-374.2(7) (public reprimand appropriate where misconduct is minor). And we appreciate the mitigating factors that exist here, particularly concerning defendant's cooperation with the

Commission and his near-immediate acknowledgment of the impropriety of his conduct.

¶ 10 Nevertheless, we must view this matter keeping in mind that the central purpose of the Code of Judicial Conduct, as articulated in the Preamble, is to uphold an "independent and honorable judiciary" for the people of North Carolina. In *In re Mack*, 369 N.C. 236 (2016), where the respondent judge was publicly reprimanded for failing to report non-judicial income, the activity the judge engaged in, namely renting residential property, was not an activity that itself is prohibited conduct. Judges are permitted under the Code of Judicial Conduct to own and realize a profit from rents, so long as the income is properly disclosed. Here, the Code of Judicial Conduct explicitly prohibits the activity that produced the non-reported income. Further, the estates were settled in respondent's own judicial district with respondent seeking and receiving a significant commission for serving as executor. This is an additional aggravating factor that created the appearance of a lack of judicial independence. *Cf. In re Badgett*, 362 N.C. 202, 209 (2008) (imposing a sixty-day suspension where some of the conduct occurred in the courtroom "which gave rise to the unavoidable inference that [the judge] sought to use the powers of his position to obtain a personal favor which was beyond the legitimate exercise of his authority."). Respondent's conduct here was a willful violation that was prejudicial to the administration of justice and brought the judicial office into disrepute.

¶ 11 In *In re Chapman*, 371 N.C. 486 (2018), this Court imposed a thirty-day suspension even though the conduct in question did not result in a financial gain for the judge, and where the judge cooperated with the Commission, entered into a stipulation of facts, took responsibility for his actions, and expressed remorse. *Id.*, 371 N.C. at 496. Nevertheless, by unreasonably delaying for five years his ruling on a motion for permanent child support, the judge in that case committed egregious misconduct requiring more than a censure.

¶ 12 Similarly, in *In re Badgett*, this Court went beyond the Commission's recommendation of censure to impose a suspension because the judge's misconduct was "of a significantly greater magnitude than that present in other recent cases where we have held censure to be appropriate." 362 N.C. at 208; *see also In re Hill*, 357 N.C. 559 (2003) (censuring judge for verbally abusing an attorney and for sexual comments and horseplay); *In re Brown*, 356 N.C. 278 (2002) (censuring judge when on two occasions, the judge caused his signature to be stamped on orders for

which he did not ascertain the contents and effect); *In re Stephenson*, 354 N.C. 201 (2001) (censure imposed when the judge solicited votes for his reelection from the bench); *In re Brown*, 351 N.C. 601 (2000) (censure appropriate when the judge consistently issued improper verdicts).

¶ 13 In the circumstances of this case it is our judgment that, after weighing the severity of defendant's conduct with his candor, cooperation, remorse, and otherwise good character, a one-month suspension is appropriate. At the conclusion of the suspension, respondent may resume the duties of his office.

¶ 14 The Supreme Court of North Carolina orders that respondent William F. Brooks be, and is hereby, SUSPENDED without compensation from office as a Judge of the General Court of Justice, District Court Division, Judicial District Twenty-Three, for THIRTY DAYS from the entry of this order for conduct in violation of Canons 1, 2A, 5D, and 6C of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute and willful misconduct in office in violation of N.C.G.S. § 7A-376.

By order of the Court in Conference, this the 16th day of April 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of April 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk

STATE v. MEADER

[377 N.C. 157, 2021-NCSC-37]

STATE OF NORTH CAROLINA
v.
FAYE LARKIN MEADER

No. 49A20

Filed 16 April 2021

Criminal Law—defenses—voluntary intoxication—jury instructions

In a trial for felony breaking or entering a motor vehicle, misdemeanor larceny, and misdemeanor possession of stolen property, the trial court did not err by denying defendant's request for a jury instruction on voluntary intoxication where, although defendant appeared to be intoxicated and her actions were periodically unusual at the time of her arrest, there was no substantial evidence that she was utterly incapable of forming specific intent. Defendant did not slur her speech, was able to give biographical information, made appropriate responses to a law enforcement officer's questions, was able to walk under her own power and navigate a flight of stairs with her hands cuffed behind her back, and was able to follow directions.

Justice HUDSON dissenting.

Justices MORGAN and EARLS 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, 269 N.C. App. 446, 838 S.E.2d 643 (2020), finding no error after appeal from judgments entered on 19 December 2018 by Judge R. Stuart Albright in Superior Court, Guilford County. Heard in the Supreme Court on 15 February 2021.

Joshua H. Stein, *Attorney General*, *by Matthew Baptiste Holloway*, *Assistant Attorney General*, *for the State-appellee.*

Bonnie Keith Green for defendant-appellant.

BERGER, Justice.

¶ 1 On December 19, 2018, a Guilford County jury found defendant Faye Larkin Meader guilty of felony breaking or entering a motor vehicle, misdemeanor larceny, and misdemeanor possession of stolen

property.[1] Defendant received a split sentence, and she was placed on supervised probation. The Court of Appeals determined that the trial court did not err when it declined to instruct the jury on voluntary intoxication. Defendant appeals.

I. Factual and Procedural Background

¶ 2 At approximately 2:00 p.m. on November 22, 2017, defendant arrived at a mental health counseling center in Greensboro, North Carolina. Law enforcement was contacted, and dispatch was informed that defendant was behaving as if she was intoxicated.

¶ 3 Earlier that afternoon, a family arrived for an appointment at the same counseling center. When the family returned to their vehicle after the appointment, they noticed that the driver's side door was open, and items were missing from their vehicle. Among the missing items were an ammunition clip, a pair of sunglasses, and a drink koozie. In addition, a soda can, which did not belong to any of the family members, had been placed in a cupholder. The husband called law enforcement to report the incident. The wife returned to the counseling center, where she observed defendant drinking soda out of a cup. The wife recognized defendant because they had attended school together.

¶ 4 The husband returned to the counseling center and informed an employee that someone had broken into his vehicle. He asked if anyone had "seen anything weird." Defendant, who was still in the lobby of the counseling center at the time, "stood up and came over to where [the family was] and started talking" to them. Defendant informed the husband that she knew who broke into the car and provided him with a name. When the husband informed defendant that law enforcement had been contacted, defendant got "irate" and said, "no cops."

¶ 5 When the husband walked past defendant to exit the counseling center, he "smelled alcohol somewhere." Two other witnesses stated that defendant "appeared to be" or "seemed" intoxicated.

¶ 6 Caterina Sanchez, a therapist at the counseling center, testified that defendant "was disruptive in terms of not wanting to leave and not really listening to us [b]ut she . . . wasn't misbehaving or anything like that." Ms. Sanchez testified that because of defendant's behavior, Ms. Sanchez decided to call law enforcement and Chris Faulkner, the owner of the counseling center.

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1. The trial court arrested judgment on the possession of stolen goods conviction.

¶ 7 Mr. Faulkner testified that, although defendant was "agitated," she "was answering the [law enforcement officers'] questions . . . [and was being] fairly cooperative." Mr. Faulkner advised defendant that she was banned from the property; when asked if she understood, defendant replied, "yes, sir."

¶ 8 When officers arrived at the counseling center, they asked defendant why she was there. Defendant told them her father passed away the previous month and that she had been the victim of a domestic violence incident the day before. Defendant removed her pants to show officers a bruise on her thigh.

¶ 9 As officers escorted defendant from the center, she became agitated and stated that she needed to collect her shoes, bra, and purse. When defendant failed to leave the premises as instructed, defendant was handcuffed and escorted out. Defendant navigated a flight of stairs without assistance while her arms were handcuffed behind her back.

¶ 10 A search of the premises failed to reveal missing property, and officers were prepared to release defendant when they noticed a shiny object in defendant's jacket pocket. Defendant told officers that the object was a cellphone, but she pulled the missing ammunition clip from her pocket. Defendant was then arrested for felony breaking or entering a motor vehicle, misdemeanor larceny, and misdemeanor possession of stolen property. Once at the police station, the stolen drink koozie was located in defendant's jacket pocket and the stolen sunglasses were found on the floorboard of the patrol car.

¶ 11 On September 24, 2018, defendant was indicted on one count of felony breaking or entering a motor vehicle, one count of misdemeanor larceny, and one count of misdemeanor possession of stolen property. On December 7, 2018, defendant gave notice of her intent to offer the defense of voluntary intoxication. On December 17, 2018, defendant's case came on for trial. The trial court denied defendant's request for a voluntary intoxication jury instruction. On December 19, 2018, the jury found defendant guilty on all charges. Defendant entered notice of appeal.

¶ 12 In denying defendant's request for the instruction on voluntary intoxication, the trial court stated:

> That will be denied[.] . . . [T]he [c]ourt has listened to all of the testimony intently. I also reviewed State's Exhibit Number 1, which was admitted without objection. And—and there are three videos on State's 1. The first video clearly shows the Defendant, and I

understand that the witnesses in the light most favorable to the Defendant have testified that the Defendant was intoxicated. However, during the course of the video, I could hear the Defendant's words. She was not slurring her words. She was speaking in easily understandable English. There were many questions that were asked of her to which she was responsive. It was clear that she was responsive and was aware of what was going on around her.

For instance, they asked her how she got there, and she said, well, they brought me. It was an appropriate response to the question. She later identified, or attempted to identify the name of the people that brought her, but in any event, there are many other indications that she was responsive and aware of what was going on.

For instance, on the video you clearly hear Mr. Faulkner, the owner of the business at issue, "You are not allowed to come here any longer. You understand?" And her response was, "Yes, sir." At one point one law enforcement officer, I believe it was a law enforcement officer, asked her for her name, and she clearly indicated it was Faye Larkin Meader. It was easily understandable. It was an appropriate response, a direct response to the question asked.

Although she was escorted out of the business at issue by law enforcement officers, she was able to walk under her own power. In other words, the officers didn't have to carry her, did not have to put her in some type of wheelchair, simply directed her to leave, and that's what she did.

At one point, when she was sitting in the patrol car, she was directed or requested by the officer to put your feet back in there for me, and the Defendant immediately complied, indicating she understood, was responsive and aware of what was going on. At one point, when she was attempting to articulate what happened, and how she got to the predicament she was in, she was complaining of another person selling marijuana and oxycontin. Oxycontin is not

> a—it's not a tongue-twister, but for someone that was so completely intoxicated and without the ability to form intent, it would—it would seem to me to be very hard to articulate such a word very clearly and easily, as she did, as I witnessed in the video. At one point, she indicated she wanted her coat because it was cold outside. Again, the point is she was aware of what was going on, that it was cold, and that when you're cold, you need a jacket. That's exactly what she indicated.
>
> At one point, she was asked on the video what happened to the laptop computer, or words to that effect, and the Defendant immediately said she had no idea what the officer was talking about, which was, in fact, an accurate statement based on the facts of this case. Again, the Defendant was responsive and aware of what was going on around her, and answered that question immediately, appropriately, and, as it turns out, accurately.
>
> She was also—the Defendant was also aware of what was going on around her because she knew she was interacting with law enforcement officers. At one point she said, "God bless you all. You all have a hard job." In any event, there is ample evidence to show that, again, she was responsive and aware of what was going on around her.
>
> . . . .
>
> No one in this case testified that the Defendant was, in fact, drunk. Although the testimony was that she was impaired or intoxicated on some type of substance. The substance has been unidentified.

¶ 13 In an opinion filed January 21, 2020, the Court of Appeals held that the trial court did not err when it declined to instruct the jury on voluntary intoxication because defendant failed to produce sufficient evidence of voluntary intoxication. *State v. Meader*, 269 N.C. App. 446, 450, 838 S.E.2d 643, 646 (2020). The dissenting judge argued that substantial evidence was presented to support a voluntary intoxication instruction and the failure to instruct the jury on voluntary intoxication constituted prejudicial error which requires a new trial. *Id.* at 451–56, 838 S.E.2d at 646–50 (Brook, J., dissenting).

¶ 14 Defendant argues that substantial evidence was presented to require a voluntary intoxication instruction. We disagree.

II. Standard of Review

¶ 15 To determine whether a defendant is entitled to a requested instruction on voluntary intoxication, this Court reviews de novo whether each element of the defense is supported by substantial evidence when taken in the light most favorable to the defendant. *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990).

III. Analysis

¶ 16 "[T]he doctrine [of voluntary intoxication] should be applied with great caution." *State v. Murphy*, 157 N.C. 614, 617–18, 72 S.E. 1075, 1076–77 (1911). A defendant is not entitled to an instruction on voluntary intoxication "in every case in which a defendant . . . consum[es] intoxicating beverages or controlled substances." *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992).

¶ 17 To obtain a voluntary intoxication instruction, a defendant

> must produce substantial evidence which would support a conclusion by the judge that [s]he was so intoxicated that [s]he could not form [the specific] intent . . . . The evidence must show that at the time of the [crime] the defendant's mind and reason were so completely intoxicated and overthrown as to render [her] utterly incapable of forming [specific intent]. In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

Mash, 323 N.C. at 346, 372 S.E.2d at 536 (cleaned up). "[T]here must be some evidence tending to show that the defendant's mental processes were so overcome by the excessive use of liquor or other intoxicants that he had temporarily, at least, lost the capacity to think and plan." *State v. Cureton*, 218 N.C. 491, 495, 11 S.E.2d 469, 471 (1940). "A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol . . . has the burden of producing evidence, or relying on evidence produced by the [S]tate, of his intoxication." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536. "Evidence of mere intoxication . . . is not enough to meet defendant's burden of production." *Id.* at 346, 372 S.E.2d at 536.

¶ 18 Defendant argues that witnesses testified about her bizarre behavior, that she appeared to be intoxicated, and that there was an odor of alcohol in the counseling center. In addition, defendant argues that testimony and police body camera footage established that she was out of touch with reality, hallucinating, talking to people who were not present, and unaware of her surroundings. However, while defendant's actions were periodically unusual, the mere fact that "[a] person may be excited, intoxicated and emotionally upset" does not negate "the capability to formulate the necessary" intent. *Id.* at 347, 372 S.E.2d at 537 (cleaned up). Defendant has failed to present substantial evidence that she was "utterly incapable" of forming specific intent. *Id.* at 346, 372 S.E.2d at 536.

