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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

APRIL 20, 2022

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OF
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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 11 FEBRUARY 2022

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SCHEDULE FOR HEARING APPEALS DURING 2022

NORTH CAROLINA SUPREME COURT

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

January 5, 6
February 14, 15, 16, 17
March 21, 22, 23, 24
May 9, 10, 11, 23, 24, 25, 26
August 29, 30, 31
September 1, 19, 20, 21, 22
October 3, 4, 5, 6

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

GIFT SURPLUS, LLC, AND SANDHILL AMUSEMENTS, INC., PLAINTIFFS

v.

STATE OF NORTH CAROLINA, EX REL. ROY COOPER, GOVERNOR, IN HIS OFFICIAL CAPACITY, BRANCH HEAD OF THE ALCOHOL LAW ENFORCEMENT BRANCH OF THE STATE BUREAU OF INVESTIGATION, MARK J. SENTER, IN HIS OFFICIAL CAPACITY, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ERIK A. HOOKS, IN HIS OFFICIAL CAPACITY, AND DIRECTOR OF THE NORTH CAROLINA STATE BUREAU OF INVESTIGATION, BOB SCHURMEIER, IN HIS OFFICIAL CAPACITY

No. 363A14-4

Filed 11 February 2022

1. Gambling—electronic sweepstakes—game of chance versus game of skill—predominant factor test

The Supreme Court reaffirmed its prior holding that in order to determine whether a video gaming machine is prohibited by N.C.G.S. § 14-306.4 (banning electronic sweepstakes games), courts must utilize the predominant factor test to evaluate whether the game is one of chance or of skill, since a sweepstakes conducted by use of an entertaining display is prohibited only if it is not dependent on skill or dexterity.

2. Gambling—electronic sweepstakes—predominant factor test—mixed question of fact and law—standard of review

A trial court's determination of whether a video gaming machine is prohibited by N.C.G.S. § 14-306.4 under the predominant factor test (i.e., whether the outcome of the game depends on chance or on skill and dexterity) involves a mixed question of law and fact, and is reviewed de novo when there is no factual dispute about how the game is played.

3. Gambling—electronic sweepstakes—game of chance versus game of skill—predominant factor test—viewed in entirety

Plaintiffs' video-game kiosks violated the ban on electronic sweepstakes in N.C.G.S. § 14-306.4 under the predominant factor test where the outcome of the game in question depended on chance and not on skill or dexterity. Although the game included a nominal "winner-every-time" feature, chance determined which prizes a player was eligible to win, since the top prize was not available for 75% of player turns. Further, the "double-nudge" modification (allowing a player to nudge two symbols up or down to align three spinning slots) involved no more than de minimis skill and dexterity, as evidenced by data of error rates, and chance could override any exercise of skill with regard to the outcome.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 268 N.C. App. 1 (2019), reversing an order entered on 2 February 2018 by Judge Ebern T. Watson III, in the Superior Court, Onslow County. Heard in the Supreme Court on 23 March 2021.

Fox Rothschild LLP, by Elizabeth Brooks Scherer, Troy D. Shelton and Kip D. Nelson; Hyler & Agan PLLC, by George B. Hyler, Jr.; and Grace, Tisdale, Clifton, P.A., by Michael A. Grace for plaintiff-appellants.

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

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.

HUDSON, Justice.

¶ 1 Gift Surplus, LLC, and Sandhill Amusements, Inc., (plaintiffs) sued Governor Roy Cooper and several state law enforcement officials (defendants) seeking a declaratory judgment that their operation of a sweepstakes through video game kiosks does not violate N.C.G.S. § 14-306.4, North Carolina's criminal prohibition on certain video sweepstakes. This case presents the third time plaintiffs have appeared before

this Court seeking to avoid liability under North Carolina's ban on video sweepstakes. The question presented here is whether plaintiffs' new game, as modified since plaintiffs last appeared before this Court, is not "dependent on skill or chance" and is thus criminalized by N.C.G.S. § 14-306.4 (2021), which prohibits the operation of sweepstakes conducted through video games of chance. As we held over one hundred years ago and reaffirmed when plaintiffs appeared before this Court challenging the video sweepstakes ban twelve years ago,

> [n]o sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter of the definition. But, in this way, it is not possible to escape the law's condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness. It will look to the substance and not to the form of it, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. The Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited. It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps and by good luck, get something for nothing, or a great deal for a very little outlay. This is the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing.

Hest Techs., Inc. v. State ex rel. Perdue, 366 N.C. 289, 289 (2012) (quoting *State v. Lipkin*, 169 N.C. 265, 271 (1915)). After "inquir[ing], not into the name, but into the game, however skillfully disguised" of plaintiffs, we hold that chance predominates over skill in plaintiffs' new game and, accordingly, that this game is a game of chance that violates the sweepstakes statute. Accordingly, we modify and affirm the decision of the Court of Appeals.

