377 N.C.—No. 4 **Pages 384-568**

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AUGUST 23, 2021

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OF
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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 11 JUNE 2021

ORDERS

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

HEADNOTE INDEX

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning order—findings and conclusion—sufficiency of evidence—The trial court's permanency planning order granting guardianship of the minor child to her maternal grandmother was affirmed where clear and convincing evidence supported the challenged findings of fact regarding respondent-father's lack of suitable and safe housing, substance abuse, and domestic violence. In turn, those findings supported the trial court's conclusion that respondent acted inconsistently with his constitutionally protected status as a parent. **In re I.K., 417.**

CONSTITUTIONAL LAW

North Carolina—right to education—harassment by other students—board's deliberate indifference—sovereign immunity—Where plaintiff alleged that defendant-school board was deliberately indifferent to the continual harassment of her children by other students, she could bring a claim under the North Carolina Constitution because—as alleged—the indifference denied the children their constitutionally guaranteed right to a sound basic education pursuant to Article I, Section 15. Since plaintiff alleged a colorable constitutional claim for which no adequate state law remedy existed, sovereign immunity did not bar her claim and the trial court properly denied defendant's motion to dismiss. **Deminski v. State Bd. of Educ., 406.**

State and federal—freedom of speech—right to petition the government—public rezoning hearings—Where a land developer backed out of a deal to purchase property from a real estate company (plaintiff) based on statements made by the owners of a neighboring open-quarry mine (defendants) at local public rezoning hearings, the trial court properly dismissed plaintiff's action against defendants for tortious interference with a prospective economic advantage because defendants' statements constituted protected petitioning activity under the First Amendment of the U.S. Constitution and Article I, Section 12 of the North Carolina Constitution. The Supreme Court reversed the Court of Appeals' decision reversing the trial court's order granting dismissal. **Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., Inc., 384.**

HOMICIDE

Murder by starvation—elements—malice—"starvation" defined—In a prosecution for first-degree murder by starvation (N.C.G.S. § 14-17(a)), where defendant's four-year-old stepson died after defendant fed him no more than once a day for the last few months of his life, the State was not required to make a separate showing that defendant acted with malice because the malice required to prove first-degree murder is inherent in the act of starving someone. For purposes of section 14-17(a), "starvation" is the deprivation of food or liquids necessary to the nourishment of the human body and is not limited to situations involving the complete denial of all food and hydration. **State v. Cheeks, 528.**

Murder by starvation—proximate cause—sufficiency of evidence—In a prosecution for first-degree murder by starvation (N.C.G.S. § 14-17(a)), there was sufficient evidence that starvation proximately caused the death of defendant's four-year-old stepson where a medical examiner's initial autopsy identified malnutrition and dehydration as the immediate causes of death. Although the examiner's amended autopsy report attributed the boy's death to strangulation, this opinion rested exclusively on defendant's claim that he choked his stepson, which he retracted at trial and which the trial court found to lack credibility. Additionally, other evidence—including accounts of the boy's emaciated, doll-like corpse—showed that defendant failed to feed his stepson more than once a day or to seek medical attention for him even though he was visibly hungry, thin, and malnourished in the months leading up to his death. **State v. Cheeks, 528.**

INDICTMENT AND INFORMATION

Negligent child abuse inflicting serious injury—factual allegations—mere surplusage—consistent with trial court's determinations—In a prosecution for negligent child abuse inflicting serious injury, where the indictment alleged that defendant failed to provide his four-year-old stepson with medical treatment for over one year, despite the child having a disability, and failed to provide proper nutrition and medicine, resulting in weight loss and failure to thrive, the trial court did not err in convicting defendant on grounds that the stepson suffered from severe diaper rash, bedsores, and pressure ulcers under defendant's care. The indictment alleged all essential elements of the offense and any specific factual allegations were mere surplusage. At any rate, no fatal variance existed between the indictment and the court's grounds for convicting defendant, where the court's factual determinations were consistent with the indictment's allegations that defendant deprived the child of medical treatment. **State v. Cheeks, 528.**

JUDGES

Discipline—sexual misconduct—material misrepresentations—The Supreme Court ordered that a retired district court chief judge be censured for conduct in violation of Canons 1, 2A, 2B, 3A(4), and 3A(5) of the N.C. Code of Judicial Conduct, and pursuant to N.C.G.S. § 7A-376(b) for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, where the judge engaged in sexual misconduct with numerous women, failed to diligently discharge his judicial duties by constantly using his cell phone while on the bench and frequently continuing cases in order to meet with women, misused the prestige of his office, made material misrepresentations to law enforcement during an investigation, and made material misrepresentations to the Judicial Standards Commission during its investigation. The Court considered mitigating factors, including the judge's recent

TERMINATION OF PARENTAL RIGHTS

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

CHERYL LLOYD HUMPHREY LAND INV. CO., LLC v. RESCO PRODS., INC.

[377 N.C. 384, 2021-NCSC-56]

CHERYL LLOYD HUMPHREY LAND INVESTMENT COMPANY, LLC
v.
RESCO PRODUCTS, INC., AND PIEDMONT MINERALS COMPANY, INC.

No. 326PA19

Filed 11 June 2021

Constitutional Law—state and federal—freedom of speech—right to petition the government—public rezoning hearings

Where a land developer backed out of a deal to purchase property from a real estate company (plaintiff) based on statements made by the owners of a neighboring open-quarry mine (defendants) at local public rezoning hearings, the trial court properly dismissed plaintiff's action against defendants for tortious interference with a prospective economic advantage because defendants' statements constituted protected petitioning activity under the First Amendment of the U.S. Constitution and Article I, Section 12 of the North Carolina Constitution. The Supreme Court reversed the Court of Appeals' decision reversing the trial court's order granting dismissal.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 266 N.C. App. 255, 831 S.E.2d 395 (2019), reversing an order granting defendants' motion to dismiss entered on 1 October 2018 by Judge Michael J. O'Foghludha in Superior Court, Orange County. Heard in the Supreme Court on 12 January 2021.

Manning Fulton & Skinner, P.A., by J. Whitfield Gibson and Charles L. Steel, IV, for plaintiff.

Weaver, Bennett & Bland, P.A., by Abbey M. Krysak, and McGuireWoods, LLP, by Bradley R. Kutrow, for defendants.

Joshua H. Stein, Attorney General, by Nicholas S. Brod, Assistant Solicitor General, Ryan Y. Park, Solicitor General, and K. D. Sturgis, Special Deputy Attorney General, amicus curiae.

NEWBY, Chief Justice.

¶ 1 Expressing one's views to government officials is foundational to our political system. This fundamental right to petition the government is protected by both the United States and North Carolina Constitutions. Lawsuits that seek to impose liability based on petitioning activity in-

evitably chill the exercise of this fundamental right. Here defendants exercised their constitutional right to petition the government when speaking at the public zoning hearings, a political process. We hold that the First Amendment of the United States Constitution and Article I, Section 12 of the North Carolina Constitution explicitly protect petitioning activity, including defendants' speech in this case. Therefore, we reverse the decision of the Court of Appeals.

¶ 2 Because this case involves a motion to dismiss, we take the following allegations as true from plaintiff's complaint. In the summer of 2013, Cheryl Lloyd Humphrey Land Investment Company, LLC (plaintiff), began negotiations with a third party, Braddock Park Homes, Inc. (Braddock Park), to sell approximately 45 acres of land located in Hillsborough. Braddock Park planned to develop the land into a 118-unit subdivision of townhomes. A five-and-a-half acre portion of the property, referred to as Enoe Mountain Village (EMV Property), is located adjacent to the open-quarry mine that Resco Products, Inc. and Piedmont Minerals Company, Inc. (together, defendants) jointly own.

¶ 3 The property could not be developed as planned unless the Town of Hillsborough (Town) annexed the land and rezoned[1] it as "Multi-Family Special Use." In the fall of 2013, the Town began a series of hearings to allow the public to express their views about the rezoning petition. Defendants' representatives attended the public hearings and opposed the rezoning of the EMV Property. Defendants' representatives told the Town that (1) they operate an active mine adjacent to the EMV Property; (2) they regularly engage in explosive blasting at the mine; and (3) they conduct the explosive blasting operations roughly 300 feet from the EMV Property. Defendants' representatives "maliciously, intentionally and without justification misrepresented" that future residents living on the EMV Property could be endangered by fly rock, excessive air blasts, and excessive ground vibrations from the blasting operations. When questioned, defendants admitted that they had not reported any violations of ground vibration or air blast limits or the occurrence of fly rock beyond the mine's permitted areas since the date of their last mining permit. Further, defendants conceded they could conduct their operations without endangering the future improvements to or residents of the EMV Property. They admitted that doing so would require additional safety precautions, increasing their costs. Despite the opposition expressed

1. We refer to the annexation and rezoning of plaintiff's land collectively as "rezoning." Further, we refer to the body deciding whether to rezone plaintiff's land and before which defendants made their contested statements as the "Town."

by defendants' representatives, the Town rezoned all of the land as residential and issued the necessary permit in early February of 2014.

¶ 4 Thereafter, plaintiff and Braddock Park entered into a Purchase and Sale Agreement, whereby Braddock Park would purchase the entire 45-acre parcel. However, in the agreement, Braddock Park reserved the right to exclude the EMV Property from the purchase. Later Braddock Park exercised this contractual right to exclude the EMV Property from the purchase, citing the dangers that defendants' representatives reported to the Town—i.e., fly rock and damage to the foundations of homes.

¶ 5 Plaintiff thereafter filed its complaint alleging that "[b]y virtue of their intentional and malicious misrepresentations made to the Town of Hillsborough, the Defendants tortiously interfered with the Plaintiff's prospective economic advantage by inducing Braddock Park Homes, Inc., not to perform [the purchase of the EMV Property]." Defendants moved to dismiss the complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing they were immune from liability because their statements to the Town were constitutionally protected petitioning activity. The trial court granted defendants' motion to dismiss. Plaintiff appealed.

¶ 6 The Court of Appeals reversed, reasoning that this case involves the applicability of the *Noerr-Pennington* doctrine under the United States Constitution, which provides immunity from antitrust liability based on petitioning activity. *Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Prods., Inc.*, 266 N.C. App. 255, 258–59, 831 S.E.2d 395, 398 (2019). Given the apparent limitations of *Noerr-Pennington*, the Court of Appeals reasoned that defendants' conduct—speaking in opposition to the rezoning of plaintiff's land—would fall outside of the doctrine's protections. *Id.* at 263, 831 S.E.2d at 401. The Court of Appeals then determined that defendants may have overstated the dangerousness of their blasting activity, despite the classification of blasting as ultrahazardous under North Carolina law. *Id.* at 265, 831 S.E.2d at 402–03. Further, the Court of Appeals concluded that the statements inducing Braddock Park to exercise their contractual right to exclude the EMV Property were sufficient to show interference in a business relationship. *Id.* at 268–69, 831 S.E.2d at 403–05. Thus, the Court of Appeals determined that plaintiff's complaint adequately alleged tortious interference with prospective economic advantage to survive dismissal under Rule 12(b)(6). *Id.* at 270, 831 S.E.2d at 405.

¶ 7 Defendants sought review, which this Court allowed, to determine whether defendants must defend a lawsuit premised on statements

made while speaking at the public rezoning hearings. The right to petition the government, protected by both the First Amendment to the United States Constitution and Article I, Section 12 of the North Carolina Constitution, prevents a person from being subjected to a lawsuit based on that person's petitioning activity. Here plaintiff's suit is based on defendants' presentation at the rezoning hearings, which is protected petitioning activity. We hold that defendants' petitioning is protected by the First Amendment and Article I, Section 12.

¶ 8 This Court reviews a trial court's order on a motion to dismiss de novo, *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013), and considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory," *Coley v. State*, 360 N.C. 493, 494–95, 631 S.E.2d 121, 123 (2006) (quoting *Thompson v. Waters*, 351 N.C. 462, 463, 526 S.E.2d 650, 650 (2000)).

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

Wood v. Guilford Cty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)).

¶ 9 The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, *and to petition the Government for a redress of grievances*." U.S. Const. amend. I (emphasis added). "The right of petitioning is an ancient right. It is the cornerstone of the Anglo-American constitutional system." Norman B. Smith, "*Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153, 1153 (1986). The Magna Carta of 1215, "the fundamental source of Anglo-American liberties," states that if the king's officials were " 'at fault toward anyone,' " then the barons could " 'lay[ ] the transgression before [the king], [and] petition to have the transgression redressed without delay.' " *Id.* at 1155 (emphasis omitted) (quoting William S. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 467 (2d ed. 1914)).

> In 1689, the [English] Bill of Rights exacted of William and Mary stated: "[I]t is the Right of the

> Subjects to petition the King." This idea reappeared in the Colonies when the Stamp Act Congress of 1765 included a right to petition the King and Parliament in its Declaration of Rights and Grievances. And the Declarations of Rights enacted by many state conventions contained a right to petition for redress of grievances.

McDonald v. Smith, 472 U.S. 479, 482–83, 105 S. Ct. 2787, 2790 (1985) (second alteration in original) (citations omitted).

¶ 10 The United States Supreme Court has often addressed the right to petition as a defense to antitrust liability. *See E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138, 81 S. Ct. 523, 529–30 (1961) (holding the right to petition precluded antitrust liability under the Sherman Act); *see also United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 671, 85 S. Ct. 1585, 1594 (1965) (reiterating the holding of *Noerr*). Although the holdings from *Noerr* and its progeny—the *Noerr-Pennington* doctrine—originated in the antitrust context, the First Amendment principles upon which the doctrine rests are foundational to our political system. Therefore, the protections afforded by the right to petition, recognized in the First Amendment, are not limited to antitrust matters. *See Prof'l. Real Estate Inv'rs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59, 113 S. Ct. 1920, 1927 (1993) (acknowledging the right to petition functions in "other contexts," not solely "as an antitrust doctrine"); *see also McDonald*, 472 U.S. at 485, 105 S. Ct. at 2791 (holding that the right to petition, while not absolute, provides the same protection in defamation actions as the freedoms of speech, press, and assembly).

¶ 11 Rather, the right to petition protects efforts to influence the actions of government officials, whether in the legislative, executive, or judicial branch. *See* Congressional Research Service, S. Doc. 99-16, *The Constitution of The United States of America: Analysis and Interpretation*, 1141–45 (Johnny H. Killian & Leland E. Beck eds., 1982). Protected petitioning activity includes lobbying local officials regarding a zoning ordinance. *See City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 382, 111 S. Ct. 1344, 1355 (1991) (holding that the right to petition precluded liability for lobbying in favor of a local zoning ordinance). The right to petition protects petitioning activity "regardless of intent or purpose" because whether "a private party's political motives are selfish is irrelevant[.]" *Id.* at 380, 111 S. Ct. at 1354 (citing *Pennington*, 381 U.S. at 670, 85 S. Ct. at 1593). In a political process meant to address public concerns, a commitment to "free and open

debate" means other parties are free to counter selfish or misleading speech with speech of their own. *Connick v. Meyers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 1689 (1983) (quoting *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 571–72, 88 S. Ct. 1731, 1736 (1968)).

¶ 12 Predating the federal Bill of Rights, the North Carolina Constitution has protected the right to petition since 1776. *See* N.C. Const. art. I, § 12; N.C. Const. of 1868, art. I, § 25; N.C. Const. of 1776, Declaration of Rights § 18. Article I, Section 12 provides that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances[.]" N.C. Const. art. I, § 12. Provisions like Article I, Section 12 in state declarations of rights served as a model for the Bill of Rights. *See* Smith, *Shall Make No Law Abridging*, at 1174 (noting that state declarations of rights "expressly included the right to petition" prior to the Bill of Rights). Because the General Assembly "delegate[s] a portion of [its] power to municipalities," petitioning activity can occur at the local government level. *King v. Town of Chapel Hill*, 367 N.C. 400, 406, 758 S.E.2d 364, 370 (2014); *see High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965) (stating the General Assembly "strengthen[ed] local self-government by providing for the delegation of local matters by general laws to local authorities" (emphasis omitted)).

¶ 13 These local governments are "[l]ocal political subdivisions [that] are 'mere instrumentalities of the State for the more convenient administration of local government[.]' " *Town of Boone v. State*, 369 N.C. 126, 131, 794 S.E.2d 710, 714 (2016) (quoting *Holmes v. City of Fayetteville*, 197 N.C. 740, 746, 150 S.E. 624, 627 (1929)); *see also King*, 367 N.C. at 404, 758 S.E.2d at 369 ("[The Town of Chapel Hill is] a mere creation of the legislature[.]" (citing *Pleasants*, 264 N.C. at 654, 142 S.E.2d at 701)). The right to petition protected by Article I, Section 12 is "connect[ed] with the mechanics of popular sovereignty" which can occur before these local political subdivisions. John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 58 (2d ed. 2013). Article I, Section 12 thus protects petitioning activity before "local political subdivisions" such as a town.

¶ 14 Protecting the right to petition requires early dismissal of lawsuits that impermissibly seek to infringe on the right and thus chill petitioning activity occurring in these political contexts. *See Bill Johnson Rests. v. NLRB*, 461 U.S. 731, 740–41, 103 S. Ct. 2161, 2168 (1983) ("A lawsuit no doubt may be used by [a party] as a powerful instrument of coercion or retaliation . . . . [T]he [opposing party] will most likely have to retain

counsel and incur substantial legal expenses to defend against it." (citing *Power Sys., Inc.*, 239 N.L.R.B. 445, 449–50 (1978), *enf. denied*, 601 F.2d 936 (7th Cir. 1979))). "[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the [right to petition] cannot survive." *New York Times Co. v. Sullivan*, 376 U.S. 254, 278, 84 S. Ct. 710, 725 (1964). When a lawsuit is premised on a party's petitioning activity, the First Amendment and Article I, Section 12 mandate early dismissal.

¶ 15 The question here is whether defendants' speech constitutes protected petitioning activity. Taking the allegations of plaintiff's complaint as true, defendants "maliciously, intentionally and without justification" made misrepresentations regarding the dangers of fly rock, excessive air blasts, and ground vibrations from their own mining activity. Defendants, however, made these statements during a public zoning process before the Town. The Town is a clear example of a local political subdivision with delegated authority from the General Assembly. Zoning is a political process by which a local government seeks citizen input to make informed decisions for the good of the whole. Neither the maliciousness nor the falsity of the statements has any bearing on our analysis. Rather than subjecting to civil liability misleading or malicious speech made before a local political subdivision during a public zoning process, our constitutions protect free and open debate so that citizens may voice their concerns to the government without fear of retribution. Plaintiff's remedy is to expose the falsity of the statements and submit alternative evidence, as plaintiff did here. During the process, defendants' misstatements of the current risk associated with their mining activities and their financial incentives were exposed. The evidence taken as a whole convinced the Town to rezone the EMV Property over defendants' objections. That Braddock Park declined to purchase the EMV Property, to plaintiff's economic disadvantage, does not remove protection from defendants' speech. Therefore, defendants' statements during the zoning process constitute protected petitioning activity.

¶ 16 The right to petition the government is a fundamental right. Here defendants' testimony during the public zoning process constitutes petitioning activity. Because early dismissal is necessary to protect the exercise of this fundamental right, the trial court properly granted defendants' motion to dismiss plaintiff's lawsuit. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

CRAZIE OVERSTOCK PROMOTIONS, LLC v. STATE OF NORTH CAROLINA

[377 N.C. 391, 2021-NCSC-57]

CRAZIE OVERSTOCK PROMOTIONS, LLC
v.
STATE OF NORTH CAROLINA; AND MARK J. SENTER, IN HIS OFFICIAL CAPACITY AS BRANCH HEAD OF THE ALCOHOL LAW ENFORCEMENT DIVISION

No. 345PA19

Filed 11 June 2021

Gambling—retail customer rewards program—electronic games—section 14-306.4—game of chance versus game of skill

In a declaratory judgment action brought by a company selling discount goods, where the company ran a rewards program through which customers could earn cash prizes by playing two electronic games, the trial court correctly determined that the program constituted an unlawful sweepstakes under N.C.G.S. § 14-306.4, which prohibits the operation of electronic gaming machines that allow users the opportunity to win prizes through games based on chance rather than "skill or dexterity." Although the second game required some skill and dexterity, the amount of cash customers could win by playing it depended on how many points they won when playing the first game, which was entirely chance-driven. The Supreme Court affirmed (as modified) the Court of Appeals' decision upholding the trial court's ruling on this matter.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 266 N.C. App. 1 (2019), affirming, in part, and reversing and remanding, in part, an order entered on 7 August 2018 by Judge Vince M. Rozier, Jr., in the Superior Court, Alamance County. Heard in the Supreme Court on 23 March 2021.

Morningstar Law Group, by Keith P. Anthony and William J. Brian, Jr., for plaintiff-appellant.

Joshua H. Stein, Attorney General, by Olga E. Vysotskaya de Brito, Special Deputy Attorney General; Ryan Y. Park, Solicitor General; and James W. Doggett, Deputy Solicitor General, for the State-appellees.

Edmond W. Caldwell, Jr., and Matthew L. Boyatt for North Carolina Sheriffs' Association; Fred P. Baggett for North Carolina Association of Chiefs of Police; and Jim O'Neill for North Carolina Conference of District Attorneys, amici curiae.

ERVIN, Justice.

¶ 1 This case arises from an enterprise developed and operated by plaintiff Crazie Overstock, LLC, which has sought in this litigation to enjoin enforcement measures taken by the State and certain members of the State's Alcohol and Law Enforcement Division[1] stemming from the belief that a Rewards Program encompassed within the operation of Crazie Overstock's enterprise violates various provisions contained in Article 37 of Chapter 14 of the North Carolina General Statutes. For the reasons set forth in more detail below, we modify and affirm the decision of the Court of Appeals.

¶ 2 Crazie Overstock sells discount goods, such as furniture, jewelry, kitchen goods, movies, music, and electronics on its website and through licensed retail establishments which are operated by independent owners. Although Crazie Overstock's customers have the ability to view the goods that are offered for sale, both in these retail establishments and on Crazie Overstock's website, the goods in question may only be purchased through its website.

¶ 3 The retail establishments through which Crazie Overstock operates feature a "showroom" in which samples of the goods that are available through Crazie Overstock's website are displayed. In addition, these retail establishments contain computers, which Crazie Overstock refers to as "order stations," that are connected to the internet and through which customers have the ability to order products from Crazie Overstock's website. In addition, customers are also entitled to place orders through Crazie Overstock's website from any location at which an internet connection is available. Crazie Overstock's customers have the ability to either order goods through the website using a credit card or to purchase electronic gift certificates at retail establishments which the customer can use to purchase goods through Crazie Overstock's website.

¶ 4 The customers who purchase gift certificates at the retail establishments through which Crazie Overstock operates pay $1.00 for each $1.00 of credit that is available in connection with a particular gift certificate. Each customer who purchases a gift certificate receives a receipt bearing a number which can be registered with and credited to the customer's

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1. More specifically, Crazie Overstock has sought relief in this case against Mark J., Senter, individually and in his official capacity as Director of the Alcohol Law Enforcement Division, and Iris L. Redd, Kelly J. McMurray, Chris Poole, and Brian Doward, each of whom are agents of the Alcohol Law Enforcement Division; in their official and individual capacities.

account, which, in turn, can be accessed using an individual username and password at an order station or on any device that is connected to the Crazie Overstock website through the internet. In view of the fact that the value of any gift certificate that a customer may purchase is not automatically loaded into the customer's account, gift certificates may be freely transferred from the customer to other persons. Although customers may utilize gift certificates to purchase goods through the Crazie Overstock website, any such purchases involve separately stated shipping and handling charges that the customer must cover using a credit card.

¶ 5 The portion of Crazie Overstock's enterprise that underlies this case is known as the Rewards Program and revolves around the use of gift certificates to play two electronic games. In order to play these games, a customer is required to obtain Game Points by either (1) purchasing a gift certificate, with 100 Games Points being provided to the customer for every $1.00 that the customer pays in order to purchase that gift certificate; (2) "mailing a handwritten post card . . . contain[ing] the [customer's] name; address; city; state; zip code; age; date of the request for Game Points; and the name and store address" at which the points are to be used; (3) making an "in-store request from the cashier at a Retail Establishment's point-of-sale terminal"; or (4) "through the award of bonus Game Points by Retail Establishments to customers who purchase certain amounts of gift certificates." After obtaining the required Game Points, the customer may use them to play the two electronic games.

¶ 6 In the first of the two electronic games, which consists of a game of chance called the Reward Game, the customer is entitled to utilize Game Points for the purpose of attempting to win Reward Points. The Reward Game features eighteen reel-spinning games which are played on an electronic machine during which various icons appear when the reel is spun. The results derived from playing the Reward Game are "drawn randomly for each of the [eighteen] different Reward Games . . . from a finite pool of possible results," with "some results [being] associated with Reward Points while others are not." A customer who is successful in playing the Reward Game receives a number of Reward Points equal to a multiple of the number of Game Points which the customer utilized in order to play the Reward Game. In the event that the customer is unsuccessful during his or her attempts to play the Reward Game, he or she is still awarded 100 Reward Points.

¶ 7 After playing the Reward Game, the customer is entitled to take the Reward Points that he or she earned playing the Reward Game and utilize them to participate in a game of skill called the Dexterity Test.

The Dexterity Test involves the use of a simulated stopwatch that counts from 0 to 1,000 and back at a rapid rate. During the course of the Dexterity Test, the customer is allowed three attempts to stop the stopwatch on a number as close to 1,000 as possible, with the customer being awarded Dexterity Points based upon his or her best result. In the event that the customer stops the simulated stopwatch at a point between 951 and 1,000, one-hundred percent of the Reward Points that the customer used to play the Dexterity Test are converted to Dexterity Points, which can be redeemed for a cash payment calculated at the rate of $1.00 for every 100 Dexterity Points. In the event that the customer stops the simulated stopwatch at a point between 901 and 950, ninety percent of the Reward Points that the customer used to play the Dexterity Test are converted to Dexterity Points. In the event that a customer stops the simulated stopwatch at a point between 801 and 900, fifty percent of the Reward Points that the customer used to play the Dexterity Test are converted to Dexterity Points. In the event that the customer stops the simulated stopwatch at a point between 0 and 800, he or she does not win any Dexterity Points. On the other hand, the Reward Points that any such unsuccessful customer utilized to play the Dexterity Test are converted into Game Points so as to allow the customer to play the Reward Game in the hope of winning additional Reward Points.

¶ 8 The record reflects that ninety-five percent of the customers who play the Dexterity Test successfully stop the simulated stopwatch at a point above 800 on at least one of their three attempts so as to win some amount of money. As a result, a customer who successfully plays the Reward Game and proceeds to play the Dexterity Test will likely recoup some portion of the money that he or she utilized in purchasing the gift certificate that allowed him or her to play the games. However, in the event that the customer does not successfully play the Reward Game, the cash price that he or she is able to win is limited to a maximum of $1.00. In addition, the customer retains the full value of the gift certificate that he or she purchased and is entitled to use it to purchase merchandise from Crazie Overstock's website.

¶ 9 On 24 May 2016, Crazie Overstock filed a complaint against defendants in which it sought (1) a declaratory judgment that the Rewards Program is lawful and did not violate N.C.G.S. §§ 14-289 (prohibiting the advertisement of lotteries), 14-290 (prohibiting "[d]ealing in lotteries"), 14-292 (prohibiting gambling, defined as "any game of chance or any person who plays at or bets on any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not"), 14-306 (defining slot machines), 14-306.1A (prohibiting the use of

video gaming machines, including a "video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes"), 14-306.3 (prohibiting certain game promotions), 14-306.4 (prohibiting the operation of "an electronic machine or device" to play a "video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes," with a "prize" being "any gift, award, gratuity, good, service, credit, or anything else of value"), or "any other applicable law of this State"; (2) permanent injunctive relief; (3) a request for a declaratory judgment that Director Senter and Agents McMurray, Poole, Doward, and Redd had deprived Crazie Overstock of its constitutional right to procedural due process; (4) prospective injunctive relief against Director Senter and Agents McMurray, Poole, Doward, and Redd based upon alleged violations of 42 U.S.C. § 1983; and (5) damages against Agents McMurray, Poole, Doward, and Redd, in their individual capacities, jointly and severally, for violations of 42 U.S.C. § 1983. The injunctive relief that Crazie Overstock sought in its complaint included enjoining defendants from (1) warning or threatening any current or potential North Carolina retail establishment that it might be subject to criminal or administrative sanctions if it continued to display or sell Crazie Overstock gift certificates or operate equipment associated with the Rewards Program; (2) citing any North Carolina retail establishment for criminal or administrative offenses or violations based upon the display or sale of Crazie Overstock gift certificates or products, or the operation of any equipment associated with the Rewards Program; (3) compelling or attempting to compel, coerce, or persuade any North Carolina retail establishment to remove products and equipment associated with the Rewards Program or to refrain from selling or operating any such items; (4) making or issuing any statement outside of the proceedings in this case alleging or contending that any gift certificates, products, or equipment associated with the Rewards Program constituted an illegal gambling arrangement, lottery, game of chance, slot machine, or unlawful device; and (5) filing any false or misleading affidavits or otherwise engaging in any similar deceptive or unlawful conduct in connection with any investigation into the activities in which Crazie Overstock or any retail establishment offering the Rewards Program has engaged.

¶ 10 On 1 July 2016, defendants filed a motion to dismiss Crazie Overstock's complaint pursuant to N.C.G.S. §§ 1A-1, Rules 12(b)(1), (2), and (6), in which they contended that Crazie Overstock's claims were barred by the doctrines of sovereign immunity, public official immunity, and qualified immunity and asserting that Crazie Overstock's request for a declaratory judgment that its Rewards Program did not violate

N.C.G.S. § 14-306.4 failed to state a claim upon which relief might be granted. On 13 April 2017, the trial court entered an order denying defendants' dismissal motion.

¶ 11 On 17 March 2017, Crazie Overstock filed a motion seeking the issuance of a preliminary injunction that provided the same relief that it sought in that portion of its complaint seeking the issuance of a permanent injunction. On 16 May 2017, the trial court entered a temporary restraining order precluding defendants from taking certain actions against Crazie Overstock and any retail establishments participating in the Rewards Program pending a decision concerning Crazie Overstock's request for the issuance of a preliminary injunction. On 12 July 2017, defendants filed an answer in which they denied the material allegations set out in Crazie Overstock's complaint and asserted a number of affirmative defenses, including public official immunity, sovereign immunity, qualified immunity, and estoppel.

¶ 12 A hearing concerning the merits of Crazie Overstock's motion for the issuance of a preliminary injunction was held before the trial court on 29 September 2017, 5 and 6 October 2017, and 2 and 3 November 2017. On 13 December 2017, the trial court entered an order denying Crazie Overstock's motion for preliminary injunctive relief. In making this determination, the trial court concluded that Crazie Overstock had failed to demonstrate that it was likely to succeed on the merits given (1) that "[t]he fact that Crazie Overstock's games involve some level of skill and dexterity in and of itself is not enough to show a likelihood of prevailing on the merits"; (2) that "[t]he test for determining whether a game is prohibited under North Carolina law is not whether the game contains an element of skill," but is, "[i]nstead, . . . whether chance is the dominating element that determines the result of the game," citing *Sandhill Amusements, Inc. v. Miller*, 236 N.C. App. 340, 368 (2014), *rev'd per curiam on the basis of the dissenting opinion*, 368 N.C. 91 (2015); and (3) that "[t]he element of chance predominates any amount of skill or dexterity that may be present in Crazie Overstock's games, and therefore the Crazie Overstock Rewards Program may violate N.C.G.S. § 14-306.4 and other North Carolina gambling provisions." In addition, the trial court concluded that Crazie Overstock had failed to show that it was likely to sustain an irreparable injury in the absence of the issuance of the requested preliminary injunction given that (1) "Crazie Overstock's ability to sell goods over the internet will in no way be affected by law enforcement officials being allowed to enforce what they believe to be violations of the gambling laws of North Carolina as performed by retail establishments that are operating the Crazie Overstock

Rewards Program"; (2) "[Crazie Overstock] will still be able to use its website to sell goods over the internet and may continue to license retail establishments to promote the sale of their goods by displaying goods for sale and selling gift certificates"; and (3) "[t]he only impact not entering an injunction will have is that the retail establishments, that are not a party to this action, will not be able to continue to use the Crazie Overstock Rewards Program until such time as a trial/hearing on the merits is conducted and this Court rules on the pending declaratory judgment action."

¶ 13 On 11 July 2018, defendants filed a motion seeking the entry of summary judgment in their favor on the grounds that the record did not reveal the existence of any genuine issues of material fact and that defendants were entitled to judgment as a matter of law with respect to Crazie Overstock's claims pursuant to N.C.G.S. §§ 14-306.1A and 14-306.4. On 20 July 2018, Crazie Overstock voluntarily dismissed its claims against Agents McMurray, Poole, Doward, and Redd, in both their individual and official capacities, without prejudice and the claims that it had asserted against Director Senter in his individual capacity. In addition, Crazie Overstock voluntarily dismissed the claims that it had asserted pursuant to 42 U.S.C. § 1983 relating to alleged violations of its procedural due process rights and its request for prospective relief against Director Senter without prejudice, leaving the State and Director Senter, acting in his official capacity, as the only remaining defendants.

¶ 14 On 25 July 2018, defendants' summary judgment came on for a hearing before the trial court.[2] On 7 August 2018, the trial court entered an order determining that there were no genuine issues of material fact with respect to the claims that Crazie Overstock had advanced pursuant to N.C.G.S. §§ 14-306.1A and 14-306.4 and that defendants were entitled to judgment with respect to those claims as a matter of law.[3] As a result, the trial court allowed defendants' motion for summary judgment,

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2. At the hearing, Crazie Overstock objected to consideration of the expert reports submitted by defendants on behalf of Andrew Baran and Katrijn Gielens on the grounds that those reports had not been properly authenticated, that the reports had not been submitted in a timely manner, that the report prepared by Ms. Gielens contained new opinions that had not been previously disclosed in discovery, and that Mr. Baran's report invaded the province of the trial court by offering opinions concerning the ultimate issue of whether Crazie Overstock's Reward Program violated N.C.G.S. §§ 14-306.1A and 14-306.4. As a result, the trial court "excluded this information from consideration in its evaluation of the motion for summary judgment."

3. In light of this determination, the trial court declined to rule upon the claims that Crazie Overstock had advanced pursuant to N.C.G.S. §§ 14-289, 14-290, 14-292, 14-306, and 14-306.3.

resulting in the dismissal of each of Crazie Overstock's remaining claims and the entry of final judgment in favor of defendants. Crazie Overstock noted an appeal to the Court of Appeals from the trial court's order.

¶ 15 In seeking relief from the trial court's order before the Court of Appeals, Crazie Overstock argued that the trial court had erred by concluding that the Rewards Program violated N.C.G.S. §§ 14-306.1A and 14-306.4. As an initial matter, the Court of Appeals noted that N.C.G.S. § 14-306.1A "prohibits one from placing into operation a video gaming machine which allows a patron to make a wager for the opportunity to win money or another thing of value through a game of chance" and that N.C.G.S. § 14-306.4 "prohibits one from placing into operation an electronic machine which allows a patron, with or without the payment of consideration, the opportunity to win a prize in a game or promotion, the determination of which is based on chance." *Crazie Overstock Promotions, LLC v. State*, 266 N.C. App. 1, 5 (2019). According to the Court of Appeals, "[o]ne difference between [N.C.G.S. § 14-306.4] and [N.C.G.S. §] 14-306.1A is that a violation of [N.C.G.S. § 14-306.4] can occur even if the patron is not required to wager anything for the opportunity to win a prize." *Id.*

¶ 16 After noting that N.C.G.S. §§ 14-306.1A and 14-306.4 "only proscribe machines where prizes can be won through a game of chance" rather than by winning a "game of skill," the Court of Appeals distinguished these two types of games on the basis that:

> The phrase, "game of chance," is not one long known in the law and having therein a settled signification, but was introduced into our statute book by the act of 1835. . . . [This term] must be understood [ ] as descriptive of a certain kind of games of chance in contra-distinction to a certain other kind, commonly known as games of skill. [We hold that] "a game of chance" is such a game, as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance.

Id. at 5–6 (alterations in original) (quoting *State v. Gupton*, 30 N.C. 271, 273–74 (1848)). In addition, the Court of Appeals noted that, more recently, this Court has adopted a dissenting opinion reasoning that "the essential difference between a game of skill and a game of chance for purposes of our gambling statutes . . . is whether skill or chance determines the final outcome and whether chance can override or thwart the

exercise of skill." *Id.* at 6 (quoting *Sandhill Amusements*, 236 N.C. App. at 369). As a result, the Court of Appeals determined that, even though "there are elements of 'chance' in many 'games of skill' " and that "there are sometimes elements of skill present in games of chance," *id.* (first citing *Gupton*, 30 N.C. at 274, then *Collins Coin Music Co. of N.C., Inc., v. N.C. Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 409 (1994)), "[u]ltimately, whether a game is one of chance or one of skill is dependent on which element 'is the dominating element that determines the result of the game,' " *id.* (quoting *State v. Eisen*, 16 N.C. App. 532, 535 (1972) (recognizing that blackjack contains elements of both skill and chance)).

¶ 17 Although the Court of Appeals determined that the Dexterity Test, considered in isolation, is a game of skill given that "the outcome of the game is dependent primarily on the patrons' ability to react in a timely fashion," it went on to conclude that the Reward Game "is a separate game in which patrons have the opportunity to win something of value," consisting of "*the opportunity* to play an easy game of skill for money," and that "this opportunity to win money, itself," constitutes "a thing of value" and, therefore, a prize pursuant to the definition set forth in the statute. *Id.* at 6–7. As a result, the Court of Appeals held that, even though the Dexterity Test did not, standing alone, violate either N.C.G.S. §§ 14-306.1A or 14-306.4, the Reward Game violated N.C.G.S. § 14-306.4 as a matter of law. *Id.* at 8–9. On the other hand, given that "there [was] at least an issue of fact as to whether the Reward Game violates [N.C.G.S. §] 14-306.1A" arising from the fact that "[o]ne does not violate this Section unless the game of chance requires the patron to wager something of value" and the Court of Appeals' determination that it is "unclear whether, here, patrons are required to wager anything of value," the Court of Appeals affirmed the trial court's decision to grant summary judgment in defendants' favor with respect to the issue of whether the Rewards Program violated N.C.G.S. § 14-306.4 while reversing the trial court's decision to grant summary judgment in defendants' favor with respect to the issue of whether the Rewards Program violated N.C.G.S. § 14-306.1A and remanding this case to the Superior Court, Alamance County, for any necessary proceedings. *Id.* at 9.

¶ 18 In a separate concurring opinion, Judge Hampson stated that, "at least in [his] view, [the Court of Appeals'] reversal of summary judgment on the question of whether Crazie Overstock's business model violates [N.C.G.S.] § 14-306.1A should not be construed as an indication that Crazie Overstock's business model does not violate [N.C.G.S.] § 14-306.1A" and should, instead, be understood as a recognition that

"Crazie Overstock has generated a triable issue of fact as to whether the sale of gift certificates, in fact, constitutes the sale of a legitimate product offered in the free marketplace by a business regularly engaged in the sale of such goods or services or whether the sales of these gift certificates constitutes a mere subterfuge for illegal gaming." *Id.* (citing *American Treasures, Inc. v. State*, 173 N.C. App. 170, 177 (2005)). In light of the conflicting evidence concerning "the actual value received from [Crazie Overstock's] gift [certificates]," Judge Hampson wrote that "the question *sub judice* is," at least in part, "whether 'the price paid for and the value received' from the gift certificates 'is sufficiently commensurate to support the determination that the sale of [gift certificates] is not a mere subterfuge to engage in [illegal gaming], whereby consideration is paid merely to engage in a game of chance.' " *Id.* at 10 (quoting *American Treasures*, 173 N.C. at 178–79). This Court granted requests for further review of the Court of Appeals' decision filed by both Crazie Overstock and defendants.

¶ 19 In seeking to persuade us to overturn the Court of Appeals' decision with respect to the issue of whether the Rewards Program violates N.C.G.S. § 14-306.4, Crazie Overstock begins by arguing that the Court of Appeals "fail[ed] to apply the correct legal standard" in evaluating the lawfulness of the Rewards Program pursuant to N.C.G.S. § 14-306.4 and, instead, utilized a broader legal standard applicable under other gambling-related statutory provisions, thereby "ignor[ing]" the relevant statutory language, which provides that prohibited games are those which are "not dependent on skill or dexterity," *see* N.C.G.S. § 14-306.4(a)(3), so as to "render [the relevant statutory] language meaningless." Secondly, Crazie Overstock argues that the Rewards Program does not violate N.C.G.S. § 14-306.4 given that "[w]hether a participant obtains a prize is determined solely by the participant's performance on the Dexterity Test," making the "final outcome [ ] dependent on skill and dexterity." According to Crazie Overstock, "the fact that chance determines the value of the potential prize that can be realized through the Dexterity Test (by determining the amount of Reward Points awarded in the Reward Game) is not relevant to the analysis of the final outcome of the [ ] Rewards Program" given that "the test under [N.C.G.S. § 14-306.4] is limited to the analysis of the role of skill and chance in the final outcome only." Thirdly, Crazie Overstock asserts that, "even if the standard under the gambling statutes is applied, genuine issues of material fact preclude[ ] the entry of summary judgment for [defendants]" given the existence of "substantial evidence from which a reasonable trier of fact can conclude that skill and dexterity predominate over chance." Finally, Crazie Overstock argues that the Court of Appeals

erred by holding that the Reward Game, "viewed in isolation," violates N.C.G.S. § 14-306.4 on the theory that Reward Points constitute a "prize" for purposes of the relevant statutory provision. In Crazie Overstock's view, the Court of Appeals' determination that Reward Points constitute a prize amounts to a "suggest[ion] that the unrealized *opportunity* to play the Dexterity Test has value independent of the value of *playing* the game" even though "[t]he two are inextricably linked" and the "Reward Points have no inherent value."