¶ 19 The record reflects that defendant did not slur her speech or hesitate when asked to provide biographical information, and defendant gave appropriate responses to the law enforcement officers' questions when prompted. As the trial court stated, defendant "was not slurring her words. She was speaking in easily understandable English. There were many questions that were asked of her to which she was responsive." In addition, when police arrived and arrested defendant, she was able to navigate a flight of stairs with her hands cuffed behind her back. As the trial court noted, defendant "was able to walk under her own power" and "officers did[not] have to carry her, did not have to put her in some type of wheelchair, simply directed her to leave, and that's what she did." Thus, even in the light most favorable to defendant, defendant has demonstrated, at best, mere intoxication.

¶ 20 In *State v. Goodman*, 298 N.C. 1, 14, 257 S.E.2d 569, 579 (1979), the defendant was charged with first-degree murder, robbery with a dangerous weapon, and kidnapping. Defendant argued that his voluntary intoxication prevented him from premeditation and deliberation necessary for a conviction of first-degree murder.

¶ 21 In that case, the defendant shared a six pack of beer with two other men, consumed more beer at a bar less than thirty minutes before the victim got in the car with the defendant, and there was beer in the car the defendant was driving. *Id.* at 13–14, 257 S.E.2d at 579. However, this Court stated that "[w]hether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions; no inference of the absence of deliberation and premeditation arises as a matter of law from intoxication." *Id.* at 12, 257 S.E.2d at 578 (citation omitted). This Court determined that, despite evidence that the defendant had been drinking, the defendant "was capable of premeditation and deliberation and could form the specific intent." *Id.* at 14, 257 S.E.2d at 579. This Court went on to conclude that the trial court did

not err when it declined to give an instruction on voluntary intoxication because there was "no evidence which showed that defendant's capacity to think and plan was affected by drunkenness [at the time he shot the victim]."[2] *Id.* at 14, 257 S.E.2d at 579.

¶ 22 Such is the case here. The undisputed evidence tended to show that defendant was aware of her surroundings, and in control of her faculties, both before and after the police arrived. When the husband asked if anyone had "seen anything weird," defendant stood up, walked over to the family whose vehicle had been broken into, and started talking to them. Defendant informed the husband that she knew who broke into the car and provided him with a name. When the husband informed defendant that law enforcement had been contacted, defendant became "irate" and said, "no cops."

¶ 23 Defendant understood that involving law enforcement was detrimental to her interests. To conceal her involvement in the crime, she fabricated a story about another individual's involvement. Based on these facts, viewed in the light most favorable to defendant, she cannot demonstrate that her "mind and reason were so completely intoxicated and overthrown as to render [her] utterly incapable of forming [specific intent]." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536 (cleaned up).

¶ 24 Because a voluntary intoxication instruction is only appropriate when the record contains evidence that permits the jury to determine that the defendant is unable to form the specific intent necessary to support a conviction for the crime charged, the trial court did not err when it declined to instruct the jury on voluntary intoxication.

AFFIRMED.

Justice HUDSON dissenting.

¶ 25 Because I would hold that the evidence, when taken in the light most favorable to defendant, was sufficient to warrant a jury instruction on voluntary intoxication, I respectfully dissent.

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2. One could argue that *Goodman* presents an even stronger argument for an involuntary intoxication instruction than the case *sub judice* in light of the amount of alcohol that the defendant was shown to have consumed. That an instruction was not required on the facts in *Goodman* provides support for this Court's admonition that "the doctrine [of voluntary intoxication] should be applied with great caution." *Murphy*, 157 N.C. at 617–18, 72 S.E. at 1076–77.

¶ 26 A defendant is entitled to have the jury instructed on voluntary intoxication when there is substantial evidence that the defendant was so intoxicated that he or she could not form the requisite intent. *State v. Mash*, 323 N.C. 339, 346 (1988). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *Id.* at 348. In addition, all reasonable inferences from that evidence must be drawn in defendant's favor. *Cf. State v. Chevallier*, 264 N.C. App. 204, 214 (2019) ("In determining whether the trial evidence adduced was sufficient to instruct on a particular theory of criminal liability, we review the evidence and any reasonable inference from that evidence in the light most favorable to the State.").

¶ 27 In the light most favorable to defendant, the evidence here tends to show that she was intoxicated and that she was unaware that she had taken another's property. A rational trier of fact could conclude that defendant was so intoxicated that she could not form the requisite intent to commit the offenses charged.

¶ 28 At trial, the jury heard testimony from various witnesses who observed defendant at the counseling center. In addition, jurors were shown footage from the responding officers' bodycams and so were able to observe defendant's behavior for themselves. This evidence tended to show that defendant was intoxicated at the time of the alleged crime. On the day of the incident, there were two calls to 911; the first call was by a therapist at the counseling center to report an "intoxicated person," and the second call was by the vehicle owner to report a break-in to his vehicle. The first person who called 911 testified that defendant appeared to be intoxicated. Officer Fulp, who was on the team that responded to the first 911 call, testified that defendant appeared to be intoxicated or impaired by an illegal substance. And, at the scene, a witness told an officer that he smelled alcohol on defendant.

¶ 29 There was also evidence, much of which has not been mentioned in the majority opinion, that defendant was acting in a manner consistent with intoxication. When Officer Fulp first approached defendant, she "started talking about getting beat up the night before by a guy named Sebastian," and then defendant pulled down her pants in front of everyone. While speaking with the officers, defendant asked someone named Omar for her wallet, but no one named Omar was present at the time. When the owner of the counseling center asked the officers if they would continue their investigation outside, defendant "became loud" and had to be handcuffed. While the officers escorted defendant from the building, defendant claimed that she needed to get her bra from the bedroom,

but the counseling center had no bedrooms. When she was in the police vehicle being questioned by the officers, defendant lost control of her faculties and urinated on herself. She then refused to get out of the police vehicle. Once the officers coaxed her into exiting the vehicle, she produced a stolen ammunition magazine from her pocket saying it was her cell phone. Officer Fulp then placed defendant back in handcuffs and took her to the jail. From the jail, defendant phoned her aunt, who testified that she "sounded delirious." We are required to consider the evidence and draw all reasonable inferences in the light most favorable to defendant. Accordingly, I would conclude there was substantial evidence that defendant was intoxicated at the time of the alleged crime.

¶ 30 The majority is correct that "[e]vidence of mere intoxication . . . is not enough to meet defendant's burden of production." *Mash*, 323 N.C. at 346. "[T]he defense of voluntary intoxication depends not on the amount of alcohol consumed, but on its effect on the defendant's ability to form the specific intent [required by the statute]." *State v. Cagle*, 346 N.C. 497, 508 (1997). Evidence of exactly what substance defendant consumed, in what quantity she consumed it, and over what period of time it was consumed, is not required or dispositive. A defendant is only required to show that her intoxication rendered her unable to form the requisite intent to commit the crimes charged. *Mash*, 323 N.C. at 346.

¶ 31 Cases in which a voluntary intoxication instruction has been denied have involved either evidence of purposefulness despite intoxication or a complete absence of evidence of the effects of intoxication on the defendant's functioning. In *Cagle*, for example, we concluded that the trial court had committed no error in refusing to give an instruction on voluntary intoxication when the defendant had consumed significant amounts of alcohol and smoked marijuana but had discussed his plan to rob the victim, took steps to follow that plan, repeatedly said, "go finish him, go kill him," and planned an alibi. 346 N.C. at 508–09; *see also State v. Geddie*, 345 N.C. 73, 95 (1996) ("[E]vidence showed only that defendant drank some liquor. There was no evidence indicating that defendant was so intoxicated as to be utterly incapable of forming the intent to kill."); *State v. Long*, 354 N.C. 534, 538–39 (2001) (holding that, despite being "substantially impaired," actions taken to hide his involvement in the crime demonstrated defendant could think rationally); *State v. Robbins*, 319 N.C. 465, 509 (1987) ("[N]o evidence was presented showing that the defendant's capacity to think and plan was affected or impaired by intoxication.").

¶ 32 Likewise, in *State v. Goodman*, 298 N.C. 1, 12 (1979), we held that intoxication alone does not automatically lead to the inference that a

defendant cannot form the requisite intent. There, we concluded that the trial court had not erred by refusing to give an instruction on voluntary intoxication because the evidence showed that despite defendant's consumption of alcohol, he was able to drive, give directions, lead a group on a search through a neighborhood looking for items that had been stolen from his car, and participate in planning a scheme for disposing of the victim's body. *Id.* at 14. In addition, witnesses testified that defendant was "not in a drunken condition" and we concluded that "[t]here was no evidence which showed that defendant's capacity to think and plan was affected by drunkenness." *Id.*

¶ 33 Unlike those cases, from the evidence here one could infer that defendant was so intoxicated that she could not form the requisite intent to commit the crimes alleged. A reasonable juror could infer from the evidence that defendant was unaware of her surroundings, was completely unaware that she had taken items from the vehicle, and that her capacity to think and plan was affected by intoxication. For example, when the owner of the vehicle discovered the break-in and asked if anyone had seen anything, defendant approached the owner and told an unrelated story involving a man jumping from a third floor to punch her. Also, when the police arrived at the counseling center, defendant believed they had come to help her rather than to remove her from the premises.

¶ 34 Additionally, defendant made no effort to conceal her actions. During a conversation with the officers, she told them she did not have a cell phone. But a few minutes later, when an officer asked her about a bulge in her pocket, she told the officer the bulge was her cell phone. She then proceeded to grab the bulge and hand it over to the officer without reservation or reluctance. In fact, she had handed the officer an ammunition magazine—an item reported missing from the vehicle that had been broken into. When the officers reacted to the ammunition magazine as evidence of a potential crime, defendant got upset and seemed to believe all of a sudden that she had handed them a weapon. She said, "I didn't know [it was a gun]; I would have never handed it to you if I would have known it was a gun." She also wore the sunglasses she was later charged with stealing in her shirt in plain sight of the officers and other witnesses. Although evidence of defendant being an unskilled criminal does not entitle her to a voluntary intoxication instruction, in the light most favorable to defendant this evidence tends to show that she could not have formed the intent to commit the offenses charged. This evidence goes beyond defendant being "excited, intoxicated and emotionally upset," *Mash*, 323 N.C. at 347 (quoting *State v. Hamby*, 276 N.C. 674, 678 (1970)), and could support an inference of a real inability to comprehend the surroundings and events around her.

¶ 35 Pointing to evidence that defendant walked down a stairway while handcuffed, provided biographical information, did not slur her words, and responded to the officers' questions, the majority concludes that this is not a " 'very clear case[ ]' [where] the intoxication was so severe that it could have negated [ ] defendant's ability to form specific intent."[1] But the sum of the evidence here is, at best, equivocal. Substantial evidence supports the opposite conclusion, and our courts are required to consider the evidence in the light most favorable to defendant; in doing so, I would hold that the jury should have been instructed on voluntary intoxication.

¶ 36 Finally, I would conclude that the trial court's failure to deliver the voluntary intoxication instruction to the jury was prejudicial. Having been given no instruction on voluntary intoxication, the jury was initially split regarding defendant's intent and had to be reminded that they must reach a unanimous verdict. The jury continued to deliberate before eventually requesting the definition of "utterly incapable," a term that pertains to the voluntary intoxication defense. The trial court's response was that "utterly incapable" had no legal significance in this case. Ultimately, the jury returned guilty verdicts. Because the jury seemed particularly concerned with defendant's ability to form the requisite intent, I would conclude that there is a reasonable possibility that had a voluntary intoxication instruction been given, the jury would have reached a different result.

¶ 37 When taken in the light most favorable to defendant, there is substantial evidence from which a reasonable juror could have found that defendant was so intoxicated that she could not form the specific intent to commit the offenses charged. In addition, the trial court's failure to deliver the instruction was prejudicial.

¶ 38 For the foregoing reasons, I respectfully dissent.

Justice MORGAN and Justice EARLS join in this dissenting opinion.

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1. I also note that our law does not require that a voluntary intoxication instruction be given only in "very clear cases." The majority quotes from *State v. Absher*, 226 N.C. 656, 660 (1946), where our Court quoted from a jury instruction on voluntary intoxication. In that instruction, the trial court said, "[a]s the doctrine [of voluntary intoxication] is one that is dangerous in its application, it is allowed only in very clear cases." *Id.* at 660. Far from establishing a threshold requirement that the voluntary intoxication jury instruction only be given in very clear cases, our Court was merely quoting from a case in which the trial court determined there was sufficient evidence to warrant instructions on voluntary intoxication. The trial court then gave that instruction to the jury, warning the jury that the defense should only apply in clear cases.

STATE v. ALLEN

[377 N.C. 169, 2021-NCSC-38]

STATE OF NORTH CAROLINA
v.
HARLEY AARON ALLEN

No. 8A20

Filed 16 April 2021

Constitutional Law—due process—competency to stand trial—sua sponte competency hearing

In a case involving multiple drug offenses and habitual felon status, the trial court did not err by failing to sua sponte initiate an inquiry into defendant's competence at the time of trial where—although defendant had twice been determined to be incompetent—six months prior to trial the trial court, after interviewing defendant and his counsel and relying on a medical evaluation, determined defendant to be competent to stand trial. Because there was nothing in the record which occurred after that determination or before the end of the trial to raise a substantial doubt about defendant's continued competence, the trial court was entitled to rely on the correctness of the pre-trial competency determination and was not required to conduct an additional competency inquiry.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 269 N.C. App. 24 (2019), remanding judgments entered on 9 February 2018 by Judge Alan Z. Thornburg in Superior Court, Mitchell County, for a hearing to determine defendant's competency at the time of trial and to correct clerical errors. Heard in the Supreme Court on 15 February 2021.

Joshua H. Stein, Attorney General, by Nicholas S. Brod, Assistant Solicitor General, and Ryan Y. Park, Deputy Solicitor General, for the State-appellant.

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

ERVIN, Justice.

¶ 1 The issue before us in this case addresses whether defendant Harley Aaron Allen was subjected to a deprivation of his right to liberty without due process of law on the grounds that he was tried for and convicted of committing a criminal offense at a time when he "lack[ed] 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). The Court of Appeals determined that the trial court had erred by failing to hold a second hearing for the purpose of inquiring into defendant's competence immediately prior to trial even though defendant had been found to be competent at a hearing held six months earlier. After careful consideration of the State's challenge to the Court of Appeals' decision, we hold that the trial court did not err by failing to hold a second competency hearing immediately prior to the beginning of defendant's trial on its own motion. As a result, we reverse the Court of Appeals' decision and remand this case to the Court of Appeals for consideration of defendant's remaining challenge to the validity of the trial court's judgments.