I. Background

¶ 2 This case follows from the North Carolina General Assembly's repeated efforts since 2006 to ban all video-gaming machines, including video poker and other video card games. Act of June 6, 2006, N.C. Sess. Law 2006-6, §§ 4, 12, 2006 N.C. Sess. Laws 4, 4–5, 7 (codified as amended

at N.C.G.S. § 14-306.1A (2021)). Since this first prohibition was enacted, owners of video-gaming machines have developed machines with various interactive operations, in apparent efforts to circumvent the ban. *See Hest*, 366 N.C. at 291. In response to these perceived loopholes, the General Assembly enacted Session Law 2010-103, "An Act to Ban the Use of Electronic Machines and Devices for Sweepstakes Purposes," codified at N.C.G.S. § 14-306.4. 2010 N.C. Sess. Laws Ch. 408. N.C.G.S. § 14-306.4 makes it illegal to "[c]onduct a sweepstakes through the use of an entertaining display." N.C.G.S. § 14-306.4(b).[1]

¶ 3 Following enactment of the law, purveyors of video-game kiosks that were purportedly for sweepstakes challenged the law on First Amendment grounds. In *Hest*, this Court held that N.C.G.S. § 14-306.4 regulated conduct, with only incidental burdens on speech, and that the law was supported by a rational basis. 366 N.C. at 303. One of the plaintiffs here, Sandhill Amusements, was among a group of vendor-plaintiffs in a related case making the same First Amendment argument, which was rejected by this Court for the reasons stated in *Hest. Sandhill Amusements, Inc. v. State*, 366 N.C. 323, 324 (2012) (per curiam). Although the record shows Sandhill has a long history as a video-gaming company, in that lawsuit it argued it was a business that sold long-distance phone time, merely using video sweepstakes to promote its service.

¶ 4 In 2013, shortly after our decision in *Hest*, Sandhill began operating and distributing video-gaming kiosks for sweepstakes for plaintiff Gift Surplus. Gift Surplus operates an e-commerce website, www.giftsurplus.com, but does not maintain an inventory of the products it advertises and instead buys products as necessary to fill orders as a drop shipping business.

¶ 5 In its business arrangement with Sandhill, Gift Surplus designs sweepstakes kiosks that it licenses to third-party operators like Sandhill. Sandhill places the kiosks into operation in convenience stores and retail establishments across North Carolina. The establishments are predominantly patronized by low-income customers, who Gift Surplus has identified as its target demographic.

¶ 6 Gift Surplus's kiosks appear like large video-game machines that look akin to video slot machines. When players put money into the kiosks, they receive what appear to be paper receipts called "e-credits"

1. A fuller history of the General Assembly's efforts to combat the circumvention of gambling laws is provided in *Hest*, 366 N.C. at 289–92.

that can be exchanged either for products on Gift Surplus's drop shipping website or to play Gift Surplus's phone games. Players also receive sweepstakes entries which can be used to immediately play games on the kiosks. The kiosks offer five similar games, all featuring reel-spinning video resembling a slot machine. When the game begins, the reels spin, but the three slots never come to a stop in a complete line. Instead, players always have to "nudge" the slots up or down so that three symbols align on the middle line. In the initial iteration of these games, players only had to nudge one symbol into place to win.

¶ 7 The game also limits the number of players who can win meaningful prizes. On 75% of turns, the player will never be able to play for the largest prize of $2400 and, under the original setup, could win nothing.

¶ 8 Gift Surplus and Sandhill subsequently filed the present lawsuit, seeking a declaratory judgment and preliminary and permanent injunctive relief initially against the Sheriff of Onslow County and then against the Governor and the present state defendants. A trial court judge issued a preliminary injunction for plaintiffs, which defendants appealed.

¶ 9 A divided panel of the Court of Appeals dismissed the appeal in *Sandhill Amusements, Inc. v. Sheriff of Onslow Cty.*, 236 N.C. App. 340 (2014), *rev'd per curiam*, *Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91 (2015). Then-Judge Ervin dissented from the Court of Appeals majority, reasoning that plaintiffs could not show a likelihood of success on the merits at trial because chance predominated over skill in plaintiffs' game and, accordingly, it violated N.C.G.S. § 14-306.4, so the preliminary injunction should have been denied. *Id.* at 369–70 (Ervin, J., dissenting). On appeal, this Court reversed the decision of the Court of Appeals and adopted the reasoning of Judge Ervin's dissenting opinion. *Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91 (2015).

¶ 10 On remand to the trial court, Gift Surplus made two changes to its games. First, they added a "winner-every-time" modification, so that, on the 75% of turns on which users originally could not win any prize, retailers can set up the machine to award a token prize of a few cents. Second, Gift Surplus added a "double nudge" modification, so that instead of nudging one symbol to win, retailers could set up the machines to require players to nudge two symbols into place.

¶ 11 After a bench trial, the trial court held that the sweepstakes game is lawful, relying on the new modifications made since remand to conclude that, based on the amended complaint and with the modifications, skill predominates over chance in plaintiffs' new game, unlike the game in *Sandhill*.

¶ 12 The trial court further concluded that the sale of Gift Surplus's "e-credits" was not a pretext for gambling. At trial, defendants presented evidence that the receipt-like e-credits are often thrown away rather than being redeemed in the online store or phone games. An officer in the Brunswick County Sheriff's Office testified that he visited an establishment and observed players at the kiosks throw e-credits away and, after searching the trash, found over $10,000 of unused e-credit receipts.

¶ 13 Defendants appealed the trial court's judgment to the Court of Appeals. At the Court of Appeals, the panel unanimously reversed the trial court judgment but issued three separate opinions. *See Gift Surplus, LLC v. State ex rel. Cooper*, 268 N.C. App. 1 (2019). First, Judge Murphy, in an opinion joined by Judge Collins, held that, since plaintiffs' new game was "visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play," the sweepstakes was conducted through an "entertaining display," regardless of whether the game was a game of chance or not. *Id.* at 4–5. Judge Bryant concurred in the result and would have required that the game not depend on skill or dexterity and held that "the games at issue do not amount to games whose outcomes are determined by skill and dexterity, but rather, chance." *Id.* at 13 (Bryant, J., concurring in the result). Judge Collins joined fully with Judge Murphy's opinion, but wrote a separate opinion reasoning that "[t]o the extent our Supreme Court's adoption of Judge Ervin's dissent in *Sandhill* signals the Court's determination that a sweepstakes game falls within [N.C.G.S.] § 14-306.4's "entertaining display" prohibition *only* when the video game is not dependent on skill or dexterity, I agree with Judge Bryant's concurring opinion in this case . . ." *Id.* at 6–7 (Collins, J., concurring). Since the Court of Appeals held plaintiffs' new game violated N.C.G.S. § 14-306.4, it declined to reach the separate question of whether it also violated North Carolina's prohibition on gambling. *Id.* at 5.