¶ 20 In response, defendants argue, based upon this Court's decision to adopt the dissenting opinion in *Sandhill Amusements*, that the reference to skill and dexterity contained in N.C.G.S. § 14-306.4 incorporates "the traditional distinction between a game of skill and a game of chance pursuant to state law" so as to "prohibit[ ] sweepstakes that are conducted through video games" in which "chance predominates over skill." In view of the fact that "luck controls the symbols that appear in the reel-spinning Reward Games, which in turn control whether a customer can win anything more than $1 in cash by playing the Dexterity Test," defendants argue that "pure chance is responsible for whether players ever receive anything more than $1 by playing its games," causing considerations of "chance [to] predominate[ ] in Crazie Overstock's games." In addition, defendants contend that the Court's decision to adopt the dissenting opinion in *Sandhill Amusements* establishes that the Court of Appeals correctly applied the "traditional" predominant factor test rather than the "new test" suggested by Crazie Overstock. In defendants' view, *Sandhill Amusements* makes clear "that chance is the predominate factor when it controls the maximum prizes that players receive" and "can thwart skill by preventing players from winning the best prizes." Finally, defendants claim that predominance is "a mixed question of law and fact that may be resolved on summary judgment where, as here, there is no dispute about how a game is played," citing *Best v. Duke Univ.*, 337 N.C. 742, 750 (1994), on the theory that "mixed questions like [the issues presented in this case] do not turn on assessments of credibility, but instead require 'the application of legal principles' to settled facts," quoting *State v. Sparks*, 362 N.C. 181, 185 (2008), and citing *Sandhill Amusements*, 236 N.C. App. at 370.

¶ 21 According to well-established North Carolina law, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). An appellate court reviews a trial court's decision to grant

or deny a motion for summary judgment de novo. *See Meinck v. City of Gastonia*, 371 N.C. 497, 502 (2018).

¶ 22 N.C.G.S. § 14-306.4 prohibits the operation of an electronic machine which allows a user, with or without the payment of consideration, an opportunity to win a prize in a game or promotion in the event that the patron's ability to succeed "[i]s not dependent on the skill or dexterity [of the patron]. N.C.G.S. § 14-306.4(a)(3)(i). In *Sandhill Amusements*, we adopted the dissenting opinion at the Court of Appeals, which evaluated, in pertinent part, whether an enterprise involved an illegal video sweepstakes machines in violation of N.C.G.S. § 14-306.4, *Sandhill Amusements*, 236 N.C. App. at 343, before noting that the critical analytical issue revolves around whether the relevant game was "dependent on skill or dexterity." *Id.* at 365. In spite of the fact that "the term 'skill or dexterity' as used in [N.C.G.S.] § 14-306.4 ha[d] not been statutorily defined," the dissent in *Sandhill Amusements* opined that a reviewing court should look for guidance from the Court of Appeals' prior decision in *Collins Coin*, in which the Court of Appeals held that "[a] game of chance is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance"; that "[a] game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory"; and that "[i]t would seem that the test of the character of any kind of a game . . . as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game" or, "to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment." *Sandhill Amusements*, 236 N.C. App. at 368 (quoting *Collins Coin*, 117 N.C. App. at 408) (citations and quotations omitted)). In light of the numerous "inherent limitations on a player's ability to win [the game at issue in that case] based upon a display of skill and dexterity," including the fact that the machines and equipment at issue "only permitted a predetermined number of winners," would necessarily "result in the playing of certain games in which the player [would] be unable to win anything of value regardless of the skill or dexterity that he or she displays" and the fact that the opportunity to employ skill or dexterity was "purely chance-based," the dissent in *Sandhill Amusements* noted that it was "unable to see how [an] isolated opportunity [to employ skill or dexterity] to affect the outcome overrides the impact of the other features which, according to the undisputed evidence, affect and significantly limit the

impact of the player's skill and dexterity on the outcome." *Id.* at 369. As a result, given these "inherent limitations on a player's ability to win based upon a display of skill and dexterity," the dissent in *Sandhill Amusements* stated that "an individual playing the machines and utilizing the equipment at issue simply does not appear to be able to 'determine or influence the result over the long haul' " and concluded that " 'the element of chance dominate[d] the element of skill in the operation' " of the machines at issue in that case. *Id.* at 369–70 (quoting *Collins Coin*, 117 N.C. at 409).

¶ 23 The dissenting opinion in *Sandhill Amusements* that we later adopted suggests that N.C.G.S. § 14-306.4 should be interpreted to prohibit the operation of electronic gaming equipment in which skill or chance "dominat[e]" over a player's exercise of skill and dexterity or "thwart the exercise of skill or judgment," *id.* at 368 (quoting *Collins Coin*, 117 N.C. at 408). This construction of the relevant statutory language does not, contrary to Crazie Overstock's contentions, render the words "dependent on skill or dexterity" as found in N.C.G.S. § 14-306.4(a)(3) superfluous. Instead, the approach that we believe to be appropriate simply focuses upon whether skill or dexterity *actually* give the player the ability to control the extent to which he or she receives a prize and the value of the prize that he or she wins rather than merely reflecting whether the player bests the odds of winning in a game of chance.[4] Thus, the relevant test for use in determining whether the operation of an electronic gaming device does or does not violate N.C.G.S. § 14-306.4(a) is whether, viewed in its entirety, the results produced by that equipment in terms of whether the player wins or loses and the relative amount of the player's winnings or losses varies primarily with the vagaries of chance or the extent of the player's skill and dexterity.

¶ 24 After applying the appropriate legal standard to the facts presented to us in this case, we are satisfied that the Court of Appeals correctly concluded that the Crazie Overstock's gaming enterprise violated N.C.G.S. § 14-306.4. As an initial matter, given that the number of Reward Points increases the dollar value of the prizes that a player is entitled to win in the course of the Dexterity Test, the increased potential return available to such players during the Dexterity Test compels the conclusion that Reward Points constitute a "[ ]thing . . . of value" pursuant to N.C.G.S.

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4. Assuming that all of the other requirements set forth in the statute are met, nothing in this opinion or the dissenting opinion which we adopted in *Sandhill Amusements* should be interpreted as an indication that a gaming enterprise in which skill or dexterity actually predominate in resolving the issue of whether the player receives a prize and the value of that prize would violate N.C.G.S. § 14-306.4, ensuring that the relevant language does not constitute mere surplusage.

§ 14-306.4(a)(4). For that reason, the Reward Game, even when considered in isolation, violates N.C.G.S. § 14-306.4.

¶ 25 Any decision to consider the Reward Game and the Dexterity Test in conjunction with each other produces the same result, Crazie Overstock's argument to the contrary notwithstanding. In spite of the fact that the Dexterity Test, viewed in isolation, involves skill or dexterity, the extent to which a customer is able to win more than a minimal amount of money is controlled by the outcome of the Reward Game regardless of the level of skill and dexterity that the player displays while participating in the Dexterity Test. For instance, a person who is wholly unsuccessful in playing the Reward Game cannot win more than $1.00 in the event of success in the Dexterity Test regardless of how well he or she performs while playing that game, a fact that establishes that the amount of a player's winnings is primarily dependent upon chance rather than skill or dexterity as required by N.C.G.S. § 14-306.4. *Cf. Joker Club, LLC v. Hardin*, 183 N.C. App. 92, 98 (2007) (stating that "the only factor separating the players" in a game of poker is the "relative skill levels" of the players). In other words, a customer cannot win more cash playing the Dexterity Test than the amount established by the chance-driven Reward Game, although a customer may be able to reduce the amount of cash that he or she eventually obtains by poor performance during that phase of the process, a fact that compels the conclusion that "the instrumentality for victory [is not] entirely in the player's hand." *Joker Club*, 183 N.C. App. at 99. As a result, we hold that luck is so "inherent in the nature of [Crazie Overstock's] games" that chance necessarily predominates over the exercise of skill or dexterity, *Gupton*, 30 N.C. at 274, so that Crazie Overstock's Rewards Program should be classified as a game of chance rather than a game of dexterity or skill. *See Sandhill Amusements*, 236 N.C. App. at 368.

¶ 26 The result that we reach in this case is completely consistent with the General Assembly's intent in enacting N.C.G.S. § 14-306.4. As we recognized in *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289 (2012), the General Assembly "noted that 'companies have developed electronic machines and devices to gamble through pretextual sweepstakes relationships with Internet service, telephone cards, and office supplies, among other products,' and that 'such electronic sweepstakes systems utilizing video poker machines and other similar simulated game play create the same encouragement of vice and dissipation as other forms of gambling . . . by encouraging repeated play, even when allegedly used as a marketing technique." *Id.* at 294 (quoting An Act to Ban the Use of Electronic Machines and Devices for Sweepstakes Purposes, S.L.

2010-103, 2010 NC. Sess. Laws 408, 408). As we understand the record, this statement of intent clearly describes the manner in which Crazie Overstock's Rewards Program operates. Thus, we have no hesitation in holding that Crazie Overstock's Rewards Program represents the type of gaming enterprise that the General Assembly intended to prohibit by enacting N.C.G.S. § 14-306.4.[5] In light of our determination that Crazie Overstock's Rewards Program constitutes an unlawful sweepstakes in violation of N.C.G.S. § 14-306.4 and the fact that this determination appears to us to preclude the award of any relief in Crazie Overstock's favor, we conclude that there is no need for the Court to decide either of the other issues addressed in the parties' briefs and modify the Court of Appeals' decision by obviating any necessity for a remand to the Superior Court, Alamance County, for further proceedings in this case. As a result, since the Court of Appeals correctly determined that the trial court did not err by determining that Crazie Overstock's gaming enterprise constitutes an unlawful sweepstakes in violation of N.C.G.S. § 14-306.4, we modify and affirm the Court of Appeals' decision.

MODIFIED AND AFFIRMED.

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

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5. In addition to responding to Crazie Overstock's challenge to the Court of Appeals' decision, the State argued that Crazie Overstock's enterprise (1) violated the State's ban on video gaming machines as set forth in N.C.G.S. § 14-306.1A, which defines a prohibited "video gaming machine" to include any "video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes," *see* N.C.G.S. § 14-306.1A(b)(9); and (2) constituted an illegal gambling enterprise pursuant to N.C.G.S. §§ 14-292 and 14-301 on the grounds that "participants [in the Rewards Program] are not really buying the promoted products," with "the purchase of the products" being, instead, nothing more than "a pretext to place bets," citing *Hest*, 366 N.C. at 294.

DEMINSKI v. STATE BD. OF EDUC.

[377 N.C. 406, 2021-NCSC-58]

ASHLEY DEMINSKI, AS GUARDIAN AD LITEM ON BEHALF OF C.E.D., E.M.D., AND K.A.D.
v.
THE STATE BOARD OF EDUCATION AND THE PITT COUNTY BOARD OF EDUCATION

No. 60A20

Filed 11 June 2021

Constitutional Law—North Carolina—right to education—harassment by other students—board's deliberate indifference—sovereign immunity

Where plaintiff alleged that defendant-school board was deliberately indifferent to the continual harassment of her children by other students, she could bring a claim under the North Carolina Constitution because—as alleged—the indifference denied the children their constitutionally guaranteed right to a sound basic education pursuant to Article I, Section 15. Since plaintiff alleged a colorable constitutional claim for which no adequate state law remedy existed, sovereign immunity did not bar her claim and the trial court properly denied defendant's motion to dismiss.

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. 165, 837 S.E.2d 611 (2020), reversing an order denying defendant's motion to dismiss in part entered on 3 July 2018 by Judge Vince M. Rozier, Jr., in Superior Court, Wake County. On 3 June 2020, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 23 March 2021.

Fox Rothschild LLP, by Troy D. Shelton, Matthew Nis Leerberg, and Ashley Honeycutt Terrazas, for plaintiff-appellant.

Tharrington Smith, LLP, by Deborah R. Stagner, and Poyner Spruill LLP, by Edwin M. Speas, Jr. and Caroline P. Mackie, for defendant-appellee Pitt County Board of Education.

Daniel K. Siegel and Kristi L. Graunke for ACLU of North Carolina Legal Foundation, amicus curiae.

Lisa Grafstein and Virginia Fogg for Disability Rights North Carolina, amicus curiae.

Perry Legal Services, PLLC, by Maria T. Perry, and Lawyers' Committee for Civil Rights Under Law, by Mark Dorosin and Elizabeth Haddix, for North Carolina Advocates for Justice, amicus curiae.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and Jill R. Wilson, and North Carolina School Boards Association, by Allison Brown Schafer, for North Carolina School Boards Association, amicus curiae.

NEWBY, Chief Justice.

¶ 1 In this case we consider whether an individual may bring a claim under the North Carolina Constitution for a school board's deliberate indifference to continual student harassment. As alleged, this indifference denied students their constitutionally guaranteed right to the opportunity to receive a sound basic education. Article I, Section 15 of the North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." Where a government entity with control over the school is deliberately indifferent to ongoing harassment that prevents a student from accessing his constitutionally guaranteed right to a sound basic education, the student has a colorable claim under the North Carolina Constitution. Thus, governmental immunity does not bar the claim. Because plaintiff's complaint sufficiently alleges a violation here, we hold that the trial court correctly denied defendant's motion to dismiss. As such, we reverse the decision of the Court of Appeals.

¶ 2 Because this case involves a motion to dismiss, we take the following allegations as true from plaintiff's complaint. Plaintiff is the mother of three minor children, E.M.D., K.A.D., and C.E.D. (plaintiff-students), who were students at Lakeforest Elementary School in Pitt County. E.M.D. and K.A.D. are diagnosed with autism. Over a period of several months during the fall semester of the 2016–2017 school year, C.E.D. was bullied and sexually harassed by other students. Throughout the school day, Student #1 and Student #2 would grab C.E.D. by the shoulders and push her spine so that she was in pain and had trouble breathing and swallowing. Student #3 would stare at C.E.D., interrupt her during tests and other assignments, and repeatedly talk to her during instructional time. The complaint also alleges the following:

> 13. Student #3 sexually harassed C.E.D. repeatedly during the school day:

a. On multiple occasions, Student #3 put his hands in his pants to play with his genitals in C.E.D.'s presence;

b. On multiple occasions, Student #3 informed C.E.D. he "f**** like a gangster";

c. On multiple occasions, Student #3 informed C.E.D. he "want[s] to f*** [another student] from night to morning";

d. On multiple occasions, Student #3 informed C.E.D. he has "got something special for you" before putting his hands in his pants to play with his genitals;

e. On multiple occasions, Student #3 would play with his genitals and then attempt to touch C.E.D.;

f. On at least one occasion, on or about 6 October 2016, Student #3 pulled down his pants in the hallway in C.E.D.'s presence to expose his penis and wiggle it to simulate masturbation; and,

g. On at least one occasion, Student #3 pulled down his pants in the classroom in C.E.D.'s presence to expose his penis and show it to her.

. . . .

15. Student #4, perhaps encouraged by Student #3's lewd conduct going unaddressed, sexually harassed C.E.D. repeatedly:

a. On multiple occasions, Student #4 would tell C.E.D. and other students that he and C.E.D. were dating and intimate;

b. On at least one occasion, Student #4 rolled a piece of paper to approximate a penis and made motions simulating masturbation while in C.E.D.'s presence; and,

c. On at least one occasion, on or about 21 October 2016, Student #4 rolled a piece of

> paper to approximate a penis, put it in his pants, walked over to C.E.D. and attempted to show C.E.D. how to insert himself into C.E.D.'s vagina. When C.E.D. attempted to get away from Student #4 and move to another seat, Student #4 attempted to reposition himself to attempt to get under where C.E.D. would be sitting.

¶ 3 Meanwhile, E.M.D. and K.A.D. were also enrolled in classes with student #3. Both children experienced similar treatment from Student #3, "including sexual conduct, constant verbal interruptions laced with vulgarity, and physical violence including knocking students' items onto the floor, throwing objects, and pulling books and other items off shelves onto the ground."

¶ 4 C.E.D. repeatedly informed her teacher about the incidents with all four students. C.E.D also informed plaintiff, and plaintiff repeatedly notified the teacher, assistant principal, and principal of the situation. Defendant, the Pitt County Board of Education, also knew of the incidents.[1] Nonetheless, while school personnel insisted that there was a "process" that would "take time," the bullying and harassment continued with no real change. On one occasion, attempting to resolve Student #3's harassment of C.E.D., school personnel adjusted Student #3's schedule to give him additional time in E.M.D. and K.A.D.'s classes.

¶ 5 In October 2016, plaintiff transferred C.E.D., E.M.D., and K.A.D. to a new school, which was initially designated as a transfer only for the 2016–2017 school year. The transfer was later modified to be valid for as long as plaintiff and plaintiff-students resided at their then-current address.

¶ 6 On 11 December 2017, plaintiff filed a complaint in Superior Court, Wake County, based on the allegations above. Plaintiff brought a claim under Article I, Section 15, and Article IX, Section 2 of the North Carolina Constitution.[2] Plaintiff's complaint alleges:

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1. Plaintiff also named the State Board of Education as a defendant in this action. Both parties moved to dismiss at the trial court, and that court granted the State Board of Education's motion in full. Thus, the Pitt County Board of Education is the only defendant to this appeal. "Defendant" in this opinion refers only to the Pitt County Board of Education.

2. Plaintiff also brought a claim for defendant's alleged violation of the North Carolina School Violence Prevention Act (SVPA). The trial court granted defendant's motion to dismiss that claim. Plaintiff did not appeal that portion of the trial court order.

> 31. Article I, Section 15 and Article IX, Section 2 of the North Carolina State Constitution jointly guarantee each child the right to a "sound basic education." . . . .
>
> 32. The [plaintiff-students] were each denied their rights to a sound basic education as a result of being in a hostile academic environment where they were subjected to verbal and physical harassment, and in C.E.D.'s case to physical abuse and prolonged sexual harassment.
>
> 33. Defendants had substantial control over the harassing conduct.
>
> 34. The harassing conduct was severe and discriminatory.
>
> 35. Defendants had actual knowledge of the harassing conduct.
>
> 36. Defendants exhibited deliberate indifference to the harassing conduct.
>
> 37. The [plaintiff-students] were each damaged as a result of the Defendants' violations . . . .

Plaintiff seeks compensatory and punitive damages, a permanent injunction preventing defendant from assigning or requiring plaintiff-students to attend Lakeforest Elementary, attorneys' fees, and any additional relief that the trial court deems proper and just.

¶ 7 Defendant moved to dismiss, arguing in part that the constitutional claim is barred by the defense of sovereign or governmental immunity. The trial court denied defendant's motion in part, allowing the claim under the North Carolina Constitution to proceed. Defendant appealed.

¶ 8 A divided panel of the Court of Appeals reversed the trial court's order denying defendant's motion to dismiss. *Deminski v. State Bd. of Educ.*, 269 N.C. App. 165, 166, 837 S.E.2d 611, 612 (2020). The Court of Appeals first determined that defendant's appeal from the trial court's denial of the motion to dismiss, though interlocutory, was immediately appealable. *Id.* at 169, 837 S.E.2d at 614. In doing so, the Court of Appeals reasoned that the trial court's denial affected defendant's substantial right to the defense of governmental immunity, should it apply here. *Id.*

¶ 9 The Court of Appeals next recognized that an individual may bring a direct claim under the North Carolina Constitution where her rights have been abridged but she is without an adequate state law remedy. *Id.* at 170, 837 S.E.2d at 615 (citing *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992)). The Court of Appeals also recognized that the right to education as provided in the North Carolina Constitution includes the right to a sound basic education. *Id.* at 171–72, 837 S.E.2d at 615–16 (citing *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997)). The Court of Appeals then compared the present case to *Doe v. Charlotte-Mecklenburg Board of Education*, 222 N.C. App. 359, 731 S.E.2d 245 (2012) (concluding that the plaintiff's complaint alleging constitutional violations under, *inter alia*, Article I, Section 15 was insufficient to state a colorable constitutional claim). Though *Doe* involved claims of negligence arising from a teacher's sexual relationship with a high school student, the Court of Appeals concluded that, similar to its understanding of *Doe*, "abuse . . . or an abusive classroom environment" does not violate a constitutional right to education. *Deminski*, 269 N.C. App. at 174, 837 S.E.2d at 617. In the Court of Appeals' view, the constitutional guarantee extends no further than an entity affording a sound basic education by making educational opportunities available. *Id.* at 173, 837 S.E.2d at 616.

¶ 10 The dissenting opinion, however, would have concluded that plaintiff's complaint sufficiently alleged that defendant failed to provide plaintiff-students with the constitutionally guaranteed opportunity to receive a sound basic education. *Id.* at 176, 837 S.E.2d at 618 (Zachary, J., dissenting). The dissent opined that unlike in *Doe*, plaintiff's complaint here alleged a colorable constitutional claim based on the school's deliberate indifference to the hostile classroom environment. *Id.* at 177, 837 S.E.2d at 619. Thus, the dissenting opinion would have affirmed the trial court's order. *Id.* at 178, 837 S.E.2d at 619.

¶ 11 Plaintiff appealed to this Court based on the dissenting opinion at the Court of Appeals.[3] Plaintiff argues that defendant's failure to intervene here denied plaintiff-students their constitutional right to the opportunity to receive a sound basic education. Thus, plaintiff contends that the complaint presented sufficient allegations of a colorable constitutional claim to survive defendant's motion to dismiss. We agree. The

3. Additionally, plaintiff petitioned this Court to review whether the Court of Appeals properly determined that defendant had an immediate right to appeal the trial court's interlocutory order based on the alleged substantial right of governmental immunity. This Court allowed plaintiff's petition. We now conclude that discretionary review was improvidently allowed.

right to the "privilege of education" and the State's duty to "guard and maintain" that right extend to circumstances where a school board's deliberate indifference to ongoing harassment prevents children from receiving an education. N.C. Const. art. I, § 15.

¶ 12 This Court reviews de novo a trial court's order on a motion to dismiss. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). When reviewing a motion to dismiss, an appellate court considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Coley v. State*, 360 N.C. 493, 494–95, 631 S.E.2d 121, 123 (2006) (quoting *Thompson v. Waters*, 351 N.C. 462, 463, 526 S.E.2d 650, 650 (2000)).

¶ 13 Article I, Section 15 provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. This provision, added to the North Carolina Constitution in 1868, "was intended to mark a new and more positive role for state government. Not a restriction on what the state may do, it requires a commitment to social betterment" through educational opportunities. John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 62 (2d ed. 2013).

¶ 14 Additionally, Article IX, Section 2 implements the right to education as provided in Article I. Specifically, Article IX, Section 2 states that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students." Notably, these two provisions work in tandem: "Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Leandro*, 346 N.C. at 347, 488 S.E.2d at 255. "An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate." *Id.* at 345, 488 S.E.2d at 254; *see also Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 618, 264 S.E.2d 106, 113 (1980) ("[E]qual access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process.").

¶ 15 Further, Article I, Section 15 places an affirmative duty on the government "to guard and maintain that right." N.C. Const. art. I, § 15. Taken together, Article I, Section 15 and Article IX, Section 2 require the government to provide an opportunity to learn that is free from continual

intimidation and harassment which prevent a student from learning. In other words, the government must provide a safe environment where learning can take place.

¶ 16 The issue here requires us to determine whether plaintiff's complaint sufficiently alleges a claim for relief under Article I, Section 15 and Article IX, Section 2. First, to allege a cause of action under the North Carolina Constitution, a state actor must have violated an individual's constitutional rights. *See Corum*, 330 N.C. at 782–83, 413 S.E.2d at 289–90 ("The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action . . . . The fundamental purpose for its adoption was to provide citizens with protection from the State's encroachment upon these rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State."); *id.* at 783–84, 413 S.E.2d at 290 ("This Court has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights. . . . The authorities in North Carolina are consistent with the decisions of the United States Supreme Court . . . to the effect that officials and employees of the State acting in their official capacity are subject to direct causes of action by plaintiffs whose constitutional rights have been violated.").

¶ 17 Second, the claim must be colorable. *See Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 335, 678 S.E.2d 351, 352 (2009) (referencing plaintiff's "colorable claims" that may be brought directly under the North Carolina Constitution); *Claim*, *Black's Law Dictionary* (11th ed. 2019) (defining "colorable claim" as "[a] plausible claim that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law)"); *see also Colorable*, *Black's Law Dictionary* (11th ed. 2019) (defining colorable as "appearing to be true, valid, or right"). In other words, the claim must present facts sufficient to support an alleged violation of a right protected by the State Constitution.

¶ 18 Third, there must be no "adequate state remedy." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289; *see also id.* at 783, 413 S.E.2d at 290 ("Having no other remedy, our common law guarantees plaintiff a direct action under the State Constitution for alleged violations of his constitutional freedom of speech rights."). No adequate state remedy exists when "state law [does] not provide for the type of remedy sought by the plaintiff." *Craig*, 363 N.C. at 340, 678 S.E.2d at 356. Moreover, a claim that is barred by sovereign or governmental immunity is not an adequate remedy.

"[T]o be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Id.* at 340–41, 678 S.E.2d at 355. Notably, "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Corum*, 330 N.C. at 786, 413 S.E.2d at 292; *see id.* at 785–86, 413 S.E.2d at 291 ("[S]overeign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights.").

¶ 19 Here plaintiff alleged that defendant, the Pitt County Board of Education, failed to protect plaintiff-students' constitutionally guaranteed right to education under Article I, Section 15 and Article IX, Section 2. The Pitt County Board of Education, as a government entity, is a government actor.

¶ 20 Next we must determine whether plaintiff has alleged a colorable constitutional claim. We have previously determined that the North Carolina Constitution provides the right to a sound basic education. *See Leandro*, 346 N.C. at 345, 488 S.E.2d at 254. Here plaintiff has alleged that plaintiff-students have been denied that right because the school's deliberate indifference to ongoing student harassment created an environment in which plaintiff-students could not learn. Notably, the right to a sound basic education rings hollow if the structural right exists but in a setting that is so intimidating and threatening to students that they lack a meaningful opportunity to learn. Despite the fact that plaintiff-students here were provided with a public school to attend, plaintiff alleges that defendant was deliberately indifferent to conduct that prevented plaintiff-students from accessing their constitutionally guaranteed right to a sound basic education. Deliberate indifference indicates that the government entity knew about the circumstances infringing plaintiff-students' constitutional right and failed to take adequate action to address those circumstances. The alleged facts here support plaintiff's contention that the government did not "guard and maintain that right." N.C. Const. art. I, § 15. As such, plaintiff has alleged a colorable constitutional claim. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644–47, 119 S. Ct. 1661, 1672–73 (1999) (concluding that the plaintiff, a student, sufficiently stated a claim under Title IX where the defendant, a school board with control over the conduct at issue, was deliberately indifferent to known acts of ongoing sexual harassment).

¶ 21 Finally, looking at whether an adequate state remedy exists, here plaintiff seeks monetary damages as well as injunctive relief through, *inter alia*, a permanent injunction preventing defendant from assign-

ing or requiring plaintiff-students to attend Lakeforest Elementary. The remedy sought here cannot be redressed through other means, as an adequate "state law remedy [does] not apply to the facts alleged" by plaintiff. *Craig*, 363 N.C. at 342, 678 S.E.2d at 356. Thus, plaintiff has alleged a colorable constitutional claim for which no other adequate state law remedy exists.[4] Therefore, sovereign or governmental immunity cannot bar plaintiff's claim.

¶ 22 Nonetheless, defendant argues that the Court of Appeals correctly relied on its precedent in *Doe* to reach its decision here. *Doe*, as an opinion from the Court of Appeals, is not binding on this Court. Moreover, *Doe* is clearly distinguishable from this case. In *Doe* a teacher made sexual advances on and off school grounds toward and engaged in sexual activity with the plaintiff, a high school student. *Doe*, 222 N.C. App. at 361, 731 S.E.2d at 247. The plaintiff sued the school board for negligent infliction of emotional distress and negligent hiring, supervision, and retention. The plaintiff also brought a claim against the defendant for violating her constitutional right to an education under, *inter alia*, Article I, Section 15. *Id.* at 361, 731 S.E.2d at 247. In her complaint, the plaintiff merely contended that the defendant's negligence in hiring and overseeing the teacher violated the plaintiff's rights.

¶ 23 At the trial court, the defendant in *Doe* unsuccessfully moved to dismiss the constitutional claims. *Id.* at 362, 731 S.E.2d at 247–48. The Court of Appeals reversed, however, concluding that the plaintiff's complaint did not state a colorable claim under the North Carolina Constitution. *Id.* at 371, 731 S.E.2d at 253. The Court of Appeals determined that the constitutionally guaranteed right to a sound basic education does not extend "beyond matters that directly relate to the nature, extent, and quality of the educational opportunities made available to students in the public school system." *Id.* at 370, 731 S.E.2d at 252–53. Here, however, plaintiff's complaint states a colorable claim under the North Carolina Constitution. Plaintiff has alleged that defendant prevented plaintiff-students from accessing their constitutional right to a sound

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4. We note that defendant successfully moved to dismiss plaintiff's claims under the SVPA. Defendant pled sovereign or governmental immunity as a defense to any of plaintiff's claims to which it would apply. The SVPA claim is not before us on appeal, and therefore we express no opinion on the merits of that claim. We note, however, that having sought and obtained dismissal of the SVPA claim as barred by governmental immunity, defendant cannot assert that it is an adequate state remedy that would redress the harm alleged here. *See Craig*, 363 N.C. at 340–41, 678 S.E.2d at 355 ("[T]o be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim.").

basic education as a result of defendant's deliberate indifference to ongoing harassment in the classroom. Thus, plaintiff's allegations directly impact the "nature, extent, and quality of the educational opportunities made available" to plaintiff-students as well as indicate that the government failed to "guard and maintain that right."

¶ 24 The decision of the Court of Appeals, which reversed the trial court order denying defendant's motion to dismiss, is reversed. As for plaintiff's petition for discretionary review of additional issues, we conclude that discretionary review was improvidently allowed.

REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

DIAMOND CANDLES, LLC
v.
JUSTIN WINTER; BAKER BOTTS, LLC; BRIAN LEE; SYMPHONY COMMERCE; AND HENRY KIM

No. 399A20

Filed 11 June 2021

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion on defendants' Rule 12(b)(2) and Rule 12(b)(3) motions to dismiss entered on 12 March 2020 by Judge James L. Gale, Special Superior Court Judge for Complex Business Cases, in Superior Court, Person County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 18 May 2021.

Miller Law Group, PLLC, by W. Stacy Miller, II, for plaintiff-appellee.

Gordon & Rees, by Robin K. Vinson and Allison J. Becker, for defendant-appellants.

PER CURIAM.

¶ 1 Upon consideration of the affidavits and evidence tendered to the trial court by Symphony Commerce and Henry Kim (defendants) and plaintiff Diamond Candles, the allegations in the complaint that are not controverted by defendants' affidavits, the trial court's findings of fact,

and the arguments of counsel, we conclude that there is substantial record evidence supporting the trial court's finding of personal jurisdiction over defendants in this matter and that the trial court did not abuse its discretion by denying defendants' motion to dismiss for improper venue and defendants' motion to stay under the doctrine of forum non conveniens. Thus, we affirm the trial court's order and opinion on defendants' Rule 12(b)(2) and Rule 12(b)(3) motions to dismiss entered on 12 March 2020 as it relates to defendant-appellants Symphony Commerce and Henry Kim.

AFFIRMED.[1]

IN THE MATTER OF I.K.

No. 403A20

Filed 11 June 2021

Child Abuse, Dependency, and Neglect—permanency planning order—findings and conclusion—sufficiency of evidence

The trial court's permanency planning order granting guardianship of the minor child to her maternal grandmother was affirmed where clear and convincing evidence supported the challenged findings of fact regarding respondent-father's lack of suitable and safe housing, substance abuse, and domestic violence. In turn, those findings supported the trial court's conclusion that respondent acted inconsistently with his constitutionally protected status as a parent.

Justice EARLS dissenting.

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 13 (N.C. Ct. App. 2020), affirming an order entered on 22 March 2019 by Judge Samantha Cabe in District Court, Orange County. Heard in the Supreme Court on 23 March 2021.

Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

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1. The order and opinion of the North Carolina Business Court, 2020 NCBC 17, is available at https://www.nccourts.gov/assets/documents/opinions/2020%20NCBC%2017.pdf.

Sean P. Vitrano for respondent-appellant father.

BARRINGER, Justice.

¶ 1 Respondent is the biological father of I.K. (Iliana)[1] and appeals from the Court of Appeals decision affirming the trial court's permanency-planning order granting guardianship of Iliana to her maternal grandmother. Since we conclude that the trial court's findings of fact are supported by clear and convincing evidence and the findings of fact support the conclusion that respondent acted inconsistently with his constitutionally protected status as Iliana's parent, we affirm.

I. Factual and Procedural Background

¶ 2 Iliana was born to respondent and Iliana's mother (Patty)[2] in 2012. On 10 November 2014, the Rockingham County Department of Social Services (RCDSS) received an initial Child Protective Services (CPS) report for Iliana and her half sibling.[3] CPS was concerned that Iliana was living in a hoarder home, that Iliana's parents were using illegal substances, that her parents were selling their food stamps, and that her parents were having domestic discord. After RCDSS completed an assessment, services were not recommended, and the case was closed on 6 January 2015.

¶ 3 On 16 October 2015, the Orange County Department of Social Services (OCDSS) received a CPS report alleging that Iliana's half sibling was exposed to drug abuse and domestic violence while in Patty's care. Respondent and Patty did not live together at the onset of OCDSS's involvement with Patty. On 8 January 2016, Patty was sentenced to forty-five days in jail for shoplifting and violating her probation. On 26 April 2016, Patty tested positive for cocaine and was jailed for violating her probation.

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1. A pseudonym is used to protect the juvenile's identity and for ease of reading. While the parties agreed to a different pseudonym, we use the pseudonym used by the Court of Appeals for consistency.

2. A pseudonym is used for Iliana's mother for ease of reading. Furthermore, Patty is subject to the trial court's order ceasing reunification as to Iliana and appealed the trial court order to the Court of Appeals. However, Patty neither filed a notice of appeal of the Court of Appeals opinion affirming the trial court's order to this Court, nor did she file a brief regarding the instant case.

3. Iliana's half sibling, who has the same mother, is not the subject of this appeal.

¶ 4 After Patty was jailed, respondent stated that he could not care for Iliana due to his work schedule, and he voluntarily placed Iliana in her maternal grandmother's care. After Patty was released from jail, respondent and Patty met with OCDSS and agreed that Iliana would remain with her maternal grandmother "until the housing situation was resolved and [respondent and Patty] engaged in substance abuse treatment."

¶ 5 On 27 May 2016, respondent completed an intake with a substance abuse recovery center but refused to submit to drug screens and admitted to the social worker that he would test positive for marijuana. By August 2016, respondent and Patty were homeless and were staying with respondent's mother. Due to respondent's substance abuse and lack of stable housing, OCDSS obtained nonsecure custody of Iliana on 10 August 2016. Shortly thereafter, respondent and Patty agreed to the entry of a consent order that granted temporary custody of Iliana to her maternal grandmother.

¶ 6 After a hearing on 15 September 2016, the trial court entered an order on 6 December 2016 adjudicating Iliana to be a dependent juvenile and ordering her to remain in the temporary legal and physical custody of her maternal grandmother. The trial court ordered respondent and Patty to complete drug screens, seek substance abuse treatment, and comply with all treatment recommendations. However, respondent was arrested in October 2016 and was subsequently convicted of assault on a female after a domestic violence incident between himself and Patty.

¶ 7 The trial court held a hearing on 15 December 2016 to review the case and found that respondent was not complying with drug screens and that domestic violence was a new concern due to the domestic violence incident between respondent and Patty.

¶ 8 After the first permanency-planning hearing held on 2 March 2017, the trial court entered an order setting the permanent plan for Iliana as guardianship and a secondary plan of reunification. At the time of the hearing, respondent had refused eight out of fifteen requested drug screens and stated on one of the refusals that he would likely test positive for marijuana.

¶ 9 On 4 May 2017, respondent requested that the trial court review the case to determine whether the trial court's last order was in Iliana's best interests, including the provisions regarding visitation. The trial court granted respondent unsupervised visits for a minimum of one hour each week after a review hearing on 18 May 2017. However, the trial court stated that the visits would be suspended or revised if respondent was

not in full compliance with his substance abuse treatment and did not submit negative drug screens.

¶ 10 On 15 June 2017, a second permanency-planning hearing was held. In an order entered on 17 July 2017, the trial court maintained the permanent plan of guardianship and the secondary plan of reunification for Iliana. The trial court found that respondent and Patty had refused a significant number of drug screens and had not engaged in services to address their domestic violence issues. The trial court subsequently ordered respondent and Patty to submit to random drug screens, continue substance abuse treatment, abstain from domestic violence, and maintain safe and stable housing. Respondent was also required to participate in a program for domestic violence perpetrators.

¶ 11 On 4 July 2017, respondent and Patty appeared under the influence of a substance while in Iliana's presence. OCDSS rescinded unsupervised visitation on 19 July 2017. Respondent and Patty had another child together in September 2017.

¶ 12 On 7 November 2017, the trial court entered a permanency-planning order in which it granted guardianship of Iliana to her maternal grandmother and ceased reunification efforts with respondent due to a lack of progress on his case plan. The trial court incorporated by reference the social worker's court report, which documented that respondent continued to reside in his mother's home despite safety concerns, respondent and Patty had another child that resided in respondent's mother's home, respondent could only miss one more session before being terminated from the domestic violence perpetrator program, and both respondent and Patty last refused a drug screen on 5 June 2017. Respondent and Patty timely appealed the trial court's order granting guardianship to Iliana's maternal grandmother.

¶ 13 In March 2018, both respondent and Patty completed their substance abuse program at the substance abuse recovery center. However, on 20 April 2018, Patty displayed drug-seeking behavior evidenced by text messages she sent to respondent.

¶ 14 On 7 August 2018, in a unanimous decision, the Court of Appeals vacated the trial court's order and remanded the case to the trial court based on its conclusion that there were insufficient findings to support the trial court's conclusion that respondent was acting inconsistently with his constitutionally protected status as a parent.

¶ 15 Shortly thereafter, on 23 August 2018, respondent was involved in a domestic incident with his mother. The emergency response call log

indicated that respondent was verbally aggressive toward his mother and was "tearing up" respondent's mother's home. On 4 September 2018, respondent tested positive for marijuana. Also, RCDSS completed a home visit on 12 December 2018 and found that respondent's mother's home continued to pose safety concerns for Iliana.

¶ 16 On 3 and 18 January 2019, the trial court held another permanency-planning hearing regarding Iliana. The trial court again found that respondent had acted inconsistently with his protected status as a parent and determined that guardianship with Iliana's maternal grandmother was in Iliana's best interests.

II. Respondent's Appeal

¶ 17 Respondent timely appealed to the Court of Appeals. In a divided opinion filed on 18 August 2020, the Court of Appeals affirmed the trial court's order. *See In re I.K.*, 848 S.E.2d 13, 24 (N.C. Ct. App. 2020). Respondent then appealed to this Court.

¶ 18 On appeal, respondent argues that the trial court's conclusion that he acted inconsistently with his constitutionally protected status as a parent to Iliana is not supported by clear and convincing evidence. Respondent specifically challenges the trial court's findings of fact 26(b)–(c), 28, 30, 37, and 43(a), which relate to his substance abuse, housing situation, and involvement in domestic violence.

III. Standard of Review

¶ 19 "[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63 (2001). "The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721 (2009) (cleaned up) (first quoting *In re Will of McCauley*, 356 N.C. 91, 101 (2002); then quoting *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 363–64 (1934)), *cert. denied*, 563 U.S. 988 (2011).

¶ 20 The trial court's legal conclusion that a parent acted inconsistently with his constitutionally protected status as a parent is reviewed de novo to determine whether the findings of fact cumulatively support the conclusion and whether the conclusion is supported by clear and convincing evidence. *See Boseman v. Jarrell*, 364 N.C. 537, 549 (2010);

Adams, 354 N.C. at 65–66. The trial court's findings of fact are conclusive on appeal if unchallenged, *see Boseman*, 364 N.C. at 549; *Adams*, 354 N.C. at 65–66, or if supported by competent evidence in the record, *see In re L.R.L.B.*, 2021-NCSC-49, ¶ 11.

IV. Analysis

¶ 21 The trial court relied on the challenged findings of fact along with others, which in pertinent part are listed below, to support its conclusion that respondent acted inconsistently with his constitutionally protected right to parent Iliana:

> 26. Both [Patty and respondent] have acted inconsistently with their constitutionally-protected right to parent the minor child. Specifically, this court finds as follows:
>
> > a. [Patty and respondent] voluntarily placed the minor child with her maternal grandmother on April 26, 2016 because of [Patty's] impending incarceration and [respondent's] lack of suitable housing and work schedule.
> >
> > b. [Patty and respondent] have not obtained safe and stable housing appropriate for the juvenile in the three (3) years the juvenile has been out of their custody. Though the home in which they were living was found to have met minimum standards by RCDSS on two visits between March 2, 2017 and October 5, 2017, the home was deemed not suitable for the minor child when RCDSS visited the home in the spring of 2018 and again on 12/12/2018.
> >
> > c. [Patty and respondent] continue to engage in domestic violence and illegal drug use despite their completion of treatment and classes.
>
> 27. When this hearing began on January 3, 2019, [Patty and respondent] were still residing with [respondent's] mother in a home that Rockingham County DSS deemed unsuitable for the children as late as December 12, 2018.
>
> 28. [Patty and respondent] have made some limited progress to remedy conditions that led to the minor

child being removed from their home. However, the issues of substance use, domestic violence, and safe, substance-free housing are still present despite numerous services that have been offered to the family since the issues were first identified in 2014.

. . . .

30. . . . [Respondent] completed a domestic violence perpetrator program at Alamance County DV Prevention in February 2018. There has not been another identified domestic violence incident between [Patty and respondent], however there has been domestic violence in the home between [respondent] and his mother . . . .

31. On August 23, 2018, law enforcement responded to a domestic disturbance involving [respondent and his mother] . . . , with whom [Patty and respondent] reside. [Patty and respondent] were not home at the time of law enforcement response. [Respondent] testified he and [his mother] had a disagreement over his misplacing her handicapped placard. He stated that he fell into the dryer while [his mother] was in the bathroom, and then he left the home.

32. [Patty and respondent] completed substance abuse treatment with Freedom House Recovery in March 2018. During the course of the case, [Patty and respondent] only partially complied with random drug screens. Upon remand of the case, OCDSS requested [Patty and respondent] each complete hair follicle drug screens on September 4, 2018. Both parents tested positive for marijuana.

. . . .

34. Despite [respondent] earning a gross income of $46,349.00 per year in a job he has maintained for 10 years and [his mother] paying a portion of the household expenses, [Patty and respondent] continue to reside with their infant daughter and [respondent's mother] . . . , with whom they moved after eviction in 2016 in a two-bedroom single wide trailer that has holes in the floor that were recently covered with

plywood at the request of RCDSS, and that has not otherwise been maintained.