¶ 2 On 22 July 2015, defendant sold a pill containing a derivative of opium known as buprenorphine to a confidential informant. On 22 October 2015, a warrant for arrest charging defendant with selling Subutex, delivering Subutex, and maintain a vehicle for the purpose of keeping or selling Subutex was issued. On 22 February 2016, the Mitchell County grand jury returned bills of indictment charging defendant with possession of Subutex with the intent to sell or deliver and having attained habitual felon status.

¶ 3 On 2 September 2016, defendant's trial counsel filed a motion seeking to have a forensic evaluator appointed for the purpose of assessing defendant's capacity to proceed. On the same day, Judge R. Gregory Horne entered an order allowing defendant's motion. However, defendant was involuntarily committed to Mission Hospital before the required forensic evaluation could be completed, with this being one of the two instances during 2016 in which defendant's parents petitioned to have defendant involuntarily committed after he "appeared to lose behavioral control, threatening suicide and becoming confrontational" while under the influence of methamphetamine. At the time of defendant's November 2016 hospitalization, the attending medical professionals developed the opinion that substance abuse underlay many of defendant's psychiatric, medical, and social stressors.

¶ 4 During defendant's November 2016 involuntary commitment, forensic psychologist Paul Freedman evaluated defendant in accordance with Judge Horne's order. Based upon information obtained during his evaluation, Mr. Freedman described defendant as "hav[ing] substantial deficits regarding his overall fund of knowledge."[1] More specifically, Mr.

1. According to Mr. Freedman, a person's "fund of knowledge" is "the historically accumulated and culturally developed bodies of knowledge and skills essential for household or individual functioning and well-being."

Freedman noted that defendant had a very low IQ of approximately 60, had been awarded disability payments as the result of an intellectual disability, and was unable to manage his overall finances, including his disability payments, without assistance. As a result, Mr. Freedman found that defendant suffered from an intellectual disability, memory impairment, and overall neurological dysfunction.

¶ 5 In addition, Mr. Freedman reported that defendant had "acknowledged that he had previously signed plea agreements without having an understanding of what they contained," with it being unclear to Mr. Freedman "whether [defendant] knew he was facing multiple felony charges in two counties." Furthermore, Mr. Freedman stated that defendant exhibited a serious lack of understanding of the judicial system, having described a judge as "the man you gotta stand in front of" and being unable to say whether the defense attorney was "on his side."

¶ 6 In the course of a phone conversation that Mr. Freedman had with defendant's adoptive mother, defendant's adoptive mother stated that she and her husband had adopted defendant as an infant after he had experienced almost two years of extreme abuse and neglect. In Mr. Freedman's view, the "abuse, detailed to this examiner, that the defendant suffered as an infant necessarily leaves a permanent, tragic, and irrevocable mark," with defendant's cognitive deficits, which had "been with him since early childhood," being conditions that he would "likely struggle with [ ] for the remainder of his life." In light of "the nature of his impairments," Mr. Freedman felt "that [defendant's] prospects of restorability are limited." At the conclusion of his evaluation, Mr. Freedman opined that defendant was not capable of proceeding to trial.

¶ 7 After defendant had been released from Mission Hospital, the State moved on 17 January 2017 that defendant be committed to Butner Central Regional Hospital for a second evaluation of his capacity to proceed. On the same date, Judge Gary M. Gavenus entered an order granting the State's motion. On 20 February 2017, Dr. Bruce Berger, a forensic psychiatrist, completed a second evaluation of defendant's capacity to proceed.

¶ 8 After the completion of his evaluation, Dr. Berger concluded that defendant had a "profound lack of knowledge" of the court system and that defendant's adaptive functioning was significantly impaired. In Dr. Berger's view, defendant's limited adaptive functioning, when taken "in combination with [defendant's] attention deficits, learning deficits[,] difficult[ies] in moderating his behavior, mood disorder, and possible decrease of day-to-day structure since his marriage, all contribute to him

being more impaired than IQ scores alone . . . would suggest." Dr. Berger noted that, when asked what a prosecutor did, defendant had replied that "[h]e and the judge work together," and that, when asked what a "plea bargain" was, defendant had said that it meant that you "[s]ign something." As a result, Dr. Berger determined that defendant was not capable of proceeding to trial.

¶ 9 On 19 April 2017, following the completion of Dr. Berger's competency evaluation, Judge Gavenus entered an order committing defendant to Broughton Hospital for temporary custody and mental health treatment. On 18 May 2017, Monisha Berkowskie, Ph.D., a Senior Psychologist at Broughton Hospital, wrote a letter stating that, in the opinion of defendant's treatment team, defendant had developed a "strong foundation of rational and factual knowledge of the legal system" following a course of treatment that included medication, educational sessions focused upon the development of an understanding of courtroom procedures, and attendance at Alcoholics Anonymous meetings that were intended to assist defendant in combating his substance abuse problems. In light of these developments, Dr. Berkowskie requested that another capacity evaluation be performed.

¶ 10 On 1 June 2017, Dr. Berger conducted another capacity evaluation of defendant at Broughton Hospital. Dr. Berger noted that, since beginning treatment at Broughton Hospital, defendant had become able to "follow unit routine, advocate for his needs, interact with peers and staff appropriately, and successfully complete activities of daily living independently." In addition, Dr. Berger reported that defendant was able to identify the specific charges that had been lodged against him and understood that he would be sent to prison if found guilty. Similarly, Dr. Berger stated that defendant comprehended the nature of the plea negotiation process and had the ability to explain the roles that defense attorneys, prosecutors, judges, juries, and witnesses played in the judicial system. At the conclusion of his evaluation, Dr. Berger opined that defendant had an improved and nuanced understanding of the court system and was capable of proceeding to trial.

¶ 11 On 23 August 2017, a pre-trial competency hearing was held before Judge Gavenus. In the course of the competency hearing, Judge Gavenus asked defendant's trial counsel whether he agreed with Dr. Berger's conclusion that defendant was now competent to stand trial. In response, defendant's trial counsel stated that:

> Your Honor, I don't agree that he's necessarily capable. . . . [H]e goes in two or three different directions

> sometimes as far as -- as far as talking to him. He does understand the charges now. . . . He does understand what he is facing as far as the felonies, and when he was here the first time he didn't understand that. I think that . . . they have improved his capability. . . . I'm not a doctor. I mean, there is some question in my mind because I've dealt with [defendant] for a number of years. . . .
>
> I don't really feel like I'm in a position to judge necessarily if I -- I'm not a doctor to judge his condition. But we just ask the Court to look at the report and make a determination, to make a finding on -- based on that. There's really, there's really nothing specific that I can disagree with in the report because I have seen some improvement in his condition.

In addition, Judge Gavenus had the following colloquy with defendant:

> THE COURT: All right, [defendant], you having any trouble thinking today? Do you feel confused in anyway today?
>
> DEFENDANT: No, sir.
>
> THE COURT: You been able to talk with your attorney about your case?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Has your attorney gone over the [second] report of Dr. Berger with you?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Are you in agreement with that report?
>
> DEFENDANT: Yeah, yes, sir.

At the conclusion of the hearing, Judge Gavenus determined that defendant was capable of proceeding to trial.

¶ 12 On 13 November 2017, the Mitchell County grand jury returned original and superseding indictments charging defendant with selling buprenorphine, delivering buprenorphine, maintaining a vehicle for the purpose of selling buprenorphine, possession of buprenorphine with the intent to sell or deliver, and having attained habitual felon status. The charges against defendant came on for trial before the trial court

and a jury at the 5 February 2018 criminal session of the Superior Court, Mitchell, County. On 9 February 2018, the jury returned verdicts convicting defendant of selling buprenorphine, delivering buprenorphine, and possessing buprenorphine with the intent to sell or deliver and acquitting defendant of maintaining a vehicle for the purpose of selling buprenorphine.

¶ 13 After the jury returned these verdicts, defendant entered a guilty plea to having attained habitual felon status. In the course of accepting defendant's guilty plea, the trial court directly addressed defendant for the purpose of ensuring that he was acting in a knowing and voluntary manner. Among other things, the trial court inquired whether defendant was "under the influence of any alcohol, drugs, narcotics, medicines, pills or any other substances" and received a negative answer. In addition, the trial court had the following discussion with defendant concerning the plea negotiation process:

> THE COURT: Have you agreed to plead guilty as part of a plea arrangement?
>
> [DEFENDANT:] Yes, sir.
>
> THE COURT: You are pleading guilty – you pled guilty to attaining the status of habitual felon, but was there actually a plea arrangement?
>
> [DEFENDANT:] No.
>
> [DEFENSE COUNSEL:] There's not a plea arrangement, Your Honor.
>
> THE COURT: So let me ask you that again. Have you agreed to plead guilty as part of a plea arrangement?
>
> [DEFENDANT:] No, sir.

At the conclusion of its inquiry into the voluntariness of defendant's decision to enter a plea of guilty to having attained habitual felon status, the trial court accepted defendant's plea.

¶ 14 At the ensuing sentencing hearing, defendant's trial counsel requested and received permission for defendant to address the court. At that point, defendant stated that:

> Your Honor, I've made a lot of mistakes, and just like [defendant's trial counsel] said, I've not been into nothing since we went through this, and I show up to court all the time. Not even probation officers have

> to worry about me, because I'm always there. I show up, I pay my fines. Never failed a drug test. . . . If you would take it into consideration, give me another chance, . . . you won't be sorry for your decision if you do. Let me have a probationary sentence. I'll do what I have to to get it done. You'll never see my face back here again. I want to apologize to everybody here.

After finding as mitigating circumstances that defendant suffered from "a mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense" and that defendant "had a support system in the community," the trial court entered a judgment based upon defendant's convictions for selling buprenorphine after having attained the status of a habitual felon sentencing defendant to a term of 58 to 80 months imprisonment and entered a second judgment based upon defendant's conviction for possession of buprenorphine with the intent to sell or deliver sentencing defendant to a concurrent term of 8 to 19 months imprisonment.[2] Defendant noted an appeal to the Court of Appeals from the trial court's judgments.[3]

¶ 15 In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the trial court had erred by failing to hold another competency hearing before the beginning of defendant's trial and by denying defendant's motion to dismiss the charges that had been lodged against him for insufficiency of the evidence.[4] A majority of the Court of Appeals panel that had been assigned to hear and decide this case agreed with the first of defendant's contentions, holding that the trial court had erred by failing to determine whether defendant was competent to proceed prior to the beginning of defendant's trial. *State v. Allen*, 269 N.C. App. 24, 26–27 (2019).

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2. Although the trial court orally arrested judgment in connection with defendant's conviction for delivering buprenorphine, a written order that the trial court entered at the conclusion of defendant's trial reflected that judgment had been arrested in connection with defendant's conviction for selling buprenorphine. The Court of Appeals unanimously determined that this discrepancy constituted a clerical error and remanded this case to the Superior Court, Mitchell County, for the correction of this and another, separate clerical error.

3. In view of the fact that the notice of appeal that defendant, who was proceeding pro se at that point, filed with the Clerk of Superior Court, Mitchell County, was procedurally defective, defendant filed a petition seeking the issuance of a writ of certiorari authorizing review of the trial court's judgments on the merits with the Court of Appeals on 3 January 2019. The Court of Appeals allowed defendant's certiorari petition on 10 July 2019.

4. Neither the majority nor the dissenting opinions at the Court of Appeals discussed the merits of defendant's challenge to the denial of his motion to dismiss for insufficiency of the evidence.

¶ 16 According to the Court of Appeals, a criminal defendant cannot be tried or convicted "for a crime when by reason of mental illness or defect [the defendant] is unable to understand the nature and object of the proceedings against him," *Id.* at 27 (quoting N.C. Gen. Stat. § 15A-1001(a) (2017)), with "defendant's competency [to be] assessed at the time of trial" given that "a defendant's capacity to stand trial is not necessarily static." *Id.* (quoting *State v. Mobley*, 251 N.C. App. 665, 675 (2017)). In addition, the Court of Appeals noted that the trial court has a constitutional duty to initiate a competency hearing on its own motion if the record contains "substantial evidence" tending to show that the defendant might not be competent to stand trial. *Id.* (citing *Mobley*, 251 N.C. App. at 668).

¶ 17 In the Court of Appeals' view, "there was substantial evidence before the trial court that [d]efendant might have been incompetent to stand trial," *id.*, with this evidence having included defendant's three involuntary commitments during the period between his arrest and trial, the fact that defendant had been diagnosed as suffering from a number of mental health conditions,[5] his history of noncompliance with mental health treatment, his significant intellectual disabilities and cognitive defects, and the fact that two out of the three competency evaluations conducted prior to trial resulted in a finding of incompetence. *Id.* at 28–29. In addition, the Court of Appeals noted that defendant's trial counsel had expressed concern about defendant's competence to stand trial during the pre-trial hearing that was held before Judge Gavenus, at which point defendant's trial counsel stated that he did not necessarily agree with Dr. Berger's decision to find defendant to be competent to stand trial and that, at an earlier point in time, defendant had not understood the manner in which the judicial system functioned and had continuously asked his trial counsel to explain what was occurring. *Id.* at 30–31.

¶ 18 Furthermore, the Court of Appeals stated that the mistaken responses to certain questions that the trial court had posed to defendant during the process leading to the acceptance of defendant's plea of guilty to having attained habitual felon status cast further doubt upon defendant's ability to understand the proceedings in which he was involved. *Id.* at 33. More specifically, the Court of Appeals pointed out that, when asked if he was under the influence of alcohol, drugs, narcotics,

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5. The mental health diagnoses noted by the Court of Appeals included severe methamphetamine use disorder, severe opioid use disorder, adjustment disorder with depressed mood, antisocial personality disorder, attention deficit hyperactivity disorder, an unspecified mood disorder, an unspecified personality disorder, and polysubstance dependence. 269 N.C. at 28.

medicines, pills, or other intoxicants, defendant had responded in the negative. According to the Court of Appeals, this answer should have raised concerns on the part of the trial court about the extent to which defendant was taking the medications that had been prescribed for him in connection with the "intensive outpatient" mental health treatment that defendant had been receiving. *Id.* In the same vein, the Court of Appeals emphasized that, when asked if he had agreed to a plea arrangement in connection with the entry of his plea of guilty to having attained habitual felon status, defendant had mistakenly responded in the affirmative before correcting his answer both prior to and after receiving clarification from his trial counsel. *Id.*

¶ 19 After reviewing the information contained in the record, the Court of Appeals reiterated that "the trial court must evaluate the defendant's competency to proceed *at the time of trial*" in light of possible fluctuations in a defendant's competence to stand trial, *id.* at 34 (citing *State v. Cooper*, 286 N.C. 549, 565 (1975)). In view of the fact that defendant's most recent psychiatric evaluation, which had been conducted in June 2017, "was not current, and may not have accurately reflected Defendant's mental state at trial in February 2018" given that defendant's competence could have deteriorated over the course of the ensuing eight-month period, *id.*, and the fact that the pre-trial competency hearing that had been conducted before Judge Gavenus occurred six months before defendant's trial, the Court of Appeals held that "the trial court erred in failing to determine whether, *at the time of trial*, [d]efendant was competent to proceed." *Id.* at 35. As a result, the Court of Appeals remanded this case to the Superior Court, Mitchell County, for the purpose of determining whether defendant had been competent at the time of trial, with defendant to be granted a new trial in the event that the trial court could not determine on remand that defendant had been competent while the trial was in progress. *Id.* at 35–36.