¶ 14 Plaintiffs filed a notice of appeal based on a constitutional question, which this Court dismissed, and a petition for discretionary review, which was allowed. Defendants filed a conditional petition for discretionary review, which was also allowed.

II. Analysis

¶ 15 On appeal, plaintiffs first argue the Court of Appeals erred by applying a new legal standard for claims under the video sweepstakes statute rather than the predominant-factor test. Second, plaintiffs argue the application of the predominant-factor test is reviewed deferentially rather than de novo. Third, plaintiffs argue that, under the predominant-factor test, the trial court correctly determined that chance did not predominate

over skill in plaintiffs' new game and Judge Collins in her concurring opinion at the Court of Appeals erred in stating otherwise., plaintiffs argue that their new game does not constitute gambling. We consider plaintiffs' arguments in turn.

A. The Predominant-Factor Test Under N.C.G.S. § 14-306.4

¶ 16 **[1]** Plaintiffs first argue the majority opinion below erred in failing to apply the predominant-factor test under N.C.G.S. § 14-306.4 as applied in then-Judge Ervin's dissent in *Sandhill* and as adopted by this Court. Defendants do not argue for the majority's holding that it is not necessary to decide whether games "are chance or skill-based." *Gift Surplus*, 268 N.C. App. at 4. We agree and hold that the majority opinion erred in failing to consider whether skill or chance predominates in the game under the sweepstakes statute as interpreted by this Court's prior decision in *Sandhill*.[2]

¶ 17 North Carolina's criminal code prohibits sweepstakes conducted through electronic machines using video games of chance. This prohibition was codified at N.C.G.S. § 14-306.4, entitled "Electronic machines and devices for sweepstakes prohibited." Under this statute, a sweepstakes is defined as "any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance." N.C.G.S. § 14-306.4(a)(5). N.C.G.S. § 14-306.4(b) provides that "it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to . . . [c]onduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize." N.C.G.S. § 14-306(b), (b)(1) (2019). The statute defines "entertaining display" as follows:

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2. Plaintiffs argue the majority erred in failing to apply the predominant-factor test for a myriad of procedural reasons, including that the Court of Appeals "swapped horses on appeal" for the appellant, that it violated the law-of-the-case doctrine, that defendants failed to make that argument before the trial court and so abandoned it under North Carolina Rule of Appellate Procedure 10, that even if properly raised defendants abandoned the argument on appeal under Appellate Rule 28(b)(6), that adopting a theory not argued offends notions of equity and fundamental fairness, and, taken together, violation of these doctrines contravenes the "principle of party presentation" recently enunciated by the Supreme Court of the United States. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578–89 (2020). While the majority opinion's discarding of the predominant-factor test in interpreting N.C.G.S. § 14-306.4 in favor of a theory not advanced by any party was doubtless procedurally improper, we need not reach these issues to hold that the majority below erred because it contravened binding precedent of this Court in *Sandhill*. *See Cannon v. Miller*, 313 N.C. 324, 324 (1985) (holding the Court of Appeals has no authority to overrule decisions of this Court).

> [V]isual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play, such as, by way of illustration and not exclusion:
>
> a. A video poker game or any other kind of video playing card game.
> b. A video bingo game.
> c. A video craps game.
> d. A video keno game.
> e. A video lotto game.
> f. Eight liner.
> g. Pot-of-gold.
> h. A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.
> i. Any other video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes.

N.C.G.S. § 14-306.4(a)(3).

¶ 18 In *Sandhill*, this Court adopted then-Judge Ervin's opinion dissenting from the majority opinion of the Court of Appeals. *Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91 (2015). In his dissenting opinion, Judge Ervin reasoned that "given that [plaintiffs'] equipment and activities . . . clearly involve the use of electronic devices to engage in or simulate game play based upon which a participant may win or become eligible to win a prize, the only basis upon which [p]laintiffs' equipment and activities can avoid running afoul of [N.C.G.S.] § 14-306.4(b) is in the event that the game or simulated game involved is 'dependent on skill or dexterity.' " *Sandhill*, 236 N.C. App. at 365 (Ervin, J., dissenting). In adopting the dissenting opinion, therefore, this Court necessarily held that sweepstakes conducted through an "entertaining display" under the statute is only prohibited when the game or simulated game is not "dependent on skill or dexterity."

¶ 19 The majority opinion below, however, held that it "need not decide whether these sweepstakes are chance or skill-based in order to hold that they violate N.C.G.S. § 14-306.4," noting that "[*r*]*egardless of whether it is dependent on skill or dexterity*, a video sweepstakes falls within the entertaining display prohibition simply if it is 'visual information,

capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play[.]' " *Gift Surplus*, 268 N.C. App. at 4–5 (emphasis added) (quoting N.C.G.S. § 14-306.4(a)(3)). It based its interpretation on the fact that the list of prohibited games in the definition of "entertaining display" in N.C.G.S. § 14-306.4(a)(3) was set out "by way of illustration and not exclusion."