35. Rockingham County DSS completed multiple home visits in 2018. The home was identified to need serious repairs, specifically to the floor, that needed to be resolved for safety; and the home continued to be extremely cluttered akin to hoarding. The home was not deemed appropriate for another juvenile to reside as recently as December 12, 2018.

36. The GAL made two visits to [Patty and respondent's] home . . . prior to appeal of the last order. He recalled the condition of the home to be similar to the description testified to by [the CPS investigator] . . . .

37. At the continuation of this hearing on January 18, 2019, [Patty and respondent] provided photographs of the home that showed somewhat improved conditions from the conditions reflected in the photographs and testimony presented on January 3, 2019. [Patty] testified that the new photos were taken after the January 3, 2019 beginning of the hearing. The court finds the testimony and documentation of Rockingham County DSS to be credible, and that the housing conditions of [Patty and respondent] as of December 12, 2018 was not safe and appropriate for [Iliana]. Any improvements made between the beginning of this hearing and its conclusion are not indicative of the day-to-day condition of the home.

38. [Patty and respondent] indicate they plan to reside with [respondent's mother] in the future despite the ongoing concerns about the safety and appropriateness of the condition of the home.[ ]

39. [Patty and respondent] represent that their finances are tight despite [respondent's] stable employment where he earns more than $46,000 per year. [Patty and respondent] have two vehicle loans that total $519 per month. . . . [Patty and respondent] do not pay rent to [respondent's mother], and they share utility expenses with her. [Respondent's mother] pays the mortgage on the home and all of the

> car insurance is in her name. [Respondent] pays $53 per week in child support.
>
> . . . .
>
> 43. Pursuant to N.C.G.S. § 7B-906.2(d), the following demonstrate a lack of success:
>
> > a. [Patty and respondent] are not making adequate progress within a reasonable period of time under the secondary plan of reunification. They have not resolved the issues of substance abuse and [u]nstable housing that led to [the] removal of custody [of Iliana].

A. Substance Abuse

¶ 22 Respondent challenges finding of fact 26(c) as unsupported by clear and convincing evidence. We first address his challenge to the portion of the finding addressing his substance abuse. We conclude the evidence clearly shows that respondent continued to engage in substance abuse after he completed the substance abuse treatment program.

¶ 23 In March 2018, respondent completed his court-ordered substance abuse treatment program. Yet, a month later, in April 2018, Patty exchanged text messages with respondent that displayed drug-seeking behavior. Respondent also continued to use marijuana despite his substance abuse history and tested positive for marijuana in September 2018. Respondent concedes some of these facts expressly in his brief and also concedes them by not challenging these findings of fact by the trial court.

¶ 24 Furthermore, the evidence and testimony from the hearing tend to show that respondent's substance abuse issue had persisted since RCDSS became involved with Iliana in 2014. In 2014, RCDSS was concerned that respondent was abusing substances. Respondent also repeatedly refused to submit to drug screens throughout the duration of this case, refusing a total of eleven out of thirty-one requested drug screens, and of the screens he completed, he tested positive for substances on two occasions.

¶ 25 Respondent asks this Court to reweigh the evidence and conclude that one positive drug screen does not establish that he continued to use illegal drugs as found by the trial court. However, the trial court was also presented with evidence that Patty exchanged text messages with respondent displaying drug-seeking behavior in April 2018,

that respondent tested positive for marijuana after completing his court-ordered substance abuse treatment program in September 2018, and that respondent refused eleven out of thirty-one drug screens. Furthermore, respondent's request is untenable; this Court reviews the trial court's order to determine whether competent evidence supports the finding of fact and cannot reweigh the evidence when making this determination.

> It is the trial court's responsibility to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. Because the trial court is uniquely situated to make this credibility determination appellate courts may not reweigh the underlying evidence presented at trial.

In re G.G.M., 377 N.C. 29, 2021-NCSC-25, ¶ 18 (cleaned up) (first quoting *In re A.R.A.*, 373 N.C. 190, 196 (2019); then quoting *In re J.A.M.*, 372 N.C. 1, 11 (2019)). In light of the aforementioned evidence and concessions by respondent, the portion of finding of fact 26(c) that respondent "continue[s] to engage in . . . illegal drug use despite [his] completion of treatment and classes" is plainly supported by clear and convincing evidence.

B. Safe and Stable Housing

¶ 26 Respondent challenges findings of fact 26(b), 28, 37, and 43(a) as not supported by clear and convincing evidence.[4] However, substantial evidence was presented to the trial court to support its findings that respondent did not have safe and stable housing for Iliana.

¶ 27 At the 3 January 2019 permanency-planning hearing, the Rockingham County CPS investigator testified that when he visited respondent's mother's home for the spring 2018 visit, the clutter in the home was piled to the ceiling in some areas and there were holes in the floor of the home covered with plywood. When the investigator returned to complete another visit on 12 December 2018, he found the same conditions present. The investigator stated that respondent's mother's home would pose safety concerns to Iliana, and he was unsure of where she would be able to sleep if respondent regained custody. Specifically, the investiga-

4. Respondent also challenges the trial court's finding that the guardian ad litem corroborated the RCDSS report of the condition of respondent's mother's home as being irrelevant. Since the finding is not necessary to our determination that the trial court's findings are supported by clear and convincing evidence, we do not consider that challenged finding in our analysis.

tor stated that respondent's mother offered that Iliana could sleep on a "foldout couch," but the investigator was "not sure how that would be folded out because [of] the size of the trailer." Notably, respondent has not challenged finding of fact 35, in which the trial court found based on the investigator's testimony that the house was deemed inappropriate for Iliana "to reside as recently as December 12, 2018."

¶ 28 The investigator also testified that during his spring 2018 inspection, the holes in the floor of respondent's mother's home had plywood on it, but when he walked on it, he "could feel [the plywood] kind of bouncing a little bit." The investigator notified respondent of the issues with the floor during that inspection. At the 12 December 2018 inspection, when the investigator found the floor in the same condition, respondent's mother asked the investigator not to include the flooring issue in his report, but nevertheless told the investigator that her in-home aide has shared concerns that she would fall through the floor. While respondent and Patty testified to placing new plywood over the holes in the floor after the 12 December 2018 home inspection, respondent had been aware of the ongoing safety concerns with his mother's home since 2017. Additionally, Patty presented photographs of some additional improvements made only *after* the 3 January 2019 hearing, but it was within the trial court's authority to weigh this evidence with the other evidence before the trial court and find that the state of the home in the pictures was "not indicative of the day-to-day condition of the home."

¶ 29 Furthermore, evidence from the hearing indicates that respondent has and continues to live in his mother's home despite earning an income of more than $46,000.00 and maintaining stable employment for ten years yet had not obtained independent housing, despite OCDSS's offers of assistance. Respondent also continues to live with Patty and their other child, but the trial court ceased efforts to reunify Iliana with Patty and Patty did not appeal the 18 August 2020 Court of Appeals decision to this Court. Respondent has no plans of moving out of his mother's home, despite the ongoing safety concerns and overcrowded conditions, nor does he plan to live separately from Patty and their other child. Iliana would be subjected to living with Patty if she were returned to respondent's care, despite the trial court's conclusion that Patty acted inconsistently with her protected status as Iliana's parent. As aptly stated by OCDSS, "[respondent] should not [be] confronted with a Sophie's Choice between Iliana and [Patty] and their new [child]," which would impose further instability in an already precarious situation.

¶ 30 Respondent's housing situation exposes Iliana to unsafe living conditions and exposes her to an unstable living environment. Therefore, we

conclude that clear and convincing evidence supports the trial court's finding that respondent did not have safe and stable housing for Iliana.

C. Domestic Violence

¶ 31 Respondent challenges findings of fact 26(c) and 30 as not supported by clear and convincing evidence. We agree with the Court of Appeals that the trial court mischaracterized the incident between respondent and his mother as involving physical violence when there was no evidence to support this characterization. *See In re I.K.*, 848 S.E.2d at 20–21. Therefore, we disregard that portion of finding of fact 30 as not supported by clear and convincing evidence. However, the unchallenged findings of fact documenting respondent's past domestic violence and the domestic incident involving his mother support the trial court's finding that domestic violence was an ongoing concern with respondent.

¶ 32 Specifically, domestic violence between respondent and Patty was identified as an ongoing issue since the first report was made to RCDSS in 2014. In 2016, a domestic violence incident occurred between them that led to respondent being convicted of assault on a female. Subsequently, in May 2017, respondent was ordered by the trial court to participate in a domestic violence perpetrator program in May 2017. While respondent demonstrated a reluctance to participate by missing several sessions, respondent reported that he eventually completed the program in February 2018. Nevertheless, only a few months later, respondent was involved in a domestic disturbance involving his mother. The involvement of law enforcement was required to address the incident. The 911 call log indicated that respondent was "verbally aggressive towards his mother[and] was tearing up [his mother's] home that he also resides in" during the 2018 incident.

¶ 33 Considering the unchallenged findings of fact and evidence concerning respondent's history with domestic violence and continued aggressive and violent behavior in the home in August 2018 after completing the domestic violence perpetrator program, we conclude that challenged findings of fact 26(c) and 30 are supported by clear and convincing evidence.

D. Respondent Acted Inconsistently with his Constitutionally Protected Status as Iliana's Parent

¶ 34 The Supreme Court of the United States has recognized that a natural parent has a constitutionally protected liberty interest in the custody, care, and control of his or her child. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *see also Petersen v. Rogers*, 337 N.C. 397, 402 (1994) (discuss-

ing that "North Carolina's recognition of the paramount right of parents to custody, care, and nurture of their children antedates the constitutional protections set forth in" *Stanley v. Illinois*, 405 U.S. 645 (1972)). In ceasing reunification efforts with a parent and granting guardianship to a nonparent, there is no bright-line test to determine whether a parent's conduct amounts to action inconsistent with his constitutionally protected status. *Boseman*, 364 N.C. at 549. "[E]vidence of a parent's conduct should be viewed cumulatively." *Owenby v. Young*, 357 N.C. 142, 147 (2003).

¶ 35 While there is no bright-line test, respondent's actions displayed an unwillingness to act as Iliana's parent. Reviewed by this Court de novo, the cumulative evidence, as discussed previously herein, supports the trial court's findings that throughout OCDSS's involvement with Iliana, respondent did not refrain from using illegal substances, respondent did not adequately address his issues with domestic violence, and respondent did not obtain safe and stable housing. In fact, in May 2016, respondent voluntarily placed Iliana with her maternal grandmother "until the housing situation was resolved." Yet now, respondent states that he has no plans to move from the unsafe and crowded home, notwithstanding the fact that the home is totally unsuitable for Iliana. What may have begun as a temporary placement is now, by the respondent's choice, an indefinite one.

¶ 36 Since the trial court's findings of fact supporting its conclusion that respondent acted inconsistently with his constitutionally protected status as Iliana's parent were supported by clear and convincing evidence and the findings support the trial court's conclusion, the Court of Appeals did not err by affirming the trial court's order.

V. Conclusion

¶ 37 The trial court's challenged findings of fact regarding respondent's substance abuse, lack of safe and stable housing, and domestic violence concerns are supported by clear and convincing evidence, and the findings of fact support the trial court's conclusion that respondent acted inconsistently with his constitutionally protected status as Iliana's parent. As such, the trial court did not err by concluding that respondent acted inconsistently with his constitutionally protected status as Iliana's parent. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

¶ 38 Unless a parent has been deemed unfit, an order awarding guardianship to a nonparent over a parent in the best interest of the child, as occurred in this case, requires the court to find, based on evidence in the record, that the parent has acted inconsistently with his or her constitutionally protected status as a parent. *Price v. Howard*, 346 N.C. 68, 79 (1997). Abdicating its dual responsibilities to follow precedent and uphold the federal constitution, the majority strains to find sufficient facts in this case supporting such a conclusion. If we are not more careful, literally thousands of parents will be swept into the net of potentially losing their parental rights by virtue of their poverty. Such a result is contrary to our constitutional guarantees. As we said in *Price*, "[i]f a natural parent's conduct has not 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 would offend the Due Process Clause." *Id.* Courts cannot take children away from their natural parents merely because another person could provide a materially better home.

¶ 39 Respondent made the difficult decision on 26 April 2016 to send his daughter (Iliana)[1] to live with her grandmother while he settled his housing situation and received substance abuse treatment. Respondent ultimately completed a substance abuse treatment program in March 2018. The record also reveals one incidence of domestic violence between respondent and his partner (Patty)[2] for which respondent received treatment, completing a "domestic violence perpetrator program at Alamance County DV Prevention in February 2018." After completing the substance abuse treatment program, the record and the trial court's findings indicate that respondent tested positive for marijuana on one occasion, on 4 September 2018. Moreover, the record and the trial court's findings indicate that, after completing the domestic violence perpetrator program, respondent had a loud argument with his mother that prompted a call to law enforcement.

¶ 40 At the time of the permanency planning hearing, respondent and Patty were living in a two-bedroom mobile home with respondent's mother and respondent's and Patty's infant daughter. They had been liv-

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1. As does the majority, I use a pseudonym to protect the juvenile's identity and for ease of reading.

2. As does the majority, I use a pseudonym for Iliana's mother.

ing there since being evicted in 2016. That mobile home was deemed to meet minimum standards on two visits in 2017 but was then deemed to be unsuitable on two visits in 2018, the last of which was on 12 December 2018. Between the hearings on 3 January 2019 and 18 January 2019, respondent and Patty improved the condition of the home and provided photographs of the same to the trial court at the 18 January hearing.

¶ 41 The majority has determined that respondent's failure to timely repair the damaged floor of the mobile home or to obtain new housing, along with his positive test for marijuana and loud argument with his mother (the majority describes the argument as "a domestic incident"), sufficiently establish that respondent has acted inconsistently with his constitutionally protected status as a parent. In my view, this low bar is inconsistent with our precedent and seriously threatens the stability of families throughout the state. There is no record evidence that respondent willfully acted to subvert his constitutional rights. Instead, the majority's decision to disrupt his constitutional interest in the upbringing of his daughter poses a threat to families who may be forced by financial constraints to put off home repairs, or who need to place their children with family members when times are hard or while dealing with personal issues. I do not read the record as supporting the conclusion that respondent has acted inconsistently with his constitutionally protected status as a parent, nor do I read the law as permitting such a conclusion where a parent has not acted in conscious disregard of their parental obligations. I respectfully dissent.

I. Findings of Fact

¶ 42 Respondent has argued in substance that three of the trial court's factual findings are unsupported by the record: (1) that respondent failed to obtain safe and stable housing, (2) that respondent continued to engage in domestic violence after having received treatment, and (3) that respondent continued to have a substance abuse problem after having received treatment. The trial court's findings that respondent "continue[d] to engage in domestic violence and illegal drug use despite [his] completion of treatment and classes" are unsupported by the record. As a result, these findings cannot support the conclusion that respondent has lost his constitutional rights to his child. Although I might have found differently from the trial court, I agree with the majority that the trial court's conclusion that respondent had "not obtained safe and stable housing appropriate for the juvenile" is supported by the record. In the context of this case, however, that finding is not sufficient to conclude that respondent acted inconsistently with his constitutionally protected status as a parent.

A. Safe and Stable Housing

¶ 43 I agree with the majority's determination "that clear and convincing evidence supports the trial court's finding that respondent did not have safe and stable housing for Iliana." The trial court found that, on two occasions in the year leading up to the commencement of the permanency planning hearing, the home in which respondent and Patty were living had been "deemed not suitable for [Iliana]." This finding was supported by testimony from Jordan Houchins, an investigator with Rockingham County Child Protective Services, who stated that he visited the home in spring 2018 and again in December 2018. Mr. Houchins testified that, in addition to problems with the flooring and some clutter, the home was not large enough for another child as well as the home's current occupants, particularly given the "pretty serious health issues" of respondent's mother.

¶ 44 Respondent argues that he "addressed Mr. Houchins' concerns by replacing the portions of the floor that were unsound and removing items from the home that contributed to the clutter." However, repairing the floors and removing some items from the home does not address the crowded conditions identified by Mr. Houchins. Indeed, the trial court credited the testimony of Mr. Houchins, who testified that "[e]ven if [the mobile home] wasn't cluttered, it's very small" and identified the number of people in the home as a concern. The trial court acted appropriately within its role as factfinder when it determined that the improvements made by respondent were "not indicative of the day-to-day condition of the home" and the improvements were not enough to overcome the conclusions of the most recent report of the CPS investigator and convince the trial court that the home was now safe and appropriate for Iliana.

¶ 45 However, there are plenty of parents and families in our state who experience housing insecurity. Sometimes families are forced to live in cramped conditions. It seems unusually cruel to scrutinize families who are struggling to obtain adequate housing and use the lack of enough bedrooms to justify taking away their children. As discussed in more detail below, the simple fact of living in poor housing conditions is not enough to support the conclusion that a parent has acted inconsistently with their constitutionally protected interest in their child. In the absence of any clear and convincing evidence that respondent had better housing options available and chose this one in contravention of his parental obligations, there is no logical connection between respondent's housing insecurity and the conclusion that he has acted inconsistently with his constitutionally protected status as a parent. *Cf. Owenby v. Young*, 357 N.C. 142, 147 (2003) (a father's drunk driving was not

conduct inconsistent with his constitutionally protected status as a parent because the children were not in the car or living with him at the time). Mere supposition about what the respondent's income might have enabled him to rent is not enough. As a result, while the trial court's finding on this point is supported by the record, that finding does not include the element of volitional conduct that is necessary to support the conclusion that respondent's constitutional interest in his child should be severed.

¶ 46 The majority also mentions the fact that respondent continues to live with Patty and intends to continue doing so. The majority notes that Patty did not appeal the decision below to this Court, leaving intact the trial court's determination that she has engaged in conduct inconsistent with her constitutionally protected status as a parent. This is a particularly unfair and unjustified argument. Patty's conduct is not conduct on the part of respondent that is inconsistent with respondent's obligations as a parent. Moreover, there was never a court order that Patty be kept away from Iliana or other evidence that would make respondent's decision to live with her detrimental to his ability to be a parent.

B. Domestic Violence

¶ 47 The trial court's finding that domestic violence continued in respondent's home was unsupported. Instead, the evidence in the record at most supports the conclusion that respondent engaged in a loud argument with his mother.

¶ 48 In support of its conclusion that respondent had "acted inconsistently with [his] constitutionally-protected right to parent" Iliana, the trial court found that respondent "continue[d] to engage in domestic violence." The trial court elaborated, finding that respondent "completed a domestic violence perpetrator program at Alamance County DV Prevention in February 2018." The trial court also noted that "[t]here has not been another identified domestic violence incident between [respondent and Patty]." The trial court, however, stated that "there has been domestic violence in the home between [respondent] and his mother." This finding was unsupported.

¶ 49 The trial court wrote that "law enforcement responded to a domestic disturbance involving [respondent] and paternal grandmother" and that respondent "testified he and [his mother] had a disagreement over his misplacing her handicapped placard. He stated that he fell into the dryer while [his mother] was in the bathroom, and then he left the home." The record indicates that respondent's mother "reported it had been a 'family disagreement.' " There is no evidence in the record that

respondent was violent toward his mother, that respondent was violent toward his mother's property, or that there was any law enforcement involvement related to the incident other than responding to a call about a disturbance. The record does not support the majority's factual finding that respondent engaged in "aggressive and violent behavior," nor does the record support the trial court's factual finding that respondent "continue[d] to engage in domestic violence."

C. Drug Use

¶ 50 The trial court's findings that respondent "continue[d] to engage in illegal drug use" and that "the issue[ ] of substance use" was "still present despite numerous services that have been offered" are similarly unsupported. As the trial court acknowledged, the only evidence that respondent continued to use illegal drugs after receiving substance abuse treatment was one positive drug screen for marijuana on 4 September 2018. However, this drug screen was followed by three negative drug screens in the months leading up to the permanency planning hearing. Moreover, this was the only positive drug screen from May 2016 through December 2018.

¶ 51 The majority characterizes respondent's request that we conclude the trial court's findings were not supported by the record as a request to "reweigh the evidence." However, this characterization is off the mark. It is, of course, our job on appellate review to look to the record and determine whether the trial court's findings are supported by the evidence. In this case, a review of the relevant record evidence reveals no record that respondent had a problem with substance abuse, or even that respondent used illegal drugs on more than one occasion in over two years.

¶ 52 The majority leans heavily on the fact that "throughout the duration of this case," respondent refused eleven out of thirty-one requests for drug screens. What the majority overlooks is that from November 2016 through December 2018, respondent was in fact tested (meaning that he did not refuse the test) at least one time each month and received a negative test result. The only exceptions are a positive test in January 2017 for oxycodone, for which respondent provided a prescription, and the one positive test for marijuana in September 2018. Against this backdrop, in which it is clear from the record that respondent tested negative for drugs each month for more than two years and had just one positive drug test for a nonprescription drug in that time, it is astoundingly disingenuous for the majority to conclude that the record supports the trial court's finding that respondent continued to engage in illegal drug use despite the completion of substance abuse treatment. Even more

disingenuous is the majority's reliance on the fact that "Patty exchanged text messages with respondent that displayed drug-seeking behavior." The majority neglects to mention the trial court's finding that the text messages evidenced drug-seeking behavior on the part of *Patty*, not on the part of respondent.

II. Legal Conclusions

¶ 53 The trial court's remaining factual findings establish that respondent failed to secure adequate housing despite seemingly making enough money to afford better housing or to improve the existing housing. This finding is not sufficient to support the conclusion that respondent acted inconsistently with his constitutionally protected status as a parent. "North Carolina law traditionally has protected the interests of natural parents in the companionship, custody, care, and control of their children, with similar recognition that some facts and circumstances, typically those created by the parent, may warrant abrogation of those interests." *Price*, 346 N.C. at 75. For example, the interest may be overcome "when a parent neglects the welfare and interest of his child." *Id.* (quoting *In re Hughes*, 254 N.C. 434, 437 (1961)).

¶ 54 As explained in more detail below, a conclusion that this interest has been overcome requires factual findings that a parent has willfully acted contrary to their parental obligations. Without evidence that respondent chose to live in substandard conditions in contravention of his obligations to Iliana, the findings related to respondent's housing are insufficient to support the necessary legal conclusion.

¶ 55 The majority fails to discuss any of our relevant precedent and summarily concludes that: "[w]hile there is no bright-line test, respondent's actions displayed an unwillingness to act as Iliana's parent." *But see Price*, 346 N.C. at 75 ("[P]rior cases of this Court are instructive on the issue [of whether a parent's constitutionally protected interest must prevail] because they show how we have addressed custody issues in a wide variety of circumstances."). A review of our prior cases demonstrates that respondent's actions in this case do not rise to the level of conduct that we have previously found to be inconsistent with the constitutionally protected status as parent.

¶ 56 In an early case on the issue before us here, we considered a custody dispute between a biological mother and a non-biological father. *Price*, 346 N.C. at 70–71. From the time that the child was born, the mother had represented that the man she lived with at the time was the child's biological father. *Id.* at 71. However, the parents separated

just a few years after the child's birth. *Id.* The child lived primarily with the purported father, although she also spent some time with her mother. *Id.* Approximately three years after the separation, the purported father sued for custody when the mother attempted to have the child's school records transferred to another county's school system. *Id.*

¶ 57 We concluded that the record was not sufficient to determine whether the mother had acted inconsistently with her constitutional right to parent. *Id.* at 84. The trial court had "made no findings about whether defendant and plaintiff agreed that the surrender of custody would be temporary, or about the degree of custodial, personal, and financial contact defendant maintained with the child after the parties separated." *Id.* If the mother had "represented that plaintiff was the child's natural father and voluntarily given him custody of the child for an indefinite period of time with no notice that such relinquishment of custody would be temporary," we would have held that the mother had acted inconsistently with her constitutional right to parent. *Id.* at 83. This is because, in that case, the mother "would have not only created the family unit that plaintiff and the child [had] established, but also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated." *Id.*

¶ 58 In another case, we considered a custody dispute between a child's biological mother, biological father, and maternal grandparents. *Adams v. Tessener*, 354 N.C. 57, 58 (2001). The mother and father had a one-night stand that eventually resulted in the child's birth. *Id.* at 63–64. The mother informed the father that she was pregnant, but the father "took no action at that time." *Id.* at 58. Approximately four months after the child was born, the mother again contacted the father and told him that he would be contacted by the Department of Social Services regarding child support. *Id.* at 59. The father "made no inquiry concerning [the child]." *Id.* However, the father signed a voluntary support agreement and began making child support payments after DSS conducted a DNA test and determined that he was the father. *Id.* Some months later, after completing three visits with the child, the father sought to intervene in an existing custody action between the mother and maternal grandparents and sought custody of the child. *Id.* We concluded that the father's conduct had been inconsistent with his constitutionally protected interest in the child. *Id.* at 66. We noted that the father had "elected to do 'nothing' about the pregnancy and impending birth" upon being informed about the pregnancy. *Id.* We also considered that the father had made no inquiries with the child's mother about the child's "health and progress" nor had he made any further inquiry as to "whether he had fa-

thered the child." *Id.* We concluded that this failure to involve himself in the child's life supported the trial court's conclusion that the father had acted inconsistently with his rights to the child. *Id.*

¶ 59 We have also held that a mother's "lifestyle and romantic involvements," including her employment as a topless dancer, resulting in her "neglect and separation from the child" amounted to conduct inconsistent with the right to parent. *Speagle v. Seitz*, 354 N.C. 525, 528, 534 (2001). The evidence in that case further indicated that the mother had conspired with a boyfriend to kill the child's father, even though she was acquitted of criminal charges. *Speagle*, 354 N.C. at 532–33; *see also Owenby*, 357 N.C. at 147 (discussing *Speagle*).

¶ 60 In *Owenby v. Young*, however, we affirmed a trial court's conclusion that a parent's "protected status as parent was not constitutionally displaced." 357 N.C. at 148. The parent in that case, the father of two children, had divorced the children's mother seven years before the mother's death in a plane crash. *Id.* at 142. Prior to her death, the mother had primary custody while the father had "secondary custody, structured as visitation." *Id.* The children's maternal grandmother sought custody of the children, arguing that their father had problems with alcohol abuse, was financially unstable, and sometimes drove without a license. *Id.* at 143. The Court of Appeals opinion contains additional information about the evidence presented to the trial court:

> A two-day hearing was held on 7 and 18 December 2000 to determine if Plaintiff had standing to seek custody of Trey and Taylor. The trial court stated Plaintiff's burden was "to show [Defendant] to be unfit or in some other way to have acted . . . in a [manner] inconsistent with the parental relationships." At the hearing, Defendant testified he has driven while impaired and has also driven without a license. At times, Defendant has "operated a vehicle [ ] and consumed alcohol at the same time." Defendant also testified that while he knew it was wrong, he has allowed others to drive his children in the recent past while the individuals were consuming alcohol. According to Defendant, the children have spent a significant part of their lives in McDowell County, living either with or in proximity to Plaintiff.
>
> Both Trey and Taylor testified they often smelled alcohol on Defendant's breath. Trey stated that on

> several instances in the past, he has ridden in a vehicle with Defendant while Defendant drank beer. In addition, Trey's paternal uncle, while drinking, has driven Trey, Taylor, and Defendant to Charlotte.
>
> Taylor testified that on more than one occasion, he has ridden in a car with Defendant while Defendant and others consumed alcohol while driving. On one occasion, when the children's paternal uncle was drinking alcohol and driving, the children were involved in an automobile accident but were not severely injured. Taylor stated that he did not feel good about riding with his father because he was "afraid [Defendant] might . . . [drink] and [they] would get in a wreck again." Both children testified that when Defendant drinks alcohol, he becomes upset and agitated with Trey and Taylor. The two minor children were aware Defendant's driver's license was suspended, he often operated a vehicle while drinking alcohol or being under its influence, and Defendant operated a vehicle on several occasions while his license had been revoked.

Owenby v. Young, 150 N.C. App. 412, 413–14 (2002) (alterations in original).

¶ 61 The trial court determined that the father had a consistent employment history and improved finances, that most instances of his driving without a license were not on public roads, and that the father did not have a problem with alcohol abuse (going so far as to conclude that two convictions for driving while impaired did not raise an inference of "a problem with alcohol abuse"). *Owenby*, 357 N.C. at 143–44. This Court agreed, noting that it was of significance that the father "did not have primary custody of the children, nor were they accompanying him, on either of the occasions for which he received a driving while impaired citation." *Id.* at 147. We concluded that the child's maternal grandmother "failed to carry her burden of demonstrating that defendant forfeited his protected status" and reversed the Court of Appeals, reinstating the trial court's order. *Id.* at 148.

¶ 62 Our decisions in *Price*, *Adams*, and *Speagle* all involved a consistent defining feature: volitional conduct on the part of the parent intended in contravention of their parental obligations. For example, the mother in *Price* actively represented that the child's purported father was the

biological father and voluntarily relinquished custody to the purported father. *Price*, 346 N.C. at 83. We determined that this conduct would be inconsistent with the constitutionally protected parent status if the mother had not made clear that the arrangement was temporary, because it would have actively "induced [father and child] to allow that family unit to flourish" without her. *Id.* Similarly, in *Adams*, the father ignored the existence of his child despite repeated contact from the child's mother. *Adams*, 354 N.C. at 58–59. When we determined that the father's conduct was inconsistent with his constitutionally protected parent status, we did not focus our determination merely on the father's absence—instead, we discussed the father's decision to be absent from his child's life. *Id.* at 66. Finally, in *Speagle*, the Court held that evidence that a mother had some involvement in a conspiracy to murder her child's father was relevant and if proven by a preponderance of the evidence, such conduct would be inconsistent with her constitutionally protected status as a parent. *Speagle*, 354 N.C. at 532–34. In each case, the parent engaged in willful conduct evidencing an intention to act inconsistently with their obligations as a parent.

¶ 63 In the instant case, no such willful conduct exists. The only evidence of drug use by respondent following treatment is a single positive test for marijuana in over two years of consistent testing. Similarly, the only evidence of domestic violence is a loud argument with respondent's mother. Neither of these isolated incidents supports the conclusion that respondent acted willfully in contravention of his parental obligations.

¶ 64 This leaves the trial court's findings that respondent lived in housing conditions that were not appropriate for Iliana to reside in. While, as discussed above, I agree that the trial court's findings are supported by the evidence, this does not indicate that respondent acted contrary to his parental obligations. As the trial court noted, respondent improved the condition of the home between the hearing's commencement on 3 January 2019 and the hearing's second day on 18 January 2019. At the same time, there is no evidence in the record that respondent had better housing options available—instead, the trial court found that respondent and Patty had been living with respondent's mother since being evicted in 2016. In the absence of any evidence that respondent had better options available, it cannot be said that respondent's living conditions are "conduct" on his part that is inconsistent with his constitutionally protected status as a parent. Indeed, the evidence that respondent improved (albeit not sufficiently) the conditions of the home prior to the hearing on 18 January 2019 suggest that he was attempting to live up to his obligations as a parent. As a result, applying the rule that is apparent

from our decisions in similar cases, it is inappropriate to conclude that respondent has forfeited his constitutional interest in Iliana. The majority's characterization of respondent's living situation as a choice resulting in Iliana's indefinite absence from the home does nothing to create the missing factual findings which are necessary to show that respondent, with other options available to him, actually chose to live in housing that would not and could not support his daughter.[3]

¶ 65 A more direct application of and comparison to the decisions in the cases cited above suggests that respondent's conduct was consistent with his constitutionally protected status as a parent. As in *Price*, this case "involves a period of voluntary nonparent custody rather than unfitness or neglect." *Price*, 346 N.C. at 82. However, unlike *Price*, there is no indication in the record that respondent "represented to [Iliana] and to others that [her maternal grandmother] was [Iliana's] natural [mother]." *Id.* at 83. Moreover, the circumstances of the relinquishment made clear from the outset that it was to be temporary—respondent placed Iliana in the care of her maternal grandmother because of respondent's work schedule and because of respondent's lack of adequate housing and agreed it would last "until the housing situation was resolved and [respondent and Patty] engaged in substance abuse treatment." Whereas we determined that "relinquishment of custody" to a nonparent "for an indefinite period" would be conduct inconsistent with the constitutional right to parent in *Price* because such conduct would have "created the family unit that [the nonparent] and the child have established" and "also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated," *Price*, 346 N.C. at 83, no such concerns are present here. The present case presents precisely the scenario we envisioned in *Price*, where a parent's decision to temporarily send a child elsewhere could be action consistent with their obligations as a parent and therefore *consistent* with their constitutionally protected status as a parent. *See id.* ("We wish to emphasize this point because we recognize that there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment.").

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3. Ironically, the majority writes that respondent should not be confronted with the "Sophie's Choice" of choosing between living with Iliana on the one hand and living with Patty and his new child on the other. In fact, it is only the majority's decision here that would have forced him to do so.

¶ 66 The father in *Adams* showed almost no interest in the existence of his child, and his absence from the child's life was a result of his failure to involve himself despite repeated contact from the mother. *Adams*, 354 N.C. at 58–59. By contrast, there is no evidence in the present case that respondent abandoned Iliana. Rather, respondent's decision to place Iliana with a nonparent custodian appears to have been an act of parental responsibility, as the trial court found that the placement was made voluntarily in acknowledgment that respondent needed to improve Iliana's home life. Similarly, respondent has not shown the type of conduct inconsistent with parental status as was demonstrated in *Speagle*—no evidence in the record indicates that respondent was involved in murdering Iliana's mother or indeed that respondent engaged in any other seriously illegal conduct even potentially injurious to his ability to parent Iliana.

¶ 67 Respondent's conduct in this case does not arise nearly to the level of conduct which we have previously found to forfeit a parent's constitutional interest in their child. Instead, the record evidence shows that respondent has responded well to treatment for substance abuse and domestic violence but remains in a difficult housing situation. I do not believe that the law permits a difficult housing situation, without evidence that it results from a parent's decision in contravention of that parent's obligations to a child, to sever the constitutionally protected tie between parent and child. I respectfully dissent from the majority's decision.

IN RE POOL

[377 N.C. 442, 2021-NCSC-61]

IN RE INQUIRY CONCERNING A JUDGE, NOS. 19-136 & 19-242
C. RANDY POOL, RESPONDENT

No. 14A21

Filed 11 June 2021

Judges—discipline—sexual misconduct—material misrepresentations

The Supreme Court ordered that a retired district court chief judge be censured for conduct in violation of Canons 1, 2A, 2B, 3A(4), and 3A(5) of the N.C. Code of Judicial Conduct, and pursuant to N.C.G.S. § 7A-376(b) for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, where the judge engaged in sexual misconduct with numerous women, failed to diligently discharge his judicial duties by constantly using his cell phone while on the bench and frequently continuing cases in order to meet with women, misused the prestige of his office, made material misrepresentations to law enforcement during an investigation, and made material misrepresentations to the Judicial Standards Commission during its investigation. The Court considered mitigating factors, including the judge's recent diagnosis with frontotemporal dementia, his prior years of distinguished service, and his agreement not to serve as a judge again.

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 on 18 December 2020 that Respondent C. Randy Pool, a Judge of the General Court of Justice, District Court Division, Judicial District 29A, be censured for conduct in violation of Canons 1, 2A, 2B, 3A(4), and 3A(5) of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. This matter was calendared for argument in the Supreme Court on 27 April 2021 but determined on the record without briefs or oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 2(c) of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or Respondent.

IN RE POOL

[377 N.C. 442, 2021-NCSC-61]

ORDER OF CENSURE

¶ 1 By the recommendation of the North Carolina Judicial Standards Commission (the Commission), the issue before this Court is whether Judge C. Randy Pool (respondent) should be censured for violations of Canons 1, 2A, 2B, 3A(4), and 3A(5) of the North Carolina Code of Judicial Conduct, and pursuant to N.C.G.S. § 7A-376(b) for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

¶ 2 On 21 August 2019, the Commission filed a Statement of Charges against respondent alleging violations of Canons 1, 2A, and 2B. On 7 October 2019, respondent filed his answer. On 19 March 2020, the Commission filed an Amended Statement of Charges that included new allegations, charging respondent with violations of Canons 1, 2A, 2B, 3A(4), and 3A(5) in the following manner:

> (1) by engaging in sexual misconduct while serving as and exploiting his position as Chief Judge of his judicial district through a pattern of predatory sexual advances towards numerous women in Respondent's community, many of whom were involved in matters pending in the district where Respondent served as Chief Judge; (2) by demonstrating a pattern of failing to diligently discharge his judicial duties for the period from at least November 2016 until his retirement in November 2019; (3) by misusing the prestige of his judicial office to solicit assistance from local law enforcement relating to the attempted extortion of Respondent[1] . . . ; (4) by making material misrepresentations to law enforcement agents during the investigation of [an] attempt to extort money from Respondent; and (5) by making material misrepresentations to the Commission during its investigation into Inquiry No. 19-136.

¶ 3 On 9 November 2020, the Commission and respondent entered into a Stipulation Pursuant to Commission Rule 18 (the Stipulation). The parties stipulated to the following findings of fact:

> 1. Respondent was first appointed to the district court in 1999 and served as the Chief Judge of

1. Respondent's inappropriate electronic communications and exchange of nude photographs resulted in an extortion attempt by one woman, which led to an investigation by law enforcement agencies.

District 29A from 2006 until his retirement effective December 1, 2019.

. . . .

3. For the period beginning in 2016/2017 through June 2019, Respondent was an active user of the social media platform Facebook ("FB") and had a single FB account for both personal and campaign purposes. Respondent ceased the use of his FB account in or about June 2019.

4. A review of Respondent's Facebook activity for the period from November 1, 2018 through May 9, 2019 establishes that: Respondent identified himself on his Facebook page as the Chief District Court Judge located in Marion, North Carolina; Respondent's Facebook page was public and open to anyone to see his posts and comments; Respondent had thousands of "friends" on Facebook; and Respondent was a very active user of Facebook, frequently posting his own photos or comments or commenting on posts of other Facebook users.

. . . .

6. Although some of Respondent's FB messages have been deleted, a review of Respondent's existing FB messages during the period from November 2018 to May 2019 shows that Respondent, who is married, knowingly and willfully initiated and engaged in conversations with at least 35 different women that ranged from inappropriate and flirtatious to sexually explicit. In some cases, Respondent and the female also had telephone conversations, exchanged texts and had personal meetings (including in some cases sexual encounters).

7. Respondent knowingly and willfully engaged in FB conversations of a sexual nature with 12 women during the period from at least November 2018 through July 2019[2] . . . .

2. While the parties stipulated to the fact that respondent stopped using his FB account in or about June 2019, the stiplations indicate that one exchange included text messages that were sent in July 2019. From November 2018 through May 2019, respondent

. . . .

9. In addition . . . , Respondent also made either inappropriate or flirtatious comments through FB messages to women who were required to appear or work in Respondent's court in their professional capacities[.]

. . . .

11. Respondent's FB records from the period from November 2018 to May 2019 when compared to official reports of Respondent's time on the bench show that Respondent engaged in extensive FB activity, including posts, comments and private messages, while Respondent was reported as being in court. Respondent's FB records also establish that Respondent routinely sought to arrange personal meetings with women he contacted on FB either during breaks and recesses from court, before court convened or immediately after court adjourned. Court personnel assigned in Respondent's courtroom in McDowell County regularly observed that Respondent was frequently on his cell phone while on the bench and would often "disappear" during recesses and lunch breaks, and that Respondent would often recuse in cases where the stated reason appeared to be very tenuous, and at other times would continue cases at such a high rate that it would make their jobs more difficult. While Respondent did not engage in any FB or other conversations on his cell phone at times when he was actively presiding in a case, he did use his cell phone extensively during times on the bench that did not require his direct attention.

. . . .

26. Prior to the incidents described herein that began in or about 2017, Respondent had enjoyed a long and distinguished career as a judge of his district

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communicated, via Facebook, through inappropriate messages with at least sixteen additional women, often seeking photographs of them or sharing photographs of himself. In addition, respondent had ex parte discussions through Facebook regarding pending proceedings in his district.

for almost twenty years. As Chief District Court Judge, Respondent made a number of significant contributions to the administration of justice during his 13 years in that position. Upon being named Chief Judge, Respondent immediately instituted a Continuance Policy for his district that all judges followed and successfully eliminated significant back log in his district. Respondent also created a new Truancy Court for McDowell and Rutherford County at least twelve years ago where he and his colleagues volunteered their time after court to meet with parents, grandparents and students to emphasize and encourage students to stay in school, be present each day, and to work hard to get a good education.

27. Respondent has also actively been engaged in his community. . . .

28. Other than as set forth herein, Respondent has enjoyed a good reputation as a judge for being professional and for diligently discharging his judicial duties while presiding in court.

29. Respondent has also undertaken significant efforts to determine the cause of his sexual misconduct and to address the problems in his personal life. . . . His primary care physician conducted a physical examination in early October 2020 and ordered an MRI, which showed mild atrophy or shrinkage of the front and the left temporal lobes of his brain. . . . [O]n or about October 20, 2020, Respondent was evaluated by a physician . . . . That evaluation resulted in a diagnosis of early stage Frontotemporal Dementia, a disease which can manifest itself through a lack of control of sexual impulses. . . . Frontotemporal Dementia is also recognized as a progressive and terminal illness with a life expectancy of 6–8 years after symptoms manifest . . . .

. . . .

31. Respondent agrees that based upon the nature of his misconduct and his recent diagnosis of early signs of dementia, he will not seek a commission as an emergency judge or a retired recall judge, nor will

> he attend future judicial conferences or continuing judicial education (CJE) programs offered to judges of the State of North Carolina.

¶ 4 The parties further stipulated to the following Code and statutory violations:

> 1. Respondent acknowledges and agrees 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 the integrity of the judiciary is preserved in violation of Canon 1;
>
> b. he failed to 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;
>
> c. he allowed his personal relationships . . . to influence his official judgment and conduct, in violation of Canon 2B;
>
> d. he abused the prestige of his judicial office in seeking favors and influence in the handling of the investigation by local law enforcement and the SBI in violation of Canon 2B;
>
> e. he engaged in improper *ex parte* or other communications concerning pending proceedings in violation of Canon 3A(4);
>
> f. his Facebook activity while in court and consistent efforts to take breaks from court to meet women interfered with his duty to diligently discharge his judicial duties in violation of Canon 3A(5).
>
> 2. Respondent further acknowledges and agrees 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 into disrepute in violation of N.C.[G.S.] § 7A-376.