¶ 20 In a dissenting opinion, Judge Dillon expressed the opinion that the trial court had not erred by failing to hold a second competency hearing prior to the beginning of defendant's trial. *Id.* at 36. After noting that the trial court was only required to initiate a competency hearing on its own motion in the event that the record contained "substantial evidence" tending to show that the defendant might be incompetent, *id.* (citing *State v. Badgett*, 361 N.C. 234, 259 (2006)), Judge Dillon pointed out that a trial court was not required to initiate a hearing for the purpose of evaluating a defendant's competence to stand trial after an earlier hearing stemming from an expression of concern about the defendant's competence raised by the defendant's trial counsel two months prior to

trial had resulted in a determination that the defendant was competent to stand trial. *Id.* at 37 (citing *State v. Young*, 291 N.C. 562, 568 (1977) (stating that, "where, as here, 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").

¶ 21 According to Judge Dillon, the record contained no indication at the time that defendant's trial began that defendant lacked the capacity to proceed, that neither defendant's trial counsel nor anyone else had expressed any concern about defendant's capacity to proceed during defendant's trial, and that nothing had occurred during defendant's trial that sufficed to raise questions about defendant's capacity to proceed. *Allen*, 269 N.C. App. at 37–38. In Judge Dillon's view, defendant's denial that he was "under the influence of any alcohol, drugs, narcotics, medicines, pills or any other substances" at the time that he entered his plea of guilty to having attained habitual felon status should be understood as an indication that defendant was not currently using any illegal substances or impaired in any way that would have prevented him from understanding the nature and consequences of his decision to plead guilty, rather than as an indication that he was not taking his medication as directed. *Id.* at 38. In addition, Judge Dillon concluded that defendant's initial response to the trial court's inquiry concerning the extent, if any, to which he was entering a guilty plea pursuant to a plea arrangement with the State reflected a response to the first portion of the trial court's question, during which the trial court asked if defendant was pleading guilty, *id.*, and that defendant had immediately corrected his answer upon further inquiry. *Id.* at 38–39. The State noted an appeal to this Court from the Court of Appeals' decision based upon Judge Dillon's dissent.

¶ 22 In seeking to persuade us to overturn the Court of Appeals decision, the State argues that the record does not contain a substantial basis for questioning defendant's competence to stand trial in the aftermath of Judge Gavenus' finding that defendant was competent. After noting that the relevant inquiry "depends on the totality of the circumstances" and that a court "must review the entire record," citing *State v. Heptinstall*, 309 N.C. 231, 236–37 (1983), the State directs our attention to *Young*, 291 N.C. at 568, in which this Court held that, when a "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." According to the State, de-

fendant's most recent psychiatric evaluation found that he was competent, neither defendant nor his trial counsel disputed the contents of the evaluator's finding of competency at the pre-trial competency hearing held before Judge Gavenus, and nothing in the record tended to show that defendant had become incompetent between the date of the pre-trial competency hearing and the date of defendant's trial.

¶ 23 In addition, the State argues that the Court of Appeals' holding rested upon nothing more than speculation that defendant's mental capabilities might have deteriorated between the pre-trial competency hearing and the trial in spite of the fact that the record contained no indication that anything of the sort had occurred and that such speculation does not suffice to raise a bona fide doubt concerning defendant's competence. On the contrary, the State contends that the record contains substantial justification for the opposite conclusion given that defendant's condition had improved after two earlier evaluations found him to be incapable of proceeding, that defendant had received intensive psychiatric treatment that had resulted in improvements to his mental condition, and that defendant's decision to take responsibility for the crimes that he had committed at the sentencing hearing demonstrated that he comprehended the nature of the proceedings in which he was involved.

¶ 24 The State contends that the Court of Appeals misinterpreted the information contained in the record in concluding that defendant might have become incompetent by the time of trial. In the State's view, the Court of Appeals erred by relying upon defendant's intellectual disability and low IQ scores in determining that he might have become incompetent given that a competency determination requires evaluation of the extent to which a defendant is able to understand the proceedings that have been initiated against him and to assist in his defense, citing *Godinez v. Moran*, 509 U.S. 389, 396 (1993). Similarly, the State claims that the Court of Appeals erred by relying upon the statements that defendant's trial counsel made at the competency hearing held before Judge Gavenus given that defendant's trial counsel requested the trial court to "make a finding" concerning defendant's competency and did not dispute Judge Gavenus' determination that defendant was capable of proceeding. Finally, the State argues that the Court of Appeals erred by relying upon certain statements that defendant made during the habitual felon status plea acceptance and sentencing phases of the proceeding as tending to show defendant's incompetence given that defendant's denial that he was under the influence of any drugs or medication could readily be understood as an assertion that he had not consumed any illegal drugs or other substances that might impair his judgment rather than as

an admission that he had stopped complying with the course of mental health treatment that had been prescribed for him and given that defendant's mistaken statement that he had entered his plea of guilty to having attained habitual felon status as part of a plea arrangement represented nothing more than an acknowledgement that he was pleading guilty and given that his error in making this statement had been quickly corrected.

¶ 25 In seeking to persuade us to uphold the Court of Appeals decision, defendant asserts that a trial court has a constitutional duty to initiate a competency hearing on its own motion in the event that the evidence "raises a 'bona fide doubt' as to a defendant's competence to stand trial," citing *Pate v. Robinson*, 383 U.S. 375, 385 (1966). According to defendant, the trial court had a duty to evaluate his competency to proceed at the time of trial and that, "[d]ue to the nature of [his] limitations, the trial court could not assume the stability of [his] competence when a substantial period of time elapsed between the finding of competence and the commencement of trial." In defendant's view, defendant's (1) well-documented disabilities; (2) short- and long-term memory deficits and impaired ability to recall information; (3) profound deficits in his fund of knowledge; and (4) various mental illnesses and conditions all raised questions about the extent to which defendant was competent to stand trial. As a result of the fact that his competency was "transient in nature, tenuous, and extremely fragile," and that a period of eight months had elapsed between his most recent psychiatric evaluation and the time of trial, defendant argues that the trial court had erroneously relied upon a "stale competency determination" that failed to reflect his present ability to stand trial.

¶ 26 In addition, defendant argues that his responses during the plea colloquy and sentencing phase demonstrate that he failed to understand the nature and consequences of the proceedings against him. In defendant's view, our decision in *Young* stands for the proposition 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" and does not create a presumption of ongoing competency in the event that the defendant was found to be competent at the time of his or her most recent psychiatric evaluation.

¶ 27 "A criminal defendant may not be tried unless he is competent," *Godinez*, 509 U.S. at 396 (citing *Pate*, 383 U.S. 375, 378 (1966)), with a defendant having been deprived of his right to avoid being deprived of liberty without due process of law in the event that his conviction resulted from a trial during which he was incompetent. *Pate*, 383 U.S. at 378. A

defendant is deemed to be incapable of standing trial when he "lacks 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*, 420 U.S. at 171; see also N.C.G.S. § 15A-1001(a) (providing 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"). A defendant's competence to stand trial may be raised at any time during trial, with "the court [being required to] hold a hearing to determine the defendant's capacity to proceed" in the event that a challenge to the defendant's competence is asserted. N.C.G.S. § 15A-1002(b)(1) (2019). In addition, a trial court in this jurisdiction 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." *Heptinstall*, 309 N.C. at 236 (1983) (quoting *Young*, 291 N.C. at 568).

¶ 28 The "substantial evidence" sufficient to require a trial court to initiate a competency hearing on its own motion exists in situations in which the record raises a "bona fide doubt" concerning the defendant's competence. *Pate*, 383 U.S. at 385. In determining whether the evidence is sufficient to raise a bona fide doubt concerning the defendant's competence, a trial court is entitled to consider, among other things, the

> defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial . . . but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

Drope, 420 U.S. at 180. "The relevant period of time for judging a defendant's competence to stand trial is 'at the time of trial.' " *State v. Hollars*, 376 N.C. 432, 442 (2020) (quoting *Cooper*, 286 N.C. at 565). Moreover, "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.' " *Hollars*, 376 N.C. at 442 (quoting *Drope*, 420 U.S. at 181).

¶ 29 The mere existence of evidence tending to show that the defendant has exhibited certain signs of mental disorder in the past or has engaged in what might be deemed unusual behavior during trial does not necessarily require the trial court to inquire into the defendant's competence to proceed on his own motion. For example, we have previously stated that, 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." *Young*, 291 N.C. at 568. Similarly, in a case in which the trial judge made inquiry of the defendant's trial counsel prior to the commencement of the defendant's trial for first-degree murder if the defendant's competence had been evaluated and in which the defendant's trial counsel responded by stating that the defendant had previously received mental health services for the purpose of treating his depression following a suicide attempt, we determined that

> there is some evidence in the record indicating that defendant had received precautionary treatment for depression and suicidal tendencies several months before trial. However, this evidence of past treatment, standing alone, does not constitute "substantial evidence" before the trial court, indicating that defendant "lack[ed] the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense" at the time his trial commenced.

State v. King, 353 N.C. 456, 467 (2001) (citation omitted) (first quoting *Young*, 291 N.C. at 568; and then quoting *Drope*, 420 U.S. at 171). Finally, in *Badgett*, 361 N.C. at 259–60, this Court determined that the fact that the defendant had told the jury that he wished to be sentenced to death and verbally attacked the prosecutor during an emotional outburst "did not constitute 'substantial evidence' requiring the trial court to institute a competency hearing." As a result, the fact that a defendant has received mental health treatment in the past or acts in an unusual or emotional manner during trial does not, without more, suffice to require the trial court to undertake an inquiry into the defendant's competence on the trial court's own motion.

¶ 30 A careful review of the record before the trial court at the time of defendant's trial indicates that he had been involuntarily committed on four occasions during the two-year period between the date upon which defendant was arrested and the date upon which this case was called for trial. During this period, three different evaluations were

conducted for the purpose of determining whether defendant was competent to stand trial. In the first of these evaluations, which was conducted during November 2016, Mr. Freedman found that defendant was not competent to stand trial given the existence of profound deficits in his fund of knowledge, his low IQ scores, his intellectual disabilities, and his near-complete failure to understand the judicial process. In addition, defendant's treatment team diagnosed him as suffering from severe methamphetamine use disorder, severe opioid use disorder, adjustment disorder with depressed mood, antisocial personality disorder, and suicidal ideation and Mr. Freedman noted that defendant had previously been diagnosed as suffering from attention deficit/hyperactivity disorder, mood disorder, polysubstance dependence, and personality disorder.

¶ 31 At the time of defendant's second evaluation, which was conducted in February 2017, Dr. Berger opined that, while defendant was not capable of proceeding to trial at that time, the extent to which he might be competent to stand trial in the future would depend upon the extent to which defendant could develop an understanding of the judicial process and the nature and extent of the charges that had been lodged against him. According to Dr. Berger, any improvement in the likelihood that defendant would be found competent to stand trial depended upon the extent to which defendant successfully participated in the competency restoration classes that were available at Broughton Hospital. In the course of his commitment to Broughton Hospital, defendant received various treatments that were designed to improve his mental health and comprehension, including the administration of medication for the purpose of addressing anxiety and improving his sleep, participation in educational groups focused upon improving his understanding of courtroom procedures, and attendance at Alcoholics Anonymous meetings.

¶ 32 After defendant had received treatment at Broughton Hospital for about a month, Dr. Berger conducted another evaluation of defendant's competence to stand trial. At that time, defendant was only diagnosed as suffering from intellectual disability and opiate use disorder in sustained remission. Dr. Berger reported that, according to the treatment team, defendant had cooperated with the educational and treatment process, had not presented any behavioral management challenges, had been able to advocate for his own needs, had interacted with his peers and hospital staff in an appropriate manner, and had been able to independently complete tasks associated with daily living. In addition, Dr. Berger noted that defendant was able to identify his attorney; name the specific charges that had been lodged against him; state that, in the

event that he was found guilty of committing a felony, he would receive a prison sentence; and was able to provide a basic explanation of the plea negotiation process. According to Dr. Berger, defendant was able to provide "reality-based and accurate" explanations of the roles played by defense attorneys, prosecutors, judges, members of the jury, and witnesses during the trial process and had informed Dr. Berger that he was ready to proceed to trial and believed that he would be treated fairly in the judicial system. As a result, Dr. Berger concluded that defendant's competency had been restored and that he was capable of proceeding to trial.

¶ 33 At the pre-trial competency hearing that was held before Judge Gavenus, defendant's trial counsel did express reservations about whether defendant's competency had been "restored" during his time at Broughton Hospital, stating "I don't agree that he's necessarily capable" and indicating that "there is some question in my mind" about defendant's competency "because I've dealt with [defendant] for a number of years." On the other hand, defendant's trial counsel admitted he was not "a doctor to judge [defendant's] condition" and asked Judge Gavenus to carefully examine Dr. Berger's report, thoroughly consider the evidence, and make a determination concerning defendant's competence to stand trial. After reading Dr. Berger's second forensic evaluation and asking defendant several questions, Judge Gavenus determined that defendant was competent to proceed.

¶ 34 At the time that this case was called for trial, neither party made any attempt to revisit the issue of defendant's competence. In addition, neither party raised the issue of defendant's competence at any point during the course of the trial. Finally, no witness testified in such a manner as to question defendant's competence and nothing else occurred during the trial that tended to suggest that defendant had become incompetent since Judge Gavenus had found that defendant was capable of standing trial. As a result, since defendant had previously been "committed and examined relevant to his capacity to proceed" and since "all evidence before the court indicate[d] that he ha[d] that capacity," *Young*, 291 N.C. at 568, we conclude that the trial court did not err by failing to initiate an inquiry into the issue of defendant's competence on its own motion.