¶ 20 We conclude that the majority erred in this interpretation of the sweepstakes statute. Although the list in question was not intended to be exhaustive, the list of types of game play included in the statute, including poker and other card games, bingo, and craps, contemplates only games of chance. Any doubt about whether the statute is only concerned with games of chance is resolved by subsection (i), the statute's "catch-all provision," *see Hest*, 366 N.C. at 292, which prohibits sweepstakes through "[a]ny other video game not dependent on skill or dexterity . . . ." The canon of construction *ejusdem generis* provides that "where general words follow a designation of particular subjects or things, the meaning of the general words should be construed as including only things of the same kind, character, and nature as those specifically enumerated." *Smith v. Smith*, 314 N.C. 80, 87 (1985). Applying this principle to the catch-all provision, the logical implication of this provision is that the other games listed are also games "not dependent on skill or dexterity" and that only sweepstakes conducted through video games of chance are prohibited under N.C.G.S. § 14-306.4. In other words, the majority erred in concluding that the non-exhaustiveness of the list meant that the only limitation on other games being included was that they must be video games and not that they must be *games of chance*. In doing so, the majority directly contravened the dissenting opinion in Sandhill that this Court adopted as its own, which held that a sweepstakes is not conducted through an electronic display when it involves a game or simulated game "dependent on skill or dexterity." *Sandhill*, 236 N.C. App. at 365. Accordingly, we reaffirm our prior holding that N.C.G.S. § 14-306.4 prohibits sweepstakes conducted "through the use of an entertaining display," but only when the electronic display "takes the form of actual game play, or simulated game play" where the game in question is "not dependent on skill or dexterity." N.C.G.S. § 14-306.4(a)(3); *see Sandhill*, 236 N.C. App. at 365.

¶ 21 The question, then, is not whether plaintiffs' new game is conducted through an electronic display, but whether the video game is "not dependent on skill or dexterity." In *Sandhill*, by adopting the dissenting opinion, we held that this reference to skill and dexterity incorporates "the traditional distinction between a game of skill and a game

of chance pursuant to state law" such that it prohibits sweepstakes conducted through video games in which "chance predominates over skill." *Sandhill*, 236 N.C. App. at 368. In *Sandhill*, relying on the Court of Appeals' prior decision in *Collins Coin*, Judge Ervin reasoned 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, accordingly, 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 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*, 236 N.C. App. at 368 (quoting *Collins Coin Music Co.*, 117 N.C. App. 405, 408 (1994)) (cleaned up). In *Crazie Overstock Promotions, LLC v. State*, argued the same day as this case, we summarized the predominant-factor test under N.C.G.S. § 14-306.4 based on this caselaw as follows:

> [T]he 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.

377 N.C. 391, 2021-NCSC-57, ¶ 23. We reaffirm that the predominant-factor test is the applicable test for determining whether a video sweepstakes is conducted through a game of chance as prohibited under N.C.G.S. § 14-306.4.

B. The Standard of Review for the Predominant-Factor Test

¶ 22 **[2]** Plaintiffs argue that defendants and Judge Collins's concurring opinion propose the wrong standard of review in applying the predominant-factor test under N.C.G.S. § 14-306.4. Specifically, plaintiffs argue that "[a] factfinder's determination as to whether a game complies with the predominant-factor test is reviewed deferentially." Plaintiffs contend "the proper standard of review of a trial court's predominance

analysis in a bench trial would be whether competent evidence supports the factfinder's determination that skill or dexterity predominate over chance in a particular game." Plaintiffs argue that "because the factfinder, whether judge or jury, is in the best position to conduct the balance or 'weighing' required by the predominant-factor test, the *application* of that legal standard is a factual issue entitled to deference."

¶ 23 Defendants in turn argue, citing *State v. Gupton*, 30 N.C. 271 (1848), that the question of whether a game is a game of skill or a game of chance—that is, the question of whether chance or skill predominates under the predominant-factor test—is a mixed question of law and fact, and, citing *Gupton* and *Best v. Duke University*, 337 N.C. 742, 750 (1994), that "mixed questions like these are reviewed de novo where, as here, there is no factual dispute about how a game is played." Moreover, defendants note that while findings of fact from a bench trial are reviewed for substantial evidence, an appellate court conducts "de novo review of a conclusion of law that the trial court [has] mislabeled as a finding of fact." *Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 512 (2013).

¶ 24 In neither *Sandhill* nor *Crazie Overstock*, our Court's recent cases applying N.C.G.S. § 14-306.4, did we expressly state the standard of review exercised by appellate courts in evaluating a trial court's determination of whether chance or skill predominates in a game under that statute. However, in both cases, our Court did not defer to the trial court's conclusion as to whether chance or skill predominated in the game but freely substituted its own judgment based on the undisputed evidence. *See Sandhill*, 236 N.C. App. at 370 ("As a result, . . . I am compelled by the undisputed evidence to conclude that the element of chance dominates the element of skill in the operation of Plaintiffs' machines." (cleaned up)); *Crazie Overstock, LLC*, 2021-NCSC-57 ¶ 25 (holding based on the undisputed evidence that "chance necessarily predominates over the exercise of skill or dexterity" in the plaintiff's game). Accordingly, we hold that whether chance or skill predominates in a given game is a mixed question of fact and law and is therefore reviewed de novo when there is no factual dispute about how a game is played. *See Best*, 337 N.C. at 750. This approach is consistent with *Gupton*, our first decision enunciating and applying the predominant-factor test to a game of "ten pins," or modern-day bowling, where Chief Justice Ruffin, speaking for the Court, reviewed de novo the trial court's determination that the indictment adequately alleged a "game of chance" prohibited by our criminal laws and held that skill predominated over chance in the game. *See Gupton*, 30 N.C. at 275.

C. Application of the Predominant-Factor Test

¶ 25 **[3]** Having determined that the predominant-factor test will properly determine whether plaintiffs' video sweepstakes is conducted through a game of chance as prohibited by N.C.G.S. § 14-306.4 and that the question of whether chance or skill predominates in plaintiffs' new game is a mixed question of fact and law, we must now apply the predominant-factor test to the undisputed facts of plaintiffs' new game to determine whether plaintiffs' game is a game of chance. The question is "whether, viewed in its entirety, the results produced by [plaintiffs'] 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." *Crazie Overstock, LLC*, 377 N.C. 391, 2021-NCSC-57, ¶ 23.