¶ 5 On 13 November 2020, the Commission held a disciplinary hearing in this matter.

¶ 6 On 18 December 2020, the Commission filed its Recommendation of Judicial Discipline. The Commission made the following conclusions of law:

> 1. Commission Counsel, Respondent and Counsel for Respondent, all of whom executed the Stipulation, agreed that the factual stipulations contained therein were sufficient to prove by clear and convincing evidence that Respondent had violated Canons 1, 2A, 2B, 3A(4) and 3A(5) of the North Carolina Code of Judicial Conduct. . . . Upon its independent review of the stipulated facts and the Code of Judicial Conduct, the Commission agrees.
>
> 2. 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." Canon 2A of the Code of Judicial Conduct requires that a judge "should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The Commission concludes that Respondent's failure to personally observe appropriate standards of conduct in and out of the courtroom, his conduct in creating the perception among local law enforcement that he wanted a favor in the matter involving Ms. [T.], and his conduct in making misleading statements to the SBI and the Commission violated Canon 1 and Canon 2A.
>
> 3. Canon 2B of the Code of Judicial Conduct provides that a judge "should not lend the prestige of the judge's office to advance the private interest of others." The Commission concludes that Respondent violated Canon 2B by using his office to assist various female litigants as found in the Findings of Fact, including his conduct in using his position

as Chief Judge to direct a local attorney to assist a litigant with whom Respondent was having a sexual relationship and to otherwise use his office to assist her in her divorce proceeding.

4. Canon 3A(4) of the Code of Judicial Conduct provides that "except as authorized by law, [a judge may] neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding." The Commission concludes that Respondent violated Canon 3A(4) through his conversations with the women as described herein relating to pending proceedings in his district.

5. Canon 3A(5) of the Code of Judicial Conduct provides that a "judge should dispose promptly of the business of the court." The Commission concludes that the Stipulation of Facts establishes that Respondent violated Canon 3A(5) through his constant cell phone use on the bench, frequent breaks to have conversations or physical encounters with women he contacted through Facebook, and frequent continuances and recusals (some of which were created by his sexual misconduct).

6. 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.

7. 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 initiating and engaging in inappropriate conversations and relationships with women through FB messages, the exchange of indecent photographs, and his inappropriate comments to women who appeared in his court either in their professional capacities or as parties or witnesses, and the resulting extortion attempt by Ms. [T.] based on his indecent photographs, is without question conduct prejudicial to the administration of justice that brings the judiciary into disrepute.

8. 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, these elements need not necessarily be present." 290 N.C. at 305, 226 S.E.2d at 9. The undisputed facts at issue in this matter establish that Respondent's conduct involved moral turpitude and dishonesty with the SBI and the Commission during their investigations in an effort to prevent the discovery of the full extent of his sexual misconduct. As such, and despite Respondent's recent diagnosis of the early stages of frontotemporal dementia on the eve of his disciplinary hearing (a fact he noted during his clinical evaluation on October 20, 2020), the Commission

> does not hesitate to conclude that Respondent's conduct between 2017 and 2019 was willful and renders him unfit to serve as a judge of the State of North Carolina and that Respondent fully understood that his conduct would justify disciplinary action. By Respondent's own admission to the SBI on May 16, 2019, his conduct with respect to Ms. [T.] alone was "terrible" and could result in disciplinary action by the Commission to include a recommendation of removal from office and loss of his pension and that his preference was that the Commission would not learn of his misconduct. . . . The Commission thus concludes that Respondent also engaged in willful misconduct in office.

(Second alteration in original).

¶ 7 In addition to these conclusions of law, the Commission also considered the fact that respondent "is no longer a sitting judge of the State of North Carolina and has agreed that he will never serve in such capacity again," that he "had served for approximately 18 years as a judge, and for over a decade as chief judge of District 29A, without any disciplinary matters before the Commission," that he "had contributed to improvements to the administration of justice in his district," and that he is in "the early stages of frontotemporal dementia." Based on the conclusions of law and these mitigating factors, the Commission recommended that respondent be censured.

¶ 8 In reviewing recommendations from the Commission, the Supreme Court acts as a court of original jurisdiction rather than as an appellate court. *In re Daisy*, 359 N.C. 622, 623, 614 S.E.2d 529, 530 (2005). Because this Court is not bound by the Commission's recommendations, we must independently determine what, if any, disciplinary measures to impose on respondent. *In re Stephenson*, 354 N.C. 201, 205, 552 S.E.2d 137, 139 (2001). "[I]n reviewing the Commission's recommendations, this Court must first determine if the Commission's findings of fact are adequately supported by clear and convincing evidence, and in turn, whether those findings support its conclusions of law." *In re Badgett*, 362 N.C. 202, 207, 657 S.E.2d 346, 349 (2008). An admission of facts in a stipulation is "binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent of the necessity of producing evidence to establish the admitted fact." *State v. McWilliams*, 277 N.C. 680, 686, 178 S.E.2d 476, 480 (1971) (quoting Stansbury, *North Carolina Evidence* § 166 (2d ed. 1963)).

¶ 9 After a careful review of the record, we conclude that the Commission's findings of fact are supported by clear and convincing evidence, and we find that the Commission's conclusions of law are supported by those facts. Therefore, we adopt the Commission's conclusions of law. Furthermore, we agree with the Commission's conclusion that respondent's conduct amounts to willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute. *See In re Hair*, 324 N.C. 324, 325, 377 S.E.2d 749, 750 (1989) (concluding that censure was appropriate because the respondent's inappropriate sexual advances and comments were prejudicial to the administration of justice).

¶ 10 In addition, because respondent is no longer a sitting judge and has agreed not to serve as such, while taking into account respondent's eighteen years of distinguished service as a judge and respondent's expression of remorse, we agree that censure is appropriate. *See id.* at 325, 377 S.E.2d at 750 (concluding censure was appropriate where the respondent was a retired judge and had made no application to sit as an emergency district court judge); *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978) (stating that jurisdiction for purposes of judicial discipline is not lost upon a judge's resignation).

¶ 11 The Supreme Court of North Carolina orders that respondent, C. Randy Pool, be CENSURED for conduct in violation of Canons 1, 2A, 2B, 3A(4), and 3A(5) of the North Carolina Code of Judicial Conduct, and pursuant to N.C.G.S. § 7A-376(b) for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

By order of the Court in Conference, this the 11th day of June 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of June 2021.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

IN RE M.J.R.B.

[377 N.C. 453, 2021-NCSC-62]

IN THE MATTER OF M.J.R.B., Z.M.B., N.N.T.B., S.B.

No. 76A20

Filed 11 June 2021

1. Termination of Parental Rights—request for new counsel and new guardian ad litem—denied—abuse of discretion analysis

In a termination of parental rights proceeding, the trial court did not abuse its discretion by denying respondent-father's motions for new counsel and a new guardian ad litem (GAL) where respondent made the requests prior to the hearing and outside the presence of counsel and the GAL, failed to present good cause to remove counsel and the GAL, and did not renew the motion or otherwise address the issue once counsel arrived for the hearing.

2. Continuances—request for two-hour continuance to take medication—failure to show error or prejudice

In a termination of parental rights hearing, the trial court did not abuse its discretion by denying respondent-father's request for a two-hour continuance to take his medication where respondent failed to show the denial of the motion was erroneous or that he was prejudiced by the denial of the motion.

3. Termination of Parental Rights—grounds for termination—failure to make reasonable progress

In a termination of parental rights hearing where the unchallenged findings of fact showed respondent-mother failed to submit to a required psychological assessment, failed to submit to a required domestic violence assessment, repeatedly failed to submit to drug screens upon request, and failed to complete a parenting program, the trial court did not err when it terminated her parental rights to the older juveniles for willful failure to make reasonable progress in correcting the conditions that led to the removal of the juveniles.

4. Termination of Parental Rights—grounds for termination—failure to establish paternity

In a termination of parental rights proceeding where the trial court's findings related to paternity were unchallenged by respondent-father and he did not challenge the sufficiency of the findings to support termination or that the termination was in the best interests of the children, the trial court's order terminating his parental rights to the children under N.C.G.S. § 7B-1111(a)(5) was affirmed.

5. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—12-month requirement

The trial court erred in terminating respondent-mother's parental rights to the youngest child for failure to make reasonable progress in correcting the conditions that led to the removal of the child where the evidence showed that only nine months had elapsed between the custody order and the filing of the termination petition. The court was required by N.C.G.S. § 7B-1111(a)(2) to look at the parent's reasonable progress over a twelve-month period.

6. Termination of Parental Rights—grounds for termination—incapable of providing proper care and supervision—necessary findings

In a termination of parental rights proceeding where—although there may have been sufficient evidence in the record to show respondent-mother was incapable of providing proper care and supervision for the youngest child—the trial court failed to make findings showing the absence of an acceptable child-care arrangement, did not identify the condition that made respondent incapable of parenting the child, and did not address whether her condition would continue for the foreseeable future, the court's order terminating respondent's parental rights under N.C.G.S. § 7B-1111(a)(6) was vacated and remanded for entry of a new order.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review orders entered on 12 November 2019 by Judge Karen Alexander in District Court, Craven County. Heard in the Supreme Court on 17 February 2021.

Peter M. Wood for respondent-appellant-father.

Mercedes O. Chut for respondent-appellant-mother.

Bernard Bush for petitioner-appellee Craven County Department of Social Services.

J. Mitchell Armbruster for respondent-appellee guardian ad litem.

BERGER, Justice.

¶ 1 On August 23, 2016, the Craven County Department of Social Services ("DSS") filed petitions alleging that M.J.R.B., Z.M.B., and N.N.T.B. (col-

lectively, the "older children") were neglected and dependent juveniles. DSS alleged, among other things, that on August 15, 2016, three-month-old M.J.R.B. tested positive for cocaine and THC. The trial court ordered that the children be placed in DSS custody, and each parent was appointed a guardian ad litem ("GAL") due to their mental health issues. On February 27, 2017, the trial court entered an order which adjudicated the older children as neglected and dependent.

¶ 2 On November 8, 2017, respondent-mother gave birth to S.B. S.B. tested positive for cocaine at birth, and DSS filed a petition alleging that S.B. was a dependent juvenile. S.B. was placed in nonsecure custody, and on February 20, 2018, the trial court entered an order adjudicating S.B. a dependent juvenile because the older children were in DSS custody and respondent-parents had made no progress toward reunification with them. In addition, respondent-parents had not complied with mental health treatment recommendations, and respondent-mother admitted to consuming cocaine while she was pregnant with S.B.

¶ 3 After a hearing on July 20, 2018, the trial court ceased reunification efforts and changed the children's permanent plan to adoption. On August 2, 2018, DSS filed petitions to terminate respondent-parents' parental rights in the minor children. Before the hearing began on July 2, 2019, respondent-father requested that his counsel and GAL be fired. In addition, respondent-father requested that the hearing be suspended for two hours so he could take his medication. Respondent-father made both of these requests outside of the presence of his attorney and GAL. The court denied both requests. Prior to the start of the hearing, the attorney and GAL met with respondent-father, and no further motions were made.

¶ 4 On November 12, 2019, the court entered orders terminating respondent-parents' parental rights to the older children pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6). Respondent-parents' parental rights to S.B. were terminated pursuant to N.C.G.S. § 7B-1111(a)(2) and (6). Respondent-parents appeal.

I. Standard of Review

¶ 5 We review a district court's adjudication under N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. Unchallenged findings of fact are deemed supported by competent evidence and are binding on appeal. Moreover, we review only those findings needed to sus-

> tain the trial court's adjudication. The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo. However, an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order.

In re J.S., 374 N.C. 811, 814–15, 845 S.E.2d 66, 70–71 (2020) (cleaned up).

II. Respondent-Father's Motion to Substitute Counsel and Motion to Continue

¶ 6 **[1]** Respondent-father argues the trial court erred by failing to sufficiently inquire about his request for new counsel and a new GAL before the termination hearing began when neither his attorney nor his GAL were present. Respondent-father further alleges that the trial court erred when it declined to postpone the hearing for two hours so respondent-father could take his medication. We disagree.

A. Motion to Substitute Counsel

¶ 7 Parents in a termination of parental rights proceeding have "the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." *In re K.M.W.*, 376 N.C. 195, 208–09, 851 S.E.2d 849, 859 (2020). In addition, "the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17." N.C.G.S. § 7B-1101.1(c) (2019). "A parent qualifying for appointed counsel may be permitted to proceed without the assistance of counsel only after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary." N.C.G.S. § 7B-602(a1) (2019).

¶ 8 Here, the trial court made the following relevant findings related to respondent-father's request:

> Prior to the hearing in this matter, the Respondent Father made a motion to dismiss his attorney. The court finds good cause to deny this motion. Let it also be noted that both respondents appeared highly anxious at the start of the proceedings. This court noted their anxiety and frustration and privately requested the attending court bailiffs to show some flexibility with court decorum and not to immediately apprehend and or interrupt the respondents if there were angry outbursts from the respondents. Also, this court denied the respondents to discharge their counsel

> but told them they would be allowed to ask additional questions of witnesses personally if their attorney did not ask a question they wanted. Moving forward, the respondents appeared satisfied and comfortable with this ruling.

¶ 9 Respondent-father's motions were made prior to the termination hearing and outside the presence of his attorney and GAL. The trial court accommodated respondent-father with relaxed courtroom rules during this time. After considering respondent-father's request, the trial court found good cause to deny respondent-father's motion. Once respondent-father's attorney and GAL arrived at the hearing, they conferred with respondent-father and no further motions were made by respondent-father or his attorney. Respondent-father presented no additional information, at trial or on appeal, to make a requisite showing of "good cause" to substitute counsel.

¶ 10 Because respondent-father made these motions prior to the hearing and outside the presence of counsel and his GAL, failed to present good cause to warrant removal of his attorney at the trial court, and did not renew these motions or otherwise address the matter when counsel arrived for the hearing, the trial court did not abuse its discretion in denying respondent-father's motion to substitute counsel.

B. Motion to Continue

¶ 11 **[2]** Respondent-father also argues that the trial court abused its discretion when it denied his request for a two-hour continuance to take his medication.

> Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. If, however, the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable. . . . Moreover, regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error.

In re A.L.S., 374 N.C. 515, 516–17, 843 S.E.2d 89, 91 (2020) (cleaned up). Here, respondent-father has failed to show that the denial of his motion

to delay the hearing was erroneous, or that he was prejudiced by the trial court's denial of his motion. Thus, the trial court did not abuse its discretion in denying respondent-father's motion to continue.

III. Respondent-Parents' Parental Rights to the Older Children

¶ 12 **[3]** Respondent-mother argues that the trial court erred when it terminated her parental rights because DSS did not make reasonable efforts to work with her, and there was no evidence of lack of fitness as of the termination hearing. We disagree.

A. Respondent-Mother's Parental Rights

¶ 13 A court may terminate parental rights if grounds exist under N.C.G.S. § 7B-1111(a), and the trial court determines that termination is in the best interest of the juvenile. *See* N.C.G.S. § 7B-1111(a) (2019); N.C.G.S. § 7B-1110(a). Here, the trial court determined that grounds existed to terminate respondent-mother's parental rights to the older children pursuant to N.C.G.S. § 7B-1111 (a)(1), (2), and (6).

¶ 14 Grounds for terminating a parent's rights to a juvenile exist under N.C.G.S. § 7B-1111(a)(2) when:

> 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. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C.G.S. § 7B-1111(a)(2) (2019).

¶ 15 The trial court made the following unchallenged findings of fact:

> 1. The Petitioner, the Craven County Department of Social Services, was granted custody of the [older children] by non-secure Custody Orders dated August 24, 2016, and subsequent orders in this matter . . . .
>
> . . . .
>
> 14. Regarding the Respondent Mother's level of compliance with the orders of the court for her to facilitate reunification, [as stated earlier in the order]:

a. The Respondent Mother failed to [s]ubmit to a full psychological assessment, to include a substance abuse assessment and a parenting capacity inventory, with an approved and licensed clinician.

b. The Respondent Mother failed to submit to a domestic violence assessment and follow all recommendations. She appeared for the assessment with [respondent-father], and they refused to allow her to be interviewed without him present. As a result, the [a]ssessment could not be completed.

c. The Respondent Mother failed to [s]ubmit to random drug screens immediately upon the request of the Craven County Department of Social Services. She submitted to an initial assessment for drug screen but failed to submit to subsequent drug screens. Drug screens were requested on 1/18/17, 1/30/17, 2/16/17, 3/18/17, 3/14/17, 5/25/17, 6/5/17, 6/27/17, 7/7/17, 3/13/18, 8/21/17, 1/24/17, 4/3/18, 8/29/18, 5/12[/]17, 4/20/18, and she refused to submit to drug screens every time.

d. The Respondent Mother failed to submit to random pill counts and medication monitoring immediately upon the request of the Craven County Department of Social Services.

e. The Respondent Mother failed to execute all necessary releases such that the Craven County Department of Social [Services] may access all medical, mental health and substance abuse records for the Respondent Parent, until December 2018.

f. The Respondent Mother failed to attend parenting referral appointments on the following dates: 1/22/17, 3/22/17, 7/11/17, 1/13/18, 3/13/18, 1/3/19. She started attending EPIC parenting classes in April 2018 but did not complete that parenting program.

g. The Respondent Mother failed to make the Craven County Department of Social Services aware of her residence; however, she did maintain contact with the social workers to inquire about the minor children. The Social Worker testified that this was the Respondent Mother's one strength.

h. The Respondent Mother failed to submit to a full psychological assessment and a recommendation from a mental health professional of safety and mental health stability of the Respondent Mother. The court ordered that visits would be suspended until the respondents submitted themselves for a mental health evaluation due to safety concerns. Therefore, no visitations or any other communication between the parents and minor children took place. The Respondent Parents made repeated requests to visit since that order of suspension. While the Respondent Parents have not caused or attempted to cause any bodily injury to Craven County Department of [S]ocial [S]ervices staff, they have made threats of bodily injury against the staff. As a result, neither Respondent Parent has visited the minor children since September 16, 2016.

. . . .

100. The Respondent Parents' inability to make reunification efforts and their inability to care for the minor child is not caused by poverty.

. . . .

155. Independent of any other grounds found by this court, the parental rights of the Respondent Parents should be terminated due to the following grounds as set forth in North Carolina General Statutes, Sections 7B-1111(a)(2):

a. Respondent Parents have 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 within 12 months in correcting those conditions which led to the removal of the juvenile.

¶ 16 Because respondent-mother did not challenge these findings of fact, they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). These unchallenged findings of fact support the trial court's conclusion of law that "grounds authorizing Termination of Parental Rights exist" pursuant to N.C.G.S. § 7B-1111(a)(2). Further, the trial court found that it was in the best interests of the older children that respondent-mother's parental rights be terminated. Accordingly, because the trial court's findings of fact support its conclusion of law, the trial court did not err when it terminated respondent-mother's parental rights to the older children pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 17 Because grounds existed to terminate respondent-mother's parental rights under (a)(2), we need not address the trial court's order to terminate parental rights under subsections (a)(1), (a)(5), or (a)(6). *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) ("an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order.").

B. Respondent-Father's Parental Rights

¶ 18 **[4]** The trial court terminated respondent-father's parental rights to the older children under N.C.G.S. § 7B-1111 (a)(1), (2), (5), and (6). With regard to section (a)(5), the trial court's findings of fact relating to establishment of paternity were unchallenged by respondent-father.

¶ 19 A trial court may terminate the parental rights of a father under N.C.G.S. § 7B-1111(a)(5) states:

> The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights, done any of the following:
>
> > a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services. The petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.

> b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.
>
> c. Legitimated the juvenile by marriage to the mother of the juvenile.
>
> d. Provided substantial financial support or consistent care with respect to the juvenile and mother.
>
> e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

N.C.G.S. § 7B-1111(a)(5) (2019).

¶ 20 Here, respondent-father does not challenge the findings of fact related to paternity, and therefore, they are binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Further, respondent-father does not challenge the sufficiency of the grounds to terminate his parental rights to the older children pursuant to N.C.G.S. § 7B-1111(a)(5), or that termination was in the best interests of the older children. Because respondent-father presents no challenge to the sufficiency of these grounds, we affirm the trial court's order terminating respondent-father's rights to the older children under N.C.G.S. § 7B-1111(a)(5).

IV. Respondent-Parents' Parental Rights to S.B.

¶ 21 The trial court's order terminated respondent-parents' parental rights to S.B. under N.C.G.S. § 7B-1111(a)(2), (5), and (6). Again, respondent-father failed to challenge the sufficiency of any grounds for termination or the trial court's best interests determination. Therefore, we affirm the order terminating respondent-father's parental rights to S.B. under N.C.G.S. § 7B-1111(a)(5).

¶ 22 **[5]** However, respondent-mother argues that the trial court erred when it terminated her parental rights to S.B. under N.C.G.S. § 7B-1111(a)(2) and (6). Specifically, respondent-mother contends that (1) termination was improper under N.C.G.S. § 7B-1111(a)(2) because only 9 months elapsed between the placement by DSS and the filing of the termination petition, and (2) the trial court failed to make sufficient findings under the (a)(6) standard. We agree.

¶ 23 N.C.G.S. § 7B-1111(a)(2) states:

> 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. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C.G.S. § 7B-1111(a)(2).

¶ 24 The plain language of N.C.G.S. § 7B-1111(a)(2) requires the trial court to look at the parent's reasonable progress over a twelve-month period. Because only nine months elapsed between the custody order for S.B. and the filing of the termination petition, this subsection is inapplicable. Thus, the trial court erred in terminating parental rights under N.C.G.S. § 7B-1111(a)(2).

¶ 25 **[6]** Respondent-mother further contends that the trial court committed reversible error when it terminated her parental rights under N.C.G.S. § 7B-1111(a)(6) because the trial court failed to make sufficient findings of fact regarding the lack of alternative care arrangements, failed to identify the condition that rendered respondent-mother incapable of providing proper care, and failed to make a finding that the condition would persist for the foreseeable future.

¶ 26 N.C.G.S. § 7B-1111(a)(6) states:

> That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C.G.S. § 7B-1111(a)(6) (2019).

¶ 27 After a thorough review of the record, we conclude the trial court has not made sufficient findings to support the termination of parental rights under N.C.G.S. § 7B-1111(a)(6). As respondent-mother notes, the trial court failed to find the absence of an acceptable alternative childcare arrangement, did not identify the condition that rendered respondent-mother incapable of parenting S.B., and did not address the issue of whether respondent-mother's condition would continue for the foreseeable future. Again, while there may be sufficient evidence in the record, the lack of sufficient findings compels us to vacate the order terminating parental rights to S.B., and remand this matter back to the trial court for hearing additional evidence, if necessary, and entry of a new order.

V. Conclusion

¶ 28 The trial court did not abuse its discretion when it denied respondent-father's request to substitute counsel and continue the case for respondent-father to take medication. In addition, we affirm the orders terminating respondent-father's parental rights to the minor children under N.C.G.S § 7B-1111(a)(5). We further affirm the orders terminating respondent-mother's parental rights to the older children pursuant to N.C.G.S. § 7B-1111(a)(2). We vacate and remand the order terminating respondent-mother's parental rights to S.B. under N.C.G.S § 7B-1111(a)(6) for further proceedings consistent with this opinion.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

McGUIRE v. LORD CORP.

[377 N.C. 465, 2021-NCSC-63]

ROBERT McGUIRE
v.
LORD CORPORATION

No. 320A20

Filed 11 June 2021

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion granting defendant's motion to dismiss entered on 18 February 2020 by Judge Louis A. Bledsoe III, Chief Business Court Judge, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 18 May 2021.

Ellis & Winters LLP, by Scottie Forbes Lee, for plaintiff-appellant.

Parker, Poe, Adams & Bernstein LLP, by Charles E. Raynal IV and Scott E. Bayzle, for defendant-appellee.

PER CURIAM.

AFFIRMED.[1]

1. The order and opinion of the North Carolina Business Court, 2020 NCBC 11, is available at https://www.nccourts.gov/assets/documents/opinions/2020%20NCBC%2011.pdf.

STATE v. PARKER

[377 N.C. 466, 2021-NCSC-64]

STATE OF NORTH CAROLINA
v.
BRANDON ALAN PARKER

No. 119PA20

Filed 11 June 2021

Criminal Law—prosecutor's closing argument—factual misstatements—no objection

In a prosecution for possession of a firearm by a felon where a picture had been admitted into evidence showing defendant with face and chest tattoos, but the witnesses only described the shooter as having a face tattoo, the trial court did not abuse its discretion by failing to intervene ex mero motu when the prosecutor mistakenly stated several times in her closing argument—without objection from defendant—that the witnesses saw a chest tattoo on the shooter. Nothing suggested the misstatements were intentional and, in light of other evidence of defendant's appearance, they did not constitute an extreme or gross impropriety.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 269 N.C. App. 629, 839 S.E.2d 83 (2020), finding no error in a judgment entered on 12 June 2018 by Judge Ebern T. Watson III in Superior Court, Sampson County. Heard in the Supreme Court on 26 April 2021.

Joshua H. Stein, *Attorney General*, *by Michael T. Wood*, *Special Deputy Attorney General*, *for the State-appellee.*

Michael E. Casterline for defendant-appellant.

BERGER, Justice.

¶ 1 On June 11, 2018, a Sampson County jury found defendant Brandon Alan Parker guilty of possession of a firearm by a felon. After the jury returned its verdict, defendant pleaded guilty to attaining habitual felon status. Defendant appealed, and on February 4, 2020, a unanimous panel of the Court of Appeals found no error in defendant's conviction, concluding that the prosecutor's statements during closing argument were not grossly improper. Defendant petitioned this Court for discretionary review.

I. Factual and Procedural Background

¶ 2 On March 5, 2015, Michael Harbin, Carlos James, Derrick Copeland, and an unidentified male went to Garland, North Carolina, to purchase marijuana from Jafa McKoy. Harbin drove a Toyota Camry with James and Copeland inside, while the unidentified male followed them in a Ford Explorer.

¶ 3 The men arrived in Garland between 10:00 and 10:30 a.m. The unidentified driver of the Ford Explorer parked at a nearby apartment complex and remained there while Harbin, James, and Copeland drove to a house at a different location. When Harbin, James, and Copeland arrived, two men were standing outside. Copeland recognized McKoy standing near the front porch, and McKoy introduced the other man, who was on the porch, as "P." Copeland described "P" as being about six feet and two inches tall, weighing around 240 pounds, and having "a Muslim-type beard, brown skin, [and] tattoo on the upper cheek." Harbin stated that the man on the porch was wearing a red hat, and was "[l]ike a bigger, burley (*sic*) dude."

¶ 4 Upon arrival, McKoy informed the men that the marijuana was not there. Harbin, James, and Copeland then left the house and drove to a nearby gas station to buy cigarettes. The three men left the gas station around 11:13 a.m. and returned to the house.

¶ 5 When they returned, McKoy and "P" were outside of the house and a compact car, that was not previously present, was parked outside. Copeland and Harbin exited the Camry while James remained inside. McKoy told Copeland that the marijuana was in the compact car. As Copeland and Harbin walked toward the car, "P" jumped off the porch, pulled out a revolver, and moved toward the Camry. At the same time, McKoy pulled out a gun and began firing at Copeland and Harbin. Copeland and Harbin escaped to the woods, and they made their way to the Ford Explorer parked at the nearby apartment complex. Copeland, Harbin, and the unidentified male traveled back to the house to look for James. After failing to locate James, Harbin called 911 around 12:24 p.m.

¶ 6 Around 12:30 p.m., Freddie Stokes, a resident of the house, returned home and saw a body in his driveway. Stokes called 911, and Sampson County EMS subsequently arrived at the house to find James dead in the driveway. James died from a single gunshot wound to the head.

¶ 7 On March 9, 2015, defendant was identified by Copeland from a photographic lineup as the man McKoy introduced as "P." Copeland stated

that he had eighty-five to ninety percent confidence in his identification of defendant.

¶ 8 Thirteen days after the homicide, on March 18, 2015, defendant learned that law enforcement was looking for him, and defendant called the police and went to the sheriff's office. The same day, Agent William Brady with the North Carolina State Bureau of Investigation interviewed defendant. Initially, defendant denied being present at the house where James was killed. However, approximately seventeen minutes into the interview, defendant admitted he was at the house that morning but claimed that he left by 8:30 or 9:00 a.m. The same day that defendant was interviewed by Agent Brady, the State obtained a search warrant for defendant's cell phone records, including defendant's cell site data.

¶ 9 At trial, Copeland and Harbin testified for the State. During their testimony, neither Copeland nor Harbin positively identified defendant in the courtroom as the man they knew as "P." The State also presented testimony from Jane Peterson, who was dating defendant in March 2015. Peterson testified about defendant's appearance and stated that in March 2015, defendant had a close-cut beard and tattoos on his arm and face. During Peterson's testimony, the State introduced, for illustrative purposes, a photograph of defendant's upper torso that showed defendant had a tattoo on his chest. Defendant objected to the introduction of the photograph.

¶ 10 The trial court, in ruling on the admissibility of the photograph, stated the following:

> In this case, you have someone who has testified she was in a close relationship on the date in question. She's also testified that she has a memory of his physical appearance at the time. She's testified that over your suggestion that it was a peace sign, that his right hand appears to be raised in example of a peace sign, as a layperson might interpret that one way or another. And there's nothing ominous about a peace sign, of course. That's her layperson interpretation and her opinion of the sign that was given by the person in the photograph using their right hand.
>
> The individual in the photograph is bare from the waist up, appearing to have a white, baseball-type cap placed on his head and his right hand raised in some type of gesture. It does not show him in the company

> of any other individuals. It does not show him in a menacing or compromising position. It does show tattoos that she has now said she believes were the same, not different, than what she has testified about in her earlier recollections.
>
> The hat, itself, appears to be white in color, to have a brim, and then have some established marking on it that might represent a sports affiliate, the New York Yankees, of some sort. But it is a neutral color, white. And it is not very graphic as to what the tattoos might say or appear to be, but it does appear to show ink markings upon the chest and/or upper torso of the subject in the photograph itself. Those are not immutable characteristics. Those are things that have been placed upon an individual by choice.
>
> Tattoos are things that you mark yourself with by choice. Those are not things you are born with. And if you place them on your person, you do so in a way that permanently identifies you right, wrong, or indifferent. You subject yourself to that. And, in this case, any of those markings were placed there without any rebuttal at this time, not forcibly, but upon request of the individual that displayed them so proudly in the photograph, and that's not substantially prejudicial, in my opinion. It is admissible for illustrative purposes.

¶ 11 In addition, the State tendered Special Agent Michael Sutton with the Federal Bureau of Investigation as an expert witness on historical cell site analysis and cellular technology. Agent Sutton testified that defendant's phone was used on March 5, 2015, from approximately 8:09 a.m. to 9:57 a.m. in an area of Garland that included the house in question. Between 9:57 a.m. and no later than 11:38 a.m., defendant's phone could not be identified because it was not in use. At 11:49 a.m., defendant's phone was determined to be located in Clinton, North Carolina.

¶ 12 During closing arguments, the prosecutor made the following three statements without objection that mentioned defendant having a chest tattoo:

> And they gave you a description of a guy, Muslim-type beard, big, burley (*sic*), larger than Jafa. They knew Jafa. They could tell the difference between this guy

> and Jafa. A tattoo on his chest, the same guy who was seen on the porch, pulling the revolver from his waistband. The same type of weapon that killed the victim.
>
> . . . .
>
> . . . The man that Michael Harbin described as a big, burley (*sic*) guy with a beard and a hat pulled low who gets up, pulls out a revolver, and walks towards Carlos. The man on the porch that Derrick Copeland described as 6'2, big with a beard, called P, with a tattoo on his chest, who got up, and pulled out a revolver, and went towards Carlos in the car. That's what Mr. Copeland said.
>
> . . . .
>
> Ms. Peterson told you what the defendant looked like back on March 5, 2015. He looks a little different today. But she told you that back in March of 2015 he looked like this big, burley (*sic*) guy with a beard, even a low hat and a tattoo on his chest, just like Mr. Copeland told you.

¶ 13 Prior to closing arguments, the trial court instructed the jury as follows:

> The final arguments of the lawyers are not evidence but are given to assist you in evaluating the evidence. . . .
>
> . . . .
>
> . . . Now if, in the course of making a final argument, a lawyer attempts to restate a portion of the evidence and your recollection of the evidence differs from that of the lawyer, you are as jurors in recalling and remembering the evidence, to be guided exclusively by your own recollection of the said evidence.

¶ 14 During the jury charge after closing arguments, the trial court similarly instructed the jury as follows:

> Now, members of the jury, you have heard the evidence and the arguments of counsel. If your recollection of the evidence differs from that of the attorneys, you are to rely solely upon your recollection. Your duty is to remember the evidence, whether called to your attention or not.

¶ 15 Defendant was found guilty of possession of a firearm by a felon and not guilty of the remaining charges. Defendant subsequently pleaded guilty to attaining habitual felon status, and he was sentenced to a minimum of 105 months to a maximum of 138 months in prison. Defendant entered notice of appeal.

¶ 16 In a published opinion filed February 4, 2020, the Court of Appeals determined that the State's closing argument did not constitute prejudicial error and that defendant failed to show that trial court erred in not intervening *ex mero motu*. *State v. Parker*, 269 N.C. App. 629, 639, 839 S.E.2d 83, 90 (2020). Defendant filed a petition for discretionary review, which this Court allowed on June 3, 2020.

II. Analysis

¶ 17 "Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury." *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984). "When defendant does not object to comments made by the prosecutor during closing arguments, only an extreme impropriety . . . will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996).

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

¶ 18 A "[g]rossly improper argument is defined as conduct so extreme that it renders a trial fundamentally unfair and denies the defendant due process." *State v. Fair*, 354 N.C. 131, 153, 557 S.E.2d 500, 517 (2001). A "trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *State v. Smith*, 351 N.C. 251, 269, 524 S.E.2d 28, 41 (2000) (quoting *State v. Atkins*, 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998)).

¶ 19 Defendant contends that the three statements referencing defendant's chest tattoo were not supported by the evidence, and as a result, the trial court committed reversible error when it failed to intervene *ex mero motu*. In essence, defendant argues that in the absence of intervention by the trial court *ex mero motu*, misstatements of evidence by an attorney during closing arguments entitles the opposing party to a new trial. We decline to impose a perfection requirement on the attorneys and trial courts of this State, ever mindful that parties are "entitled to a fair trial but not a perfect one." *State v. Branch*, 288 N.C. 514, 536, 220 S.E.2d 495, 510 (1975) (quoting *Lutwak v. United States*, 344 U.S. 604, 619 (1953)), *overruled on other grounds by State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984).

¶ 20 Here, rather than stating that the individual on the porch identified as "P" had a tattoo on his face, the prosecutor stated that the tattoo was on his chest. At trial, Copeland, Harbin, and Peterson all testified to defendant's appearance. While there was evidence admitted that showed defendant had a chest tattoo, neither Copeland nor Harbin identified "P" as having a chest tattoo. Copeland described the man on the porch as being about six feet and two inches tall, weighing around 240 pounds, and having "a Muslim-type beard, brown skin, [and] tattoo on the upper cheek." Harbin stated that the man on the porch was wearing a red hat pulled low and had a bigger, burly build. According to Harbin, this was the individual that pulled out a revolver, jumped off the porch, and walked towards the Camry.

¶ 21 Defendant admitted to being at the house the morning of March 5, 2015, and defendant's cell site data placed his phone in the vicinity of the house on the morning of the shooting and traveling away from the location in the hours following the incident. Two witnesses placed an individual matching defendant's appearance at the scene. Those characteristics were confirmed by Peterson as matching defendant's appearance in March 2015.

¶ 22 This Court has found that "improper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106.

> [I]n cases of clear-cut violations—those couched as appeals to a jury's passions or that otherwise resulted in prejudice to a defendant—this Court has not hesitated to overturn the results of the trial court. *State v. Smith*, 279 N.C. 163, 165–67, 181 S.E.2d 458, 459–60 (1971) (reversing defendant's rape conviction because of the prosecutor's "inflammatory and prejudicial" closing argument, in which the prosecutor described defendant as "lower than the bone belly of a cur dog"); s*ee also State v. Miller*, 271 N.C. 646, 659–61, 157 S.E.2d 335, 344–47 (1967) (holding that the prosecutor committed reversible error by, *inter alia*, calling defendants "storebreakers" and expressing his opinion that a witness was lying).

Id. at 129, 558 S.E.2d at 105; *see also State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) (holding that the trial court erred in not intervening *ex mero motu* when the prosecutor impermissibly commented on the defendant's right to remain silent during sentencing by stating, "he decided just to sit quietly. He didn't want to say anything that would 'incriminate himself' ").

¶ 23 The statements in this case stand in stark contrast to remarks this Court has previously held to be grossly improper. This is not the case where an attorney engages in name-calling, makes statements of opinion, intrudes upon constitutional rights, or references events outside of the evidence. *See Jones*, 355 N.C. at 131, 558 S.E.2d at 106. This is a case where an attorney mistakenly summarized evidence during her closing argument. Nothing in the record suggests that the prosecutor's misstatements about the location of the tattoo were intentional, much less "clearly calculated to prejudice the jury." *Huffstetler*, 312 N.C. at 111, 322 S.E.2d at 122. We fail to see how the conflation of the location of defendant's tattoos in conjunction with the other evidence of defendant's appearance at trial was an extreme or gross impropriety. *See Fair*, 354 N.C. at 153, 557 S.E.2d at 517.

¶ 24 Defendant further contends that statements and arguments by attorneys to the jury may be afforded greater weight and that the danger of unfair prejudice results from even unintentional misstatements of the

evidence.[1] However, the plain language of the trial court's instructions to the jury acknowledges and contemplates that attorneys may mistakenly summarize the evidence during closing arguments.

¶ 25 The jurors were specifically instructed that they were to "be guided exclusively by [their] own recollection" of the evidence any time their "recollection of the evidence differs from that of the attorneys." The jury heard the instructions immediately before and after closing arguments. "Jurors are presumed to follow the instructions given to them by the court." *State v. Price*, 344 N.C. 583, 593, 476 S.E.2d 317, 323 (1996) (quoting *State v. Johnson*, 341 N.C. 104, 115, 459 S.E.2d 246, 252 (1995)). There is no evidence in the record from which we can conclude that the jurors failed to follow the trial court's instructions concerning the manner in which they should consider closing arguments by counsel.

¶ 26 Moreover, defendant's argument would permit attorneys to sit back in silence during closing arguments but then claim error whenever a trial court fails to address or otherwise correct a misstatement of the evidence. *See generally State v. Tart*, 372 N.C. 73, 81, 824 S.E.2d 837, 842–43 (2019) ("In circumstances in which a defendant in his or her role as an obvious interested party in a criminal trial fails to object to the other party's closing statement at trial, yet assigns as error the detached trial judge's routine [silence] during closing arguments in the absence of any objection, this Court has consistently viewed the appealing party's burden to show prejudice and reversible error as a heavy one."). Trials are not carefully scripted productions. Absent extreme or gross impropriety in an argument, a judge should not be thrust into the role of an advocate based on a perceived misstatement regarding an evidentiary fact when counsel is silent.

¶ 27 The misstatements by the prosecutor appear to be mistakes in arguing the evidence admitted at trial for which defendant did not lodge an objection, and defendant has failed to meet his heavy burden. Based on the circumstances presented in this case, the misstatements by the prosecutor during closing arguments were not extreme or grossly improper, and the trial court did not abuse its discretion when it declined to intervene *ex mero motu*. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

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1. The opposite may well be true. Jurors may be distrustful of attorneys who repeatedly misstate the evidence, thus, compromising the prospect of a successful outcome.

STATE v. GOINS

[377 N.C. 475, 2021-NCSC-65]

STATE OF NORTH CAROLINA
v.
BRANDON SCOTT GOINS

No. 71A20

Filed 11 June 2021

Criminal Law—prosecutor's closing argument—improper statements—failure to object—prejudice requirement

In a trial for attempted first-degree murder and assault charges where defendant failed to object to the prosecutor's improper closing argument regarding his decision to plead not guilty, the trial court's failure to intervene ex mero motu was not reversible error because defendant was not prejudiced by the improper argument. The argument was a small part of the State's closing argument, the evidence of defendant's guilt was essentially uncontroverted, and the trial court instructed the jury that defendant's decision to plead not guilty could not be taken as evidence of his guilt. The improper argument, without a showing of prejudice, was not enough to grant defendant a new trial and the decision of the Court of Appeals was reversed and remanded for consideration of defendant's remaining arguments.

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. 618 (2020), vacating judgments entered on 21 September 2018 by Judge Christopher W. Bragg in Superior Court, Cabarrus County, and remanding for a new trial. Heard in the Supreme Court on 26 April 2021.

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

Joseph P. Lattimore for defendant-appellee.

HUDSON, Justice.

¶ 1 Here we must determine whether a prosecutor's improper comments on defendant's decision to plead not guilty during closing arguments prejudiced defendant so as to warrant a new trial. Because we conclude that defendant was not prejudiced, we reverse and remand to the Court of Appeals for consideration of defendant's remaining issues on appeal.

I. Factual and Procedural Background

¶ 2 Defendant plead guilty to a felony in 2016 and was later released on probation. Defendant's probation officer testified that defendant did not follow the terms of his probation and actively avoided meeting with the officer. Defendant met with his probation officer only once over a period of several months and during that meeting the officer explained that if defendant continued to avoid supervision he could return to jail. Some time prior to April 2017, having lost all contact with defendant, the probation officer secured a warrant for defendant's arrest.

¶ 3 Defendant's grandmother testified at trial that defendant showed her a gun at a family gathering on Easter 2017 and told her that the bullets inside were powerful enough to pierce a bulletproof vest. According to his grandmother's testimony, defendant said that he would kill himself—or the police would have to kill him—before he went back to jail. Defendant's uncle also testified that defendant showed him the gun. According to the uncle, defendant said the gun contained "cop-killer" bullets and that he would rather kill himself than return to prison.

¶ 4 On 28 April 2017, police officers located defendant at a hotel in Kannapolis. When defendant saw one of the officers, Detective Hinton, he ran into a stairwell. Detective Hinton chased defendant up the stairs. After a struggle on the third-floor landing, in which Detective Hinton slammed the hallway door on defendant and defendant pointed his gun directly at Detective Hinton, defendant managed to slide through the door and run. The officer followed yelling, "Police," "Drop your gun," and "Drop your weapon." As he was running away, defendant passed a hotel resident, Shannon Arnette, who testified at trial that defendant suddenly stopped running, turned around, drew his weapon, and fired at Detective Hinton. Detective Hinton testified that he saw and heard the initial blast from defendant's gun. Both Detective Hinton and Arnette testified that defendant shot first and that Detective Hinton only returned fire after defendant's first shot.