¶ 35 In support of his argument, defendant points to certain statements that he and his trial counsel made during the post-verdict proceedings that resulted in the acceptance of defendant's guilty plea to having attained habitual felon status and the imposition of the trial court's judgments. A careful review of the statements upon which defendant relies, in the context in which they were made, satisfies us that defendant's

arguments lack persuasive force. For example, we are unable to understand defendant's negative response to the trial court's inquiry concerning whether defendant was "now under the influence of any alcohol, drugs, narcotics, medicines, pills or any other substances" as a suggestion that he had ceased taking the mental health medications that had been prescribed for him, particularly given defendant's subsequent claim that he had "not been into nothing" illegal in the recent past and had "[n]ever failed a drug test" that had been administered by his probation officers and given defendant's claim that he had been receiving "intensive outpatient" services from an organization associated with Broughton Hospital. Instead, defendant's negative answer to the trial court's question seems to us to be little more than a denial that his mental faculties were adversely affected at the time of the entry of his guilty plea as a result of the consumption of an impairing substance. Similarly, we are unable to understand defendant's initial error in stating that he was entering a plea of guilty to having attained habitual felon status pursuant to a plea agreement with the prosecutor as casting doubt upon defendant's competence given that the question actually posed by the trial court inquired as to whether defendant had "agreed to plead guilty as part of a plea arrangement" and given that defendant immediately withdrew his misstatement both before and after an intervention by his trial counsel. In other words, defendant's error looks like nothing more than a simple mistake. Moreover, even though defendant's trial counsel stated at the sentencing hearing that defendant was "on disability," that he was "a very low-functioning individual" with an IQ around 82, and that "he was found to be incompetent and then found to be competent at a later date,"[6] this argument was, on its face, nothing more than a successful attempt to persuade the trial court to find the existence of the statutory mitigating factor set out in N.C.G.S. § 15A-1340.16(e)(3) (establishing a statutory mitigating factor available in situations in which "[t]he defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense"). Finally, defendant's request for the entry of a judgment placing him on probation strikes us as, in essence, a cry for mercy rather than an indication that defendant failed to understand the nature of the proceedings in which he was participating. As a result, we conclude that none of these statements, taken either individually or in conjunction with each other, suffice to raise a substantial question about defendant's competence to stand trial.

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6. As has been noted elsewhere in this opinion, Mr. Freedman reported that defendant's reported IQ was approximately 60.

¶ 36 Ultimately, defendant's challenge to the trial court's failure to inquire into defendant's competence to stand trial on its own motion rests upon the fact that defendant had significant cognitive deficiencies and the fact that a person's competence is subject to change. Although a defendant's competence must be evaluated "at the time of trial" and although events that occur during trial may place the trial court on notice that a defendant's competence has become subject to question, *Hollars*, 376 N.C. at 442, a trial court is also entitled to rely upon the correctness of a pre-trial competency determination in the absence of a specific basis for believing that the defendant's competence is subject to legitimate question. In view of our determination that nothing tending to raise a substantial doubt about defendant's continued competence occurred after the entry of Judge Gavenus' order finding defendant to be competent to stand trial and before the end of the trial, we hold that the trial court did not err by failing to conduct an inquiry into defendant's competence upon its own motion and that the Court of Appeals erred by reaching a contrary conclusion. As a result, the Court of Appeals' decision is reversed and this case is remanded to the Court of Appeals for further proceedings not inconsistent with this opinion, including consideration of defendant's challenge to the trial court's decision to deny his motion to dismiss the charges that had been lodged against him for insufficiency of the evidence.

REVERSED AND REMANDED.

STATE v. MELVIN

[377 N.C. 187, 2021-NCSC-39]

STATE OF NORTH CAROLINA
v.
JAMELL CHA MELVIN AND JAVEAL AARON BAKER

No. 486PA19

Filed 16 April 2021

Criminal Law—joinder—of defendants—objection—preservation for appellate review

Defendant properly preserved for appellate review his claim that he should not have been tried jointly with another defendant because they had antagonistic defenses, where defendant objected to the joinder before trial, moved to sever during trial, renewed his motion to sever at the close of the State's evidence and at the close of all evidence, and finally moved again to sever after closing arguments.

Justice BERGER concurring in result only.

Chief Justice NEWBY and Justice BARRINGER join in this concurring opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA18-843, 2019 WL 6134204 (N.C. Ct. App. 2019), finding no error in part and vacating and remanding in part judgments entered on 4 August 2017 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court on 15 February 2021.

Joshua H. Stein, Attorney General, by Benjamin O. Zellinger, Special Deputy Attorney General, for the State-appellee.

Sarah Holladay for defendant-appellant Jamell Cha Melvin.

EARLS, Justice.

¶ 1 In the summer of 2015, armed robbers stole nearly half a million dollars from Raleigh's Walnut Creek Amphitheater. The narrow question in this appeal is whether one of the defendants in this case, Jamell Cha Melvin, properly preserved for appellate review his claim that he should not have been tried jointly with another defendant because the two had antagonistic defenses at trial. Three defendants, Mr. Melvin, Javeal Aaron Baker, and Kianna Baker, were tried together as co-defendants

for their involvement in the crime after their motions for separate trials were denied. Following their convictions, Mr. Melvin and Mr. Javeal Baker appealed to the Court of Appeals, arguing that the trial court should have granted their motions for severance. The Court of Appeals concluded that their claims had not been properly preserved for appeal because the grounds for severance argued at the beginning of the trial were not the same as the grounds relied upon by defendants on appeal. However, the Court of Appeals erroneously analyzed the case as one involving severance of offenses rather than severance of defendants. Mr. Melvin sought and was allowed discretionary review by this Court. We reverse and remand to the Court of Appeals for consideration on the merits of Mr. Melvin's claim for severance of defendants.[1]

I. Background

¶ 2 At trial, the State presented evidence that three armed men entered the Walnut Creek Amphitheater in Raleigh, North Carolina, on 13 July 2015. The men were wearing dark clothing, except for one who was wearing a tan coat, and all three men had their faces concealed. The assailants corralled five employees in one or two offices, holding them all at gunpoint and threatening to shoot them. After forcing one of the employees, a supervisor, to call the general manager, the men compelled the general manager to open the safe. Two of the armed men then began packing money into bags while the third moved some of the employees into a walk-in freezer. The men stole approximately $497,000 and then fled the scene. The State alleged that Mr. Melvin was the driver of a car that transported the three men who robbed the amphitheater.

¶ 3 On 8 June 2017, the State filed motions (1) to join for trial the offenses of six counts of robbery with a dangerous weapon, one count of conspiracy to commit robbery with a dangerous weapon, and five counts of

1. The Court of Appeals also considered arguments from Mr. Baker and Mr. Melvin that (1) the trial court erred when, in response to a jury request for available information on Crime Stopper tips, the trial court failed to repeat a limiting instruction regarding anonymous tips; and (2) the trial committed plain error by instructing the jury that it could find Mr. Baker and Mr. Melvin guilty on six separate counts of robbery. *State v. Melvin*, No. COA18-843, 2019 WL 6134204, at *5–7 (N.C. Ct. App. Nov. 19, 2019) (unpublished). It rejected these arguments. *Id.* The Court of Appeals also rejected Mr. Baker's argument that the record did not contain any evidence that Mr. Baker had constructive possession of money found in a storage unit and rejected Mr. Melvin's argument that cumulative error warranted a new trial and his argument that the trial court erred when it entered a judgment for restitution. *Id.* at *7–9. Finally, the Court of Appeals concluded that the trial court erred in entering a civil judgment for attorneys' fees against Mr. Melvin because the trial court failed to provide Mr. Melvin with an opportunity to be heard. *Id.* at *9. Our decision leaves undisturbed these portions of the Court of Appeals decision.

second degree kidnapping against each of four defendants (Mr. Melvin, Mr. Baker, Shymale Robertson, and Adjani Bryant); and (2) to join for trial six defendants (Mr. Melvin, Mr. Javeal Baker, Shymale Robertson, Adjani Bryant, Ms. Kianna Baker, and Lorenzo McNeil) on the theory that the offenses charged against each defendant were all part of a common scheme or plan. The motion for joinder of offenses and the motion for joinder of defendants were included in the same document for each defendant, titled "Motion and Order for Joinder." The record contains a subsequent motion by the State, made 28 June 2017, that sought to join all of the same defendants with the exception of Adjani Bryant, who testified against Mr. Melvin and Mr. Baker at trial.

¶ 4 At a hearing to consider the State's motions for joinder, the defendants made various arguments about why they should be tried separately. Counsel for Mr. Robertson argued, in part, that Mr. Robertson's case should be severed because he intended to call a witness named Chicago Smith who would provide information, in the form of a statement from Mr. Melvin, that was potentially exculpatory for Mr. Robertson and potentially incriminating for Mr. Baker and Mr. Melvin. Mr. Robertson's counsel also argued that much of the evidence expected to be presented in the case did not pertain to Mr. Robertson, that he intended to elicit information from one of the State's witnesses that would likely be prejudicial to the other defendants and to Mr. Melvin in particular, that the other defendants (and Mr. Melvin particularly) were more culpable than Mr. Robertson, and that Mr. Robertson might be convicted on the basis of his association with the other defendants rather than on the basis of his guilt.

¶ 5 Mr. Baker's counsel asked for Mr. Baker's trial to be severed from Mr. Robertson's trial because of Mr. Robertson's plan to call Chicago Smith, arguing that if they were tried jointly, he would be unable to cross-examine Mr. Melvin, a co-defendant who was the source of Chicago Smith's information. However, Mr. Baker's counsel suggested that the problem could be solved if Mr. Baker's and Mr. Melvin's trials were severed from each other. Mr. Baker's counsel also requested severance from Ms. Kianna Baker (Mr. Baker's mother) and Mr. Melvin (Ms. Baker's partner), on the basis that he might be convicted based on the conduct of Ms. Baker and Mr. Melvin. Mr. Baker's counsel argued that the dearth of direct evidence related to his client and the more substantial evidence forecast to be presented against Mr. Melvin and Ms. Kianna Baker made it more likely that he might be convicted as a result of his relationship to Mr. Melvin and Ms. Baker.

¶ 6 Mr. Melvin's counsel argued that Mr. Robertson's trial should be severed because Chicago Smith's testimony, expected to be elicited by Mr. Robertson, was likely to conflict with the State's evidence presented through the testimony of Adjani Bryant. On his own motion to sever, Mr. Melvin's counsel argued that, because the State alleged that Mr. Melvin was the driver rather than one of the three armed men who robbed the amphitheater, Mr. Melvin should be tried separately to avoid confusing the jury.

¶ 7 Ms. Kianna Baker's counsel argued that she should be tried separately because (1) Ms. Baker was charged as an accessory after the fact rather than a principal, and (2) Ms. Baker was likely to be convicted on the basis of her associations rather than on the evidence. Mr. McNeil's counsel did not make any arguments as to joinder in anticipation that Mr. McNeil's case would be resolved before the trial began.

¶ 8 After taking the motions under advisement, the trial court ultimately granted the State's motion to join the defendants and offenses for trial as to Mr. Baker, Mr. Melvin, Ms. Kianna Baker, and Mr. McNeil. As to Mr. Robertson, the trial court denied the State's motion to join him as a defendant for trial, but granted the State's motion to join his charged offenses. The joint trial of Mr. Melvin, Ms. Kianna Baker, and Mr. Javeal Baker began on 10 July 2017.

¶ 9 During the joint trial, Mr. Melvin moved to sever defendants an additional five times. First, Mr. Melvin asked to be heard following direct examination testimony by Kelly Ann Kinney, a detective with the Raleigh Police Department. Mr. Melvin argued that the detective had testified to statements made by Ms. Baker to Detective Kinney indicating that Mr. Melvin sold marijuana and had purchased two vehicles. Mr. Melvin argued that he had "wanted to sever for these particular reasons" and renewed his motion to sever the defendants, which was denied. Second, Mr. Melvin renewed his objection to joinder of defendants, without further explanation, at the close of the State's evidence. Third, Mr. Melvin renewed his objection to joinder of defendants, again without further argument, at the close of all evidence.

¶ 10 Mr. Melvin's final two objections to joinder of the defendants came after the parties' closing arguments. The first of the two objections, Mr. Melvin's fifth overall objection to the defendants' joinder, came at the end of the jury's first day of deliberations. After the trial court dismissed the jury for the evening, the trial court asked whether there were any additional objections from counsel regarding instructions that had been provided. Mr. Melvin's counsel stated, "Nothing as to that. I did want

to revisit a matter and renew my objection to the joinder of this matter based on [Mr. Baker's counsel's] comments in his closing arguments." The trial court denied the motion. The following day, the jury returned its verdicts. The day after that, before the trial court conducted sentencing, Mr. Melvin's counsel asked to be heard and explained that his objection after the closing argument from Mr. Baker's counsel was because Mr. Melvin "not only had to contest [the State] but had to contest [Mr. Baker]." In the view of Mr. Melvin's counsel, this was in violation of Mr. Melvin's rights under the United States and North Carolina constitutions.

¶ 11 During his closing argument, Mr. Baker's counsel had argued to the jury that Mr. Melvin had committed the actual robbery, stating:

> The Walnut Creek Amphitheater was robbed. Those six victims were robbed. Those six victims were then kidnapped in the sense of being put in a cooler or left in the cash room. The question is who did that? And the defense that we've been trying to present to you through the questions is that it wasn't Javeal Baker, but it was Adjani Bryant, who you know did go into this robbery, and it was Jamell Melvin, and it was Lorenzo [McNeil].

Mr. Baker's counsel then emphasized that "the evidence that [he'd] tried to present" through his questions was that the robbery "was committed by Adjani Bryant, by Jamell Melvin, and by Lorenzo [McNeil]."[2] Mr. Baker's counsel went on to assert that Mr. Melvin (rather than Mr. Baker) had been in the building committing the robbery, arguing that Mr. Melvin matched the physical description of one of the robbers and that Mr. Melvin was more closely associated with the other suspects in the case.

¶ 12 At the trial's conclusion, Mr. Melvin and Mr. Baker were each convicted of six counts of robbery with a dangerous weapon, five counts of second-degree kidnapping, and one count of conspiracy to commit

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2. A review of the trial transcript reveals the efforts of Mr. Baker's trial counsel in this regard. For example, Mr. Baker's counsel used cross-examination to elicit information regarding a violent assault by Mr. Melvin; ties between Mr. Melvin and Adjani Bryant (who admitted involvement in the robbery); and Mr. Melvin's history of working at the amphitheater, contrasting the lack of a similar history on Mr. Baker's part. It was also Mr. Baker's counsel who elicited testimony regarding Mr. Melvin's height, which he later argued was evidence that Mr. Melvin and not Mr. Baker had entered the amphitheater to commit the robbery. While these examples are not every instance of Mr. Baker's counsel referring to Mr. Melvin, they indicate that the alleged conflict did not first appear during closing arguments.

robbery with a dangerous weapon.[3] The trial court entered judgment, and they both appealed their judgments to the Court of Appeals.