¶ 26 In *Sandhill*, the dissenting opinion adopted by this Court held that chance predominated over skill and dexterity in plaintiffs' game as then constituted because (1) "the machine and equipment at issue . . . only permitted a predetermined number of winners," (2) "use of the equipment . . . will result in the playing of certain games in which the player will be unable to win anything of value regardless of the skill or dexterity that he or she displays," (3) "the extent to which the opportunity arises for the 'nudging' activity . . . appears to be purely chance-based," and (4) even assuming "nudging" a symbol in one direction or another involves skill or dexterity, "this isolated opportunity for such consideration to affect the outcome [does not] override[] the impact of the other features" of plaintiffs' game. *Sandhill*, 236 N.C. App. at 369.

¶ 27 Since our reversal of the preliminary injunction in *Sandhill*, plaintiffs contend that they have modified their game in two ways that support the trial court's determination that chance does not predominate over skill or dexterity such that plaintiffs' new game is not a game of chance and avoids the reach of N.C.G.S. § 14-306.4. First, plaintiffs argue its new game "contains a 'winner-every-time' feature" allowing every player who "nudges" the slot "to claim a monetary prize of some amount." Second, plaintiffs argue "the 'double nudge' feature increases the amount of skill and dexterity required in the redesigned sweepstakes games."

¶ 28 Defendants, in contrast, argue that plaintiffs' new game, like its original game, is "similar to traditional reel-spinning slot machines," and, like the role of chance in slot machines and poker, "chance controls the symbols that appear for players to nudge." Defendants contend that plaintiffs' two new modifications do not fundamentally alter the character of plaintiffs' game and cause skill or dexterity to predominate over

chance such that our holding in *Sandhill* as to plaintiffs' original game no longer applies.

¶ 29 We first consider the change plaintiffs call a " 'winner-every-time' feature." In the original game, in 75% of turns a player took, the reels did not align so that a nudge could nudge them into place and no prize could be won at all. In plaintiffs' new game, on 75% of turns a "¢" symbol appears one "nudge" from the middle row. If the player nudges the ¢ symbol to the middle row, they now receive a nominal prize of some cents.

¶ 30 We hold the purported "winner-every-time" feature does not alter plaintiffs' game such that chance does not predominate over skill or dexterity. On 75% of turns players of plaintiffs' games will still have no opportunity to compete for the largest possible prize of $2400. Plaintiffs argue that "the sweepstakes statute does not discriminate among different cash prizes," and "money has value" irrespective of how little it is. N.C.G.S. § 14-306.4(a)(4) defines a "prize" as "any gift, award, gratuity, good, service, credit, or anything else of value. . ." But this definition has no bearing on whether the game in which the putative prize is awarded is "not dependent on skill or dexterity." N.C.G.S. § 14-306.4(a)(3). If chance determines the prizes for which players may play, then, as in the case of traditional slot machines, "the return to the player is . . . dependent on . . . chance." *State v. Abbott*, 218 N.C. 470, 479 (1940).

¶ 31 We next consider the "double-nudge" modification which, plaintiffs argue, "increases the amount of skill and dexterity required in the redesigned sweepstakes games." In the original games, two of the reels would automatically align and the third reel would show a symbol one tick out of alignment such that the player had to press a button to "nudge" the symbol once up or down into alignment to win a prize.

¶ 32 In *Sandhill*, Judge Ervin assumed arguendo that "nudging" a symbol up or down into alignment involved skill or dexterity. On remand, the trial court concluded nudging involved skill because "data from actual game play in the field and data from lab tests, both regarding the single-nudge-only games, reveal error rates that show the games are dependent on skill." The trial court also concluded the game involved dexterity because the games required both "fine motor control of the hands and visual accuracy" and "the ability to recognize and implement winning patterns" based on playing the game and the lab data. Finally, the trial court concluded the double-nudge modification increased the amount of skill and dexterity "[b]ecause the [player] must evaluate the game to determine the number of nudges required and then take the required action (one nudge or two separate nudges)."

¶ 33 Contrary to the trial court's conclusion that plaintiffs' games involve skill and dexterity, we cannot conclude based on the undisputed record evidence that skill and dexterity have any more than a *de minimis* role in plaintiffs' new games, whether they are required to make one or two "nudges" of the reels. Plaintiffs' own expert, whose testimony concerning error data from lab tests is the basis for the trial court's conclusion that nudging involved skill and dexterity, testified that, for the single-nudge game, players correctly nudged the reel into place between 86% and 90% of the time. While the trial court infers that the error rate for double nudging involves more skill and dexterity, that inference is by no means warranted. A game need not be won 100% of the time for there to be nothing more than a minimal level of skill or dexterity involved, and undisputed evidence shows that the skill and dexterity involved is essentially *de minimis*.

¶ 34 In applying the predominant-factor test, we view plaintiffs' game in the entirety. In *Hest*, we observed that "the Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited." *Hest*, 366 N.C. at 289. This approach is confirmed by N.C.G.S. § 14-306.4, which clarifies that "[i]t is the intent of this section to prohibit any mechanism that seeks to avoid application of this section through the use of any subterfuge or pretense whatsoever." N.C.G.S. § 14-306.4(c).