¶ 5 The exchange between defendant and Detective Hinton was also captured on hotel surveillance video, which was played for the jury. The video, which has no sound, shows defendant running down the hallway, stopping, and turning around. Defendant then stood with his back to the surveillance camera, facing Detective Hinton, indicating that he was ready to fire, or already was firing, his gun. Defendant then fell to the ground and the video footage shows two bursts of light from his gun. In total, defendant fired four of his five bullets.

¶ 6 Eventually the officers detained defendant. At trial, a police officer who later arrived at the scene testified that the ammunition in defendant's gun had "hollow-point rounds," bullets that are colloquially referred to as "cop-killers." The officer testified that hollow-point bullets cause more serious injuries than other types of bullets.

¶ 7 Defendant presented no evidence in his defense.

¶ 8 During closing arguments, the State made the following remarks:

> [You m]ight ask why would [defendant] plead not guilty? I contend to you that the defendant is just continuing to do what he's done all along, refuse to take responsibility for any of his actions. That's what he does. He believes the rules do not apply to him.
>
> . . .
>
> [Defendant's] not taking responsibility today. There's nothing magical about a not guilty plea to attempted murder. He's got to admit to all the other charges. You see them all on video. The only thing that's not on video is what's in his head. He also knows that those other charges carry less time. There's the magic.

Defendant did not object to the State's closing argument. Ultimately, the jury found defendant guilty on all counts.

¶ 9 At the Court of Appeals, defendant argued that the trial court's failure to intervene *ex mero motu* was reversible error.[1] The majority of the Court of Appeals panel agreed, holding that the prosecutor's commentary on defendant's decision to plead not guilty was so unfair it violated defendant's due process rights. The Court of Appeals ordered a new trial. The dissenting judge would have required a showing of prejudice by defendant because he failed to object at trial. Based on the record, the dissenting judge would have held that the State's closing argument was improper, but that defendant was not prejudiced by the error. The State appealed on the basis of that dissenting opinion.

II. Analysis

¶ 10 "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel

1. Defendant raised other issues at the Court of Appeals, but this is the only issue raised by the State in its appeal to our Court, as it was the only issue addressed in the dissenting opinion.

is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133 (2002). In *State v. Huey*, we explained,

> when defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial. Only when it finds both an improper argument and prejudice will this Court conclude that the error merits appropriate relief.

370 N.C. 174, 179 (2017) (cleaned up).

¶ 11 Here, the State concedes that the prosecutor's closing argument commenting on defendant's decision to plead not guilty was improper. Therefore, we must only determine whether defendant has shown he was prejudiced by the improper argument. As we explained in *Huey*,

> [o]ur standard of review dictates that only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. It is not enough that the prosecutors' remarks were undesirable or even universally condemned. For an appellate court to order a new trial, the relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Id., at 180 (cleaned up). Specifically, "defendant has the burden to show a 'reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached at the trial.' " *Id.*, at 185 (quoting N.C.G.S. § 15A-1443(a) (2019)) (alteration in original).

¶ 12 Here, the Court of Appeals majority concluded that the State's closing argument "violate[d] [d]efendant's right to receive a fair trial," which "rendered the proceedings fundamentally unfair and requires a new trial." *State v. Goins*, 269 N.C. App. 618, 620 (2020). Given that the argument here was improper, we must evaluate whether or not it was

prejudicial. *Huey*, 370 N.C. at 180. The Court of Appeals erred by failing to analyze prejudice.

¶ 13 When evaluating the prejudicial effect of an improper closing argument, we examine "the statements 'in context and in light of the overall factual circumstances to which they refer.' " *Id.* (quoting *State v. Alston*, 341 N.C. 198, 239 (1995)). For example, to evaluate the context here, we consider the entirety of the closing argument, the evidence presented at trial, and the instructions to the jury. *E.g.*, *State v. Phillips*, 365 N.C. 103, 135 (2011) ("Statements or remarks in closing argument must be viewed in context and in light of the overall factual circumstances to which they refer." (cleaned up)); *State v. Jones*, 355 N.C. 117, 134 (2002) ("Improper argument at the guilt-innocence phase, while warranting condemnation and potential sanction by the trial court, may not be prejudicial where the evidence of defendant's guilt is virtually uncontested."); *State v. Goss*, 361 N.C. 610, 626 (2007) ("Even if we assume *arguendo* that the closing argument in this case was grossly improper, we conclude that any prejudice to defendant was cured by the trial court's instructions to the jury following closing arguments.").

¶ 14 Here, the bulk of the State's closing arguments focused on a review of the evidence presented during trial and the elements of the offenses charged. The prosecutor argued that uncontroverted evidence showed that defendant was guilty of two counts of assault with a deadly weapon on a law-enforcement officer and one count of possession of a firearm by a felon. Thus, the only remaining issue for the jury to decide was whether defendant was guilty of attempted first-degree murder, which hinged on defendant's intent. The prosecutor explained the intent required for attempted first-degree murder and cited evidence that supported that intent. After emphasizing the deliberate, nonaccidental nature of the shooting, the prosecutor made the statements quoted above which give rise to the issue on appeal. The improper argument was a small portion of the State's closing argument and was not the primary or even a major focus of the State's argument to the jury.

¶ 15 We also examine the evidence presented to the jury. The State presented evidence that defendant was violating his probation and would rather kill himself or be killed by the police than go back to jail. Several witnesses testified that defendant's gun was loaded with bullets designed to cause more serious injuries, which are colloquially referred to as "cop-killers." The State's witnesses also testified that when defendant was eventually located by police, he pointed his gun directly at a police officer in the midst of the pursuit. Furthermore, after Detective Hinton clearly identified himself as a police officer, defendant turned around,

drew his weapon, and fired at the officer. Multiple witnesses testified that defendant shot first and that Detective Hinton only returned fire after defendant's first shot. In addition, the hotel surveillance video which was played for the jury at trial showed the shootout between defendant and Detective Hinton. Between the video and the testimony of eyewitnesses who corroborated the State's account of events, "virtually uncontested" evidence of defendant's guilt was submitted to the jury for its consideration. *Jones*, 355 N.C. at 134.

¶ 16 Finally, we examine the instructions to the jury. Here, the trial judge instructed the jury both orally and in writing. The judge told the jury that defendant's decision to plead not guilty could not be taken as evidence of his guilt. Specifically, the jury was instructed that "[t]he fact that the defendant has been charged is no evidence of guilt" and "when a defendant pleads not guilty, the defendant is not required to prove the defendant's innocence." The judge also stated that the "defendant is presumed to be innocent" and "[t]he State must prove . . . that the defendant is guilty beyond a reasonable doubt." In addition, the record here indicates that the jury properly followed the judge's instructions. Specifically, during its deliberations, the jury asked to re-watch the slow-motion surveillance video of the shooting. This tends to show that the jury based its decision on the evidence rather than on passion or prejudice resulting from the prosecutor's improper argument.

¶ 17 Based on the foregoing, we conclude that defendant was not prejudiced by the prosecutor's improper closing argument. The prosecutor's reference to defendant's plea of not guilty was undeniably improper, and as the dissenting opinion from the Court of Appeals stated, "[c]ounsel is admonished for referring to or questioning [d]efendant's exercise of his right to a trial by jury." *State v. Goins*, 269 N.C. App. 618, 626 (2020) (Tyson, J., dissenting). However, in the context of the entire closing argument we cannot conclude that the prosecutor's use of this improper argument was "so overreaching as to shift the focus of the jury from its fact-finding function to relying on its own personal prejudices or passions." *State v. Duke*, 360 N.C. 110, 130 (2005). Neither can we conclude that the mention of defendant's choice to plead not guilty "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Huey*, 370 N.C. at 180.

¶ 18 Furthermore, evidence of defendant's guilt was essentially uncontroverted and ultimately, the jury found defendant guilty of all charges. Of course, the jury could have reached a different conclusion in evaluating the evidence, but we are not convinced that there is a reasonable

possibility that without the State's improper closing argument, the jury would have reached a different verdict.

¶ 19 Finally, although it would have been better for the judge to intervene immediately after the improper argument and directly clarify to the jury that defendant's not-guilty plea could not be counted against him in any way, we believe the judge's instruction to the jury effectively cured any error. The judge clearly instructed the jury on their role and made it clear that defendant is presumed to be innocent, that when a defendant pleads not guilty he is not required to prove his innocence, and that the State must prove defendant's guilt beyond a reasonable doubt. Moreover, the jury's requests to reexamine the evidence indicates that the jury made a reasoned decision based on the evidence rather than a decision based on passion or prejudice. Therefore, we cannot conclude that defendant has met his burden of showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" at trial. N.C.G.S. § 15A-1443 (2019).

III. Conclusion

¶ 20 In conclusion, defendant has failed to show that he was prejudiced as a result of the prosecutor's improper closing arguments. Accordingly, we reverse and remand to the Court of Appeals to address the remaining issues raised by defendant on appeal.

REVERSED AND REMANDED.

STATE v. BLAGG

[377 N.C. 482, 2021-NCSC-66]

STATE OF NORTH CAROLINA
v.
CHARLES BLAGG

No. 261A20

Filed 11 June 2021

Drugs—possession with intent to sell or deliver—methamphetamine—sufficiency of evidence—totality of circumstances

The State presented sufficient evidence to convict defendant of possession with intent to sell or deliver methamphetamine where officers found in the center console of defendant's vehicle a large bag containing 6.51 grams of methamphetamine, several smaller bags of an untested white crystalline substance weighing 1.5 grams, and additional clear plastic baggies; defendant had just left a residence that was under surveillance for drug activity and had a meeting planned with a drug trafficker; the quantity of methamphetamine in defendant's possession was up to 13 times the amount typically purchased for personal use; and the officers also found a loaded syringe, a bag of new syringes, a baggie of cotton balls, and a hidden safe containing clear plastic baggies—even though there was no cash or other items typically associated with the sale of drugs.

Justice EARLS dissenting.

Justice HUDSON joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 271 N.C. App. 276 (2020), finding no error in a judgment entered on 29 January 2018 by Judge Gary M. Gavenus in Superior Court, Buncombe County. Heard in the Supreme Court on 22 March 2021.

Joshua H. Stein, Attorney General, by Nicholas R. Sanders, Assistant Attorney General, for the State-appellee.

Sean P. Vitrano for defendant-appellant.

MORGAN, Justice.

¶ 1 In this appeal, we consider whether the trial court erred in denying defendant's motion to dismiss a charge of possession with intent to sell or deliver methamphetamine. In the trial court as well as in the Court of Appeals, defendant argued that the evidence presented by the State, while sufficient to support a charge of possession of methamphetamine, was insufficient to send to the jury the greater charge of possession with intent to sell or deliver methamphetamine. The majority of the Court of Appeals disagreed with defendant's position and found no error in his trial and conviction. Viewing the evidence adduced at trial in the light most favorable to the State and considering the totality of the circumstances presented in this case, we hold that the evidence here was sufficient to withstand defendant's motion to dismiss the greater charge and to permit the jury to resolve the question of whether the State met its burden to prove beyond a reasonable doubt that defendant possessed methamphetamine with the intent to sell or deliver. Accordingly, we affirm the majority decision of the lower appellate court.

I. Factual Background and Procedural History

¶ 2 According to evidence presented at trial in this case, on the evening of 4 January 2017, Darrell Maxwell, a detective with the Buncombe County Sheriff's Office, joined two other deputies in the surveillance of a residence in Weaverville that had been the subject of complaints of illegal drug activity. Maxwell observed a vehicle arrive at the residence and park in the driveway. The detective then saw a man exit the vehicle and enter the surveilled home. Due to the encroaching darkness of the evening, Maxwell did not see the individual leave the residence, but after about ten minutes, Maxwell saw the lights of the vehicle illuminate as it departed from the driveway. Maxwell followed the vehicle in his unmarked patrol car, and after witnessing the vehicle cross the double yellow center line on a portion of the road described by the detective as a "blind curve," Maxwell initiated a traffic stop by activating his patrol car's blue lights. Defendant, who was identified by Maxwell as the operator of the vehicle he stopped, acknowledged having crossed the double yellow center line when Maxwell explained to defendant the reason for the traffic stop. Maxwell obtained defendant's driver's license, performed a records check, and then asked defendant to exit defendant's vehicle so that Maxwell could perform a pat-down of defendant's person. Defendant consented to the pat-down, during which Maxwell discovered a pocketknife.

¶ 3 By this point in the traffic stop, Deputy Jake Lambert, a K-9 handler with the Buncombe County Sheriff's Office, had arrived on the scene to

assist. Maxwell asked defendant whether defendant had any contraband in his vehicle,[1] and Maxwell specifically named several controlled substances, including methamphetamine and marijuana. Defendant denied the presence of any such illegal drugs. When Maxwell asked defendant if Maxwell could search defendant's vehicle, defendant replied, "not without a warrant." Maxwell asked Lambert to employ the K-9 to conduct an open-air sniff of defendant's vehicle, while Maxwell issued defendant a warning citation for the traffic infraction. Lambert's K-9 alerted to defendant's vehicle in a manner which was consistent with the detection of the presence of controlled substances. Lambert consequently began to conduct a search of the vehicle and discovered a bag of what appeared to be methamphetamine in the center console of the vehicle. After handcuffing defendant and placing him under arrest, Maxwell collected all of the apparent drug-related items found in defendant's vehicle, including one large bag and several smaller bags of a white crystalline substance; a bag of a leafy green substance which Maxwell believed to be marijuana; a baggie of cotton balls; several syringes; rolling papers; and a lockbox or "camo safe"[2] containing, *inter alia*, several smoked marijuana blunts and a number of plastic baggies. Upon defendant's arrest, Maxwell informed defendant of his *Miranda* rights. Defendant then offered to provide information about "Haywood[County]'s most wanted," a woman whom defendant claimed was involved in heroin trafficking and whom defendant represented that he was supposed to meet.

¶ 4 On 10 July 2017, defendant was indicted on charges of possession of methamphetamine, possession with intent to sell or deliver methamphetamine, possession of marijuana, possession of marijuana paraphernalia, and the attainment of habitual felon status. Defendant's case came on for trial during the 9 January 2018 Criminal Session of Superior Court, Buncombe County, Judge Gary M. Gavenus presiding. Defendant failed to appear when his case was called for trial, and as a result, his jury trial was conducted in absentia.

¶ 5 At trial, the State offered evidence from three witnesses: Maxwell, Lambert, and Deborah Chancey, a forensic analyst with the State Crime Lab. With regard to the charge of possession with intent to sell or deliver methamphetamine, Chancey rendered expert testimony at trial that the white crystalline substance in the large plastic baggie was methamphetamine and that its weight was 6.51 grams. Maxwell testified that he

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1. The vehicle, a Ford Focus sedan, was registered to defendant's mother. For ease of reading, we shall refer to the vehicle as "defendant's vehicle."

2. "Camo" is a shortened term for the word "camouflage."

had five years of law enforcement experience which was specifically focused on drug investigations. He further testified that a typical methamphetamine sale for personal drug use was usually between one-half of a gram to a gram, such that the tested amount of methamphetamine recovered from defendant's vehicle was somewhere between six and thirteen times the typical single use quantity. Maxwell also testified that he and Lambert had weighed two of the smaller baggies of the white crystalline substance on the date of defendant's arrest and measured the weights of those respective quantities—bags included—at 0.6 and 0.9 grams. The total weight of the methamphetamine and the untested crystalline substances recovered from defendant's vehicle was over 8 grams.

¶ 6 During his trial testimony, Maxwell opined that the baggies recovered from defendant's vehicle were consistent with those employed in drug sales. He and Lambert both acknowledged at trial that they did not recover cash from defendant's person or from defendant's vehicle, nor any cutting agents, scales, or business ledgers during the search of the vehicle. Both law enforcement officers also acknowledged that there was no evidence which they discovered during the vehicle search that would indicate that defendant was a high-level actor in the drug trade. With the admission into evidence of the lockbox or "camo safe" and its contents, which included an unspecified number of plastic baggies consistent with the illegal sale of controlled substances, the jury was able to observe and to consider the number of plastic baggies as well as the other items which were recovered from defendant's vehicle. At the close of the State's evidence, defendant moved to dismiss the possession with intent to sell or deliver methamphetamine charge because the search of his person and his vehicle yielded "no cash, no guns, no evidence of a hand to hand transaction[,] . . . [n]o books, notes, ledgers, money orders, financial records, documents, . . . [and n]othing indicating that [defendant] is a dealer as opposed to a possessor or user[.]" Defendant also moved to dismiss the possession of marijuana paraphernalia charge and the charge of maintaining a vehicle. The trial court granted defendant's motion to dismiss the possession of marijuana paraphernalia charge but denied defendant's motion to dismiss the charge of possession with intent to sell or deliver methamphetamine. Defendant did not present any evidence and renewed his motion to dismiss the possession with intent to sell or deliver methamphetamine charge. The trial court again denied the motion.

¶ 7 On 11 January 2018, the jury returned verdicts of guilty on the charges of possession of methamphetamine, possession with intent to sell or

deliver methamphetamine, possession of marijuana, and having attained habitual felon status. The trial court sentenced defendant on 29 January 2018 to concurrent sentences of 128 to 166 months and 50 to 72 months in prison. Defendant gave notice of appeal in open court.

¶ 8 Before the Court of Appeals, defendant argued that the State did not prove that he had the intent to sell or deliver methamphetamine. The panel of the lower appellate court was divided on this question, with the majority rejecting defendant's position. *State v. Blagg*, 271 N.C. App. 276, 277 (2020). In reaching this result, the Court of Appeals majority considered the various circumstances relevant to defendant's intent and noted that defendant

> had more than six times, and up to 13 times, the amount of methamphetamine typically purchased. While it is possible that [d]efendant had 13 hits of methamphetamine solely for personal use, it is also possible that [d]efendant possessed that quantity of methamphetamine with the intent to sell or deliver the same. This issue is properly resolved by the jury.
>
> Moreover, the evidence also tended to show that [d]efendant had just left a residence that had been under surveillance multiple times for drug-related complaints. Defendant also admitted that he had plans to visit an individual charged with trafficking drugs. While [d]efendant's actions may be wholly consistent with an individual obtaining drugs for personal use, the jury could also reasonably infer that he had the intent to sell or deliver methamphetamine because of the quantity of drugs, the other circumstantial evidence, and his admission.
>
> . . . . The baggies in [d]efendant's possession are paraphernalia or equipment used in methamphetamine transactions. . . .
>
> . . . .
>
> . . . . Standing alone, possession of the baggies may be innocent behavior. However, when viewed as a whole and in the light most favorable to the State, the jury could reasonably infer that baggies in [d]efendant's possession were used for the packaging and distribution of methamphetamine.

> The question here is not whether evidence that does not exist entitles [d]efendant to a favorable ruling on his motion to dismiss. That there may be evidence in a typical drug transaction that is nonexistent in another case is not dispositive on the issue of intent. Instead, the question is whether the totality of the circumstances, based on the competent and incompetent evidence presented, when viewed in the light most favorable to the State, permits a reasonable inference that [d]efendant possessed methamphetamine with the intent to sell or deliver.
>
> In this type of case, where reasonable minds can differ, the weight of the evidence is more appropriately decided by a jury. Accordingly, the trial court did not err in denying the [d]efendant's motion to dismiss and submitting the case to the jury.

Id. at 281–82 (citations omitted).

¶ 9 The dissenting judge in the Court of Appeals disagreed, summarizing an opposing view that "the record evidence in this case shows nothing more than 'the normal or general conduct of people' who *use* methamphetamine; thus, the evidence, at most, 'raises only a suspicion . . . that [d]efendant had the necessary intent to sell and deliver' methamphetamine." *Id.* at 283 (McGee, C.J., dissenting) (first alteration in original) (quoting *State v. Turner*, 168 N.C. App. 152, 158–59 (2005)). On 4 June 2020, defendant filed a notice of appeal in this Court based upon the Court of Appeals dissenting opinion pursuant to N.C.G.S. § 7A-30(2) and N.C. R. App. P. 14(b)(1).

II. Appellate Standards of Review

¶ 10 We review decisions of the Court of Appeals for errors of law. *State v. Melton*, 371 N.C. 750, 756 (2018).

> In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion. In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to

> every reasonable intendment and every reasonable inference to be drawn therefrom. In other words, if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo.

State v. Golder, 374 N.C. 238, 249–50 (2020) (citations and extraneity omitted).

¶ 11 This Court has long acknowledged that

> [i]t is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue. The general rule is that, *if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction*, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.

State v. Earnhardt, 307 N.C. 62, 66 (1982) (emphasis added; extraneity omitted) (quoting *State v. Johnson*, 199 N.C. 429, 431 (1930)). Because "[e]vidence in the record supporting a contrary inference is not determinative on a motion to dismiss," *State v. Scott*, 356 N.C. 591, 598 (2002) (citing *State v. Fritsch*, 351 N.C. 373, 382 (2000)), "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction *even when the evidence does not rule out every hypothesis of innocence*," *State v. Stone*, 323 N.C. 447, 452 (1988) (emphasis added); *see also State v. Butler*, 356 N.C. 141, 145 (2002) ("To be substantial, the evidence need not be irrefutable or uncontroverted; it need only be such as would satisfy a reasonable mind as being 'adequate to support a conclusion.' " (quoting *State v. Lucas*, 353 N.C. 568, 581 (2001))); *State v. Miller*, 363 N.C. 96, 99 (2009) (holding that "so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also 'permits a reasonable inference of the defendant's innocence.' " (quoting *Butler*, 356 N.C. at 145)). Courts considering a motion to dismiss for insufficiency of the

evidence "should not be concerned with the weight of the evidence." *Earnhardt*, 307 N.C. at 67.

¶ 12 "Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *Fritsch*, 351 N.C. at 379 (citations and extraneity omitted). "In borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Yisrael*, 255 N.C. App. 184, 193 (2017), *aff'd per curiam*, 371 N.C. 108 (2018).

III. Analysis

¶ 13 Defendant argues that the trial court erred in denying his motion to dismiss the charge of possession with intent to sell or deliver methamphetamine. He asserts that the Court of Appeals majority erred in failing to reverse the trial court outcome and to vacate his conviction for this offense. Specifically, defendant contends that the evidence introduced at trial was not sufficient to permit the charge to be submitted to the jury for consideration because the evidence was inadequate to permit the jury to reasonably infer that defendant possessed the methamphetamine discovered during the traffic stop with the intent to sell or deliver it. Defendant submits, and the dissent of the lower appellate court opines, that the evidence only supports the submission to the jury of the charged crime of possession of methamphetamine instead of the heightened indicted offense. We disagree.

¶ 14 Subsection 90-95(a)(1) of the General Statutes of North Carolina provides that it is unlawful for any person to "possess with intent to manufacture, sell or deliver, a controlled substance." N.C.G.S. § 90-95(a)(1) (2019). Methamphetamine is a controlled substance. N.C.G.S. § 90-90 (2019). In order to prove that a defendant has committed the offense of possession with intent to sell or deliver a controlled substance such as methamphetamine, the State must present evidence of the defendant's (1) possession; (2) of a controlled substance; (3) with intent to sell or deliver the controlled substance. *Yisrael*, 255 N.C. App. at 187–88. Only the third of these elements—intent to sell or deliver the controlled substance methamphetamine—is at issue in this appeal.

¶ 15 We agree with the Court of Appeals that "in ruling upon the sufficiency of evidence in cases involving the charge of possession with intent to sell or deliver, . . . our case law demonstrates that this is a fact-specific inquiry in which the totality of the circumstances in each case must be considered unless the quantity of drugs found is so substantial that this

factor—by itself—supports an inference of possession with intent to sell or deliver." *State v. Coley*, 257 N.C. App. 780, 788–89 (2018). In cases which focus on the sufficiency of the evidence of a defendant's intent to sell or deliver a controlled substance, direct evidence may be used to prove intent, but appellate courts must often consider circumstantial evidence from which the defendant's intent may be inferred. *Id.* at 786. Such an inference can arise from various relevant factual circumstances, including "(1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity [of the controlled substance] found, and (4) the presence of cash or drug paraphernalia." *Id.* (quoting *State v. Nettles*, 170 N.C. App. 100, 106, *disc. review denied*, 359 N.C. 640 (2005)). An example of drug paraphernalia which appellate courts such as ours have considered in determining intent to sell or deliver controlled substances is the presence of packaging materials, such as plastic baggies, which may be used to package individual doses of a controlled substance. *State v. Williams*, 307 N.C. 452, 457 (1983).

¶ 16 In establishing defendant's intent to sell or deliver in the present case, the State introduced evidence of the manner in which the methamphetamine was packaged, the manner in which the methamphetamine was stored, defendant's activities, the quantity of methamphetamine found, and the presence of drug paraphernalia. This combination of direct and circumstantial evidence satisfies the factors first articulated in *Nettles* which we hereby adopt to review a trial court's assessment of the sufficiency of the evidence to show a defendant's intent to sell or deliver a controlled substance, while meeting the standard of the existence of substantial evidence to compel the trial court's denial of defendant's motion to dismiss the charge of possession with intent to sell or deliver methamphetamine. In applying the long-established legal principles that the evidence must be considered in the light most favorable to the State upon a defendant's motion to dismiss a criminal charge, that the State is entitled to every reasonable inference from the evidence in the face of a defendant's motion to dismiss, and that evidence which supports a contrary inference is not determinative on a motion to dismiss, we determine that the trial court properly and correctly denied defendant's motion to dismiss the charge of possession with intent to sell or deliver methamphetamine.

¶ 17 In illustration of our determination, we now apply these factors to the evidence presented at trial.

A. Packaging of the Methamphetamine

¶ 18 In his search of defendant's vehicle, Maxwell found one large bag and several smaller bags of a white crystalline substance. The laboratory analysis conducted upon the contents of the large bag showed that the substance was 6.51 grams of methamphetamine. While two of the smaller bags which contained the untested white crystalline substance were found by Maxwell and a fellow law enforcement officer, Lambert, to weigh a total of 1.5 grams, there was also an additional unspecified number of clear plastic baggies which Maxwell testified were consistent with the type which are used in the sale of packaged illegal controlled substances. Maxwell also testified that "[u]sually a seller will individually package the substance. Usually in anywhere from half a gram to one gram, depending on what the buyer is wanting. On occasion, they will weigh out and re-package it, and sell whatever the buyer is seeking."

¶ 19 In considering the evidence in the light most favorable to the State upon defendant's motion to dismiss the charge of possession with intent to sell or deliver methamphetamine, the matter of the original packaging of the verified methamphetamine and the untested white crystalline substance discovered in defendant's vehicle, coupled with the presence of available additional packaging in the form of an undetermined number of clear plastic baggies which were deemed to be consistent with the sale of packaged illegal controlled substances, tends to support an inference that defendant intended to sell or deliver methamphetamine. Such packaging materials can be considered a relevant circumstance in determining intent to sell or deliver a controlled substance. *Williams*, 307 N.C. at 457.

B. Storage of the Methamphetamine

¶ 20 The methamphetamine was found in the center console of defendant's vehicle, according to trial testimony regarding the joint participation of Maxwell, Lambert, and the drug-sniffing K-9 in the search of the vehicle. Upon the admission of evidence during the presentation of the State's case that defendant had just left a residence which was under surveillance by law enforcement officers due to complaints of illegal drug activity at the home, that defendant had a pending meeting with someone whom he identified as a drug trafficker, along with other evidentiary aspects pertaining to the storage of the controlled substance in light of the totality of the circumstances, the trial court appropriately considered these facts in evaluating the sufficiency of the evidence to show that defendant had the required intent to sell or deliver methamphetamine.

C. Defendant's Activities

¶ 21 The activities of defendant contributed to the existence of substantial evidence which, in turn, amounted to a sufficient quantity of evidence to authorize the trial court's submission to the jury of defendant's charge of possession with intent to sell or deliver methamphetamine. Such activities included defendant's aforementioned endeavors of driving a vehicle to a residence which was under the surveillance of law enforcement officers for suspected illegal drug activity, entering the home and remaining inside its premises for a period of approximately ten minutes, committing to meet with someone whom he identified as an individual who was involved in illegal drug trafficking, and operating a vehicle which contained a large bag of a verified controlled substance and a host of items which could be readily associated with it.

D. Quantity of Methamphetamine Found

¶ 22 The evidence at trial showed that a total of more than 8 grams of a white crystalline substance was recovered from defendant's vehicle pursuant to the search of the car by law enforcement officers. Of this total, 6.51 grams was subjected to laboratory analysis and was identified as methamphetamine; the remaining quantity of the substance was not tested. As previously noted, during his trial testimony Maxwell stated that he observed, based on his training and experience, that a seller of methamphetamine will typically package the substance in a quantity ranging from one-half of a gram to a gram. Maxwell also testified that the unspecified number of clear plastic baggies which were found in defendant's vehicle during the search was consistent with his experience "as to the dealing and transportation of methamphetamine."

¶ 23 We have previously acknowledged the arithmetic computation of the Court of Appeals majority in the decision which it rendered in this case that defendant "had more than six times, and up to 13 times, the amount of methamphetamine typically purchased," such that "[w]hile it is possible that [d]efendant had 13 hits of methamphetamine solely for personal use, it is also possible that [d]efendant possessed that quantity of methamphetamine with the intent to sell or deliver the same." *Blagg*, 271 N.C. App. at 281. Meanwhile, N.C.G.S. § 90-95(h)(3b) establishes that the minimum quantity of methamphetamine for trafficking in the controlled substance is 28 grams; the quantity of 6.51 grams of methamphetamine which was verified as existent and in the possession of defendant in the instant case is 23.3% of the threshold amount of trafficking in methamphetamine. In sum, the amount of methamphetamine at issue here is greater than the amount of the substance that the trial

evidence associates with possession for one's personal use, yet lesser than the amount of the substance that the statutory law associates with trafficking for wider use.

¶ 24 The State is not required to disprove the possibility that the methamphetamine in defendant's possession was solely for personal use in order to survive defendant's motion to dismiss. *See Fritsch*, 351 N.C. at 379 (holding that in order to survive a motion to dismiss the evidence need not "rule out every hypothesis of innocence" (quoting *State v. Stone*, 323 N.C. 447, 452 (1988))). The jury was eligible to draw the permissible inference from this amount of methamphetamine, in combination with the totality of the circumstances, that defendant had the intent to sell or deliver methamphetamine. *See*, *e.g.*, *State v. McNeil*, 165 N.C. App. 777, 783 (2004) (upholding the denial of a motion to dismiss a charge of possession with intent to sell or deliver where the controlled substance—cocaine—was 19.64% of the minimum amount to sustain a trafficking charge and additional circumstances included its packaging in twenty-two individually wrapped pieces placed in the corner of a paper bag), *aff'd*, 359 N.C. 800 (2005).

¶ 25 Since the quantity of the methamphetamine found in defendant's possession was not dispositive of the issue concerning its presence for his personal use or its presence for his ability to sell or deliver the methamphetamine, we find that the trial court's adherence to the principle espoused in *Yisrael* to submit issues to the jury in borderline or close cases to be both prudent and proper.

E. Presence of Cash or Drug Paraphernalia

¶ 26 There was no currency which was recovered from defendant or from his vehicle as a result of the search. Likewise, items such as guns, cutting agents, scales, business ledgers, books, notes, money orders, financial records, documents, and suspicious cellular telephone entries which are often associated with dealers of illegal drugs were not found by law enforcement officers in the course of the search. However, other items such as a "loaded" syringe, a bag of new syringes, a baggie of cotton balls, and other items were discovered during the search. The search also uncovered a lockbox or "camo safe" which was clandestinely kept in the back floorboard of defendant's vehicle and contained numerous clear plastic baggies similar to those that were found in the vehicle's center console; a variety of other items were also maintained in the container.

¶ 27 Just as any list of circumstances frequently considered on the issue of intent to sell or deliver a controlled substance is not exhaustive, the

absence of any of those circumstances is likewise not dispositive. *See Yisrael*, 255 N.C. App. at 186, 193 (upholding denial of motion to dismiss where no baggies, scales, written ledgers, or other client information were found); *State v. Wilson*, 269 N.C. App. 648, 655 (2020) (upholding the denial of a motion to dismiss where no "cash, other drug paraphernalia, or tools of the drug trade—such as scales or additional baggies or containers—which have otherwise generally supported a conviction for" possession with intent to sell or deliver were presented); *Coley*, 257 N.C. App. at 789 (upholding denial of a motion to dismiss where scales and plastic baggies were discovered but only a small amount of marijuana was possessed and no written ledgers or other client information was found). Rather, the appropriate inquiry is a case-by-case, fact-specific consideration in which the totality of the circumstances is evaluated in the light most favorable to the State and which gives the State the benefit of every reasonable inference which can be drawn from the evidence which is produced at trial. *Golder*, 374 N.C. at 249–50; *see also Coley*, 257 N.C. App. at 788. Thus, our focus must be upon the presence of evidence which *could* reasonably support an inference of defendant's possession of the methamphetamine with the intent to sell or deliver and not upon the absence of any hypothetical evidence which could have strengthened or added support to the State's case. *See*, *e.g.*, *Earnhardt*, 307 N.C. at 67 (holding that reviewing courts "should not be concerned with the weight of the evidence" when considering the denial of a motion to dismiss).

IV. Conclusion

¶ 28 The application of the factors which we employ in the present case, the "totality of the circumstances" standard in assessing the evidence presented in this case, and the fundamental principles governing the determination of a defendant's motion to dismiss with regard to the sufficiency of the State's evidence to support the charged offense lead us to conclude that the State presented sufficient direct and circumstantial evidence of defendant's intent to sell or deliver methamphetamine so as to compel us to affirm the decision of the Court of Appeals which found no error in defendant's trial.

AFFIRMED.

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

Justice EARLS dissenting.

¶ 29 The criminal offense of possessing a controlled substance is not the same offense as possessing a controlled substance with the intent to sell or deliver it to another person (PWISD). *Compare* N.C.G.S. § 90-95(a)(3) (2019) (making it unlawful for any person "[t]o possess a controlled substance"), *with* N.C.G.S. § 90-95(a)(1) (making it unlawful for any person "[t]o manufacture, sell or deliver, or possess *with intent* to manufacture, sell or deliver, a controlled substance" (emphasis added)). The Legislature chose to draw this distinction for a reason. This distinction has consequences. A defendant convicted under N.C.G.S. § 90-95(a)(1) is guilty of a Class C, Class G, or Class H felony, N.C.G.S. § 90-95(b), whereas a defendant convicted under N.C.G.S. § 90-95(a)(3) is guilty of a Class I felony or a misdemeanor, either of which typically carries a lighter sentence.

¶ 30 In concluding that the State has presented substantial evidence of defendant Charles Blagg's intent to sell or deliver methamphetamine, the majority collapses this distinction. In the process, the majority thwarts the Legislature's effort to tailor criminal liability to the nature of a defendant's alleged criminal conduct. The majority's decision also ensures that Blagg will spend ten to fourteen years in prison, having been convicted of a crime for which the evidence was so utterly lacking that the charge never should have been presented to the jury. Because the majority misinterprets and misapplies the substantial evidence test, I respectfully dissent.

I. Analysis

¶ 31 Every person who possesses any quantity of a controlled substance could intend to sell or deliver the drug to another person. At the same time, not every person who possesses a controlled substance intends to do anything other than use it for his or her own personal consumption. The determinative question in assessing a person's potential criminal liability is the person's intent. As we have often stated, "[i]ntent is a mental attitude seldom provable by direct evidence." *State v. Bell*, 285 N.C. 746, 750 (1974). A defendant's intent to sell or deliver a controlled substance must instead "ordinarily be proved by circumstances from which it may be inferred." *Id.* The issue is that possessing a controlled substance is, at least in theory, itself a "circumstance[ ] from which it may be inferred" that a person intends to sell or deliver a controlled substance. If the evidence sufficient to convict a defendant under N.C.G.S. § 90-95(a)(3) is always sufficient to convict a

defendant under N.C.G.S. § 90-95(a)(1), then the Legislature's carefully drawn demarcation between two different statutory provisions is rendered obsolete.

¶ 32 The way we have handled this issue—at least until today—has been to require the State to present "substantial evidence" of the defendant's specific intent to sell or deliver the controlled substance he or she possessed. This evidence can be circumstantial, certainly, but it cannot merely be evidence common to any individual who possesses a controlled substance. Critically, the "substantial evidence" must be evidence from which the jury could reasonably infer that the defendant intended to sell or deliver the controlled substance to another person. *See*, *e.g.*, *State v. Williams*, 307 N.C. 452, 455 (1983). Evidence which is wholly consistent with a defendant's intention to personally consume the substance cannot, standing alone, be substantial evidence of the defendant's intent to sell or deliver it to someone else. If it were otherwise, every defendant who possessed a controlled substance could be charged, and potentially convicted, under either N.C.G.S. § 90-95(a)(1) or N.C.G.S. § 90-95(a)(3), a result which would be at odds with the Legislature's express intent. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 259 (1994) ("[A] court should give effect to every provision of a statute and thus avoid redundancy among different provisions.").

¶ 33 The substantial evidence test does not, as the majority correctly notes, require the State to "disprove the possibility that the methamphetamine in defendant's possession was solely for personal use." But the defendant does not bear the burden of disproving the State's theory of the case, either. It is not enough for the State to present evidence which, taken in the light most favorable to the State, establishes only that "[w]hile it is possible that [d]efendant had 13 hits of methamphetamine solely for personal use, it is also possible that [d]efendant possessed the quantity of methamphetamine with the intent to sell or deliver the same." (Alterations in original.) "Substantial evidence" requires "more than a scintilla or a permissible inference." *Lackey v. N.C. Dep't of Hum. Res., Div. of Med. Assistance*, 306 N.C. 231, 238 (1982); *see also State v. Slaughter*, 212 N.C. App. 59, 68 (Hunter, J., dissenting) ("[E]vidence which *merely shows it possible for the fact in issue to be as alleged*, *or which raises a mere conjecture that it is so*, is an insufficient foundation for a verdict and should not be left to the jury." (emphasis added) (quoting *State v. Madden*, 212 N.C. 56, 60 (1937))), *rev'd per curiam for reasons stated in dissent*, 365 N.C. 321 (2011). It is obviously "possible" that Blagg intended to sell or deliver the methamphetamine he possessed to another person. Indeed, it is hard to imagine a circumstance where

it would be "impossible" for a court to infer that a person apprehended while possessing some quantity of a controlled substance intended to sell or deliver it to another person. That is why we have always required substantial evidence of the defendant's specific intent to sell or deliver the controlled substance before allowing the case to proceed to the jury.

¶ 34 In this case, the evidence that Blagg intended to sell or deliver methamphetamine to another person just does not exist. Here are the facts actually established at trial: Blagg went to the home of a suspected drug dealer. He spent "approximately ten minutes" inside. As he was driving away from the home, he was pulled over for a moving violation. A K-9 officer noted the presence of narcotics near Blagg's vehicle. A (human) officer searched the vehicle and found plastic bags containing what proved to be 6.51 grams of methamphetamine and 1.5 grams of an untested white crystalline substance. The officers also found syringes, cotton balls, an untested substance that resembled marijuana, and a small safe containing used marijuana blunts and a number of plastic baggies, all scattered about the vehicle. After he was arrested, Blagg told the officers he could help them track down "a female who was wanted for trafficking heroin or something of that nature."

¶ 35 People who personally consume methamphetamine obtain it from somewhere. Blagg's presence at a residence where drug dealing was suspected of occurring—and his apparent knowledge of who in his community is dealing drugs—suggests only that Blagg knows where and how to purchase methamphetamine, not that he is himself a drug dealer. Testimony established that methamphetamine is typically sold in plastic baggies. It follows as a matter of logic that the manner in which a product is typically sold is also the manner in which it is typically purchased. The fact that Blagg had some number of plastic baggies in his vehicle says nothing about *why* he obtained methamphetamine.[1] Testimony also established that cotton balls and syringes are used for injecting methamphetamine. This says nothing about *who* the intended user of the methamphetamine is. And individuals who possess controlled substances for any reason have good reason to conceal their stash. The point is not that the evidence in the record excludes the possibility that Blagg intended to sell or deliver methamphetamine to another person. The point is that substantial evidence requires more than a mere possibility that something could, maybe, conceivably be true.

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1. If a person were observed at a store purchasing a gallon of milk and then some empty milk containers were found in that person's car, would that be substantial evidence that the person is selling or delivering milk to other people? Or would the empty milk containers be evidence that the person likes to drink milk?

¶ 36 Everything the majority relies upon beyond the evidence described above—such as its assertion that "the amount of methamphetamine at issue here is greater than the amount of the substance that the trial evidence associates with possession for one's personal use"—is pure speculation. Worse, it is exactly the same speculative reasoning that the trial court explicitly prohibited the State from engaging in during the sole portion of a criminal proceeding where factfinding is typically permitted, the trial. What a given quantity of a controlled substance found in a person's possession reveals about that person's intent is "a matter familiar only to those who regularly use or deal in the substance[or] who are engaged in enforcing the laws against it," not an inference a jury can draw based upon its own "general knowledge and experience." *State v. Mitchell*, 336 N.C. 22, 30 (1994), *abrogated on other grounds by State v. Rogers*, 371 N.C. 397 (2018). The trial court did not permit the State to argue that the amount of methamphetamine found in Blagg's vehicle signified his intent to sell or deliver it because there was "no evidence as to [the amount of methamphetamine being] more than [for] personal use. Absolutely none. [The State] never elicited that testimony from the officer. . . . There was no testimony as to that. None." Apparently, on this matter, the majority knows better than the trial court, even though there is "[a]bsolutely no[ ]" evidence in the record telling us what possessing 6.51 grams of methamphetamine implies. We may not always like the facts as established by the trial court but, as appellate jurists, we are not at liberty to find our own. *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 44 n.16 ("Were we to . . . make our own factual determinations on the evidence . . . we would impermissibly invade the province of the jury . . . ."), *reh'g denied*, 376 N.C. 535 (2020).