¶ 13 On appeal to the Court of Appeals, Mr. Melvin and Mr. Baker primarily argued that the trial court should have severed their cases and tried them separately. *State v. Melvin*, No. COA18-843, 2019 WL 6134204, at *1 (N.C. Ct. App. Nov. 19, 2019) (unpublished). They asserted that they had put on antagonistic defenses at trial. *Id.* at *2. The Court of Appeals did not address the merits of this argument, holding instead that it was unpreserved because neither Mr. Melvin nor Mr. Baker had argued before trial that they planned to present antagonistic defenses. *Id.* at *2–5. After rejecting most of the defendants' other arguments as being without merit, the Court of Appeals found no error in the judgments of conviction but vacated and remanded the civil judgment of attorneys' fees against Mr. Melvin. *Id.* at *9. Mr. Melvin sought discretionary review in this Court, asking that we review that portion of the Court of Appeals decision which addressed his objection to the joinder of his trial with that of Mr. Baker. We allowed the petition on 26 February 2020.

II. Standard of Review

¶ 14 "This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law." *State v. Golder*, 374 N.C. 238, 244 (2020) (quoting *State v. Melton*, 371 N.C. 750, 756 (2018)). As to the trial court's grant of the State's motion for joinder, consolidating the trials of defendants alleged to be responsible for the same behavior is preferred as a matter of public policy. *State v. Tirado*, 358 N.C. 551, 564 (2004) (citing *State v. Nelson*, 298 N.C. 573, 586 (1979)). Therefore, "[a] trial court's ruling on a motion for joinder is reviewed for abuse of discretion in light of the circumstances of the case, and the ruling will not be disturbed on appeal absent a showing that the joinder caused the defendant to be deprived of a fair trial." *Id.* (citing *State v. Golphin*, 352 N.C. 364, 399 (2000)); *see also State v. Slade*, 291 N.C. 275, 281–82 (1976). We will reverse a trial court for abuse of discretion "only upon a showing that its actions are manifestly unsupported by reason" or where the ruling "was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777 (1985). However, such an abuse of discretion is established when the trial court makes an error of law. *Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2 (2020) (citing *Koon v. United States*, 518 U.S. 81, 100 (1996)); *State v. Rhodes*, 366 N.C. 532, 536 (2013); *accord Lamm v. Lorbacher*, 235 N.C. 728, 732 (1952) (stating

3. Ms. Kianna Baker, who was not a party to the appeal below, was convicted of accessory after the fact of robbery with a dangerous weapon.

that "a matter resting in the sound discretion of the trial court . . . is not reviewable on appeal" absent "a palpable abuse of such discretion" or "some imputed error of law or legal inference" (first quoting *Johnston v. Johnston*, 213 N.C. 255, 257 (1938); then quoting *Hughes v. Oliver*, 228 N.C. 680, 685 (1948); then quoting *Johnston*, 213 N.C. at 257)).

III. Severance of Defendants for Trial

¶ 15 The Court of Appeals erred by considering only the pretrial motions for severance. Instead, it should have considered each of the motions made by Mr. Melvin's counsel and decided on the merits whether the trial court was required to sever the defendants' trials.

¶ 16 Section 15A-927 of the General Statutes governs objections to the joinder of defendants for trial. The statute provides that a trial court "must deny a joinder for trial or grant a severance of defendants whenever" (1) the trial court finds before trial that severance is necessary to protect a defendant's speedy trial right or to promote a fair determination of guilt or innocence, or (2) the trial court finds during trial that severance is "necessary to achieve a fair determination" of guilt or innocence. N.C.G.S. § 15A-927(c)(2) (2019). If during trial, the motion to sever must be made by the severing defendant or by the prosecutor with the severing defendant's consent. N.C.G.S. § 15A-927(c)(2)(b). Thus, the statute contemplates that defendants may object to joinder or move for severance both "before trial" and "during trial." N.C.G.S. § 15A-927(c)(2). Further, the statute does not limit such objections or motions to the period of time before trial or before the close of the State's evidence. *See id.* Instead, the trial court "must deny a joinder for trial or grant a severance of defendants whenever . . . it is found necessary to achieve a fair determination of the guilt or innocence of [the severing] defendant." *Id.* Defendants may preserve for appellate review, then, a claim for severance of defendants by objecting to joinder or moving for severance of defendants at any point during the trial. *See*, *e.g.*, *State v. Evans*, 346 N.C. 221, 231–32 (1997) (considering the merits of a defendant's argument that the trial court erred by denying his motion to sever the defendant's case for trial based in part on evidence presented during a co-defendant's case-in-chief); *State v. Workman*, 344 N.C. 482, 492–96 (1996) (considering the merits of a defendant's argument that the trial court erred by denying his motion to sever the defendant's case for trial based only on occurrences after the State rested its case-in-chief). There is no part of the statute which would support a conclusion to the contrary.

¶ 17 The Court of Appeals concluded that Mr. Melvin's argument for severance was not preserved and stated that "[t]o preserve an argument

concerning joinder or severance for appellate review, the defendant must assert that specific argument to the trial court before trial or, if the ground for severance arises only after the trial begins, immediately after that ground becomes apparent." *Melvin*, 2019 WL 6134204, at *2 (citing *State v. Walters*, 357 N.C. 68, 79 (2003)). This is true as to severance of offenses. *See* N.C.G.S. § 15A-927(a)(1) ("A defendant's motion for severance of offenses must be made before trial as provided in G.S. 15A-952, except as provided in G.S. 15A-953, and except that a motion for severance may be made before or at the close of the State's evidence if based upon a ground not previously known."); *accord Walters*, 357 N.C. at 79 ("Pursuant to N.C.G.S. § 15A-927(a), a defendant must make a motion for severance of offenses before trial unless the basis for the motion is a ground not previously known. Under such a situation, the defendant may move for severance during trial but no later than the close of the State's evidence."). However, the statute contains no similar requirement for the timing of a motion for severance of defendants. *See generally* N.C.G.S. § 15A-927.

¶ 18 Indeed, this Court has previously addressed the merits of an argument for severance of defendants against a similar procedural backdrop. In *State v. Pickens*, 335 N.C. 717 (1994), the two co-defendants "filed motions to sever prior to trial" which were denied. *Id.* at 724. Both defendants renewed their motions throughout the trial and were denied. *Id.* In that decision, we gave no indication that we were limiting our analysis to the arguments made prior to trial. Instead, we considered the "numerous evidentiary rulings" identified by the co-defendants "which they contend[ed] resulted in the denial of a fair trial for each of them." *Id.*; *see also Nelson*, 298 N.C. at 586–87 (considering testimony of co-defendants, which necessarily occurred after the close of the State's evidence, to determine whether motions of severance of defendants were properly denied). In the decision below, the Court of Appeals relied on two of our prior decisions to conclude that the arguments of Mr. Melvin and Mr. Baker were unpreserved. *See Melvin*, 2019 WL 6134204, at *2 (citing *Walters*, 357 N.C. at 79); *Id.* at *4 (citing *State v. Silva*, 304 N.C. 122, 127 (1981)). However, both of those decisions pertained to severance of offenses rather than severance of defendants. *See Walters*, 357 N.C. at 79 (considering preservation of the defendant's argument that the trial court erred by consolidating "the murders and related charges regarding" multiple victims); *Silva*, 304 N.C. at 126 (considering preservation of the defendant's argument that the trial court erred by consolidating charges of robbery, larceny, and conspiracy).

¶ 19 On these facts, where Mr. Melvin objected to joinder prior to trial, moved to sever during trial when he perceived that testimony relating

a co-defendant's statements prejudiced him, renewed the motion to sever at the close of the State's evidence and at the close of all evidence, and again moved to sever on the basis of a co-defendant arguing during closing that Mr. Melvin was guilty, we hold that Mr. Melvin sufficiently preserved for appellate review his motion to sever his trial from that of his co-defendants on the basis of antagonistic defenses. The Court of Appeals erred by applying the preservation standard for severance of offenses rather than the standard applicable to severance of defendants and erroneously limited its consideration to only Mr. Melvin's pretrial arguments for severance. As a result, we reverse the Court of Appeals decision holding that Mr. Melvin did not adequately preserve his argument and remand to that court for consideration of Mr. Melvin's claim on the merits.

REVERSED AND REMANDED.

Justice BERGER concurring in result only.

¶ 20 I agree with the majority that the Court of Appeals applied the wrong statute when it analyzed this case. Rather than applying N.C.G.S. § 15A-927(c)–severance of defendants–the Court of Appeals applied N.C.G.S. § 15A-927(a)(1)–(2)–severance of offenses. However, I concur in result only because this case should simply be remanded for the Court of Appeals to apply N.C.G.S. § 15A-927(c) and to analyze preservation under the appropriate statute, rather than this Court making the determination in the first instance.

¶ 21 Instead, the majority has issued an opinion concerning preservation which could be misinterpreted as removing Rule 10's requirement for specific grounds in cases involving joinder or severance of defendants. Given the plain language of Rule 10, the majority could not have intended for an objection to joinder on *Bruton* grounds to preserve an antagonistic defenses argument on appeal. It is more likely that the majority intended to convey that defendant's objection prior to sentencing preserved for appellate review his antagonistic defenses argument.

¶ 22 "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." N.C. R. App. P. 10(a). Defendant's sole motion to sever based on antagonistic defenses was his sixth objection to joinder, made after the jury verdict and prior to sentencing. A misreading of the majority opinion could allow defendants to argue one ground for severance at trial but still

preserve wholly unrelated arguments for appeal. This would undermine the purpose of requiring a party to state the specific grounds for a motion or an objection and obtain a ruling from the trial court.

¶ 23 N.C.G.S. § 15A-927(c) sets forth specific grounds for severance of defendants: when (1) "a defendant objects to joinder of charges against two or more defendants for trial because of an out-of-court statement of a codefendant makes reference to him but is not admissible against him," (2) "if before trial it is found necessary to protect a defendant's right to a speedy trial," or (3) either before or during trial, it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants. *See* N.C.G.S. § 15A-927(c)(1)–(3) (2019). The issue of antagonistic defenses is one of several circumstances in which severance may be related to promoting a fair determination of guilt or innocence, pursuant to N.C.G.S. § 15A-927(c)(2). *See State v. Pickens*, 335 N.C. 717, 725, 440 S.E.2d 552, 556 (1994) ("The test [for antagonistic defenses] is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." (cleaned up)).

¶ 24 Here, defendant only raised the specific ground of antagonistic defenses in his sixth objection to joinder. Defendant's other objections either concerned *Bruton* issues or were simply renewals of prior objections. As such, defendant's five earlier objections did not preserve the issue of antagonistic defenses for appellate review. *See State v. Ward*, 301 N.C. 469, 477, 272 S.E.2d 84, 89 (1980) ("A specific objection, if overruled, will be effective only to the extent of the grounds specified.").

¶ 25 During the pre-trial hearing, defendant first objected to joinder, arguing that there was a *Bruton* issue with potential witness Chicago Smith. During trial, defendant renewed his motion to sever based on *Bruton* because of a statement that defendant was a drug dealer. Counsel for defendant stated that he was renewing his motion to sever "for these particular reasons." Defendant's next two objections, made at the close of the State's evidence and the close of all of the evidence, were renewals of his prior objections. None of these objections mentioned antagonistic defenses, and there was no argument made by defendant related to antagonistic defenses.

¶ 26 After closing arguments, defendant's counsel again attempted to sever; this time based on comments counsel for co-defendant Baker made during closing arguments. However, defense counsel stated that he was "renew[ing his] objection to the joinder of this matter." Defendant failed to direct the court to the specific comments made by Baker's counsel

during closing arguments to which he was objecting, and he never objected based on antagonistic defenses.

¶ 27 Following the entry of the jury's verdicts, defense counsel finally articulated an objection related to antagonistic defenses. Defense counsel stated:

> during the course of the trial, I renewed my objection to the court joining these defendants for trial. I just want to make sure that it's on the record as to why. As you recall, Mr. Wilkinson gave a closing, and my client, Mr. Melvin, not only had to contest Mr. Waller but had to contest Mr. Wilkinson, and I think that's a violation of his constitutional rights, both under North Carolina and the U.S. Constitution. So I want to put that on the record.

¶ 28 This was the only time defendant argued for severance based on the possibility of antagonistic defenses and a fair determination of guilt or innocence.

¶ 29 The majority holds that:

> where [defendant] objected to joinder prior to trial, moved to sever during trial when he perceived that testimony relating a co-defendant's statements prejudiced him, renewed the motion to sever at the close of the State's evidence and at the close of all evidence, and again moved to sever on the basis of a co-defendant arguing during closing that [defendant] was guilty, we hold that [defendant] sufficiently preserved for appellate review his motion to sever his trial from that of his co-defendants on the basis of antagonistic defenses.

This could be read as holding that defendant's sixth objection preserved his antagonistic defense argument. Or, the majority opinion could be viewed, contrary to Rule 10, as permitting a defendant to object to joinder on one ground, but nevertheless preserve a different issue for our review.[1] The majority's approach, however, overlooks the fact that defendant abandoned many of his joinder arguments. *See* N.C. Rule App. P. 28(a)

1. Such a procedure would be equivalent to allowing an argument that a particular statement is not a present sense impression under Rule 803(1) of the North Carolina Rules of Evidence to then preserve for appellate review every potential hearsay objection that could have been made by a party.

("Issues not presented and discussed in a party's brief are deemed abandoned."). It seems incongruent to find preservation where a party has abandoned the issue on appeal.

¶ 30 While I agree with the majority that the Court of Appeals opinion was premised on the wrong statute, this matter should be remanded for the Court of Appeals to apply N.C.G.S. § 15A-927(c) and review preservation of defendant's antagonistic defenses argument under that section.

Chief Justice NEWBY and Justice BARRINGER join in this concurring opinion.

STATE OF NORTH CAROLINA
v.
ROBERT PRINCE

No. 225A20

Filed 16 April 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 843 S.E.2d 700 (N.C. Ct. App. 2020), vacating a judgment entered on 10 July 2018 by Judge Nathaniel J. Poovey in Superior Court, Gates County, and remanding for resentencing. Heard in the Supreme Court on 24 March 2021.