¶ 35 Here, chance controls plaintiffs' game by determining that in 75% of turns, players will not be eligible to play for the top prize and, indeed, cannot play for anything more than mere cents. Accordingly, just as is the case with a traditional slot machine, the return to the player in plaintiffs' game is dependent on chance. *Abbott*, 218 N.C. at 479. Nothing about the "nudge" (or even a "double nudge") obviates this fundamental aspect of plaintiffs' game. First, the skill and dexterity required to "nudge" a reel up or down is *de minimis*. More fundamentally, even assuming there was a meaningful level of skill or dexterity involved in the game, chance would always predominate because, when chance determines the relative winnings for which a player is able to play, chance "can override or thwart the exercise of skill." *Sandhill*, 236 N.C. App. at 369. As in *Crazie Overstock, LLC*, "the extent to which a customer is able to win more than a minimal amount of money is controlled by the outcome of [Plaintiffs' games' initial reel spin] regardless of the level of skill and dexterity that the player displays while participating in [nudging the reels]. *Crazie Overstock, LLC*, 2021-NCSC-57, ¶25. This situation is also analogous to the game of poker, which, despite involving a much greater level of skill, the Court of Appeals has held

to be a game of chance because the drawing of "cards . . . at random" causes chance to predominate over skill. *Collins Coin*, 117 N.C. App. at 409; *accord Joker Club, L.L.C. v. Hardin*, 183 N.C. App. 92, 99 (2007) ("No amount of skill can change a deuce into an ace."). Here, the "winner-every-time" modification to permit a nominal award of a few cents and the "double-nudge" modification are nothing more than "thin and false apparel" over the plaintiffs' games that the law "will strip . . . [to] consider [the game] in its very nakedness."[3] *Hest*, 366 N.C. at 289 (citation omitted). After considering plaintiffs' game when "viewed in its entirety," we hold that "the results produced by [plaintiffs'] 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 [and not] the extent of the player's skill and dexterity." *Crazie Overstock, LLC*, 2021-NCSC-57, ¶ 23. Accordingly, we hold that plaintiffs' game violates N.C.G.S. § 14-306.4(a)'s prohibition on sweepstakes conducted through video games of chance.

D. Gambling

¶ 36 Plaintiff further argues its game does not constitute illegal gambling under North Carolina's criminal code, while the State contends that it does. Since this Court holds that plaintiffs' conduct violates one aspect of our State's criminal code, we decline to reach this issue, which was also not reached by the Court of Appeals.

III. Conclusion

¶ 37 We conclude that in plaintiffs' new game, as in their game addressed in *Sandhill*, chance predominates over skill and, accordingly, it is a video game of chance prohibited by N.C.G.S. § 14-306.4. Because this holding is dispositive of the case, we need not address the other issues raised by the parties. Accordingly, we modify and affirm the opinion of the Court of Appeals.

MODIFIED AND AFFIRMED.

Justices ERVIN and BERGER did not participate in the consideration or decision of this case.

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3. Indeed, as defendants note, there is no guarantee that the "double-nudge" and "winner-every-time" modifications on which plaintiffs rely would even be available in actual game play since operators of kiosks may disable them or not stock the machine with coins. In such cases, the games are the same ones we held to be illegal in *Sandhill*.

IN RE A.K.

[380 N.C. 16, 2022-NCSC-2]

IN THE MATTER OF A.K.

No. 342A21

Filed 11 February 2022

Termination of Parental Rights—no-merit brief—dependency—sexual abuse

The orders ceasing reunification efforts and terminating the parental rights of a father—who had been arrested for dozens of sexual offense charges against minors, including his own young daughter—were affirmed where his counsel filed a no-merit brief, there was no error in the trial court's decision to discontinue reunification efforts, the evidence and findings supported the determination that the grounds of dependency existed to support termination, and there was no abuse of discretion in the conclusion that termination would be in the child's best interests.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 18 May 2021 by Judge Scott Etheridge in District Court, Randolph County. This matter was calendared for argument in the Supreme Court on 22 December 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Chrystal Kay for petitioner-appellee Randolph County Department of Social Services.

Hill Law, PLLC, by Lindsey Reedy, for appellee Guardian ad Litem.

Leslie Rawls for respondent-appellant father.

MORGAN, Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to "Alice,"[1] a minor child born on 13 December 2017. After careful review, we conclude that the issues identified by counsel for respondent-father as arguably supporting an appeal are meritless and therefore hold that there was no error in the trial court's decision

1. We use a pseudonym to protect the identity of the juvenile and for ease of reading.

to discontinue reunification efforts, that the evidence and resulting findings of fact support the trial court's determination that grounds existed to substantiate the termination of respondent-father's parental rights to Alice, and that there was no abuse of discretion in the trial court's conclusion that it would be in Alice's best interests for respondent-father's parental rights to be terminated. Accordingly, we affirm the trial court's order terminating respondent-father's parental rights to Alice.

I. Factual and Procedural Background

¶ 2 On 18 December 2017, the Randolph County Department of Social Services (DSS) filed a juvenile petition in the District Court, Randolph County, alleging that Alice, who was born five days prior to the filing of the petition, was a dependent juvenile. Alice's mother, who was seventeen years of age at the time that the petition was filed, was the named respondent; the identity of Alice's father was unknown at the time of the filing. The petition alleged, *inter alia*, that the mother was not providing proper care to Alice in the hospital after the child's birth and that at the time of Alice's birth, the mother was living with her own father in a home which DSS found to be inappropriate for Alice. Accordingly, DSS sought nonsecure custody of Alice on the grounds of dependency. The trial court thereupon granted nonsecure custody of Alice to DSS.