¶ 37 Lacking what is typically required to support a legal inference drawn from the quantity of methamphetamine at issue—evidence in the record—the majority casts about for something else. It lands on math. According to the majority, 6.51 grams is both "more than six times, and up to 13 times, the amount of methamphetamine typically purchased" and "23.3% of the threshold amount of trafficking in methamphetamine." This calculation is not substantial evidence of PWISD. The only evidence in the record supporting the first half of the equation is Detective Maxwell's testimony that "[u]sually a seller will individually package [methamphetamine] . . . in anywhere from half a gram to one gram." His testimony does nothing to establish how much or how many packages an individual user of methamphetamine might typically purchase for personal consumption in a single transaction. Nor does Maxwell's testimony include any statement supporting the majority's unfounded conclusion that "a typical methamphetamine sale *for personal drug use*

[i]s usually between one-half of a gram to a gram." (Emphasis added.) His testimony solely addresses how a seller typically packages methamphetamine, not a buyer's purchasing habits or preferences. Regardless, Maxwell explicitly qualified his statement by noting that a seller might package methamphetamine in different quantities "depending on what the buyer is wanting."

¶ 38 Further, the majority's reliance on the trafficking threshold amount as proof of Blagg's intent is an unjustified stretch of our precedents. The very purpose of a threshold amount is to establish the point beyond which the amount possessed becomes legally salient. Although we have previously described the quantity of a controlled substance in a defendant's possession in relation to the trafficking threshold amount, in that case, the amount considered "more than an individual would possess for his personal consumption" and relevant to the defendant's intent to sell or deliver was over two-thirds the amount required to support a conviction for trafficking. *Williams*, 307 N.C. at 457. The majority does not explain why 23.3% of the trafficking threshold amount is substantial enough to support a PWISD conviction. Without an explanation, there is no way to predict whether possessing 15% of the threshold quantity, or 5% of the threshold quantity, would be indicative of a defendant's intent to sell or deliver a controlled substance. The majority's reasoning leaves defendants and lower courts to guess the point beyond which possessing a quantity of a controlled substance less than the statutory threshold amount heightens a defendant's potential criminal liability.

¶ 39 The State presented no testimony or evidence regarding how much methamphetamine an individual user typically consumes in a single sitting, the number of doses a single purchase typically covers, or how frequently a regular consumer of methamphetamine purchases and uses the drug. Absent any of this necessary context, the fact that Blagg possessed 6.51 grams of methamphetamine is meaningless, beyond establishing that Blagg possessed methamphetamine in a quantity insufficient to sustain a trafficking charge.

¶ 40 The majority's rejoinder is that while the quantity of methamphetamine Blagg possessed is "not dispositive," it is still evidence of Blagg's intent to sell or deliver methamphetamine "in combination with the totality of the circumstances," at least when viewed in the light most favorable to the State. Again, those circumstances do nothing to distinguish Blagg from any other individual who purchases methamphetamine exclusively for personal consumption. As the majority acknowledges, "items such as guns, cutting agents, scales, business ledgers, books, notes, money orders, financial records, documents, and suspicious cel-

lular telephone entries which are often associated with dealers of illegal drugs were not found by law enforcement officers in the course of the search."

¶ 41 The majority then goes on to cite various cases in which this Court or the Court of Appeals concluded that the State had presented substantial evidence of a defendant's intent to sell or deliver in purportedly similar circumstances as presented here. Yet in each of those cases, the record disclosed that the defendant had been found with or done something unusual for a person solely intending to personally consume the controlled substance. The defendant in *Yisrael* "was carrying a large amount of cash ($1,504.00) on his person" in small denominations when he was apprehended "on the grounds of a high school while possessing illegal drugs" with a stolen and loaded handgun inside his vehicle. *State v. Yisrael*, 255 N.C. App. 184, 190 (2017). The defendant in *Wilson* "attempted to hide the larger amount of cocaine while leaving the smaller corner bag—associated with only personal use—in plain view." *State v. Wilson*, 269 N.C. App. 648, 655, *review denied*, 376 N.C. 532 (2020). The defendant in *Coley* was found with marijuana, "a digital scale[,] and an open box of sandwich bags." *State v. Coley*, 257 N.C. App. 780, 789 (2018). The defendant in *Williams* was in constructive possession of a residence where drug sales were proven to have occurred, *Williams*, 307 N.C. at 456, and his fingerprints were found on one of many "tinfoil squares, a material frequently used to package heroin for sale," found inside, *id.* at 457. Invoking the totality of the circumstances is no substitute for the State's burden to present substantial evidence of Blagg's intent to sell or deliver methamphetamine. The cases relied upon by the majority all included additional facts inconsistent with possession merely for personal use.

¶ 42 Perhaps anticipating the harsh consequences of its gloss on the substantial evidence test, the majority emphasizes that it is not the ultimate arbiter of Blagg's guilt. The majority explains that it finds "the trial court's adherence to the principle . . . to submit issues to the jury in borderline or close cases to be both prudent and proper." Yet our responsibility for ensuring fair and equal application of the law in all cases is not discharged by references to the role of the jury as factfinder. It requires us to consistently apply the law as enacted by the Legislature and interpreted though our precedents.

¶ 43 Finally, the majority's analysis does not clearly identify the basis for its holding. According to the majority, "[j]ust as any list of circumstances frequently considered on the issue of intent to sell or deliver a controlled substance is not exhaustive, the *absence* of any of those

circumstances is likewise not dispositive." What the majority appears to be saying is that even if prior cases have enumerated factors determined to be indicative of a defendant's intent to sell or deliver a controlled substance, when confronted with a case in which none of those factors are present, a court may choose to redefine the test to include new factors. This manner of deciding cases is out of step with our traditional respect for precedent.

> The doctrine of stare decisis, commonly called the "doctrine of precedents," has been firmly established in the law . . . . It means that we should adhere to decided cases and settled principles, and not disturb matters which have been established by judicial determination. The precedent thus made should serve as a rule for future guidance in deciding anal[o]gous cases . . . . This is not only a sensible, but a just, principle, and a contrary rule would manifestly be inequitable. . . . We have repeatedly said that the weightiest reasons make it the duty of the court to adhere to its decisions.

Hill v. Atl. & N.C. R.R. Co., 143 N.C. 539, 573–75 (1906). As we have long recognized, judicial inconstancy comes at a cost to litigants and to our institutional legitimacy.

¶ 44 Because the majority's decision lends the erroneous impression that any time a defendant is charged with possession of a controlled substance pursuant to N.C.G.S. § 90-95(a)(3), there is substantial evidence that the defendant possessed the substance with the intent to sell or deliver it to another person within the meaning of N.C.G.S. § 90-95(a)(1), I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

STATE v. HAMER

[377 N.C. 502, 2021-NCSC-67]

STATE OF NORTH CAROLINA
v.
DEMON HAMER

No. 279A20

Filed 11 June 2021

Criminal Law—waiver of jury trial—statutory inquiry—harmless error review

The trial court's failure to timely conduct an inquiry with defendant pursuant to N.C.G.S. § 15A-1201(d) to determine whether defendant fully understood and appreciated the consequences of his decision to waive his right to a jury trial was subject to harmless error review. Defendant could not demonstrate prejudice where the trial court belatedly conducted the statutory inquiry after the State rested its case, the record tended to show that defendant understood and appreciated his decision, and there was overwhelming evidence of defendant's guilt of the charged crime.

Justice ERVIN dissenting.

Justices HUDSON 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, 272 N.C. App. 116, 845 S.E.2d 846 (2020), affirming a judgment entered on 29 November 2018 by Judge Michael J. O'Foghludha in Superior Court, Orange County. Heard in the Supreme Court on 22 March 2021.

Joshua H. Stein, Attorney General, by Robert C. Ennis, Assistant Attorney General, for the State-appellee.

W. Michael Spivey for defendant-appellant.

BERGER, Justice.

¶ 1 On November 29, 2018, defendant was found guilty in a bench trial of speeding 94 miles per hour in a 65 mile-per-hour zone. A divided panel of the Court of Appeals determined that even though the trial court failed to follow the procedure set forth in N.C.G.S. § 15A-1201 for waiver of defendant's right to a jury trial, defendant was not prejudiced by the trial court's noncompliance. Defendant appeals.

I. Factual and Procedural Background

¶ 2 On the afternoon of January 12, 2018, Trooper Tracy Hussey with the North Carolina State Highway Patrol observed a black 2017 Jeep traveling westbound on I-40 in Orange County. Using a handheld LIDAR device for speed detection, Trooper Hussey determined that the vehicle was traveling 94 miles per hour. The speed limit on this section of I-40 is 65 miles per hour.

¶ 3 Trooper Hussey relayed information about the 2017 black Jeep to Trooper Michael Dodson with the North Carolina State Highway Patrol, who then initiated a traffic stop. Trooper Dodson identified the driver of the Jeep as defendant. Trooper Dodson issued a citation to defendant for speeding 94 miles per hour in a 65 mile-per-hour zone in violation of N.C.G.S. § 20-141(j1) and for reckless driving in violation of N.C.G.S. § 20-140(b).

¶ 4 On July 26, 2018, defendant pleaded guilty in Orange County District Court to speeding 94 miles per hour in a 65 mile-per-hour zone, and he was ordered to pay a $50.00 fine and costs. The State dismissed the reckless driving charge. Defendant filed written notice of appeal for trial de novo in Orange County Superior Court. Defendant entered a plea of not guilty, and he was appointed a public defender for the traffic charges.

¶ 5 When the matter came on for trial, defense counsel announced that defendant wanted his case to be tried in a bench trial. The State consented to this request. The following exchange occurred on the record in open court:

> THE COURT: Okay. So first of all, just technically, the defendant is waiving a jury trial?
>
> [DEFENSE COUNSEL]: That's correct, Your Honor.
>
> THE COURT: Okay. And I presume that there is a statute that allows that?
>
> [DEFENSE COUNSEL]: That is correct, Your Honor. We have—the State and I have—the State has consented. We have—there is no disagreement about the bench trial.
>
> THE COURT: Is it the same statute that says that Class I felonies can be waived? Is it under that same statute?

> [DEFENSE COUNSEL]: If I'm not mistaken, Your Honor—
>
> THE COURT: I know that one requires the consent of the State.
>
> [DEFENSE COUNSEL]: I apologize.
>
> [THE STATE]: Your Honor, I believe it's controlled by 15A-1201—
>
> THE COURT: Okay. Which does allow waiver of trial in a misdemeanor?
>
> [THE STATE]: That's correct, Your honor. Or I believe any charge except a capital offense.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: It's 15A-1201 subsection (b).
>
> THE COURT: Thank you, sir. So just as a technical matter, this is a—so that—that's accepted by the [c]ourt under that statute since the State consents.

¶ 6 After the State rested its case-in-chief, the trial court revisited defendant's waiver of jury trial in the following exchange:

> THE COURT: . . . I was just reading 20-1250—I'm sorry—15A-1201, we complied completely with that statute with the exception of the fact that I'm supposed to personally address the defendant and ask if he waives a jury trial and understands the consequences of that. Would you just explain that to your client.
>
> (Pause in proceedings while [defense counsel] consulted with the defendant.)
>
> [DEFENSE COUNSEL]: Okay, Your Honor.
>
> THE COURT: Okay. . . .
>
> . . . .
>
> Mr. Hamer, I just have to comply with the law and ask you a couple of questions. That statute allows you to waive a jury trial. That's 15A-1201. Your [defense

counsel] has waived it on your behalf. The State has consented to that. Do you consent to that also?

DEFENDANT: Yes, sir.

THE COURT: And you understand that the State has dismissed the careless and reckless driving. The only allegation against you is the speeding, and that is a Class III misdemeanor. It does carry a possible fine. And under certain circumstances it does carry [a] possibility of a 20-day jail sentence. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: All right. Is that acceptable to you?

DEFENDANT: Yes, sir. I feel confident it was.

¶ 7 Defendant was subsequently found guilty of speeding 94 miles per hour in a 65 mile-per-hour zone and was ordered to pay court costs. Defendant appealed and was assigned an appellate defender. On appeal, defendant argued that the trial court erred in conducting a bench trial because defendant did not knowingly and voluntarily waive his right to a jury trial.

¶ 8 In a published opinion filed on June 16, 2020, the Court of Appeals held that despite the trial court's initial noncompliance with N.C.G.S. § 15A-1201, the trial court remedied the initial error, thus satisfying N.C.G.S. § 15A-1201, and that defendant was not prejudiced by the error. *State v. Hamer*, 272 N.C. App. 116, 127, 845 S.E.2d 846, 853 (2020). The dissenting judge argued that the failure of the trial court to engage in a colloquy at the outset constituted structural error, requiring a new trial. *Id.* at 155, 845 S.E.2d at 870 (McGee, C.J., dissenting). Defendant appeals.

II. Analysis

¶ 9 On appeal, defendant argues that he did not knowingly and voluntarily waive his constitutional right to a jury trial. We disagree.

¶ 10 In 2014, the people of North Carolina amended our State constitution to allow criminal defendants to waive their right to trial by jury in favor of a bench trial. *See* N.C. Const. art. I, § 24 (stating that a criminal defendant in a noncapital case "in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive

jury trial, subject to procedures prescribed by the General Assembly"); *see also* N.C.G.S. § 15A-1201(a) (2019) (where a noncapital "defendant enters a plea of not guilty [in superior court, the defendant] must be tried before a jury, unless the defendant waives the right to a jury trial, as provided in subsection (b) of this section").

¶ 11 A defendant in a noncapital case may "knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury." N.C.G.S. § 15A-1201(b). The defendant must provide notice of the waiver by either (1) a stipulation signed by the State and the defendant; (2) the filing of a written notice of intent with the court; or (3) providing notice in open court by the time of the arraignment or the calling of the calendar, whichever is earlier. N.C.G.S. § 15A-1201(c). Once the defendant provides notice, the court must then:

> (1) Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.
>
> (2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

N.C.G.S. § 15A-1201(d).

¶ 12 Defendant argues that he is entitled to a new trial because the trial court committed structural error through its noncompliance with N.C.G.S. § 15A-1201(d)(1).

¶ 13 The Supreme Court of the United States has previously defined structural error as "defect[s which] affect[ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). In other words, structural error is a defect in which "[t]he entire conduct of the trial from beginning to end is obviously affected." *Id.* at 309–10. The Supreme Court has noted six instances where structural error had been found: (1) "total deprivation of the right to counsel"; (2) "lack of an impartial trial judge"; (3) "unlawful exclusion of grand jurors of defendant's race"; (4) violation of "the right to self-representation at trial"; (5) violation of "the right to a public trial"; and (6) "erroneous reasonable-doubt instruction to jury." *Johnson v. United States*, 520 U.S. 461, 468–69 (1997).

¶ 14 This Court has previously applied the Supreme Court's structural error interpretation in *Fulminante* and the six exceptions outlined in

Johnson. *See State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002) (applying *Fulminante* to the defendant's argument that the prosecutor's allegedly improper questions and comments constituted structural error); *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) ("In each of the six United States Supreme Court cases rectifying structural error, the defendant made a preliminary showing of a violated constitutional right and the identified constitutional violation necessarily rendered the criminal trial fundamentally unfair or unreliable as a vehicle for determining guilt or innocence.").

¶ 15 In support of his structural error argument, defendant cites to several cases in which our Court found the trial court committed "a form of structural error known as error per se" because the trial court violated a defendant's constitutional right to be tried by twelve jurors. *State v. Lawrence*, 365 N.C. 506, 514, 723 S.E.2d 326, 331 (2012) ("North Carolina courts also apply a form of structural error known as error per se" for certain violations of the North Carolina Constitution). *See State v. Poindexter*, 353 N.C. 440, 444, 545 S.E.2d 414, 416 (2001) (concluding that the defendant's constitutional rights were violated per se when the trial court dismissed one juror for misconduct and allowed the defendant to be capitally sentenced by less than twelve jurors); *State v. Bunning*, 346 N.C. 253, 257, 485 S.E.2d 290, 292–93 (1997) (holding that the defendant's constitutional rights were violated per se when only eleven jurors fully participated in reaching a verdict in a capital case); *State v. Hudson*, 280 N.C. 74, 80, 185 S.E.2d 189, 193 (1971) (ordering a new trial *ex mero motu* because although the defendant waived his right to trial by twelve jurors, the defendant's constitutional rights were violated when a jury of less than twelve jurors rendered a guilty verdict).

¶ 16 The cases cited by defendant in support of his structural error argument relate to the make up and proper function of the jury. While the deprivation of a properly functioning jury may be a constitutional violation, the failure of the trial court to conduct an inquiry pursuant to the procedures set forth in N.C.G.S. § 15A-1201(d) is a statutory violation.

¶ 17 In *State v. Garcia*, the defendant argued that the trial court committed structural error by deviating from the jury selection procedure of N.C.G.S. § 15A-1214 which violated his constitutional right to be tried by a fair and impartial jury. *Garcia*, 358 N.C. at 404, 597 S.E.2d at 741. Specifically, the defendant argued that the trial court "committed structural constitutional error by requiring defendant to question replacement jurors before the State approved a full panel of twelve individuals," *id*. at 404, 597 S.E.2d at 741, and that "[t]he prosecutor passed less than a full panel of twelve replacement jurors to defendant on two separate

occasions." *Id.* at 406, 597 S.E.2d at 742. While criminal defendants have a constitutional right to be tried by a fair and impartial jury, this Court failed to find structural error because the defendant "ha[d] shown only a technical violation of the state jury selection statute." *Id.* at 410, 597 S.E.2d at 745.

¶ 18 Here, defendant's argument does not relate to the constitutional sufficiency of a properly functioning jury. Rather, defendant contends that the trial court's failure to follow the statutorily prescribed procedure for waiver of a jury trial deprived him of a jury trial that he did not want. Defendant argues that no subsequent action by the trial court could remedy the statutory violation. Defendant's structural error argument would impose a per se rule that would rigidly require a new trial for technical violations of N.C.G.S. § 15A-1201(d), without regard to the facts and circumstances of a particular case and without consideration of prejudice to the defendant. *See Adams v. United States ex rel. McCann*, 317 U.S. 269, 278 (1942) ("[W]hether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case.").

¶ 19 Here, the trial court's statutory violation is "simply an error in the trial process itself" that did not "affect the framework within which the trial proceed[ed]." *Lawrence*, 365 N.C. at 513–14, 723 S.E.2d at 331 (cleaned up) (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)). Because "the error relates to a right not arising under the United States Constitution, North Carolina harmless error review requires the defendant to bear the burden of showing prejudice." *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331; *see also State v. Pruitt*, 322 N.C. 600, 603, 369 S.E.2d 590, 592 (1988) (determining whether prejudicial error occurred when the trial court failed to properly conduct a statutory inquiry with a pro se defendant).

¶ 20 N.C.G.S. § 15A-1443(a) provides the following:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C.G.S. § 15A-1443(a) (2019); *see Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331 (stating that defendants have the burden of showing there is "a

reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises" (quoting N.C.G.S. § 15A-1443(a) (2009))).

¶ 21 While the right to a jury trial is rooted in both our State constitution and the United States Constitution, the trial court's error here concerns a statutory procedure allowing criminal defendants to waive this constitutional right. *See* N.C. Const. art. I, § 24. Thus, in cases where the trial court commits a statutory violation, the defendant is not guaranteed a new trial, rather "[t]his Court has consistently required that defendants claiming [a procedural error] show prejudice in addition to a statutory violation before they can receive a new trial." *Garcia*, 358 N.C. at 406, 597 S.E.2d at 742–43. Here, defendant bears the burden of demonstrating not only that an error occurred, but also that he was prejudiced by the error.

¶ 22 At trial, defense counsel gave notice of and the State consented to proceeding with defendant's case through a bench trial The trial court discussed the waiver with counsel on the record and in the presence of defendant. However, the trial court failed to conduct an inquiry with defendant pursuant to N.C.G.S. § 15A-1201(d). After the State rested its case, the trial court acknowledged the failure to comply with N.C.G.S. § 15A-1201 and specifically requested that defense counsel explain to defendant that the trial court is to "address the defendant and ask if he waives a jury trial and understands the consequences of that." In a colloquy with the trial court, defendant affirmed the waiver announced by defense counsel prior to trial and personally consented to waiver of trial by jury.

¶ 23 Although the trial court's colloquy was untimely, N.C.G.S. § 15A-1201(d)(1) simply requires the trial court to "determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury." N.C.G.S. § 15A-1201(d)(1). Here, the pretrial exchange between the trial court, defense counsel, and the State, coupled with defendant's subsequent clear and unequivocal answers to questions posed by the trial court demonstrated that he understood he was waiving his right to a trial by jury and the consequences of that decision. There is no evidence in the record to demonstrate that defendant was not aware of his right to a jury trial or his right to waive the same.

¶ 24 Defendant had the right to waive a trial by jury, and the record tends to show that defendant's strategy was to have the merits of his case decided in a bench trial. During his colloquy with the trial court,

defendant was asked if he consented to the waiver of his right to trial by jury. Defendant answered in the affirmative. Subsequently, the trial court asked defendant if proceeding without a jury was acceptable to him. Defendant again answered in the affirmative. Although this type of inquiry should have been conducted prior to trial, defendant had the unique authority to compel the trial court to declare a mistrial. Defendant was arguably in a more advantageous position to enter a knowing and voluntary waiver at this point in the proceedings than he would have been if the inquiry had occurred prior to trial. Defendant's desire to be tried in a bench trial was affirmed after he heard the evidence presented by the State, knew that the trial court erred, and was given the opportunity to revoke the waiver and start anew, but he ultimately reaffirmed the waiver.

¶ 25 Further, there was overwhelming evidence of defendant's guilt presented at trial. The State was required to prove beyond a reasonable doubt that defendant drove "a vehicle on a highway at a speed that is either more than 15 miles per hour more than the speed limit established by law for the highway where the offense occurred or over 80 miles per hour." N.C.G.S. § 20-141(j1) (2019). Trooper Hussey testified that there was a black Jeep traveling on I-40 and determined that the vehicle was traveling at a speed of 94 miles per hour in a 65 mile-per-hour zone. The speed of the vehicle was nearly 30 miles per hour above the posted speed limit, and well in excess of 80 miles per hour. Trooper Dodson then testified that defendant was the driver of the black Jeep. The evidence supports a finding that defendant was guilty of speeding under N.C.G.S. § 20-141(j1), and defendant has not met his burden as there is no reasonable possibility that had the error in question not been committed, a different result would have been reached in a bench trial or a jury trial. *See* N.C.G.S. § 15A-1443(a) (2019).

AFFIRMED.

Justice ERVIN, dissenting.

¶ 26 I am unable to join my colleagues' decision to uphold the trial court's judgment in this case given my belief that it rests upon a significant understatement of the extent of the trial court's failure to comply with the applicable statutory procedures, a fundamental misapprehension of the nature of the claim that defendant has asserted, and the use of an erroneous standard for determining when a showing of prejudice is and is not required before an award of appellate relief becomes appropriate. Simply put, I believe that the majority's decision involves a substantial

deviation from this Court's precedent that has the effect of countenancing a violation of defendant's fundamental right to trial by jury. As a result, I would hold that defendant is entitled to a new trial and dissent from my colleagues' decision to the contrary.

¶ 27 A criminal defendant's right to trial by jury is one of the bedrock principles of American and English law. Magna Carta provides that "[n]o freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the law of the land." Ray Stringham, *Magna Carta: Fountainhead of Freedom* 235 (1966) (providing an English translation of the Magna Carta of 1215). No less an authority than Blackstone lauded "[t]he antiquity and excellence" of trial by jury, in accordance with which "the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals." 4 William Blackstone, *Commentaries*, *349–50. In recognition of the fundamental importance of the right to trial by jury, the abridgement of that right was listed as one of the actions on the part of the British crown that justified American independence enumerated in the Declaration of Independence, *see* The Declaration of Independence paras. 2–3 (U.S. 1776) (stating that the "repeated injuries" in which the monarch had engaged included "depriving us in many cases, of the benefits of Trial by Jury") and the necessity for preserving that right is enshrined in both the federal and state constitutions, *see* U.S. Const. amend. VI (providing that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . . by an impartial jury of the State and district where in the crime shall have been committed . . . ."); N.C. Const. art. I, § 24 (providing that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court . . . ."). As result, it is impossible, at least in my view, to overstate the fundamental importance of the right to trial by jury in the law of this state and this nation.

¶ 28 For many years, individuals charged with the commission of criminal offenses in North Carolina lacked the ability to waive the right to trial by jury. *State v. Hudson*, 280 N.C. 74, 79 (1971) (stating that "[i]t is equally rudimentary that a trial by jury in a criminal action cannot be waived by the accused in the Superior Court as long as his plea remains 'not guilty' "). In 2014, however, the people of North Carolina voted in favor of a constitutional amendment authorizing criminal defendants in non-capital cases to waive their right to a jury trial "in writing or on the record in the court and with the consent of the trial judge . . . subject to procedures prescribed by the General Assembly." N.C. Const. art. I,

§ 24. In the aftermath of the adoption of this amendment, the General Assembly enacted legislation providing that "[a] defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury," N.C.G.S. § 15A-1201(b) (2019), and delineating the procedures that were required to be followed in instances in which a criminal defendant sought to waive his or her right to trial by jury. Among other things, the General Assembly stated that, "[b]efore consenting to a defendant's waiver of the right to a trial by jury," the trial court "shall do all of the following:

> (1) Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.
>
> (2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

N.C.G.S. § 15A-1201(d). As a result, in order to ensure that a defendant's waiver of the right to a jury trial satisfied the constitutional requirement that it be knowing and voluntary, *State v. Thacker*, 301 N.C. 348, 354 (1980) (stating that "[the waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary . . . "), the General Assembly has prescribed statutory prerequisites that must be satisfied before a knowing and voluntary waiver of the right to trial by jury can be said to have occurred.

¶ 29 Although the majority acknowledges that "the trial court's colloquy" with defendant was "untimely," it fails to acknowledge the seriousness of the trial court's failure to take timely action to ensure that defendant's waiver of his right to a jury trial was knowing and voluntary and makes no mention of the additional ways in which the trial court failed to comply with the requirements of N.C.G.S. § 15A-1201(d). Although N.C.G.S. § 15A-1201(d) clearly contemplates that the trial court would personally address the defendant and determine whether the defendant knowingly and voluntarily waived the right to a jury trial prior to the beginning of the trial, the trial court's colloquy with defendant comes at pages 57 and 58 of a 75-page trial transcript and occurred after the State had rested its case against defendant. As a result, jeopardy had already attached and

the vast majority of the trial had already been completed before the trial court personally addressed defendant for the purpose of determining whether he wished to waive his right to trial by jury.[1] As a result, I am inclined to believe that the "untimeliness" of the trial court's colloquy with defendant was a much more serious error than the majority's opinion would appear to suggest.

¶ 30 Secondly, and even more importantly, the trial court failed to "determine whether the defendant fully underst[ood] and appreciate[d] the consequences of [his] decision to waive the right to trial by jury." N.C.G.S. § 15A-1201(d)(1). Although N.C.G.S. § 15A-1201(d)(1) clearly contemplates that the trial court would personally determine that the defendant understood the consequences of his or her decision to waive the right to a jury trial, the trial court, instead, asked defendant's trial counsel to "explain that to your client." According to decisions of this Court in the waiver-of-counsel context, the trial court is not entitled to delegate responsibility for explaining the consequences of a decision to waive a constitutional right to the defendant's attorney. *State v. Pruitt*, 322 N.C. 600, 604 (1988) (stating that "[i]t is the trial court's duty to conduct the inquiry of defendant to ensure that defendant understands the consequences of his decision"); *State v. Bullock*, 316 N.C. 180, 186 (1986) (holding that nothing in N.C.G.S. § 15A-1242, which governs the waiver of a defendant's right to counsel, "makes it inapplicable to defendants who are magistrates, or even attorneys or judges"). Moreover, even if the trial court was entitled to rely upon defendant's trial counsel to help him inform defendant about "the consequences of the defendant's decision to waive the right to trial by jury," N.C.G.S. § 15A-1201(d)(1), the record in this case is completely silent with respect to what, if anything, defendant may have been told by his trial counsel during the conversation that was held in response to the trial court's request. Finally, the trial court's colloquy with defendant was limited to an inquiry concerning whether defendant consented to his trial counsel's actions in waiving his right to a jury trial and whether defendant understood that he was charged with speeding coupled with a statement that the speeding offense "carr[ied] a possible fine" and might "carry [the] possibility of a 20-day jail sentence." For that reason, given the trial court's failure to explain that defendant

1. Although the Court suggests that this delay actually worked to defendant's benefit on the theory that "defendant had the unique authority to compel the trial court to declare a mistrial" and "was arguably in a better position to enter a knowing and voluntary waiver at this point in the proceedings than he would have been if the inquiry had occurred prior to trial," the record provides no basis for believing that defendant had any idea what would have happened had he declined to proceed without a jury.

had the right to be tried by a jury rather than by the trial court sitting without a jury and what the two methods of proceeding in defendant's case might entail, "there is nothing in the record which shows that defendant understood and appreciated the consequences of" waiving his right to trial by jury. *Pruitt*, 322 N.C. at 604. As a result, I am unable to join my colleagues in concluding that the trial court's delayed colloquy constituted a mere "technical" violation of N.C.G.S. § 15A-1201(d) and believe, instead, that the trial court's noncompliance with the requirements of N.C.G.S. § 15A-1201(d)(1) was substantial.[2]

¶ 31 The majority misapprehends the nature of the trial court's error in another respect as well. Although the majority repeatedly states that "the failure of the trial court to conduct an inquiry pursuant to the procedures set forth in N.C.G.S. § 15A-1201(d) is a statutory violation" and that "defendant's argument does not relate to the constitutional sufficiency of a properly functioning jury," this set of statements overlooks the constitutionally-based logic that led to the enactment of N.C.G.S. § 15A-1201. As I read the relevant statutory language, the requirements set out in N.C.G.S. § 15A-1201, like the requirements enunciated in the right-to-counsel context as enacted in N.C.G.S. § 15A-1242, are intended to ensure that a criminal defendant who elects to waive his or her right to trial by jury does so consistently with the constitutional requirement that such waivers be knowingly and voluntarily made by a defendant who has been fully apprised of the potential ramifications of his or her decision. For that reason, since a valid waiver is necessary before a defendant is allowed to forgo his or her right to trial by jury, a trial court's decision to allow a defendant to opt for a bench trial in the absence of a valid waiver results in a deprivation of the constitutionally-guaranteed right to trial by jury. As a result, the only remaining issue that needs to be addressed in this case is the remedy, if any, to which defendant is entitled given the defect in the proceedings that led to the entry of the trial court's judgment.

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2. According to the majority, "defendant contends that the trial court's failure to follow the statutorily-prescribed procedure for waiver of a jury trial deprived him of a jury trial that he did not want." In making this statement, my colleagues appear to be assuming the answer to the inquiry that N.C.G.S. § 15A-1201(d) requires the trial court to make on the basis of an inquiry that even they appear to recognize was less than optimal. Simply put, the entire purpose of the inquiry required by N.C.G.S. § 15A-1201(d)(1) is to permit a proper determination of the extent to which a fully informed defendant did or did not wish to exercise his state constitutional right to trial by jury. In the absence of substantial compliance with N.C.G.S. § 15A-1201(d), we simply cannot know what defendant would have wanted to do had he been properly informed of the consequences of the decision that he was being asked to make.

¶ 32 The majority's remedy-related discussion rests upon the application of the "structural error" jurisprudence that has been developed by the Supreme Court of the United States. The majority's reliance upon structural error is, however, misplaced. "North Carolina courts . . . apply a form of structural error known as error per se," with "error per se [being] automatically deemed prejudicial and thus reversible without a showing of prejudice." *State v. Lawrence*, 365 N.C. 506, 514 (2012). According to this Court, "federal structural error and state error per se have developed independently" in light of the fact that, while the question of whether a federal constitutional error is or is not harmless is a matter of federal law, the state courts are free to develop their own prejudice-related rules. *Id.* As a result, given that this Court utilizes an error per se approach rather than a structural error approach in determining whether a showing of prejudice is necessary to justify an award of appellate relief based upon a state law claim, the majority's decision to use a structural error approach in this case rests upon a misapprehension of the applicable law.[3]

¶ 33 This Court has held that a number of related violations of the defendant's right to a trial by jury constituted error per se. In *State v. Poindexter*, 353 N.C. 440, 444, this Court held that a defendant's conviction that rested upon "a guilty verdict by a jury composed of less than twelve qualified jurors" which resulted from the misconduct of one of the members of the jury as it had been originally empaneled constituted error per se. *Id.* at 444. In reaching that conclusion, we stated that a trial by an "improperly constituted" jury was "so fundamentally flawed that the verdict [could] not stand," with "a violation of a defendant's constitutional right to have the verdict determined by twelve jurors constitut[ing] error *per se*" that was "not subject to harmless error analysis." *Id.*; *see also State v. Bindyke*, 288 N.C. 608, 629 (1975) (holding that "[t]he presence of an alternate juror in the jury room at any time during the jury's deliberations will void the trial"); *State v. Bunning*, 346 N.C.

3. As an aside, we note that the Supreme Court of the United States has stated that, in light of "the Sixth Amendment's clear command to afford jury trials in serious criminal cases[, w]here th[e] right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt," given that "the error in such a case is that the wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986) (citations omitted); *see also Sullivan v. Lousiana*, 508 U.S. 275, 281-82 (1993) (stating that, since "[t]he right to trial by jury reflects . . . a profound judgment about the way in which law should be enforced and justice administered,' " "[t]he deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.' " (citations omitted) (quoting *Duncan v. Lousiana*, 391 U.S. 145, 155 (1968)). As a result, it would appear to me that, even if the applicable mode of analysis involved structural error rather than error per se, defendant would be entitled to an award of appellate relief in this case.

253, 257 (1997) (awarding the defendant a new sentencing hearing in a capital case in which the trial court allowed an alternate juror to participate in the jury's deliberations after they had already begun for the purpose of replacing a juror who had mental health-related difficulties on the grounds that a "trial by a jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand"). In the same vein, we held in *Hudson*, 280 N.C. at 80, that a verdict returned by a jury consisting of only eleven members which was allowed to render a decision after one of the original jurors had become ill and was unable to participate in the jury's deliberations was a "nullity." As a result, as the majority acknowledges, "the deprivation of a properly functioning jury may be a constitutional violation" and certainly constitutes error per se.

¶ 34 I am, quite frankly, unable to see any meaningful distinction between the facts of this case, on the one hand, and the facts at issue in *Poindexter*, *Bindyke*, *Bunning*, and *Hudson*, on the other.[4] In other words, it seems to me that, if a conviction by eleven or thirteen, rather than twelve jurors, results in error per se, a conviction obtained without a valid waiver of the right to a jury trial must necessarily constitute error per se as well. After all, a conviction based upon a verdict by a trial judge, sitting without a jury, is tantamount to a verdict without any number of jurors at all. As a result, it seems clear to me that the trial court's failure to ensure that defendant properly waived his right to trial by jury constituted error per se.[5]

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4. According to the majority, the outcome in this case is controlled by *State v. Garcia*, 358 N.C. 382 (2004), in which the Court rejected a contention that the trial court's failure to require the prosecutor to pass a full panel of prospective jurors to the defendant constituted structural error on the grounds that the defendant had "failed to show that he was denied trial by a fair and impartial jury or to show that any other constitutional error resulted from the jury selection procedure employed at his trial" and that defendant had, instead, "shown only a technical violation of the state jury selection statute." *Id.* at 410. An error in the order in which the parties are entitled to question and challenge prospective jurors bears no resemblance to a case, like this one, in which the defendant was tried by the trial judge, rather than a jury, in the absence of a valid waiver of his right to trial by jury resulting in a deprivation of that right.

5. The majority seems to suggest that a mere statutory violation can never constitute error per se. However, this Court has found error per se in cases in which the trial court violated N.C.G.S. § 84-14, *State v. Mitchell*, 321 N.C. 650, 659 (1988) (quoting N.C.G.S. § 84-14) (providing that, "in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side"), and N.C.G.S. § 7A-450(b1), *State v. Parker*, 350 N.C. 411, 421 (1999) (citing N.C.G.S. § N.C.G.S. § 7A-31-450(b1) (mandating the appointment of two counsel to represent defendants in capital cases); *State v. Brown*, 325 N.C. 427, 426 (1989); *State v. Hucks*, 323 N.C. 574, 581 (1988). As a result, any suggestion to the effect that error per se can only occur in connection with constitutional violations would be erroneous.

¶ 35 The approach that I believe to be appropriate in this case is indistinguishable from the one that this Court has consistently utilized in cases involving the absence of a valid waiver of the right to counsel. According to N.C.G.S. § 15A-1242,

> [a] defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (2019).[6] In *State v. Moore*, 362 N.C. 319 (2008), this Court held that the trial court had failed to "make an adequate determination pursuant to N.C.G.S. § 15A-1242" before allowing the defendant to proceed pro se and that this error was prejudicial and required reversal. *Id.* at 320–21; *see also Bullock*, 316 N.C. at 186 (holding that "[i]t was prejudicial error for the trial court to proceed to trial without conducting the statutory inquiry in order to clearly establish whether the defendant voluntarily, knowingly and intelligently waived his right to counsel"); *Pruitt*, 322 N.C. at 604 (holding that the defendant was entitled to a new trial when there was "nothing in the record which show[ed] that defendant understood and appreciated the consequences of proceeding *pro se*" or "understood the 'nature of the charges and proceedings and the range of permissible punishments' " as required by N.C.G.S. § 15A-1242). Thus, even though this Court has never held that a deprivation of the right to counsel in violation of N.C.G.S. § 15A-1242 constitutes error per se in so many words, our prior decisions clearly reflect that such a violation of the defendant's right to counsel necessitates an award of appellate relief without any necessity for a showing of prejudice. As a result of the substantial similarities between the language of N.C.G.S. § 15A-1201(d) and the language of N.C.G.S. § 15A-1242 and the similar purposes that these statutory provisions are intended to serve, the fact

6. The similarity between the statutory language contained in N.C.G.S. § 15A-1242 and the statutory language contained in N.C.G.S. § 15A-1201(d) is striking, a fact that gives added force to the analogy set out in the text of this dissenting opinion.

that this Court has treated violations of N.C.G.S. § 15A-1242 as if they constituted error per se strongly suggests that a similar approach should be utilized when violations of N.C.G.S. § 15A-1201(d) occur.

¶ 36 Admittedly, defendant was not charged with nor convicted of a violent crime or offense involving a significant loss of property in this case. In addition, the majority is correct in noting that the State's case against defendant was strong. Under such circumstances, it is tempting to make every effort to avoid overturning a conviction when the underlying result does not seem fundamentally unfair at a substantive, as compared to a procedural, level. On the other hand, the Court's decision, aside from departing from what seem to me to be well-established principles of North Carolina law, has ramifications that extend far beyond the facts of this case to much more serious criminal actions. For that reason, we should all remember the old adage that "hard cases make bad law" and attempt to avoid violating that principle in this case. As a result, for all of these reasons, I would hold that defendant did not properly waive his right to trial by jury, that the absence of a proper waiver resulted in a deprivation of defendant's right to trial by jury, that the failure to obtain a proper waiver of defendant's right to a jury trial constituted error per se, and that defendant is entitled to a new trial and respectfully dissent from my colleagues' decision to the contrary.

Justices HUDSON and EARLS join in this dissenting opinion.

STATE v. BETTS

[377 N.C. 519, 2021-NCSC-68]

STATE OF NORTH CAROLINA
v.
ERVAN L. BETTS

No. 376A19

Filed 11 June 2021

1. Evidence—indecent liberties trial—expert testimony—child victim—diagnosis of PTSD—credibility vouching

In a prosecution for taking indecent liberties with a child, there was no plain error in the admission of testimony from a licensed clinical social worker, qualified at trial as an expert witness in sexual abuse and pediatric counseling, who had evaluated the child victim and diagnosed her with post-traumatic stress disorder (PTSD). The expert's responses to questions about whether a PTSD diagnosis could be related to domestic violence or sexual abuse, and whether the child victim had experienced any traumas that required therapy, did not constitute impermissible vouching for the child victim's credibility because the expert did not definitively state the victim had been sexually abused or detail which traumas, if any, she had experienced.

2. Evidence—indecent liberties trial—expert testimony—use of word "disclose" in reference to child victim's statements—credibility vouching

In a prosecution for taking indecent liberties with a child, there was no plain error in the use by multiple witnesses of the word "disclose" to describe the child victim's recounting of defendant's conduct against her which resulted in criminal charges. The term, by itself, did not give rise to impermissible vouching of the child victim's credibility and was therefore admissible, and defendant was not prejudiced by its use given the substantial evidence that defendant inappropriately touched the victim.

3. Evidence—indecent liberties trial—past incidents of domestic violence—relevance—probative value

In a prosecution for taking indecent liberties with a child, there was no plain error in the admission of testimony regarding defendant's past incidents of domestic violence against the child victim and her mother, where the evidence was relevant to explain why the victim was afraid of defendant and delayed reporting allegations of sexual abuse perpetrated against her by him, to provide context for

the victim having been diagnosed with post-traumatic stress disorder, and to aid the jury in assessing the victim's credibility.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 267 N.C. App. 272 (2019), finding no plain error after appeal from a judgment entered on 23 March 2018 by Judge R. Stuart Albright in Superior Court, Forsyth County. On 28 February 2020, the Supreme Court allowed defendant's petition for discretionary review to review an additional issue not addressed by the Court of Appeals. Heard in the Supreme Court on 22 March 2021.

Joshua H. Stein, *Attorney General*, *by Anne M. Middleton*, *Special Deputy Attorney General*, *and Heyward Earnhardt*, *Solicitor General Fellow*, *for the State-appellee.*

Craig M. Cooley for defendant-appellant.

BARRINGER, Justice.

¶ 1 Defendant was convicted of three counts of indecent liberties with a child. Defendant appealed to the Court of Appeals, which in a divided opinion held that defendant had a trial free from prejudicial error. After careful review, we modify and affirm the decision of the Court of Appeals.

I. Background

¶ 2 When B.C.[1] was born in 2013, illegal drugs were found in her system, which prompted the involvement of the Forsyth County Department of Social Services (DSS). On 25 October 2013, DSS conducted an interview of M.C., the seven-year-old sister of B.C., and M.C. informed the social worker, Melodie Archie, that defendant touched her inappropriately. During this time, defendant was in a relationship with M.C. and B.C.'s mother. When the social worker asked additional questions, M.C. denied being touched inappropriately but then described domestic violence incidents between defendant and her mother.