Joshua H. Stein, Attorney General, by Terence Steed, Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Emily Holmes Davis, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

¶ 1 Justice BERGER did not participate in the consideration or decision of this case. As to the appeal of right based on the dissenting opinion, the remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g.*, *Amward Homes, Inc. v. Town of Cary*, 365 N.C. 305, 716 S.E.2d 849 (2011); *State v. Pastuer*, 365 N.C. 287, 715 S.E.2d 850 (2011).

AFFIRMED.

STATE v. SCOTT

[377 N.C. 199, 2021-NCSC-41]

STATE OF NORTH CAROLINA
v.
WILLIAM LEE SCOTT

No. 78A20

Filed 16 April 2021

Appeal and Error—criminal law—constitutional violation—standard for determining prejudicial error—burden of proof

In a second-degree murder case arising out of an automobile wreck where the Court of Appeals held that the trial court erred by denying defendant's motion to suppress (which sought to exclude blood test results) but that—in light of defendant's high speed, reckless driving, and prior record—there remained substantial evidence to show malice to support a second-degree murder conviction and, therefore, defendant failed to show prejudicial error in the denial of the motion to suppress, the Court of Appeals erred by applying the wrong legal standard for determining prejudice and by wrongly placing the burden on defendant to show prejudice. Because a federal constitutional error occurred, the State had the burden of proving the error was harmless beyond a reasonable doubt and the case was remanded to the Court of Appeals for consideration in light of the correct standard of review.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 269 N.C. App. 457 (2020), finding no prejudicial error after appeal from a judgment entered on 23 July 2018 by Judge Paul C. Ridgeway in Superior Court, Alamance County. Heard in the Supreme Court on 15 February 2021.

Joshua H. Stein, Attorney General, by Kathryne E. Hathcock, Assistant Attorney General, for the State-appellee.

M. Gordon Widenhouse Jr. for defendant-appellant.

BARRINGER, Justice.

¶ 1 To address this appeal, this Court must decide whether the Court of Appeals erred by not deciding whether an error was harmless beyond a reasonable doubt and by placing the burden on defendant to show the error was prejudicial. We conclude the Court of Appeals erred. Thus, we reverse the Court of Appeals' decision and remand to the Court of Appeals to apply the proper standard.

I. Background

¶ 2 On 21 June 2013, defendant's car collided with another vehicle. The driver of the other vehicle was pronounced dead at the scene. Defendant was transported to Moses Cone Hospital where he was treated and released. The State filed an application for an order for Moses Cone Hospital medical records, seeking medical records and the defendant's blood from his 21 June 2013 admission to the hospital. The trial court issued an order directing Moses Cone Hospital to provide defendant's medical records and blood. The North Carolina State Crime Laboratory issued a report containing the analysis of blood testing on defendant's blood on 29 July 2013. The laboratory report contained the analyst's opinion that the blood alcohol concentration of defendant's blood was .22 grams of alcohol per 100 milliliters of blood.

¶ 3 Subsequently, in September 2013, the State obtained a grand jury indictment against defendant for second-degree murder, felony death by vehicle, and misdemeanor death by vehicle. Before trial, defendant filed a motion to suppress. In the motion, defendant sought to exclude evidence generated from defendant's blood, arguing the blood was obtained in violation of the Constitutions of the United States and of North Carolina. The trial court denied defendant's motion to suppress.

¶ 4 At trial, the State introduced, and the trial court admitted into evidence the laboratory report and testimony from its expert that the blood alcohol concentration of defendant's blood was .22 grams of alcohol per 100 milliliters of blood (collectively, blood test results). Defendant preserved his objection to the admission of the blood test results during trial.

¶ 5 The jury returned a verdict of guilty of second-degree murder and felony death by motor vehicle. The trial court subsequently entered judgment on second-degree murder and arrested judgment on felony death by vehicle. Defendant appealed.

¶ 6 On appeal, the Court of Appeals held that the trial court erred by denying defendant's motion to suppress and by not excluding the blood test results. *State v. Scott*, 269 N.C. App. 457, 465 (2020). The Court of Appeals' decision stated in pertinent part:

> Here, no allegation or indication of Defendant's purported intoxication was asserted in the record or in the Application for Order [for provision of Defendant's blood]. None of the officers, firefighters, or paramedics on the scene, nurses, physicians, or investigating officers in close and direct contact with

Defendant at the hospital noticed any signs of impairment at the time of the collision or thereafter.

The first and only indication of Defendant's intoxication were results of tests on Defendant's blood samples taken from the Hospital and tested over a week later at the [State Bureau of Investigation] laboratory. . . .

. . . .

. . . [T]he trial court's order [for provision of Defendant's blood] does not base its reasoning upon exigent circumstances to draw blood without a warrant from an incapacitated person, who is under suspicion for drunk driving. "The natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *State v. Romano*, 369 N.C. 678, 687, 800 S.E.2d 644, 656 (2017) (quoting *Missouri v. McNeely*, 569 U.S. 141, 165, [133 S. Ct. 1552,] 185 L. Ed. 2d 696, 715 (2013)).

The State's reliance on *State v. Smith* is also inapposite. The facts in *Smith* involved a search warrant for the defendant's test results and did not involve whether the search warrant was supported by sufficient probable cause. [*State v.*] *Smith*, 248 N.C. App. [804,] 815, 789 S.E.2d [873,] 879 [(2016)]. This Court concluded the "identifiable health information" in [N.C.G.S.] § 90-21.2[0]B(a1)(3) requires a search warrant or judicial order that "specifies the information sought." *Id.*

However, a valid order remains subject to the reasonable suspicion standard required by our Supreme Court's opinion in *In re Superior Court Order*, 315 N.C. [378,] 382, 338 S.E.2d [307, 310 (1986)]. A search warrant remains subject to the probable cause standard contained in N.C.[G.S.] § 15A-244 (2017). As noted above, the order before us is not based upon either reasonable suspicion or probable cause.

. . . Defendant's motion to suppress should have been sustained and the blood test results should have been excluded. Defendant's second-degree murder

> conviction cannot be supported on a theory of intoxication to provide the required element of malice.

Id. at 463–65 (cleaned up). The Court of Appeals' decision then addressed the prejudicial effect of the error. *Id.* at 465–66. The Court of Appeals held:

> The State provided substantial evidence of both Defendant's high speed and his reckless driving, together with his prior record, to show malice to support Defendant's conviction for second-degree murder.
>
> Defendant has failed to carry his burden to show any prejudicial error in the denial of the motion to suppress.

Id. at 467.

¶ 7 The dissent joined a portion of the majority decision, concurring "in the holding that Defendant's motion to suppress this evidence should have been granted." *Id.* at 467 (Brook, J., concurring in part and dissenting in part). However, the dissent disagreed with the portion of the majority decision holding that the admission of the blood test results did not constitute prejudicial error. *Id.* at 467–68. The dissent observed that the majority decision "seems to be based on a misapplication of the applicable legal standard." *Id.* at 472. The dissent identified the standard as "whether [the court] can 'declare a belief that [the federal constitutional error] was harmless beyond a reasonable doubt.' " *Id.* (second alteration in original) (quoting *State v. Lawrence*, 365 N.C. 506, 513 (2012)). The dissent applied that standard and concluded he could not state that the admission of the blood test results was harmless beyond a reasonable doubt. *Id.* at 472–73.

II. Analysis

¶ 8 "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Davis v. Ayala*, 576 U.S. 257, 267 (2015); N.C.G.S. § 15A-1443(b) (2019).[1] The burden falls "upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b); *see also Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993); *Chapman*, 386 U.S. at 24; *Lawrence*, 365 N.C. at 513.

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1. Subsection 15A-1443(b) of the General Statutes of North Carolina "reflects the standard of prejudice with regard to violation of the defendant's rights under the Constitution of the United States, as set out in the case of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)." N.C.G.S. § 15A-1443 official cmt. (2019).

¶ 9 In this case, the Court of Appeals held that the motion to suppress should have been sustained. *Scott*, 269 N.C. App. at 465. In reaching this conclusion, the Court of Appeals held that the order resulting in the production of the blood to the State was not based on either probable cause or exigent circumstances. *Id.* at 464–65. Since the absence of probable cause and exigent circumstances for a search or seizure[2] violates the Constitution of the United States absent a warrant or another exception to the warrant requirement, the Court of Appeals effectively held that a federal constitutional error occurred. *See* U.S. Const. amend. IV; *State v. Welch*, 316 N.C. 578, 587 (1986) (interpreting the balancing test set forth in *Schmerber v. California*, 384 U.S. 757, 770–72 (1966), as "forbidding law enforcement authorities acting without a search warrant from requiring a defendant to submit to the drawing of a blood sample unless probable cause and exigent circumstances exist to justify a warrantless seizure of the blood sample"). As a result, the Court of Appeals should have applied the aforementioned standard for federal constitutional errors in this case. *See State v. Ortiz-Zape*, 367 N.C. 1, 13 (2013) ("When violations of a defendant's rights under the United States Constitution are alleged, harmless error review functions the same way in both federal and state courts." (quoting *Lawrence*, 365 N.C. at 513)); *State v. Autry*, 321 N.C. 392, 399 (1988) ("Assuming *arguendo* that the search violated defendant's constitutional rights and that the evidence therefrom was improperly admitted at trial, we find any such error in its admission harmless beyond a reasonable doubt.").

¶ 10 Therefore, we conclude that the Court of Appeals erred. The Court of Appeals did not apply the correct standard that the error was harmless beyond a reasonable doubt and wrongly placed the burden on defendant to show prejudice as reflected in its analysis and conclusion. *Scott*, 269 N.C. App. at 465–67.

III. Conclusion

¶ 11 The Court of Appeals applied the wrong standard for determining prejudice resulting from a violation of defendant's rights under the Constitution of the United States. Accordingly, we reverse the decision of the Court of Appeals and remand to the Court of Appeals to apply the proper standard and review this matter in a manner not inconsistent with this opinion.

REVERSED AND REMANDED.

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2. "[D]rawing blood from a person constitutes a search under both the Federal and North Carolina Constitutions." *State v. Romano*, 369 N.C. 678, 685 (2017) (citations omitted).

ARMSTRONG v. STATE OF NORTH CAROLINA

[377 N.C. 204 (2021)]

ARTHUR O. ARMSTRONG	)	
	)	
v.	)	WILSON COUNTY
	)	
STATE OF NORTH CAROLINA, ET AL.	)	

No. 41P17-8

ORDER

Defendant's motions for relief filed on 9 and 11 March 2021 are dismissed.

By order of this Court in Conference, this 14th day of April, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of April, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk

DAWN REYNOLDS-DOUGLASS	)	
	)	
v.	)	From Wake County
	)	
KARI TERHARK	)	

No. 43A21

ORDER

Defendant-appellant's petition for discretionary review of additional issues is denied as to Issues I, II, and III and dismissed as moot as to Issues IV and V.

Accordingly, the new brief of the Defendant-appellant shall be filed with this Court not more than 30 days from the date of this order. Subsequent briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 14(d)(1).

By order of the Court in Conference, this the 14th day of April, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of April, 2021.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Onslow County
	)	
BRYAN CHRISTOPHER BELL	)	

No. 86A02-2

SPECIAL ORDER

Defendant's petition for writ of certiorari is allowed as to the following issues:

I. Whether defendant preserved his claim that the prosecutor impermissibly struck a juror on the basis of gender.

II. If the claim is preserved, whether the trial court properly decided that there was no intentional gender discrimination, including whether the "dual motivation" standard applies.

III. If the claim is preserved and the trial court erred, is the record sufficient to rule on the merits, or should the matter be remanded to the trial court for an evidentiary hearing.

By order of the Court in Conference, this the 14th day of April, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of April, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

STATE v. BENNETT

[377 N.C. 207 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Sampson County
	)	
CORY DION BENNETT	)	

No. 406PA18

ORDER

The Court, on its own motion, remands this case to the Court of Appeals with instructions to examine the order that was entered by the trial court on remand on 9 February 2021 and to conduct any further review of that order that it deems to be appropriate, including requiring, in its discretion, the filing of supplemental briefs and the holding of oral argument, with any decision that it might make at the conclusion of this process being subject to possible future review by this Court in accordance with any applicable provisions of North Carolina law.

By order of the Court in conference, this the 14th day of April 2021. Berger, J., recused.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of April 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

STATE v. TUCKER

[377 N.C. 208 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Forsyth County
	)	
RUSSELL WILLIAM TUCKER	)	

No. 113A96-4

SPECIAL ORDER

Defendant's petition for writ of certiorari is allowed as to Issue I, Issue II, and Issue III and denied as to Issue IV.