¶ 3 Subsequent to the initiation of this case, DNA testing established that respondent-father was Alice's biological father, and he was then joined as a respondent in the action. Respondent-father had been living in Brunswick County, but upon learning that he was the biological father of Alice, respondent-father moved in with his sister and brother-in-law in Randolph County in order to be closer to Alice. Following a March 2018 adjudication hearing, the trial court entered an order in which it determined that Alice was a dependent juvenile and directed that Alice remain in DSS custody with a case plan of reunification. In June 2018, the mother relinquished her parental rights to Alice. Consequently, the mother did not participate in any further proceedings regarding Alice at the trial court level, and the mother is not a party to this appeal.

¶ 4 Respondent-father worked on a case plan with DSS regarding Alice, and by January 2019, he had "completed most of his services and seem[ed] committed to the minor child and meeting her needs." In an August 2019 order, the trial court permitted respondent-father to have one overnight visit per week with Alice. In an order entered in October 2019 following an August 2019 hearing, the trial court approved a trial home placement of Alice with respondent-father, with DSS retaining legal custody of the juvenile.

¶ 5 Later in October 2019, however, respondent-father was arrested and charged with twenty-seven counts of third-degree sexual exploitation of a minor involving children spanning the ages of two years to ten years. Upon respondent-father's arrest, Alice was removed from his home and returned to her previous foster home placement. In November 2019, respondent-father was also criminally charged with taking indecent liberties with the child, Alice. He was also charged with the criminal offense of statutory rape of a child under fifteen years old with a different alleged victim. As a result of these charges, sexual abuse by respondent-father upon Alice and an injurious environment for her was subsequently substantiated. After a permanency planning review hearing in December 2019, the trial court ordered reunification efforts to cease. Respondent-father preserved his right to appeal the cease reunification order.

¶ 6 On 16 July 2020, DSS filed a motion to terminate respondent-father's parental rights in which it represented that grounds existed to terminate his parental rights on the grounds of abuse, neglect, willfully leaving the child in foster care without making reasonable progress, and dependency. Respondent-father filed an "Answer/Reply and Motion to Dismiss" on 14 August 2020. The motion to terminate respondent-father's parental rights was heard on 18 February 2021 during the Juvenile Session of District Court, Randolph County. Although the trial court determined that DSS had not met its burden to establish abuse as a basis for the termination of the parental rights of respondent-father, nonetheless the trial court determined that DSS had established grounds to terminate his parental rights based upon neglect, willfully leaving the child in foster care without making reasonable progress, and dependency. The trial court thereafter found that Alice's best interests would be served by termination of respondent-father's parental rights. The termination order was entered on 18 May 2021. Respondent-father appealed both the cease reunification order and the termination order on 16 June 2021.

¶ 7 On 19 October 2021, appellate counsel for respondent-father filed a brief, stating that "[a]fter thoroughly reviewing the court record and the transcripts, the undersigned attorney for [respondent-f]ather can find no issues of merit on which to base an argument for relief. Therefore, she submits this no-merit brief and asks this Honorable Court to independently review the record," citing *In re L.E.M.*, 372 N.C. 396, 401–02 (2019).

¶ 8 Pursuant to N.C. R. App. P. 3.1(e), appellate counsel for respondent-father has identified three general issues for this Court's review which might arguably support relief on appeal: (1) whether the trial court erred by ceasing reunification efforts; (2) whether the trial court erred by

making findings of fact in the termination order that were not supported by clear, cogent, and convincing evidence and by concluding as law that termination grounds existed; and (3) whether the trial court erred and abused its discretion by finding that termination of parental rights was in Alice's best interests. Appellate counsel for respondent-father also sent a copy of counsel's no-merit brief, the record on appeal, and the transcript to respondent-father, along with a letter explaining respondent-father's right to file his own pro se brief and instructions on how to do so. Respondent-father has not submitted his own brief or any other filing to the Court, and a reasonable period of time in which he could have done so has elapsed.

¶ 9 The no-merit brief filed in this Court by appellate counsel on behalf of respondent-father first analyzes the trial court's decision to cease reunification efforts. A trial court order ceasing reunification efforts is reviewed to determine "whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law" as well as "whether the trial court abused its discretion with respect to disposition." *In re J.H.*, 373 N.C. 264, 267 (2020) (alteration in original) (quoting *In re L.M.T.*, 367 N.C. 165, 168 (2013)). After the 4 December 2019 permanency planning hearing, the trial court rendered an order for DSS to cease reunification efforts with respondent-father. Consequently, Alice's permanent plan was changed to a primary plan of adoption and a secondary plan of guardianship. An order ceasing reunification must include "written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C.G.S. § 7B-906.2(b) (2021). The trial court's order need not recite the statutory language verbatim as long as the order makes clear that the trial court considered the evidence in light of whether reunification would be futile or could be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. *In re L.E.W.*, 375 N.C. 124, 129–30 (2020). Here, the cease reunification order included findings of fact that "[b]ased on the [respondent-f]ather's lack of progress and current circumstances, ongoing reunification efforts are not likely to lead to successful reunification in the next six month[s] and [are] inconsistent with the juvenile's health, safety and need for a safe, permanent home within a reasonable period of time"; that "[f]urther reunification efforts with the [respondent-f]ather would be contrary to the minor child's best interests, health, safety, and welfare"; and that "[i]t is contrary to the minor child's health, safety, welfare, and best interests to return to the home, care, or custody of any parent today."