¶ 3 Archie testified on behalf of the State that she conducted a follow-up interview at M.C.'s elementary school where M.C. described incidents of defendant inappropriately touching her. Archie referred M.C. to an advocacy center and contacted the Winston-Salem Police Department.

1. Initials are used to protect the identities of B.C. and M.C., minor children, who are involved in the case.

M.C. went to the child advocacy center in November 2013, where she underwent a forensic interview conducted by Fulton McSwain.

¶ 4 McSwain wrote a report that was admitted into evidence showing that during the forensic interview at the advocacy center, M.C. described incidents of domestic violence between defendant and her mother, two specific incidents of defendant inappropriately touching her, and one incident where defendant slapped her on the leg so hard that he left a hand imprint and then said to her, "F**k you b**ch." M.C. also relayed specific incidents of domestic violence she witnessed between her mother and defendant, which included defendant pushing her mother into a counter and a closet, defendant punching her mother and causing her to have a black eye, and defendant bringing a gun to her mother's residence and attempting to break into her mother's apartment.

¶ 5 While M.C. only described in detail two specific incidents of inappropriate touching by defendant, M.C. explained that defendant kept on touching her private parts over and over again, but she could not remember how many times defendant had inappropriately touched her. The two specific incidents of inappropriate touching that M.C. described were defendant rubbing M.C.'s vagina beneath her underwear and defendant touching M.C.'s breasts. At the conclusion of the interview, the interviewer documented that M.C. "reported to being truthful and did not appear to display any overt signs of deception."

¶ 6 In December 2013, M.C. began seeing Mary Katherine Mazzola,[2] a licensed clinical social worker with DSS, who worked as a therapist in the clinical services unit. Mazzola testified at trial that M.C. was referred to her based on M.C.'s exposure to neglect, sexual abuse, and violence and, after a trauma assessment, Mazzola diagnosed M.C. with post-traumatic stress disorder (PTSD).

¶ 7 On 25 April 2016, defendant was indicted on three counts of indecent liberties with a child. At trial, the State called to testify, among others, M.C., Archie, McSwain, and Mazzola. Mazzola was qualified as an expert witness in sexual abuse and pediatric counseling. The defendant was subsequently convicted of all three counts and sentenced to three consecutive terms of 31 to 47 months imprisonment.

¶ 8 Defendant appealed. The Court of Appeals addressed defendant's arguments that the trial court committed plain error by "(1) not issuing a limiting instruction regarding 'profile' testimony; (2) allowing testimony

2. While there are discrepancies in how Mazzola's name is spelled, we will use the spelling of her name as documented in the Court of Appeals opinion.

and reports that amounted to improper vouching for the credibility of the victim; (3) incorrectly instructing the jury on the proper use of testimony related to the victim's PTSD; and (4) admitting evidence of prior incidents of domestic violence by defendant." *State v. Betts*, 267 N.C. App. 272, 274 (2019). In a divided opinion, the Court of Appeals held that defendant received a fair trial free from prejudicial error. *Id.* at 286.

¶ 9 The dissent, however, argued that the consistent use of the term "disclose" by the State's witnesses was impermissible vouching as to M.C.'s credibility, that the introduction of the domestic violence evidence was error, and the cumulative effect of these errors required reversal of defendant's convictions. *Id.* at 297, 309–310 (Tyson, J., dissenting). Defendant appealed as of right to this Court based on the dissenting opinion from the Court of Appeals. The Court of Appeals opinion did not directly address defendant's issue on appeal of whether separate elements of Mazzola's testimony constituted impermissible vouching of M.C.'s credibility, and this Court allowed defendant's petition for discretionary review as to that issue.

II. Standard of Review

¶ 10 If in a criminal case, an issue was not preserved by objection at trial and was not deemed preserved by rule or law, the unpreserved error is reviewed only for plain error. *See* N.C. R. App. P. 10(a)(4) (2021).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518 (2012) (cleaned up).

III. Analysis

A. Impermissible Vouching

¶ 11 **[1]** Aside from its consideration of the term "disclose," the Court of Appeals did not directly address defendant's specific challenges to part of Mazzola's testimony as impermissible vouching as to M.C.'s credibility. We address the issue here and accordingly modify the Court of Appeals' majority opinion.

¶ 12 Defendant did not object to this evidence when it was offered at trial and, thus, we review for plain error. Defendant argues that Mazzola's answers in the affirmative to a series of questions from the State constituted impermissible vouching as to M.C.'s credibility and the trial court's failure to strike her testimony was plain error. Specifically, the State asked and Mazzola answered in the affirmative the following questions: (1) "when you make a diagnosis of post-traumatic stress disorder, are there several types of traumatic events that could lead to that diagnosis?," (2) "would violence in the home be one of those?," (3) "what about domestic violence or witnessing domestic violence?," (4) "what about sexual abuse?," (5) "[w]ould it be fair to say that [M.C.] had experienced a number of traumas?," and (6) "And that was the basis of your therapy?"

¶ 13 Expert opinion is not admissible to vouch for a victim's credibility; nonetheless, "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 266–267 (2002) (per curiam). An expert's opinion that sexual abuse did in fact occur is admissible when there is physical evidence supporting a diagnosis of sexual abuse. *Id.* at 266.

¶ 14 Given the context of the testimony and the questions asked, Mazzola's testimony did not vouch for M.C.'s credibility and thus was admissible testimony. As argued by the State, the challenged testimony addressed what types of trauma could lead to a PTSD diagnosis—and never indicated which traumas M.C. experienced, if any.

¶ 15 This Court has held that "testimony amount[ing] to an expert's opinion as to the credibility of the victim . . . is inadmissible under the mandate of Rule 608(a) [of the North Carolina Rules of Evidence.]" *State v. Aguallo*, 318 N.C. 590, 599 (1986). An identification of trauma which may form the basis of a PTSD diagnosis clearly, as recited by Mazzola, does not constitute a vouching for the victim's credibility, but rather a statement of the considerations that led to the expert's diagnosis. Accordingly, Mazzola's testimony does not address credibility. Mazzola's affirmative answer to the question concerning whether M.C. had experienced a number of traumas was in response to the State's line of questioning regarding Mazzola's diagnosis of PTSD.

¶ 16 Mazzola did not "usurp the jury's function in determining credibility" as defendant claims. Mazzola never testified that M.C. was in fact sexually abused. *Cf. State v. Towe*, 366 N.C. 56, 59–60 (2012) (concluding that expert testimony was improper where the expert testified that the complainant was in fact part of a category of sexual abuse victims

that displayed no physical abnormalities). Mazzola's testimony stayed within the bounds of permissible expert witness testimony in child sex abuse cases.

¶ 17 Even if Mazzola's testimony was admitted in error, the testimony was not prejudicial to defendant. The trial court gave instructions to the jury on two occasions stating that Mazzola's testimony could only be used for two purposes: to corroborate M.C.'s testimony or to explain M.C.'s delay in reporting defendant's crimes. While defendant argues that M.C.'s testimony of the incidents contains several inconsistencies, defendant had the opportunity to present evidence and cross-examine M.C. to highlight any alleged inconsistencies. In fact, defendant's trial counsel did call attention to M.C.'s inconsistencies to the jury during closing arguments. Based on the evidence presented at trial, the burden of showing prejudice for an unpreserved error—that "the error had a probable impact on the jury's finding that the defendant was guilty"—is upon the defendant. *See Lawrence*, 365 N.C. at 518. Defendant has not met his burden of showing plain error.

B. Use of the Word "Disclose" as Impermissible Vouching

¶ 18 **[2]** Defendant next argues that the use of the word "disclose" throughout the State's expert and lay witnesses' testimony constituted impermissible vouching as to M.C.'s credibility. Defendant did not object to this evidence when it was offered at trial and, thus, we review for plain error.

¶ 19 An expert's opinion that a complainant has endured sexual abuse, absent physical evidence, is impermissible vouching as to the complainant's credibility. *Stancil*, 355 N.C. at 266–267. This Court "has found reversible error when experts have testified that the victim was believable, had no record of lying, and had never been untruthful." *State v. Aguallo*, 322 N.C. 818, 822 (1988).

¶ 20 Defendant relies on the unpublished Court of Appeals opinion *State v. Jamison*, COA18-292, 2018 WL 6318321 (N.C. Ct. App. Dec. 4, 2018),[3] which is based on *State v. Frady*, 228 N.C. App. 682, *review denied*, 367 N.C. 273 (2013), to argue that the State's witnesses' use of the word "disclose" constituted impermissible vouching. Defendant not only relies on an unpublished Court of Appeals decision to support his argument, but

3. We note that it is highly disfavored to cite to unpublished opinions. *See* N.C. R. App. P. 30(e)(3) (2021).

the holding in *Frady* does not support defendant's position.[4] An expert witness's use of the word "disclose," standing alone, does not constitute impermissible vouching as to the credibility of a victim of child sex abuse, regardless of how frequently used, and indicates nothing more than that a particular statement was made. Thus, we conclude that the trial court did not err by allowing the State's witnesses to use the term "disclose" and there is no plain error.

¶ 21 Even if it were error for the trial court to admit testimony of the State's witnesses who used the term "disclose," defendant has not shown plain error. M.C. testified about three incidents of defendant inappropriately touching her, where she gave several details and described the surrounding circumstances. While M.C.'s account of the events may have had inconsistencies, the jury had the opportunity to watch M.C. testify and make an independent determination as to her credibility. Furthermore, substantial evidence was presented to the jury to find that defendant had inappropriately touched M.C. The State submitted for the jury's consideration McSwain's report of the forensic interview, a video of the forensic interview, as well as testimony from Archie and Mazzola. Defendant has not shown that the use of the word "disclose" had a probable impact on the jury's finding that he was guilty. *See Lawrence*, 365 N.C. at 518. Therefore, there is no prejudice.

C. Domestic Violence Evidence

¶ 22 **[3]** Defendant next argues that the trial court plainly erred by allowing evidence of his past domestic violence incidents with M.C.'s mother in violation of North Carolina Rules of Evidence 401 and 403. We disagree.

¶ 23 Rule 401 states that " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2019). Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403.

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4. In *State v. Frady*, the Court of Appeals assessed the testimony of the expert and evaluated whether the meaning of the testimony would be construed by the jury as an opinion by the expert of the victim's credibility. *Frady*, 228 N.C. App. at 685–86. *Frady* did not hold that the use of the word "disclose," by itself, conveys an opinion as to the credibility of a victim.

¶ 24 Here, defendant argues that the evidence of domestic violence, which consisted of the three incidents M.C. described to McSwain during her forensic interview, "had little–if anything–to do with the charged offenses." Yet, the domestic violence evidence provides a justification for why M.C. was fearful of and delayed in reporting defendant's sexual abuse. In *State v. Espinoza-Valenzuela*, 203 N.C. App. 485 (2010), the Court of Appeals held that evidence of domestic violence between defendant and complainants' mother, although tending to show defendant's character, was relevant pursuant to N.C.G.S. § 8C-1, Rule 401 to show why complainants delayed reporting the sexual abuse defendant perpetrated against them. *Espinoza-Valenzuela*, 203 N.C. App. at 491. The same rationale can be applied in the instant case. The domestic violence evidence goes directly to crucial issues in the case including M.C.'s credibility, the veracity of her allegations, and why she did not reveal defendant's actions until DSS became involved with B.C., her younger sister.

¶ 25 The evidence of domestic violence was also probative of M.C.'s PTSD diagnosis. Mazzola testified to her opinion that M.C. has had "complex trauma" that ultimately led Mazzola to diagnosing M.C. with PTSD. Mazzola testified that domestic violence can contribute to a person developing PTSD. The domestic violence evidence, thus, aided the jury's understanding of M.C.'s PTSD diagnosis. Since the domestic violence evidence was relevant to explain why M.C. delayed reporting defendant's sexual assaults and the domestic violence contributed to M.C.'s PTSD diagnosis, it follows that the evidence was relevant under Rule 401 and 403 as it pertained to M.C.'s PTSD and its effects on M.C. *See State v. Hall*, 330 N.C. 808, 822 (1992) ("[T]estimony on post-traumatic stress syndrome may assist in corroborating the victim's story, or it may help to explain delays in reporting the crime or to refute the defense of consent.").

¶ 26 The domestic violence evidence was relevant pursuant to Rule 401 to offer an explanation as to why M.C. delayed reporting defendant's crimes and aided the jury's understanding of M.C.'s PTSD diagnosis. The domestic violence evidence was not more prejudicial than probative so as to be excluded under Rule 403 because it went directly to an issue in the case—M.C.'s credibility. Therefore, we conclude that the trial court did not err by admitting evidence of defendant's past incidents of domestic violence, and thus, there cannot be plain error.

D. Cumulative Error

¶ 27 Finally, defendant argues that the cumulative effect of the trial court's errors prejudiced him. Since we hold that none of the issues present error, we decline to consider defendant's cumulative error argument. *See State v. Thompson*, 359 N.C. 77, 106 (2004) (stating that because the Court concluded there was no error on two of defendant's assignments of error, defendant's cumulative error argument did not need to be considered).

IV. Conclusion

¶ 28 Defendant received a fair trial, free from prejudicial error. Neither Mazzola's testimony, which was not fully addressed by the Court of Appeals, nor the use of the word "disclose" throughout the State's witnesses' testimony constituted impermissible vouching as to M.C.'s credibility. Furthermore, the domestic violence evidence was relevant to explain why M.C. delayed reporting defendant's crimes and aided the jury's understanding of M.C.'s PTSD diagnosis. Since we conclude that the trial court did not commit error, there was no cumulative error. Accordingly, we modify and affirm the Court of Appeals decision.

MODIFIED AND AFFIRMED.

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

STATE v. CHEEKS

[377 N.C. 528, 2021-NCSC-69]

STATE OF NORTH CAROLINA
v.
THOMAS ALLEN CHEEKS

No. 421PA19

Filed 11 June 2021

1. Homicide—murder by starvation—proximate cause—sufficiency of evidence

In a prosecution for first-degree murder by starvation (N.C.G.S. § 14-17(a)), there was sufficient evidence that starvation proximately caused the death of defendant's four-year-old stepson where a medical examiner's initial autopsy identified malnutrition and dehydration as the immediate causes of death. Although the examiner's amended autopsy report attributed the boy's death to strangulation, this opinion rested exclusively on defendant's claim that he choked his stepson, which he retracted at trial and which the trial court found to lack credibility. Additionally, other evidence—including accounts of the boy's emaciated, doll-like corpse—showed that defendant failed to feed his stepson more than once a day or to seek medical attention for him even though he was visibly hungry, thin, and malnourished in the months leading up to his death.

2. Homicide—murder by starvation—elements—malice—"starvation" defined

In a prosecution for first-degree murder by starvation (N.C.G.S. § 14-17(a)), where defendant's four-year-old stepson died after defendant fed him no more than once a day for the last few months of his life, the State was not required to make a separate showing that defendant acted with malice because the malice required to prove first-degree murder is inherent in the act of starving someone. For purposes of section 14-17(a), "starvation" is the deprivation of food or liquids necessary to the nourishment of the human body and is not limited to situations involving the complete denial of all food and hydration.

3. Indictment and Information—negligent child abuse inflicting serious injury—factual allegations—mere surplusage—consistent with trial court's determinations

In a prosecution for negligent child abuse inflicting serious injury, where the indictment alleged that defendant failed to provide his four-year-old stepson with medical treatment for over one

year, despite the child having a disability, and failed to provide proper nutrition and medicine, resulting in weight loss and failure to thrive, the trial court did not err in convicting defendant on grounds that the stepson suffered from severe diaper rash, bedsores, and pressure ulcers under defendant's care. The indictment alleged all essential elements of the offense and any specific factual allegations were mere surplusage. At any rate, no fatal variance existed between the indictment and the court's grounds for convicting defendant, where the court's factual determinations were consistent with the indictment's allegations that defendant deprived the child of medical treatment.

Appeal pursuant to N.C.G.S. § 7A-31(c) from the decision of a unanimous panel of the Court of Appeals, 267 N.C. App. 579 (2019), finding no error in a judgment entered on 1 November 2017 by Judge Hugh B. Lewis in Superior Court, Gaston County. Heard in the Supreme Court on 22 March 2021.

Joshua H. Stein, *Attorney General*, *by Kimberly N. Callahan*, *Assistant Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Daniel Shatz*, *Assistant Appellate Defender*, *for Defendant-appellant.*

ERVIN, Justice.

¶ 1 The issues before us in this case arise from challenges lodged by defendant Thomas Allen Cheeks to a judgment entered by the trial court based upon defendant's convictions for first-degree murder by starvation and negligent child abuse inflicting serious bodily injury. After careful consideration of defendant's challenges to the trial court's judgment, we affirm the Court of Appeals' decision.

¶ 2 Malachi Golden was born on 15 November 2010 in Gaston County. His mother, Tiffany Cheeks[1], was nineteen years old at the time of Malachi's birth and lived with her grandmother in Charlotte at that time. The child's father, William Golden, was not present for Malachi's birth and was never involved in his son's life.

¶ 3 When Malachi was four months old, Ms. Cheeks noticed that the child was experiencing spasms during which "his head would fall and

1. We will utilize Malachi's mother's married name throughout this opinion in the interest of consistency.

drop." In January 2012, after discussing these occurrences with the child's primary care physician, Ms. Cheeks took Malachi to see a pediatric neurologist named Stephanie Robinett. After performing a number of tests, Dr. Robinett prescribed Malachi an anti-seizure medication called Zonisamide, which proved itself to be effective in improving his spasms.

¶ 4 In June 2012, Malachi and Ms. Cheeks moved to Gaston County. Shortly thereafter, Ms. Cheeks met defendant and entered into a romantic relationship with him. In July 2012, defendant moved into the apartment that Ms. Cheeks occupied with Malachi. Ms. Cheeks and defendant had two children together, one of whom was born in May 2013 and the other of whom was born in November 2014, and married in November 2013.

¶ 5 Malachi continued to see physicians throughout 2012. In September 2012, Malachi underwent a series of tests at the University of North Carolina at Chapel Hill. In the course of the testing process, treating physicians discovered that Malachi suffered from a genetic abnormality that consisted of an inverted 12 chromosome and a minor deletion of his 22 chromosome. After learning about Malachi's chromosomal abnormality, Ms. Cheeks authorized further treatment for her son. Ms. Cheeks did not, however, bring Malachi back to Chapel Hill so that he could receive such treatment.

¶ 6 From December 2012 until November 2013, Malachi received occupational and physical therapy as the result of referrals made by the Child Development Service Agency. Upon turning three years old in November 2013, Malachi aged out of the programs operated through the Child Development Service Agency and began to receive treatment from the Gaston County school system. In December 2014, however, Ms. Cheeks discontinued this treatment.

¶ 7 Shelly Kratt, one of the therapists assigned to provide services for Malachi through the Child Development Services Agency, conducted home visits at the Cheeks residence from April through November 2013. Ms. Kratt described Malachi as a "beautiful child" with "dark olive skin" and "dark beautiful eyes." In the aftermath of the treatment that he received from Ms. Kratt, Malachi's motor skills improved, permitting him to begin to walk and feed himself. Unfortunately, however, Ms. Kratt was frequently unable to conduct scheduled therapy sessions with Malachi because Ms. Cheeks would either cancel the session or refrain from answering the door when Ms. Kratt arrived. On the occasions when she was able to enter the home and provide therapy for Malachi, Ms. Kratt observed that the Cheeks residence was "really dirty and messy" and

"smelled really bad." According to Ms. Kratt, Malachi was always alone in a "Pack N' Play" playpen in a separate area of the home at the time of her arrival. Ms. Kratt noticed that, instead of participating in Malachi's therapy sessions, defendant would occupy himself by playing video games.

¶ 8 Susan Matznik provided occupational therapy to Malachi from December 2012 through October 2013 as the result of referrals from the Child Services Development Agency, with these therapy sessions having originally occurred at the Cheeks residence before being transferred to a clinic in Lincoln County. As had been the case with Ms. Kratt, Ms. Matznik had difficulty assessing and treating Malachi in light of the trouble that she experienced in getting an adult to answer the door at the Cheeks residence. Similarly, Ms. Matznik observed that the apartment was "dirty" and "smelled" and that Malachi was invariably alone in his playpen at the time of her arrival. According to Ms. Matznik, Malachi gained weight during the course of the therapy that she provided. On the other hand, Ms. Matznik remembered conducting a home visit at a time when defendant was the only adult in the residence in which she found Malachi "soaked with urine." Although Ms. Matznik attempted to change Malachi, she had to use paper towels to clean the child given defendant's inability to locate any baby wipes.

¶ 9 At the end of 2013, Malachi began participating in treatment sessions provided by Erica Reynolds, a pre-K itinerant teacher employed by the Gaston County public school system. Ms. Reynolds described Malachi as having "big brown eyes, little chubby cheeks, [and] curly brown hair." Malachi missed several appointments with Ms. Reynolds as a result of Ms. Cheeks' failure to come to scheduled appointments without having sufficient reason for her non-attendance. During the one-year course of treatment that she provided for Malachi, Ms. Reynolds noticed that Malachi's ability to walk had improved, with the child having gone from "taking maybe one or two steps to being able to walk the length of the hallway at the elementary." On the other hand, Ms. Reynolds observed that Malachi appeared hungry during her visits, consistently "shovel[ing] food in his mouth and gulp[ing] his food down."

¶ 10 Linda Hutchins, who provided physical therapy for Malachi during the summer of 2013, remembered that Malachi appeared to be adequately nourished when she began treating the child. Ms. Hutchins discharged Malachi from treatment at some point during 2013 for attendance-related reasons. In 2014, Ms. Cheeks stopped administering Zonisamide to Malachi. The last treatment of any type that Malachi received was provided by Ms. Reynolds in December of 2014.

¶ 11 In spite of the fact that she was no longer treating Malachi, Ms. Hutchins returned to the Cheeks residence during January and February 2015 for the purpose of providing services to one of Malachi's younger siblings. At the time of one such visit in January of 2015, Ms. Hutchins observed that Malachi appeared to be "very thin." Upon being asked if Malachi was under a doctor's care, Ms. Cheeks responded that a physician had been seeing Malachi and that Malachi's needs were being addressed even though Malachi had not been seen by a medical doctor since 31 October 2013.

¶ 12 On 22 January 2015, Ms. Hutchins and Michelle Hartman, a case coordinator with the Child Development Services Agency, came to the Cheeks residence for a visit. On that occasion, Ms. Hutchins observed that both Malachi and his younger sibling were hungry. However, while defendant fed Malachi's sibling, Ms. Hartman had to take care of feeding Malachi. Similarly, upon arriving at the Cheeks residence on 5 February 2015, Ms. Hutchins observed that Malachi and his younger sibling were hungry and that, while the younger sibling received food, no one gave Malachi anything to eat. No one from outside the Cheeks household ever saw Malachi alive after that date.

¶ 13 On 11 May 2015, Ms. Cheeks was away from the residence and at work for most of the day, having left Malachi in the care of defendant, who served as Malachi's primary caregiver during Ms. Cheeks' absences. Upon returning home that night, Ms. Cheeks discovered that Malachi was "not breathing and [was] blue." After calling 911 for help, Ms. Cheeks asked defendant to help attempt to resuscitate Malachi, a request with which defendant refused to comply.

¶ 14 Upon their arrival at the Cheeks residence, emergency medical technicians found Malachi's body lying on the floor in a bedroom. According to Travis Gilman, who was one of the emergency medical technicians dispatched to the Cheeks residence, Malachi was "cold to the touch and . . . stiff." As a result, Mr. Gilman pronounced Malachi dead on the scene.

¶ 15 Jennifer Elrod, another emergency medical technician who came to the Cheeks residence in response to Ms. Cheeks' call, observed that Malachi's "facial features were very sunken," "his eyes were extremely sunken," "you could see every bone on his body," "you could count every rib in his rib cage," "his stomach was very sunken," and "there was no fat on his body." In addition, Ms. Elrod stated that Malachi's skin was gray, that his arms were "very skinny and very stiff," that Malachi's body was propped up on a pillow, and that there was "nothing" in the room other than a playpen and a highchair, with there being "no toys, nothing, it was just a very sparse room."

¶ 16 Upon his arrival at the Cheeks residence shortly after the arrival of the emergency medical technicians, Officer Justin Kirkland with the Gaston County Police Department observed that the kitchen was stocked with food items and found a bottle containing a thirty-day supply of Malachi's seizure medication, in which all thirty pills were still present, dated 24 July 2013. In addition, Officer Kirkland observed the presence of several flat screen televisions and video game consoles throughout the house. At the time that he "glanced in and passed by [Malachi's body,]" Officer Kirkland "saw what appeared to [be] a doll or — it didn't appear like a person on the floor . . . it didn't appear like a boy to me."

¶ 17 According to Officer Kirkland, Malachi appeared "small, skinny, and bony," with his head seeming to be disproportionately large when compared to his body. Officer Kirkland testified that, despite the fact that Malachi was four years old and the fact that his clothes were sized for a 24-month old child, they were too baggy for his body. Officer Kirkland described Malachi as "laying on a pillow that was covered in numerous yellow stains and had a strong smell or odor of urine coming from the pillow."

¶ 18 Detective James Brienza of the Gaston County Police Department, who also came to the Cheeks residence in the aftermath of Malachi's death, stated that "Malachi didn't look or appear to be real" and "almost looked doll like." At the time that he interviewed defendant at the residence, Detective Brienza observed that defendant maintained an "emotionless" demeanor. In the course of his interview with Detective Brienza, defendant stated that he had fed Malachi earlier in the day and that Malachi had vomited before implying that Malachi's genetic disorder had something to do with his death. A few days later, Detective Brienza interviewed defendant for a second time and noticed that there were several inconsistencies in the statements that defendant made on these two occasions. For example, Detective Brienza noticed that defendant claimed to have given different types of food to Malachi in these two interviews and made no mention of his earlier claim that Malachi had vomited in the second interview.

¶ 19 Angela Elder-Swift with the Gaston County Medical Examiner's office examined Malachi's body before it was removed from the Cheeks residence on 11 May 2015. Ms. Swift "didn't even notice the decedent laying in the middle [of the bedroom floor] because [he] didn't look real." According to Ms. Elder-Swift, Malachi "looked like a doll laying on a pillow" and "almost looked plastic." Ms. Elder-Swift testified that she "was able to see all of [Malachi's ribs]," that Malachi's "spine was showing"

and "his skin was hanging off," and that Malachi was "very cachectic." In addition, Ms. Elder-Swift noticed that "[Malachi] had sores on places like pressure ulcers" and "pretty bad diaper sores." Furthermore, Ms. Elder-Swift said that Malachi's "eyes were very dry" and that "his mouth was extremely dry," facts which, in Ms. Elder-Swift's opinion, tended to suggest that Malachi was dehydrated. Upon removing Malachi's diaper, Ms. Elder-Swift discovered "what looked to be some blood that transferred from [the] bad sores." As best Ms. Elder-Swift could tell, no attempt had been made to perform cardio-pulmonary resuscitation upon Malachi.

¶ 20 On 12 May 2015, forensic pathologist Dr. Jonathon Privette performed an autopsy upon Malachi's body. Malachi weighed only nineteen pounds at the time of his death even though an average four-year old male child would be expected to weigh thirty-eight to forty pounds. Dr. Privette testified that "most of [Malachi's] organs seemed small for his age" and that "[d]ehydration could cause the organs to weigh less." Dr. Privette determined that Malachi had very little subcutaneous body fat, resulting in "tenting" of the skin, a condition that exists when "you can take the skin and pinch it and pull it up and it retains that position when you release the skin" and which "is a clinical indication of dehydration."

¶ 21 According to Dr. Privette, the sunken appearance of Malachi's eyes stemmed from a lack of periorbital fat, which provided yet another indication of malnutrition and undernourishment. Dr. Privette found a "small amount of clear fluid with . . . scattered fragments of semi-solid white material consistent with dairy product" in Malachi's stomach. In addition, Dr. Privette observed that Malachi had severe dermatitis on his buttocks and back, with this condition being attributable to diaper rash resulting from the fact that the child's skin had been in contact with urine or feces for lengthy periods of time. According to Dr. Privette, Malachi's diaper rash was so severe that he suffered from "skin slippage," in which "the very superficial areas of the epidermis will basically slip away as you rub."

¶ 22 As a result of the fact that Malachi's body was in a state of isonatremic dehydration, Dr. Privette described Malachi's dehydration as chronic and stated that it would have occurred over "more than a few days," "probably weeks." Upon detecting a scalp contusion and a subgaleal hemorrhage near Malachi's forehead, Dr. Privette opined that these conditions would have resulted from either "an object hitting the skin or the skin hitting a stationary object," with both of these injuries likely to have "happened very recently." Finally, Dr. Privette noticed pressure ulcers on the inner portions of Malachi's knees at the point where his knees

would touch. Although he sought medical records relating to Malachi for the purpose of obtaining additional information that could be used in determining the cause of the child's death, Dr. Privette was unable to locate any such records for 2014 or 2015. As a result, Dr. Privette initially concluded that Malachi was a "debilitated male child with failure to thrive"; that "[t]here is the clinical appearance of malnutrition and dehydration including severe underweight, sunken eyes, absence of body fat, muscle atrophy, and severe skin tenting"; and that "[m]alnutrition/dehydration may be the immediate cause of death in this case and would represent neglect in the proper context."

¶ 23 On 15 October 2015, Detective Brienza received Dr. Privette's autopsy report. In reviewing that document, Detective Brienza identified several additional difficulties in the statements that defendant had made to him. As a result, Detective Brienza interviewed defendant for a third time on 30 October 2015, at which point defendant admitted to Detective Brienza that he had killed Malachi. During this interview, defendant provided two different accounts concerning the manner in which Malachi's death had purportedly occurred. Initially, defendant told Detective Brienza that he had drowned Malachi in the bathtub. As their conversation progressed, however, defendant stated that he had "put his hands around Malachi's throat to keep him quiet" because he "was frustrated with Malachi." According to defendant, "he would put his hands around Malachi's throat and pick him up by his neck and choke him enough to quiet him" and that, "[o]nce Malachi would become limp, he would physically throw him in the Pack N' Play from a distance." As a result, defendant claimed to have killed Malachi by choking him to death and described "how he watched Malachi take his last few gasps of breath of air of life."

¶ 24 Dr. Privette read the transcript from the third interview that Detective Brienza had conducted with defendant and amended his autopsy report in light of the statements that defendant had made in that interview. In spite of the fact that there was no bruising to Malachi's neck, Dr. Privette opined in his amended report that, "based on the fact that [Malachi] is very debilitated, isn't going to be able to fight back, [and] isn't going to be able to try and put an end to this pressure on the neck," death by strangulation would be "totally consistent with [defendant's] description of the events as to what happened" on the night of Malachi's death. In addition, Dr. Privette stated that the description that defendant had given of Malachi's last moments was consistent with agonal respiration and that defendant's "explanation was spot on for what would [have] happen[ed]." Based upon defendant's account of the man-

ner in which Malachi died, Dr. Privette changed his conclusion concerning the cause of Malachi's death from "failure to thrive" as the result of malnutrition and dehydration to strangulation, with "[n]utritional and medical neglect contibut[ing] to the death."

¶ 25 On 16 November 2015, the Gaston County grand jury returned a bill of indictment charging defendant with first-degree murder. On 6 February 2017, the Gaston County grand jury returned bills of indictment charging defendant with child abuse inflicting serious bodily injury on the basis of an allegation that defendant had "plac[ed] his hands around Malachi Golden's throat restricting air and blood flow resulting in Malachi Golden's death" and negligent child abuse inflicting serious bodily injury on the basis of an allegation that defendant had "show[ed] reckless disregard for human life by committing a grossly negligent omission . . . by not providing [Malachi] with medical treatment in over 1 year, despite the child having a disability, and further, not providing the child with proper nutrition and medicine resulting in weight loss and failure to thrive." On 26 September 2017, defendant requested the trial court to conduct his trial while sitting without a jury. On 2 October 2017, defendant filed a formal waiver of his right to a jury trial. After conducting a colloquy with defendant, the trial court granted defendant's motion for bench trial on 4 October 2017.

¶ 26 The charges against defendant came on for trial before the trial court sitting without a jury at the 23 October criminal session of the Superior Court, Gaston County. At the close of the State's evidence, defendant unsuccessfully moved to dismiss the charges that had been lodged against him for insufficiency of the evidence. While testifying in his own behalf, defendant made a number of statements that conflicted with those that he had made during his previous interviews with Detective Brienza, including assertions that he had fed Malachi several times on the day of his death. On cross examination, defendant testified that the explanations that he had given to Detective Brienza concerning the manner in which Malachi had died were "lie[s]":

> Q. You gave vivid details. You had long dialogs about what you did to Malachi?
>
> A. Yes, ma'am, but I did not do those things to my son.
>
> Q. You heard Dr. Privette say that you are spot on with your description of this choking, that that was exactly how it would look if a child was

> choked and you gave vivid details of that. You knew what it would look like?
>
> A. No, I didn't, because I never choked anyone out.
>
> . . . .
>
> Q. You are saying that's all a lie?
>
> A. Yes, ma'am.

After denying that he had strangled Malachi, defendant expressed an inability to explain how the child had become so skinny or why Dr. Privette had found nothing in his stomach during the autopsy. At the close of all of the evidence, defendant unsuccessfully renewed his motion to dismiss for insufficiency of the evidence.

¶ 27 After conferring with the parties for the purpose of discussing the applicable law and the procedures that it would use in determining defendant's guilt or innocence, the trial court developed a set of "jury instructions" that it would utilize in deciding the case, with those instructions including, over defendant's objection, a consideration of the extent, if any, to which defendant was guilty of murder by starvation. *See* N.C.G.S. §14-17(a) (stating that "[a] murder which shall be perpetrated by means of . . . poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing . . . shall be deemed to be murder in the first degree"). In the course of developing these instructions, the trial court identified the following definitions of "starvation":

> Starvation is the result of a severe or total lack of nutrients needed for the maintenance of life. https://medicaldictionary.thefreedictionary.com/starvation
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> To starve someone is to "kill with hunger;" to be starved is to "perish from lack of food." Starving: Medical Definition, Merriam-Webster Dictionary, http://www.merriam-webster.com/medical/starving (last visited Apr. 16, 2012).
>
> COMMENT: KinderLARDen Cop: Why States Must Stop Policing Parents of Obese Children. 42 Seton Hall L. Rev. 1783. 1801
>
> To starve someone is the act of withholding of food, fluid, nutrition, *Rodriguez v. State*, 454 S.W. 3d 503, 505 (Tex. Crim. App. 2014).

> Starving can result from not only the deprivation of food, but also liquids. Deprivation of life-sustaining liquids amounts to starvation under the statute. A specific intent to kill is . . . irrelevant when the homicide is perpetrated by means [of] starving, or torture. *State v. Evangelista*, 319 N.C. 152 (1987).
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> When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the means and method used involves planning and purpose. Hence, the law presumes premeditation and deliberation. The act speaks for itself. *State v. Dunheen*, 224 N.C. 738, 739 (1944).

After defendant's trial counsel claimed to have "found almost the exact same thing" in his research, the trial court relied upon these definitions during its deliberations.

¶ 28 On 1 November 2017, the trial court entered an order in which it made the following findings of fact, among others:

> 6. Malachi Golden died on May 11, 2015.
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> . . . .
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> 10. At the time of death, Malachi Golden had a plastic appearance with sunken eyes, protruding collarbones, protruding spine, protruding joints and protruding ribs.
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> 11. At the time of death, Malachi Golden had very little body fat or muscle tissue.
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> . . . .
>
> 15. The autopsy revealed that Malachi Golden was malnourished and dehydrated.
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> 16. At the time of death, Malachi Golden weighed 19 pounds compared to the average weight of a 38-40 pounds for a four-year-old boy.
>
> . . . .
>
> 18. At the time of death, Malachi Golden had a very wasted appearance.
>
> . . . .

> 20. Malachi Golden suffered from acute diaper rash with extensive inflammation on his buttocks and groin.
>
> . . . .
>
> 22. Malachi Golden suffered from acute diaper rash for an extended period without treatment.
>
> . . . .
>
> 36. The caregivers ceased all medication, medical care and therapy sessions without consulting Malachi Golden's physicians.
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> 37. For the last few months of his life, Malachi Golden was cloistered from all adults except Tiffany Cheeks and Defendant.
>
> 38. During this period, Defendant became the primary caregiver for Malachi Golden and provided up to 80 percent of the child's care.
>
> . . . .
>
> 49. Both Defendant and Ms. Tiffany Cheeks recanted their interviews with the police where they admitted wrongdoing regarding the care of Malachi Golden.
>
> 50. Defendant contradicted himself several times on the stand during his testimony during the trial.

Based upon these findings of fact, the trial court concluded as a matter of law that:

> 7. Defendant committed a grossly wanton and negligent omission with reckless disregard for the safety of Malachi Golden by:
>
> a. Allowing [Malachi] to remain in soiled diapers until acute diaper rash formed on the groin and bottom of Malachi Golden which included open sores and ulcers; and
>
> b. Keeping [Malachi] in a playpen for so long of period that bed sores formed on Malachi Golden's legs and knees.

8. The above sub-paragraphs caused the child extreme pain and with reckless disregard for human life.

9. To starve someone is to "kill with hunger."

10. A reasonably careful and prudent person could foresee that failing to provide a child's nutritional needs would cause death.

11. By feeding Malachi Golden typically only once a day and watching the child waste away to skin and bones, the Defendant intentionally starved the four-year-old boy.

12. Malachi Golden perished from the lack of food and life-sustaining liquids.

13. Defendant's starving Malachi Golden was the proximate cause of the child's death.

14. Defendant's failure to take any action to seek medical help, through any means possible, for Malachi Golden as the child wasted away from lack of nutrients needed for the maintenance of life was the commission of a homicide.

Based upon these findings of fact and conclusions of law, the trial court found defendant guilty of first-degree murder on the basis of starvation and negligent child abuse inflicting serious bodily injury while refusing to find defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation, torture, or the felony murder-rule using child abuse inflicting serious bodily injury as the predicate felony and child abuse inflicting serious bodily injury.[2] After making these determinations, the trial court consolidated defendant's convictions for judgment and entered a judgment sentencing defendant to a term of life imprisonment without the possibility of parole. Defendant noted an appeal from the trial court's judgment to the Court of Appeals.

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2. The parties have not argued that the trial court erred by adopting the procedures that it utilized to decide this case. Although we are inclined to agree with the Court of Appeals that there was no necessity for the trial court to have instructed itself concerning the applicable law or to enter an order containing findings of fact and conclusions of law, *State v. Cheeks*, 267 N.C. App. 579, 595 (2019), we do not believe that the trial court erred by proceeding as it did and will evaluate defendant's challenges to the trial court's judgment utilizing the approach that the trial court elected to adopt in deciding the relatively novel issues that were before it in this case.

¶ 29 In seeking to persuade the Court of Appeals to overturn the trial court's judgment, defendant argued, among other things, that (1) the trial court had erred by denying his motion to dismiss for insufficiency of the evidence on the grounds that the record did not suffice to support defendant's conviction for first-degree murder on the basis of starvation; (2) the trial court had committed plain error and had erred by failing to instruct itself that malice was an essential element of first-degree murder on the basis of starvation and by failing to make a separate determination that defendant had acted with malice; and (3) that the trial court had erred by convicting defendant of negligent child abuse inflicting serious injury based upon a theory that defendant had allowed Malachi to develop sores and pressure ulcers in spite of the fact that the indictment that had been returned against defendant for the purpose of charging him with that offense did not support such a determination. *State v. Cheeks*, 267 N.C. App. 579, 599, 602, 605–06, 610 (2019).

¶ 30 In rejecting these contentions, the Court of Appeals began by noting that no reported decision by either this Court or the Court of Appeals had directly addressed the issue of a convicted criminal defendant's guilt of first-degree murder on the basis of starvation and that neither N.C.G.S. § 14-17(a) nor our appellate jurisprudence defined the term "starv[ation]" for purposes of that statutory provision. *Cheeks*, 267 N.C. App. at 599–600. Based upon this Court's decision in *State v. Evangelista*, 319 N.C. 152 (1987), the Court of Appeals determined that "starving" can be defined as "death from the deprivation of liquids or food 'necessary in the nourishment of the human body,' " *Cheeks*, 267 N.C. at 602 (quoting *Evangelista*, 319 N.C. at 158), while rejecting defendant's contention that murder by starvation requires the complete denial of all food or water, or both, for a certain period of time, concluding that "[t]he deprivation need not be absolute and continuous for a particular time period." *Id.*

¶ 31 In addition, the Court of Appeals held that the record contained sufficient evidence to support a determination that starvation proximately caused Malachi's death. *Id.* at 610. In spite of the fact that Dr. Privette's amended written report and his trial testimony stated that the findings that he had made during the autopsy that he performed upon Malachi's body could be consistent with strangulation, the Court of Appeals noted that the only direct evidence that Malachi died as the result of strangulation stemmed from the statement that defendant gave to Detective Brienza, an account that defendant had repudiated at trial and which the trial court found to lack credibility. *Id.* at 608–09. In addition, the Court of Appeals pointed out that Dr. Privette had testified that, in the absence of defendant's claim to have strangled Malachi, he would not

have amended his initial autopsy report, which concluded that malnutrition and dehydration were the immediate causes of Malachi's death. *Id.* According to the Court of Appeals, the trial court acted well within its authority as the trier of fact in rejecting defendant's extra-judicial claim to have strangled Malachi and the related cause of death determination set out in Dr. Privette's amended report. *Id.* at 609. As a result, given the absence of any additional evidence tending to show that Malachi died as the result of strangulation, the Court of Appeals concluded that there was ample evidence to support a determination that Malachi's death was the proximate result of the deprivation of food and water at a time when defendant was his primary caregiver. *Id.*

¶ 32 Secondly, the Court of Appeals determined that this Court "has clearly held that no separate showing of malice is required for first degree murder by the means set forth" in N.C.G.S. § 14-17(a). *Id.* at 605 (citing *State v. Smith*, 351 N.C. 251, 267 (2000)). For that reason, the Court of Appeals concluded that, "[j]ust as with poisoning or torture, murder by starving 'implies the requisite malice, and a separate showing of malice is not necessary.' " *Id.* at 606 (quoting *Smith*, 351 N.C. at 267). As a result, the Court of Appeals held that "the trial court did not err by not making a finding or conclusion as to malice." *Id.*

¶ 33 Finally, the Court of Appeals held that the trial court did not err by convicting defendant of negligent child abuse inflicting serious bodily injury on the basis of a factual theory that had not been alleged in the indictment on the grounds that the indictment that had been returned against defendant for the purpose of charging him with negligent child abuse alleged all of the essential elements of that offense and that the more specific factual allegations contained in the indictment constituted nothing more than mere surplusage. *Id.* at 614. For that reason, the Court of Appeals rejected defendant's contention that there was a fatal variance between the indictment and the theory of guilt upon which the trial court's instructions and findings and conclusions rested. *Id.* Moreover, given the fact that the indictment that had been returned for the purpose of charging defendant with negligent child abuse inflicting serious injury alleged that defendant had failed to "provid[e] the child with medical treatment in over one year despite having a disability," the Court of Appeals determined that the allegations set out in the indictment were supported by the evidence that Malachi was suffering from severe diaper rash at the time of his death and the evidence that Malachi had not seen a physician during the last year of his life. *Id.* On 1 April 2020, this Court allowed defendant's request for discretionary review of the Court of Appeals' decision in this case.