By order of the Court in Conference, this the 14th day of April, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of April, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

16 APRIL 2021

6P14-2	State v. Daniel Harrison Brennick	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **04/06/2021**
20P19-2	State v. Utaris Mandrell Reid	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-205) 2. Def's Motion to Amend PDR	1. Allowed 2. Dismissed as moot **Berger, J., recused**
20P21	Radiator Specialty Company v. Arrowood Indemnity Company (as Successor to Guaranty National Insurance Company, Royal Indemnity Company, and Royal Indemnity Company of America); Columbia Casualty Company; Continental Casualty Company; Fireman's Fund Insurance Company; Insurance Company of North America; Landmark American Insurance Company; Munich Reinsurance America, Inc., (as Successor to American Reinsurance Company); Mutual Fire, Marine and Inland Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Pacific Employers Insurance Company; St. Paul Surplus Lines Insurance Company; Sirius America Insurance Company (as Successor to Imperial Casualty and Indemnity Company); United National Insurance Company; Westchester Fire Insurance Company; Zurich American Insurance Company of Illinois	Plt's Motion to Admit Jonathan G. Hardin Pro Hac Vice	Allowed **Berger, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

16 APRIL 2021

32P21	State v. Jemar Bell	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1147)	Denied **Berger, J., recused**
40P21-2	Charlie L. Hardin v. Todd E. Ishee, et al.	1. Plt's Pro Se Motion for Redress of Grievances 2. Plt's Pro Se Motion for Violations of U.S. Constitutional Amendments Rights 3. Plt's Pro Se Petition for Writ of Certiorari 4. Plt's Pro Se Motion to Submit Grievance 5. Plt's Pro Se Motion for Complaint f or Violations	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed
41P17-8	Arthur O. Armstrong v. State of North Carolina, et al.	1. Plt's Pro Se Motion for Relief - Complaint - Civil Rights Violation 2. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint 3. Plt's Pro Se Motion for Relief - Defamation of Character Complaint 4. Plt's Pro Se Motion for Relief - Complaint 5. Plt's Pro Se Motion for Relief - Complaint - Civil Rights Violation 6. Plt's Pro Se Motion for Relief - Complaint - Civil Rights Violation 7. Plt's Pro Se Motion for Relief - Complaint 8. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint 9. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint 10. Plt's Pro Se Motion for Relief - Complaint 11. Plt's Pro Se Motion for Relief - Defamation of Character Complaint 12. Plt's Pro Se Petition for Writ of Certiorari	1. Special Order 2. Special Order 3. Special Order 4. Special Order 5. Special Order 6. Special Order 7. Special Order 8. Special Order 9. Special Order 10. Special Order 11. Special Order 12. Dismissed
43A21	Dawn Reynolds-Douglass v. Kari Terhark	1. Def's Pro Se Notice of Appeal Based Upon a Dissent (COA20-112) 2. Def's Pro Se PDR as to Additional Issues	1. --- 2. Special Order

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53P21	Michael E. Williams v. Susan L. McDonald	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-10)	Denied
57A21	State v. Calvin Lee Miller	1. Def's Notice of Appeal Based Upon a Dissent (COA19-1083) 2. Def's PDR as to Additional Issues 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
73P21	State v. Jalen M. Anderson	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County	Dismissed
74P21	William Jernigan, Jr. v. Sam Page, Sheriff, Lt. Brown, Matthew Cockman, District Attorney for Rockingham County, NC, Individually and in their Official Capacities, et al.	Plt's Pro Se Petition for Writ of Mandamus	Dismissed
77A19	In the Matter of the Proposed Foreclosure of a Claim of Lien Filed on Calmore George and Hygiena Jennifer George by the Crossings Community Association, Inc. Dated August 22, 2016, Recorded in Docket No. 16-M-6465 in the Office of the Clerk of Court of Superior Court for Mecklenburg County Registry by Sellers, Ayers, Dortch & Lyons, P.A. Trustee	1. Petitioners' Notice of Appeal Based Upon a Dissent (COA18-611) 2. Petitioners' Notice of Appeal Based Upon a Constitutional Question 3. Respondents' Motion to Dismiss Appeal 4. Charlotte Center for Legal Advocacy, Financial Protection Law Center, North Carolina Justice Center, and Legal Aid of North Carolina, Inc.'s Motion to File Amicus Curiae Brief 5. Charlotte Center for Legal Advocacy, Financial Protection Law Center, North Carolina Justice Center, and Legal Aid of North Carolina, Inc.'s Motion to File Amended Amici Curiae Brief	1. --- 2. Dismissed *ex mero motu* 3. Dismissed as moot 4. Allowed **07/16/2020** 5. Allowed **07/17/2020**
77P21	Nancy Ann Fuller v. Rafael E. Negron-Medina, M.D., in His Individual and Official Capacity	1. Plt's Motion for Temporary Stay (COA19-492) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/12/2021 Dissolved 04/14/2021** 2. Denied 3. Denied

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79P19-3	William Paul James v. Rumana Rabbani	1. Plt's Pro Se Petition for Writ of Certiorari to Review Decision of District Court (COAP19-156) 2. Plt's Pro Se Petition for Writ of Supersedeas 3. Plt's Pro Se Motion for Expedited Review 4. Plt's Pro Se Motion for Temporary Stay	1. Denied **03/11/2021** 2. Denied **03/11/2021** 3. Dismissed as moot **03/11/2021** 4. Denied **03/11/2021**
79P21	State v. Luis E. Mendez	Def's Pro Se Motion for Speedy Trial and 5th Amendment Guarantees	Dismissed
86A02-2	State v. Bryan Christopher Bell	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Onslow County 2. State's Motion to Hold Defendant's Petition for Writ of Certiorari Prematurely Filed in Violation of this Court's Order Dated 25 January 2013 3. Def's Motion for Leave to File Reply in Support of Petition for Writ of Certiorari	1. Special Order 2. Special Order **04/29/2020** **3.** Denied **08/13/2020**
89P21	State v. O'Kiera Donnell Myers	1. Def's Pro Se Motion to Withdraw Counsel 2. Def's Pro Se Motion to Grant Two Public Defender Counsel	1. Dismissed without prejudice 2. Dismissed without prejudice
96P21	State v. Karl Lafayette Johnson	1. Def's Pro Se Motion for Appeal (COA20-110) 2. Def's Pro Se Motion to Dismiss State Appointed Representative	1. Dismissed 2. Dismissed
97P21	State v. Charlie James Harris, III	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-617)	Dismissed
98P21	State v. Corey Tashombae Hines	1. Def's Pro Se Motion for Appeal 2. Def's Pro Se Motion for Appeal	1. Dismissed 2. Dismissed

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108A21	Volvo Group North America, LLC d/b/a Volvo Trucks North America, a Delaware Limited Liability Company; and Mack Trucks, Inc., a Pennsylvania Corporation v. Roberts Truck Center, Ltd., a Texas Limited Partnership, Roberts Truck Center of Kansas, LLC, a Kansas Limited Liability Company; and Roberts Truck Center Holding Company, LLC, a Texas Limited Liability Company	1. Defendants' Motion to Admit Patrick R. Barnes Pro Hac Vice 2. Defendants' Motion to Admit James T. Drakely Pro Hac Vice	1. Allowed **04/08/2021** 2. Allowed **04/08/2021**
110P21	State v. Anthony Wayne Yates	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/30/2021**
113A96-4	State v. Russell William Tucker	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Forsyth County 2. Def's Motion for Leave to File Reply in Support of Petition for Writ of Certiorari	1. Special Order 2. Denied
118P21	State v. Breanna Regina Dezara Moore	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-85) 2. Def's Motion to Amend PDR	1. 2. Allowed **04/08/2021**
119P21	State v. Maderkis Deyawn Rollinson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-42) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Motion in the Alternative to Review as a Petition for Writ of Certiorari 4. Def's Motion for Temporary Stay 5. Def's Petition for Writ of Supersedeas	1. 2. 3. 4. Allowed **04/08/2021** 5.
122P21	State v. Enrique Elizalde Lozanon	Def's Pro Se Motion for Supreme Court of North Carolina to Take Action and Remove Restraint on Liberty	Denied **04/12/2021**

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131P16-17	State v. Somchai Noonsab	Def's Pro Se Petition for Writ of Mandamus	Dismissed
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 Defs'	Motion to Continue Oral Argument	Allowed **04/14/2021**
228P07-3	State v. Raymond C. Marshall	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/31/2021**
238A20	Ricky Curlee, a Minor, by and through his Guardian ad Litem, Karina Becerra, and Karina Becerra, Individually v. John C. Johnson, III, Raymond Craven, and Stacey Talado Def's (John C. Johnson, III)	Motion to Strike Plaintiffs' Supplement to the Record on Appeal	Dismissed as moot
242A20	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Judy Lunsford	Plt's Motion to Reschedule Oral Argument	Dismissed as moot **04/01/2021**
256P16-5	State v. Jonathan James Newell	Def's Pro Se Motion for PDR	Dismissed

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306A20	Sound Rivers, Inc. and North Carolina Coastal Federation, Inc., Petitioners v. N.C. Department of Environmental Quality, Division of Water Resources, Respondent, Martin Marietta Materials, Inc., Respondent-Intervenor	1. Petitioners' Notice of Appeal Based Upon a Dissent (COA18-712) 2. Respondent-Intervenor's PDR Under N.C.G.S. § 7A-31 3. Joint Motion to Extend Time and Set Briefing Schedule 4. Petitioners' Motion to Amend Response to PDR	1. --- 2. Allowed 3. Allowed **07/27/2020** 4. Allowed **Berger, J., recused**
325P19-2	Paula Saunders v. Hull Property Group, LLC and Blue Ridge Mall, LLC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-728) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31 3. North Carolina Advocates for Justice's Conditional Motion for Leave to File Amicus Brief 4. North Carolina Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot 3. Dismissed as moot 4. Dismissed as moot
327P02-12	State v. Guy Tobias LeGrande	Def's Pro Se Motion for Actual Innocence Appropriate Relief	Dismissed **Ervin, J., recused**
337A20	Loretta Nobel v. Foxmoor Group, LLC, Mark Griffis, David Robertson	Plt's Motion of Counsel for Extension of Time to File Secured Leave Designation	Allowed **03/19/2021**

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339A18-2	The New Hanover County Board of Education v. Josh Stein, in his capacity as Attorney General of the State of North Carolina and North Carolina Coastal Federation and Sound Rivers, Inc., Intervenors	1. Attorney General's Motion for Temporary Stay (COA17-1374-2) 2. Attorney General's Petition for Writ of Supersedeas 3. Intervenors' (North Carolina Coastal Federation, Inc. and Sound Rivers, Inc.) Petition for Writ of Supersedeas 4. Intervenors' (North Carolina Coastal Federation, Inc. and Sound Rivers, Inc.) Notice of Appeal Based Upon a Dissent 5. Intervenors' (North Carolina Coastal Federation, Inc. and Sound Rivers, Inc.) PDR as to Additional Issues 6. Attorney General's Notice of Appeal Based Upon a Dissent 7. Attorney General's PDR as to Additional Issues 8. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **12/31/2020** 2. Allowed 3. Allowed 4. --- 5. Dismissed as moot 6. --- 7. Allowed 8. Allowed **Berger, J., recused**
362P20	Curtis Lambert v. Town of Sylva	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA19-727) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion for Leave to File Amended Notice of Appeal (Constitutional Question) and PDR 4. Plt's Amended Notice of Appeal Based Upon a Constitutional Question 5. Plt's Amended PDR Under N.C.G.S. § 7A-31 6. Def's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **08/14/2020** 4. --- 5. Denied 6. Allowed
367P05-2	State v. Steven Dixon Prentice	Def's Pro Se Motion for Notice of Appeal (COAP20-371)	Dismissed
373P20	State v. Bradrick Kentae Bennett	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1122)	Denied **Berger, J., recused**
377P19-2	State v. Dmarlo Levonne Faulk Johnson	Def's Pro Se Motion for Notice of Appeal (COA19-191)	Dismissed as moot **03/18/2021** **Berger, J., recused**

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377P20-2	State v. Andrew Ellis	Def's Pro Se Motion for Release Without Paying Money	Dismissed **03/18/2021**
379A20	State v. Ramon Perry Givens	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-40) 2. Def's Motion to Amend Certificate of Service 3. State's Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed
382P19-2	Wymon Griffin v. Ashley Place Apartments	1. Plt's Pro Se Motion to Vacate and Set Aside the Orders Entered on August 12, 2020 Dismissing the Appellant's Appeal 2. Plt's Pro Se Motion for Appropriate Relief 3. Plt's Pro Se Motion to Amend Both the Original Complaint and Motion to Vacate and Set Aside Orders	1. Dismissed as moot 2. Dismissed 3. Dismissed as moot
406PA18	State v. Cory Dion Bennett	Responses to Order Requesting Procedural Suggestions	Special Order **Berger, J., recused**
406A19	Dennis D. Chisum, Individually and Derivatively on Behalf of Judges Road Industrial Park, LLC, Carolina Coast Holdings, LLC, and Parkway Business Park, LLC v. Rocco J. Campagna, Ricard J. Campagna, Judges Road Industrial Park, LLC, Carolina Coast Holdings, LLC, and Parkway Business Park, LLC	Defs' Petition for Rehearing	Denied **04/14/2021** **Berger, J., recused** **Barringer, J., recused**
436A19	Window World of Baton Rouge, LLC, et al. v. Window World, Inc., et al. ——— Window World of St. Louis, Inc., et al. v. Window World, Inc., et al.	Plts' Motion to Admit John P. Wolff, III Pro Hac Vice	Allowed **03/16/2021**

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455P20	State v. Michael Ray Waterfield	1. Def's Motion for Temporary Stay (COA19-427) 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. Allowed 3. Allowed
473A20	In the Matter of D.M. & A.H.	Respondent's Motion to Amend the Filed Record on Appeal	Allowed **03/16/2021**
475P20	State v. Solomon Nimrod Butler	Def's Pro Se Motion for PDR (COAP18-746)	Dismissed without prejudice
488P20	Mary Cooper Falls Wing v. Goldman Sachs Trust Company, N.A., et al. ——— Ralph L. Falls III, et al. v. Goldman Sachs Trust Company, N.A., et al.	1. Def's (Goldman Sachs Trust Company, N.A.) PDR Under N.C.G.S. § 7A-31 (COA19-1007) 2. Defs' (Dianne C. Sellers, Louise Falls Cone, Toby Michael Cone, Gillian Falls Cone, and Katherine Lenox Cone) PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
502P20	State v. Denzel Rashad Dancy	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-70) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
510P20-2	State v. Johnny M. Cook	Def's Pro Se Motion for Complaint	Dismissed
513P20	State v. Thomas Sonny Brown	Def's PDR Under N.C.G.S. § 7A-31 (COA19-983)	Denied

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519P20	Nyamedze Quaicoe, by and through His Guardian ad Litem, Sally A. Lawing, Fafanyo Asiseh, and Obed Quaicoe v. The Moses H. Cone Memorial Hospital Operating Corporation, d/b/a Moses Cone Health System, d/b/a Women's Hospital; Jody Bovard Stuckert, M.D.; Piedmont Healthcare for Women, P.A. d/b/a Greensboro OB/GYN Associates	Plts' PDR Under N.C.G.S. § 7A-31 (COA20-233)	Denied
520P20	Derrick Dunbar v. ACME Southern, Employer, Hartford Underwriters Insurance Company (The Hartford), Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-1153) 2. Plt's Notice of Appeal Based Upon a Constitutional Question	1. Denied 2. Dismissed *ex mero motu*
537P20	Joyce Williams, as Personal Representative of the Estate of Ruth Hedgecock-Jones v. Maryfield, Inc. d/b/a Pennybyrn at Maryfield	Def's PDR Under N.C.G.S. § 7A-31 (COA19-804)	Denied **Berger, J., recused**
580P05-21	In re David Lee Smith	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion to Amend Petition 3. Def's Pro Se Motion for Fair Amendment of Pro Se Habeas Petition 4. Def's Pro Se Motion to Amend Pro Se Petition 5. Def's Pro Se Petition for Writ of Mandamus	1. Denied 2. Dismissed 3. Dismissed 4. Dismissed 5. Denied **Ervin, J., recused**

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