¶ 34 In seeking to persuade us to overturn the Court of Appeals' decision, defendant argues that the trial court erred by failing to dismiss the first-degree murder charge that had been lodged against him on the grounds that the record failed to contain sufficient evidence to support a finding that Malachi's death was proximately caused by starvation. In support of this contention, defendant asserts that Dr. Privette's testimony provided the only expert testimony concerning the cause of Malachi's death and that Dr. Privette had unequivocally testified that Malachi had died as the result of asphyxia secondary to strangulation. Defendant claims that, "[a]lthough the Court of Appeals was correct that the trial court was free to reject Dr. Privette's opinion that Malachi died of strangulation," "it does not necessarily follow that the trial court could rely on Dr. Privette's previous opinion, even if that opinion really had been that Malachi died of starvation." In defendant's view, expert testimony was necessary to establish the cause of Malachi's death given that the cause of Malachi's death would not have been reasonably apparent to a lay juror. Defendant reasons that, "[a]lthough several of [Dr. Privette's] findings note that Malachi was malnourished and dehydrated at the time of his death, none of these findings relate to cause of death," with "Malachi's emaciated and dehydrated condition as depicted in the pictures [being insufficient to] explain why Malachi was alive on May 10, 2015 but dead on May 11, 2015." As a result, defendant argues that, "because there was no other expert testimony to support any other cause of death, and because expert testimony was necessary to establish the cause of Malachi's death, the evidence was insufficient to support the trial court's verdict that Mr. Cheeks was guilty of murder by starvation."

¶ 35 Secondly, defendant argues that, in light of the manner in which murder and manslaughter are defined at common law, the State was required to make a separate showing of malice in order to prove defendant's guilt of murder on the basis of starvation. In support of this argument, defendant asserts that N.C.G.S. § 14-17(a) did not abrogate the common law requirement that proof of malice was necessary to sustain a murder conviction. As a result, defendant contends that the trial court committed plain error by failing to instruct itself that malice is a necessary prerequisite for a conviction of first-degree murder based upon a theory of starvation and erred by failing to make a specific finding that defendant acted with malice.

¶ 36 In the alternative, defendant argues that, if malice is deemed to be implied in the event of a murder by starvation in a manner similar to the way in which malice has been deemed to be implied in connection with the other forms of murder specified in N.C.G.S. § 14-17(a), *see*, *e.g.*,

Smith, 351 N.C. at 267 (holding that malice is implied through the act of killing another by torture or poison), then "starving" must be defined narrowly in order to ensure that only malicious homicides are punished as first-degree murder. In defendant's view, this Court held that malice was implied in murders by torture and poisoning because such killings require "intentional infliction of grievous pain and suffering." *Smith*, 351 N.C. at 267. In order to ensure consistency between murders by torture and poisoning, on the one hand, and murder by starvation, on the other, defendant asserts that it is necessary that "starving" be defined as involving a complete deprivation of food and water, with this Court having adopted such a definition in dicta in *State v. Evangelista*, 319 N.C. 152, 158 (1987) (affirming a first-degree murder based upon premeditation and deliberation in a case in which the defendant held others, including an infant, hostage while denying them food or water, resulting in the infant's death, and stating that, in addition, the record evidence would have supported a first-degree murder conviction on the basis of a theory of starvation). According to defendant, since the common law did not view the "act of allowing a child to die of malnutrition" as "inherently malicious" and since the enactment of N.C.G.S. § 14-17(a) "did not change the common law definition of murder," this Court should either require the State to make a separate showing of malice or define starvation in the narrowest possible manner.

¶ 37 Finally, defendant contends that his conviction for negligent child abuse inflicting serious bodily injury rested upon findings that Malachi suffered from bedsores, pressure ulcers, and diaper rash while the indictment alleged that defendant's guilt rested upon a failure to provide Malachi with medical treatment and proper nutrition. In defendant's view, the alleged discrepancy between the basis for the claim of serious bodily injury alleged in the indictment and the injuries depicted in the trial court's findings resulted in a conviction that rested upon "a theory not charged in the indictment [that] constitutes reversible error," with the Court of Appeals having erred by relying upon its own earlier decision in *State v. Qualls*, 130 N.C. App. 1, 8 (1998) (holding that "if an indictment contains an averment which is not necessary in charging the offense, it may be disregarded as inconsequential"), which defendant contends to be in conflict with prior decisions of this Court, and by holding that the factual allegations set out in the indictment charging defendant with negligent child abuse inflicting serious injury were nothing more than "mere surplusage."

¶ 38 The State, on the other hand, argues that the record contains ample evidence tending to show that Malachi's death was proximately caused

by starvation. In the State's view, the evidence of starvation in this case was "extreme and obvious" and that, by doing nothing more than "viewing the condition of Malachi's body, any person of average intelligence would be able to determine, at a minimum, that starvation substantially contributed to his death." In addition, the State asserts that the testimony of Dr. Privette coupled with the circumstances surrounding the changes that he made to his autopsy report provided any necessary expert support for the trial court's cause of death determination. In view of the fact that the trial court expressly found as a fact that defendant's testimony conflicted with the admissions that he had made at an earlier time, the State contends the trial court had ample justification for deciding that defendant was not a credible witness, with the same being true of any expert opinion testimony predicated upon defendant's prior statements to Detective Brienza.

¶ 39 Secondly, the State argues that malice is implied in connection with the specific means of killing that are treated as first-degree murder in N.C.G.S. § 14-17(a) given defendant's "willful intent to withhold life sustaining food and water, rather than mere negligence." In support of this contention, the State directs our attention to *State v. Dunheen*, 224 N.C. 738 (1944), which it describes as holding that, "where the murder is perpetrated by means of poison, lying in wait, imprisonment, starving, or torture, the means and method used involve planning and purpose, and the act speaks for itself." *Id.* at 740. In view of the fact that the sufficiency of the evidence to support a conviction for first-degree murder by starvation is a matter of first impression in North Carolina, the State identifies decisions from a number of other jurisdictions which hold that the commission of such a murder inherently involves malice given that the length of time needed to starve someone to death shows "coldness and deliberation, for within that time there was ample opportunity for reflection." *See, e.g.*, *Commonwealth v. Tharp*, 574 Pa. 2d 272 (2002). As a result, the State asserts that the operative distinction between conduct that constitutes murder and conduct that constitutes manslaughter hinges upon whether the defendant did or did not act willfully.

¶ 40 In addition, the State responds to defendant's contention that starvation for purposes of N.C.G.S. § 14-17(a) should be limited to situations involving the complete deprivation of food and water by arguing that the adoption of such a definition would unduly restrict the types of conduct that would be deemed to constitute first-degree murder for purposes of N.C.G.S. § 14-17(a). More specifically, the State contends that the adoption of "defendant's argument would lead to the illogical result that giving a victim a drop of food or water each day would shield

a defendant from a charge of first-degree murder by starvation in North Carolina," with there being no reported decision of any court holding that the viability of a "charge of murder was dependent upon a complete deprivation of food and water as a matter of law." On the contrary, the State asserts that numerous decisions from other jurisdictions hold that evidence tending to show that defendants who starved victims over a prolonged period of time could appropriately be convicted of murder even though they occasionally provided food to their victims.

¶ 41 Finally, the State denies that there was a fatal variance between the allegations of the indictment charging defendant with negligent child abuse inflicting serious bodily injury and the evidence upon which the trial court relied in convicting defendant of that offense. According to the State, the Court of Appeals correctly held that the factual allegations set out in the negligent child abuse indictment constituted mere surplusage in light of several decisions by this Court which, in the State's view, hold that an indictment need only allege the essential elements of the crime that the grand jury was attempting to charge and that any factual allegations above and beyond the elements of the offense have no bearing upon the validity of the defendant's conviction. In addition, the State argues that *Qualls* had not been overruled by the cases upon which defendant relies given that they involve allegations that specified the legal theory upon which the State relied in seeking to convict defendant rather than mere recitations of non-essential factual information. *See*, *e.g.*, *State v. Silas*, 360 N.C. 377, 379 (2006) (finding the existence of a fatal variance when the State's evidence did not tend to show that the defendant intended to commit the felony enumerated in the indictment charging the defendant with burglary). The State also argues that, even if the factual allegations upon which defendant's argument relies were not mere surplusage, those allegations support the theory of guilt embodied in the trial court's conclusions given that the indictment alleged both malnutrition and failure to provide medical care while the record evidence tending to show that Malachi suffered from diaper rash, bedsores, and pressure ulcers sufficed to support a determination that defendant was negligent in failing to "provid[e] the child with medical treatment" causing serious bodily injury.

¶ 42 **[1]** This Court reviews the sufficiency of the evidence to support a criminal conviction by evaluating "whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense of that charged." *State v. Workman*, 309 N.C. 594, 598 (1983). "The evidence is to be considered in the light most favorable to the State," with the State being "entitled to . . . every reasonable inference

to be drawn therefrom" and with any "contradictions and discrepancies [being left] for the jury to resolve . . . ." *Id.* at 598–99 (quoting *State v. Powell*, 299 N.C. 95, 99 (1980)). In the event that the record contains sufficient evidence, "whether direct, circumstantial, or both," "to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury." *State v. King*, 343 N.C. 29, 36 (1996) (quoting *State v. Locklear*, 322 N.C. 349, 358 (1988)).

¶ 43 According to well-established North Carolina law, a conviction for an unlawful homicide requires sufficient evidence that a defendant's unlawful act proximately caused the victim's death. *State v. Minton*, 234 N.C. 716, 721 (1952). Although expert medical testimony is needed to support the making of the necessary proximate cause determination in instances in which an average layman is unable to determine the cause of death, such evidence is not necessary when a "person of average intelligence would know from his own experience or knowledge that the wound was mortal in character" given that "the law is realistic when it fashions rules of evidence for use in the search for truth." *Id.*

¶ 44 A careful review of the record evidence satisfies us that the trial court had ample justification for concluding that Malachi died as a proximate result of starvation. According to testimony provided by a number of persons responsible for providing him and his sibling with various forms of treatment during the last two years of his life, Malachi was not fed even though he was ravenously hungry and looking considerably thinner in the months leading up to his death. Similarly, the emergency medical technicians who responded to Ms. Cheeks' call in the aftermath of Malachi's death noticed the malnourished state of Malachi's body, which some of them initially mistook for a doll. In addition, the physical evidence set out in Dr. Privette's autopsy report unequivocally demonstrates that Malachi was severely malnourished and dehydrated.

¶ 45 Moreover, the record provides ample expert support for a determination that Malachi died of starvation.[3] According to Dr. Robinette, the only thing that "would cause Malachi or any child to look like" the child described by the emergency medical technicians and depicted in the autopsy report and related photographs was "starvation." Although Dr. Privette's amended report attributed Malachi's death to asphyxia secondary to strangulation, the record clearly demonstrates that his opinion to that effect rested solely upon the information that defendant

3. For this reason, we need not determine whether defendant or the State has the better of the dispute over the extent to which expert testimony concerning the cause of death was necessary in this case.

provided in his final interview with Detective Brienza. In light of the fact that Dr. Privette made no physical findings in support of the cause of death determination set out in his amended report and the fact that the record provided more than sufficient support for a determination that defendant's claim to have strangled Malachi lacked credibility, we have no difficulty in concluding that the trial court had ample justification for rejecting any contention that Malachi died from strangulation. *See State v. Morganherring*, 350 N.C. 701, 729 (1999) (holding that, in the event that an expert witness gives testimony regarding the cause of a victim's death, the degree of "familiarity with the sources upon which he based his opinion is certainly relevant as to the weight and credibility the jury should give to [the testimony]"). Furthermore, in light of the fact that Dr. Privette's initial autopsy report appears to have been admitted into evidence without being subject to any limitation, we know of no reason why the trial court was not entitled to rely upon Dr. Privette's initial conclusion that "[m]alnutrition may be the immediate cause of death in this case," particularly given the fact that Dr. Privette returned to the theme of starvation in his amended report by stating that "nutritional and medical neglect contributed to this death" in his amended report.[4] As a result, for all of these reasons, the record contained more than sufficient support for the trial court's determination that Malachi died as a proximate result of starvation.

¶ 46 **[2]** Similarly, we conclude that the trial court did not commit plain error or err by failing to instruct itself concerning the issue of malice or to make a separate finding that defendant acted with malice in connection with the killing of Malachi. As this Court has previously held, the act of torture is indistinguishable from the act of poisoning for purposes of the specifically enumerated types of killings set out in N.C.G.S. § 14-17(a), *Smith*, 351 N.C. at 267, with torture and poisoning both constituting wanton acts that are necessarily conducted "in such a manner as to manifest depravity of mind, a heart devoid of a sense of social duty, and a callous disregard for human life." *Id.* (quoting *State v. Crawford*, 329 N.C. 466, 481 (1991)). As a result, the showing of malice necessary

4. Although defendant emphasizes the fact that Dr. Privette's initial report used the word "may" in attributing Malachi's death to malnutrition and dehydration in arguing that that testimony failed to satisfy the evidentiary principle set out in *Holley v. ACTS, Inc.*, 357 N.C. 228, 233 (2003) (stating that "expert testimony as to the *possible* cause of a medical condition is admissible," "it is insufficient to prove causation"), we conclude that defendant's argument lacks merit given that, when read it its entirety, it is clear that Dr. Privette's report indicates that malnutrition and dehydration probably contributed to Malachi's death.

for guilt of murder is inherent in the act of fatally torturing or poisoning another human being. *Id.*

¶ 47 As is the case with acts of torture or poisoning resulting in the death of another person, the intentional withholding of the nourishment and hydration needed for survival resulting in the death of that other person at a time when the person in question is unable to provide these things for himself or herself shows a reckless disregard for human life and a heart devoid of social duty. *See State v. Wilkerson*, 295 N.C. 559, 916 (1978) (stating that, if "an act of culpable negligence . . . 'is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life,' it will support a conviction for second degree murder") (quoting *State v. Wrenn*, 279 N.C. 674, 687 (1971) (Sharp, J., dissenting)). Put another way, the act of starving another person to death takes time, during which the defendant has ample opportunity to reflect upon his or her conduct, to take mercy upon the victim, and to be increasingly aware of the other person's condition, with a decision to intentionally deprive another person of needed nutrition and hydration resulting in death being, under such circumstances, inherently malicious as a matter of law. Thus, the malice necessary for guilt of murder is inherent in the intentional withholding of hydration or nutrition sufficient to cause death. As a result, we hold that the act of starving another person to death for purposes of N.C.G.S. § 14-17(a), without more, suffices to show malice, so that the trial court did not commit plain error by failing to instruct itself to make a separate finding of malice or err by failing to make a separate determination that defendant acted maliciously in its findings of fact and conclusions of law.[5]

¶ 48 The record contains testimony from multiple witnesses tending to show that food was present in the Cheek residence and that Malachi's siblings received sufficient nutrition and hydration to survive. Although the evidence clearly depicts Malachi as hungry and dehydrated during the months leading to his death, defendant made no effort to seek medical attention for Malachi during that period of time and, at most, fed Malachi only once each day despite the fact that he served as Malachi's primary caretaker for a great deal of the time. For that reason, we further hold that the record and the trial court's findings contain ample evidence tending to show that defendant proximately caused Malachi's

5. In view of the fact that there is not and never has been a requirement that the trial court or jury make a separate finding of malice in order to convict a defendant of first-degree murder on the basis of starvation pursuant to N.C.G.S. § 14-17(a), our decision does not subject defendant to impermissible punishment on the basis of *an ex post facto* law.

death by intentionally depriving him of needed hydration and nutrition, a showing that amply supports the trial court's decision to convict defendant of murder by starvation pursuant to N.C.G.S. § 14-17(a).

¶ 49 In addition, we are unable to accept defendant's contention that starvation for purposes of N.C.G.S. § 14-17(a) should be understood to require proof that the defendant subjected the alleged victim to a complete deprivation of food and hydration. Aside from the fact the language from our decision in *Evangelista* upon which defendant relies is dicta, nothing in the related discussion in any way suggests that a complete deprivation of nutrition and hydration is necessary for guilt of first-degree murder on the basis of starvation pursuant to N.C.G.S. § 14-17(a). Instead, that discussion simply indicates that murder by starvation occurs in the event that the defendant completely deprives the victim of food and drink, a statement that is self-evidently true. In the same vein, nothing in *State v. Fritsch*, 351 N.C. 373 (2000), upon which defendant also relies, makes the difference between guilt of murder or manslaughter contingent upon the amount of nutrition or hydration that the alleged victim failed to receive. Finally, the adoption of defendant's definition of starvation for purposes of N.C.G.S. § 14-17(a) would produce what strikes us as an absurd result in certain cases, *see Mazda Motors of Am., Inc. v. Southwestern Motors, Inc.*, 296 N.C. 357, 361 (1979) (quoting *State v. Barksdale*, 181 N.C. 621, 250, 253 (1921)), given that, under defendant's definition, a person who kills someone else by withholding virtually all, but not all, food and drink would not be guilty of murder by starvation. As a result, we reject defendant's contention that murder by starvation pursuant to N.C.G.S. § 14-17(a) is limited to situations involving the complete deprivation of hydration and nutrition.

¶ 50 **[3]** Finally, we hold that defendant's contention that there is a fatal discrepancy between the allegations of the indictment charging defendant with negligent child abuse inflicting serious injury and the trial court's factual justification for convicting defendant of that offense lacks merit.[6] As we have already noted, the indictment charging defendant with negligent child abuse inflicting serious injury alleges that defendant failed to provide Malachi "with medical treatment" for over one year, "despite the child having a disability," and with failing to "provid[e] the

6. In view of our determination that the trial court's findings do, in fact, support the theory of guilt alleged in the indictment, we need not determine whether the Court of Appeals correctly concluded that the factual allegations set out in the indictment are or are not mere surplusage or whether defendant properly preserved this claim for purposes of appellate review and express no opinion concerning the manner in which either of these issues should be decided.

child with proper nutrition and medicine, resulting in weight loss and failure to thrive." In our opinion, the trial court's determinations that defendant "allow[ed] the child to remain in soiled diapers until acute diaper rash formed on the [child's] groin and bottom," resulting in "open sores and ulcers," and that defendant kept "the child in a playpen for so long a period of time that bed sores formed on [his] legs and knees" are fully consistent with the grand jury's allegations that defendant deprived Malachi of medical treatment, resulting in the infliction of serious bodily injury. As a result, we hold that the trial court's findings and the relevant allegations of the indictment are fully consistent with each other. As a result, for all of these reasons, the Court of Appeals decision should be affirmed.

AFFIRMED.

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.

No. 436A19

Filed 11 June 2021

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion on Window World defendants' motions to compel and motion to strike plaintiffs' objections to third-party subpoenas entered on 26 September 2018, from an order and opinion on Window World, Inc.'s motion to compel net worth information entered on 19 December 2018, from an order and opinion on Window World defendants' motion for reconsideration entered on 25 January 2019, and from an order and opinion on plaintiffs' privilege motions, Window World defendants' motion to strike, and the parties' Rule 53(g) exceptions to the special master's report entered on 16 August 2019 by Judge Louis A. Bledsoe III, Chief Business Court Judge, in Superior Court, Wilkes County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 28 April 2021.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Charles E. Coble, Robert J. King III, Benjamin R. Norman, and Andrew L. Rodenbough, for plaintiff-appellees.

Fox Rothschild LLP, by Matthew Nis Leerberg, Kip D. Nelson, and Troy D. Shelton; and Manning, Fulton & Skinner, P.A., by Michael T. Medford, Judson A. Welborn, Natalie M. Rice, and Jessica B. Vickers, for defendant-appellants.

Joseph S. Dowdy for BNI Franchising, LLC, Brixx Franchise Systems, LLC, East Coast Wings Corporation, Extended Stay America, Inc., Fleet Feet, Incorporated (d/b/a Fleet Feet), Golden Corral Franchising System, Inc., N2 Franchising, Inc., Salsarita's Franchising, LLC, Village Juice Co. Franchising, LLC, and Wine & Design Franchise LLC; and Richard M. Hutson II for Family Fare, LLC, amici curiae.

Bradley Arant Boult Cummings LLP, by Corby C. Anderson and Jonathan E. Schulz, for International Franchise Association, amicus curiae.

PER CURIAM.

¶ 1 This interlocutory appeal from the order and opinion entered on 16 August 2019 is affirmed per curiam.

¶ 2 Defendant-appellants' appeal from the order and opinion entered on 19 December 2018 based on the claim that the net worth of an individual who owns and controls a business operating as a franchisee is necessary to apply the large franchisee exemption pursuant to 16 C.F.R. § 436.8(a)(5)(ii) is not properly before this Court, and it is hereby dismissed.[1]

AFFIRMED.[2]

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1. Defendant-appellants did not present or discuss any issues in their brief pertaining to the order and opinion on Window World defendants' motions to compel and motion to strike plaintiffs' objections to third-party subpoenas entered on 26 September 2018 and the order and opinion on Window World defendants' motion for reconsideration entered on 25 January 2019. Thus, defendant-appellants have abandoned all corresponding arguments. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

2. The order and opinion of the North Carolina Business Court, 2019 NCBC 53, is available at https://www.nccourts.gov/assets/documents/opinions/2019_NCBC_53.pdf.

IN RE K.S.

[377 N.C. 553 (2021)]

IN THE MATTER OF K.S.	)	
	)	
	)	Cumberland County
	)	
	)	

No. 60PA21

ORDER

The petition for discretionary review filed by the Cumberland County Department of Social Services and the Guardian ad Litem is decided as follows: The petition is allowed with respect to Issue Nos. I, II, and III and is denied with respect to Issue No. IV.

By order of the Court in conference, this the 9th day of June 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of June 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

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

IN RE V.S.

[377 N.C. 554 (2021)]

IN RE	)	
V.S. AND A.S.	)	BERTIE COUNTY
	)	

No. 121PA21

ORDER

Respondent's petition for certiorari is decided as follows: The petition is allowed for the purpose of addressing the following issues:

1. Whether the trial court erred by striking respondent's notice of appeal and dismissing her appeal.

2. Whether the trial court erred in terminating respondent's parental rights, with the more specific issues that respondent wishes to address to be identified and briefed in accordance with the applicable rules of appellate procedure.

The record on appeal shall be settled and filed, and the parties' briefs shall be submitted in accordance with the applicable provisions of the rules of appellate procedure, with the proposed record on appeal to be served within fifteen days from the date of this order.

By order of this Court in Conference, this 9th day of June 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of June 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk

STATE v. HODGE

[377 N.C. 555 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wake County
	)	
ROBERT LEE HODGE	)	

No. 134A20

ORDER

The trial court entered judgment following a jury verdict finding defendant guilty of attaining the status of habitual felon. The record contains a document labeled "INDICTMENT – HABITUAL FELON STATUS" dated 7 November 2017 and marked "NOT A TRUE BILL." The record also contains a separate document labeled "INDICTMENT – HABITUAL FELON STATUS" dated 7 November 2017 and marked "A TRUE BILL by twelve or more grand jurors, and I the undersigned Foreperson of the Grand Jury, attest to the concurrence of twelve or more grand jurors in the bill of Indictment." However, the record contains no factual findings from the trial court as to whether the grand jury found the bill to be a true bill of indictment and whether the true bill of indictment was returned in open court. Accordingly, the matter is remanded to the Superior Court, Wake County, for findings of fact on the following four questions:

1) Was there a true bill for habitual felon indictment dated 7 November 2017?

2) Pursuant to N.C.G.S. § 15A-628(c), if there was a true bill, was it returned by the foreman of the grand jury to the presiding judge in open court?

3) Pursuant to N.C.G.S. § 15A-628(d), if there was a true bill, did the clerk keep a permanent record of it along with all matters returned by the grand jury to the judge?

4) If there was a true bill, was defendant properly served with it?

Once these questions are answered by the trial court, the answers shall be certified to this Court no later than ninety days from the date of this Order.

By order of the Court in Conference, this the 5th day of May, 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of May, 2021.

AMY L. FUNDERBURK
Clerk, Supreme Court of
North Carolina

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

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

11 JUNE 2021

6P14-3	State v. Daniel Harrison Brennick	Def's Pro Se Motion to Vacate Order	Denied
7P10-2	James Christopher Stitt v. Cumberland County Clerk for Register of Deeds	Petitioner's Pro Se Petition for Writ of Mandamus	Denied **05/26/2021**
11P21	Winifred Hauser v. Brookview Women's Center, PLLC and Donald E. Pittaway, MD	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-1073)	Denied **Earls, J., recused**
22A21	Jerry Mace, Sr. & Mace Grading Co., Inc. v. Scott T. Utley, II, Jody Bell, Energy Partners, LLC & Energy Partners of NC, LLC, Utley Enterprises, LLC d/b/a Energy Partners of Mebane	1. Defs' Notice of Appeal Based Upon a Dissent (COA19-726) 2. Defs' PDR as to Additional Issues	1. --- 2. Allowed
40P21-3	Charlie L. Hardin v. Todd E. Ishee, et al.	Plt's Pro Se Motion for Grievance Due to Harassment and Retaliation	Dismissed
44P21-2	Reginald Anthony Falice v. State of North Carolina	Petitioner's Pro Se Motion for Complaint	Dismissed
54P21	State v. Marc Christian Gettleman, Sr. and Marc Christian Gettleman, II and Darlene Rowena Gettleman	1. Def's (Marc Christian Gettleman, Sr.) PDR Under N.C.G.S. § 7A-31 (COA19-1143) 2. Def's (Darlene Rowena Gettleman) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
60A20	Ashley Deminski, as guardian ad litem on behalf of C.E.D., E.M.D., and K.A.D. v. The State Board of Education, and the Pitt County Board of Education	1. Plt's Notice of Appeal Based Upon a Dissent (COA18-988) 2. Plt's Notice of Appeal Based Upon a Constitutional Question 3. Plt's PDR as to Additional Issues 4. Def's (Pitt County Board of Education) Motion Suggesting Mootness of Plaintiff's Claims for Injunctive Relief	1. --- 2. Dismissed *ex mero motu* **06/03/2020** 3. Allowed **06/03/2020** 4. Dismissed

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

11 JUNE 2021

60P21	In the Matter of K.S.	1. Petitioner and Guardian ad litem's Motion for Temporary Stay (COA20-271) 2. Petitioner and Guardian ad litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad litem's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/05/2021** 2. Allowed 3. Special Order
63P16-3	State v. Michael Anthony York	1. Def's Pro Se Amended Petition for Writ of Certiorari to Review Decision of the COA (COA15-419) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
67P18-2	Jonathan Eugene Dixon v. Erik A. Hooks, Secretary of N.C. Department of Public Safety, Kenneth Diggs, Warden of Albemarle Correctional Institution	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus 2. Petitioner's Pro Se Motion to Appoint Counsel	1. Denied **05/10/2021** 2. Dismissed as moot **05/10/2021** **Ervin, J., recused**
88P21	Amy Betts v. DHHS, et al.	1. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cabarrus County 2. Petitioner's Pro Se Motion to Proceed as Indigent	1. Dismissed 2. Allowed
101P21	Epcon Huntersville, LLC, Plaintiff v. Frances Clairmont and Joe Dominguez, Defendants --- Frances Clairmont and Joe Dominguez, Plaintiffs v. Epcon Huntersville, LLC, Defendant	Plts' (Frances Clairmont and Joe Dominguez) Pro Se Motion for Notice of Appeal Based Upon a Constitutional Question (COA20-471)	Dismissed
105P20-2	State v. Matthew Joseph Taylor	Def's Pro Se Motion for Paternity Test	Dismissed
106P21	State v. Robert Chad Bridges	Def's PDR Under N.C.G.S. § 7A-31 (COA19-838)	Denied **Ervin, J., recused**

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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. Plts' Motion to Admit Billy M. Donley Pro Hac Vice 2. Plts' Motion to Admit J. Keith Russell Pro Hac Vice 3. Plts' Motion to Admit William P. Geise Pro Hac Vice	1. Allowed **04/29/2021** 2. Allowed **04/29/2021** 3. Allowed **04/29/2021**
111P21	In the Matter of the Foreclosure of a Deed of Trust Executed by Walter Reinhardt Dated March 27, 2000 and Recorded in Book 1616 at Page 338 in the Onslow County Public Registry, North Carolina Substitute Trustee: Luke C. Bradshaw, Grady I. Ingle or Elizabeth B. Ellis Record Owner(s): HGGLBT International Express Trust	1. Petitioner's Pro Se Motion for Petition de Droit (COA20-517) 2. Petitioner's Pro Se Motion for Appeal	1. Dismissed 2. Dismissed
115P21	State v. Emunta Carpenter	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1006)	Denied
116P21	Tammie Counts v. Danny Lee Counts	Def's PDR Under N.C.G.S. § 7A-31	Denied

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117P21	Erie Insurance Exchange v. Edward R. Smith; Archie N. Smith, a Minor; Emily A. Tobias, as Administrator of the Estate of John Pinto, Jr., Deceased; Valley Auto World, Inc.; Universal Underwriters Insurance Company; VW Credit Leasing, Ltd.; and Doe Insurance Companies 1-3	1. Defs' (The Smiths) PDR Under N.C.G.S. § 7A-31 (COA20-246) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
120P21	In re Harley Edwards	Petitioner's Pro Se Motion for PDR (COAP21-104)	Denied
121P21	In the Matter of V.S. and A.S.	Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Bertie County	Special Order
125P21	State v. Roger Del Herring	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA03-1138)	Denied **Ervin, J., recused**
127P21	TAC Stafford, LLC, a North Carolina Limited Liability Company v. Town of Mooresville, a North Carolina Body Politic and Corporate	1. Def's Motion for Temporary Stay (COAP20-582) 2. Def's Petition for Writ of Supersedeas	1. Denied **04/21/2021** 2. Denied **04/21/2021**
128A20	James Rickenbaugh and Mary Rickenbaugh, Husband and Wife, Individually and on behalf of all others Similarly Situated v. Power Home Solar, LLC, a Delaware Limited Liability Company	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Petition for Writ of Certiorari to Review Order of Business Court 4. Plts' Motion to Dismiss Appeal	1. Allowed **03/20/2020** 2. Allowed **04/03/2020** 3. Denied 4. Allowed
128P21	State v. Ricky L. Hefner	Def's Pro Se Motion to End Deprivation of Life and Liberty	Denied **05/07/2021**
129P15-2	State v. Marqueion Jamal Harrison	Def's Pro Se Motion for a New Trial	Dismissed

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129P21	Jessika M. Morgan v. Karen D. McCallum, Presiding Judge Western District 26th Judicial Court	1. Petitioner's Pro Se Petition for Writ of Mandamus 2. Petitioner's Pro Se Petition for Writ of Prohibition 3. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis* 4. Petitioner's Pro Se Motion for Expedited Review	1. Dismissed **04/19/2021** 2. Dismissed **04/19/2021** 3. Allowed **04/19/2021** 4. Dismissed **04/19/2021**
131P16-18	State v. Somchai Noonsab	Def's Pro Se Motion to Vacate Imprisonment – Punishment	Dismissed
131P16-19	State v. Somchai Noonsab	Def's Pro Se Motion for Discharge-Vacated and Monetary Relief	Dismissed
133P21	State v. Matthew Benner	Def's PDR Under N.C.G.S. § 7A-31 (COA19-879)	Allowed
134A20	State v. Robert Lee Hodge	The Court's *ex mero motu* Motion to Remand to Trial Court for Specified Findings of Fact	Special Order **05/05/2021**
134P21	In the Matter of B.M.P.	1. Respondent-Mother's Pro Se Motion to Stay the Mandate Pending a Petition for Writ of Certiorari (COA20-794) 2. Respondent-Mother's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed **04/23/2021** 2. Denied
136P21	State v. Ronald Jason Gibson	Def's PDR Under N.C.G.S. § 7A-31 (COA20-219)	Denied
137P07-2	State v. Sherman Wall	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Richmond County	Denied **05/28/2021**
139P21	State v. Andrew Joe Lea, Jr.	Def's Pro Se Motion to Review Orders	Dismissed
142P21	Lydia Self v. Larry Self	Plt's Pro Se Motion to Modify Custody/ Visitation Order	Dismissed
145P21	State v. Marleick Rashaan Jones	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **05/03/2021**
146P21	State v. Treyvon Latrell Turner	1. Def's Pro Se Motion for 49 Day Jail Credit 2. Def's Pro Se Motion to Supplement	1. Dismissed 2. Dismissed
148P21	State v. Nathan D. Fowler	Def's Pro Se Motion to Run Consecutive Sentences Concurrently	Dismissed

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150P21	State v. Namique Farrow	1. Def's Emergency Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **05/06/2021** 2.
151P21	State v. Landon W. Barnes	Def's Pro Se Motion for PDR (COAP21-44)	Dismissed **05/06/2021**
152P21	In the Matter of Foreclosure Falecia Richmond	1. Plt's Pro Se Motion for Notice of Appeal (COAP20-545) 2. Plt's Pro Se Motion for Injunctive Relief 3. Plt's Pro Se Motion to Reconsider	1. Denied **05/06/2021** 2. Denied **05/06/2021** 3. Denied **05/06/2021**
153P21	In the Matter of S.M., Jr.	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **05/07/2021** 2.
156P21	State v. Corey Terrell Lee	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **05/12/2021**
163A21	Murphy-Brown, LLC, et al. v. ACE American Insurance Company, et al.	1. Def's (Old Republic Insurance Company) Motion to Admit Amy R. Paulus Pro Hac Vice 2. Def's (Old Republic Insurance Company) Motion to Admit Don R. Sampen Pro Hac Vice	1. Allowed **05/19/2021** 2. Allowed **05/19/2021**
167A21	Inhold, LLC and Novalent, Ltd. v. Pureshield, Inc.; Joseph Raich; and Viaclean Technologies, LLC	1. Plts' Motion to Dismiss Appeal 2. Defs' Motion for Extension of Time to File Response	1. 2. Allowed **05/24/2021**
174P21	State v. Phillip Brandon Daw	1. State's Motion for Temporary Stay (COA20-680) 2. State's Petition for Writ of Supersedeas	1. Allowed **05/25/2021** 2.
188P21	Brian C. Johnson v. Karen D. McCallum, Presiding Judge Western District 26th Judicial Court	1. Petitioner's Pro Se Petition for Writ of Mandamus 2. Petitioner's Pro Se Petition for Writ of Prohibition 3. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis* 4. Petitioner's Pro Se Motion for Expedited Review	1. Dismissed **06/09/2021** 2. Dismissed **06/09/2021** 3. Allowed **06/09/2021** 4. Dismissed **06/09/2021**

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190P21	State v. Michael K. Eutsey	Def's Pro Se Motion for Assistance to Be Heard	Dismissed **06/01/2021**
196P21	State v. Sherry Lee Lance	1. Def's Motion for Temporary Stay (COA20-273) 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/07/2021** 2.
197P21	State v. Charisse L. Garrett	1. Def's Motion for Temporary Stay (COA20-326) 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/07/2021** 2.
198P21	In the Matter of Ashley Morris	Claimant's Pro Se Motion for Appeal	Dismissed **06/07/2021**
200P21	In the Matter of J.M., N.M.	1. Petitioner and Guardian ad litem's Motion for Temporary Stay (COA20-677) 2. Petitioner and Guardian ad litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad litem's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/09/2021** 2. 3.
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 Withdraw Appeal	Allowed **05/04/2021**
247P20	Paul Allan Cobb, Jon Allan Cobb, Marc Allan Cobb, and Merie Cobb Mirosavich, Grandchildren of John Bruce Day v. Arley Andrew Day	Def's PDR Under N.C.G.S. § 7A-31 (COA19-805)	Denied **Berger, J., recused**

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249PA14-2	State v. Jose Gustavo Galaviz-Torres	1. Def's Pro Se Motion to Discharge-Vacate Conviction-Sentence 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed **05/24/2021** 2. Denied **05/24/2021**
262P18-2	Alessandra L. McKenzie v. Steven M. McKenzie	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-1116) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
294P20	Kidd Construction Group, LLC, Rocky Russell Builders, Inc., and Tommy Williams Builders, LLC v. Greenville Utilities Commission	Def's PDR Under N.C.G.S. § 7A-31 (COA19-910)	Denied
299P10-4	State v. Michael Wayne Mabe	Def's Pro Se Motion for Discretionary Review or Other Relief	Dismissed **05/27/2021**
301P12-2	State v. Mark Bradley Carver	1. State's Motion for Temporary Stay (COA19-1055) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/11/2021** 2. 3.
329P20	State v. Leon Dechas Dickens	Def's PDR Under N.C.G.S. § 7A-31 (COA19-722)	Denied
346P20	State v. Gregory Simmons	Def's Pro Se Motion for Due Process Violation	Dismissed
365P20-2	State v. Richard Lee Deyton	Def's Pro Se Motion for PDR	Denied **05/11/2021**
377P20-3	State v. Andrew Ellis	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **06/01/2021**
385P20	State v. Mitchell Andrew Tucker	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/04/2020** 2. Allowed 3. Allowed

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394P20	State v. Joshua Lewis Johnson	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-625) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Berger, J., recused**
395P20-2	State v. Michael Anthony Sheridan	Def's Pro Se Motion for Court Appointed Attorney	Denied **05/14/2021**
397P20	State v. Billy Russell Land	1. Def's Motion for Temporary Stay (COA19-1060) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/16/2020 Dissolved 06/09/2021** 2. Denied 3. Denied
404P20	State v. Tonya Renee Whitaker	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1220) 2. State's Motion to Deem Response to PDR as Timely Filed	1. Denied 2. Allowed

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412P20	Shearon Farms Townhome Owners Association II, Inc. v. Shearon Farms Development, LLC; Dan Ryan Builders-North Carolina, LLC; Abbington Heights, LLC; Jeld-Wen, Inc., and Jeld-Wen Holding, Inc., Defendants ——— Dan Ryan Builders-North Carolina, LLC, Defendant/Third-Party Plaintiff v. JP&M Enterprise, Inc.; JP&M Enterprise, Inc. d/b/a Ace Vinyl Siding; Alpha Omega Construction Group of Raleigh, Inc.; Alpha Omega Construction Group of Raleigh, Inc. d/b/a Alpha Omega Const. Group of Raleigh; BMC East, LLC; BMC East, LLC d/b/a BMC; BMC East, LLC f/k/a Stock Building Supply, LLC d/b/a Stock Building Supply; Brinley's Grading Service, Inc.; Brinley's Grading Service, Inc. d/b/a Brinley's Grading Service; GMA Supply Inc.; GMA Supply Inc. f/k/a GMA Supply LLC d/b/a GMA Supply, Locklear Roofing Inc.; Locklear Inc.; Locklear Roofing Inc. d/b/a Locklear Roofing; Locklear Inc. d/b/a Locklear Roofing; Taylor's Landscaping, Inc.; Taylor's Landscaping, Inc. d/b/a Taylor's Landscaping Inc., Third-Party Defendants	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-1308)	Denied

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423P20	State v. Omari Lewis Crump, Sr.	Def's PDR Under N.C.G.S. § 7A-31 (COA19-747)	Denied
425P20-2	Bilal K. Rasul v. Erik Hooks, North Carolina Department of Public Safety	Petitioner's Pro Se Motion for PDR (COAP20-491)	Denied
436A19	Window World of Baton Rouge, et al. v. Window World, Inc., et al.	1. Plts' Motion to Dismiss Improper Appeals from Interlocutory Discovery Orders Prior to Briefing on Privilege Appeal 2. Defs' Conditional Petition for Writ of Certiorari to Review Order of Business Court	1. Denied 2. Dismissed as moot
445P20	State v. Roberto Lainez	Def's Pro Se Motion for Relief and Release	Denied
456P20	Samuel Sealey v. Farmin' Brands, LLC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-583) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
495P20	U.S. Bank National Association v. Leland J. Thompson and Amber Thompson, Arkh Isra Ali-Dey, Third-Party Claimant	1. Third-Party Claimant's Pro Se Motion for Judicial Review for Void Judgment in Equitable Relief for Quiet Title Action 2. Third-Party Claimant's Pro Se Motion for Notice of Default 3. Third-Party Claimant's Pro Se Petition for Writ of Mandamus	1. Dismissed 2. Dismissed *ex mero motu* 3. Dismissed
525P20	State v. Michael Williams Yelverton	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-1123) 2. Def's Motion to Amend PDR to Add Additional Authority	1. Denied 2. Allowed
548A04-3	State v. Vincent Lamont Harris	1. Def's Motion to Dismiss Appeal 2. Def's Motion to Stay Briefing Schedule Until Resolution of the Motion to Dismiss	1. 2. Allowed **04/22/2021**
580P05-21	In re David Lee Smith	1. Def's Pro Se Motion to Vacate Stay 2. Def's Pro Se Motion for Release Pending Appeal	1. Denied **04/19/2021** 2. Denied **04/19/2021** **Ervin, J., recused**

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580P05-22	In re David Lee Smith	1. Def's Pro Se Petition for Writ of Mandamus	1. Denied
		2. Def's Pro Se Motion to Amend Pro Se Motion and Vacate Denial Order	2. Dismissed
		3. Def's Pro Se Petition for Writ of Mandamus	3. Denied
		4. Def's Pro Se Motion to Amend Pro Se Habeas Corpus Petition	4. Dismissed
		5. Def's Pro Se Motion to Liberally Construe Pro Se Petition as a Notice of Appeal and Appellate Brief	5. Dismissed
		6. Def's Pro Se Motion to Amend Pro Se Petition or for Court to Allow Fair Amendment Opportunity	6. Dismissed
		7. Def's Pro Se Motion to Vacate April 19, 2021 Denial Order	7. Dismissed **Ervin, J., recused**

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