¶ 10 The trial court must also make written findings of fact to show the parent's progress toward reunification regarding whether the parent: (1) is making adequate progress within a reasonable period of time under the plan; (2) is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile; (3) remains available to the court, the department, and the guardian ad litem for the juvenile; and (4) is acting in a manner inconsistent with the health or safety of the juvenile. N.C.G.S. § 7B-906.2(d) (2021). Here, the trial court made appropriate findings of fact which addressed the statutory considerations. For example, while respondent-father's completion of all of his court-ordered services prior to the trial home placement was expressly recognized by the trial court with regard to respondent-father's case plan in its findings of fact, the trial court also made findings of fact regarding respondent-father's subsequent arrest on more than twenty-seven sex offense charges involving juveniles, the discovery of photographs of naked children on his cellular phone, and the substantiation of his sexual abuse of Alice and his exposure of Alice to an injurious environment. In addition, the trial court found that respondent-father was incarcerated with no scheduled trial date and with a substantial bond, and that respondent-father lacked an adequate source of income to support Alice. The trial court also made multiple findings of fact regarding possible relative placements for Alice and problems regarding these potential placements which prevented them from being approved as homes for the juvenile. In light of such factual findings, we conclude that the trial court's conclusions of law were supported and it did not abuse its discretion by ceasing reunification efforts.

¶ 11 Likewise, we conclude that the evidence and findings of fact support the trial court's conclusion of law that a ground existed to terminate parental rights on the basis of dependency.[2] *See* N.C.G.S. § 7B-1111(a)(6) (2021). In a termination of parental rights proceeding, dependency is shown, *inter alia*, when a "parent is incapable of providing for the proper care and supervision of the juvenile . . . and that there is a reasonable probability that the incapability will continue for the foreseeable future . . . and the parent lacks an appropriate alternative child care arrangement." *Id.* Upon review on the appellate level, we consider "whether

2. The trial court found that clear, cogent, and convincing evidence supported three grounds to terminate respondent-father's parental rights: (1) neglect, (2) willfully leaving the juvenile in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting the conditions that led to her removal, and (3) dependency. The "adjudication of any single ground . . . is sufficient to support a termination of parental rights." *In re D.C.*, 378 N.C. 556, 2021-NCSC-104, ¶ 13 (quoting *In re E.H.P.*, 372 N.C. 388, 395 (2019)).

the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the trial court's conclusions of law." *In re D.W.P.*, 373 N.C. 327, 338 (2020) (quoting *In re B.O.A.*, 372 N.C. 372, 379 (2019)). Unchallenged findings of fact are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 12 As noted above, the trial court made extensive findings of fact indicating the following: (1) that respondent-father had been arrested and had remained incarcerated on dozens of pending sexual offense charges involving juveniles, including Alice; (2) that DSS had substantiated respondent-father's sexual abuse of Alice, as shown by physical and behavioral evidence regarding the juvenile, along with testimony from respondent-father's sister and brother-in-law, among others; and (3) that respondent-father's suggested alternative placements for Alice had all been found to be unsuitable for the juvenile. In light of these unchallenged findings of fact which were fully supported by the evidence, we affirm the trial court's determination that the ground of dependency existed for the termination of the parental rights of respondent-father, in that respondent-father was incapable of providing for Alice's care and well-being, that there was "a reasonable probability that the incapacity would continue for the foreseeable future," and that respondent-father lacked any alternative childcare for the juvenile. N.C.G.S. § 7B-1111(a)(6).

¶ 13 As a final potential basis for relief, appellate counsel for respondent-father identifies the trial court's conclusion that termination of respondent-father's parental rights was in the juvenile's best interests. We review a trial court's best interests determination for an abuse of discretion. *In re A.M.*, 377 N.C. 220, 2021-NCSC-42, ¶ 18. Under such review, a trial court's decision will remain undisturbed unless we determine that it is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.U.D.*, 373 N.C. 3, 6–7 (2019) (quoting *In re T.L.H.*, 368 N.C. 101, 107 (2015)).

¶ 14 In determining the child's best interests, the trial court is required to consider and make findings of fact regarding specific statutory factors:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2021). The trial court made factual findings encompassing each of the statutory factors: (1) that Alice was three years old; (2) that adoption was "the most likely plan to achieve [a] safe, permanent home" for Alice, that the foster family wanted to adopt her, and that adoption was "very likely"; (3) that termination was likely to aid in accomplishing the permanent plan of adoption; (4) that Alice had a bond with respondent-father but had not seen him since his arrest; and (5) that Alice was significantly bonded with her foster family and her potential sibling in the foster family. None of these findings of fact have been challenged by respondent-father and each of them is supported by evidence introduced during the trial court proceedings. In light of these unchallenged findings of fact which are contained in the termination order and are fully supported by the evidence, we perceive no abuse of the trial court's discretion in its decision that termination of respondent-father's parental rights was in the juvenile's best interests.

¶ 15 After a careful review of the record on appeal and the briefs submitted by the parties in this matter, we agree with respondent-father's appellate counsel that there are no meritorious arguments supporting relief for respondent-father. We therefore affirm the trial court's order ceasing reunification efforts and the trial court's order terminating the parental rights of respondent-father to the juvenile Alice.

AFFIRMED.

IN RE C.C.G.

[380 N.C. 23, 2022-NCSC-3]

IN THE MATTER OF C.C.G.

No. 59A21

Filed 11 February 2022

1. Termination of Parental Rights—denial of motion to continue—no-show by parent—abuse of discretion analysis

The trial court did not abuse its discretion by denying respondent-mother's motion to continue a termination of parental rights hearing where, although respondent did not appear at the hearing, no arguments were advanced by her counsel or guardian ad litem that would justify allowing the continuance and information given to the trial court from respondent's representatives and a social worker tended to show that respondent was aware of the hearing date. Further, respondent did not demonstrate prejudice where there was nothing to show she would have testified or that her testimony would have impacted the outcome of the hearing.

2. Native Americans—Indian Child Welfare Act—termination of parental rights—reason to know status as Indian—statutory inquiry

In a termination of parental rights hearing, the trial court did not fail to comply with the Indian Child Welfare Act (ICWA) where, although respondent-mother told the department of social services that she might have a possible distant Cherokee relation on her mother's side of the family, there was insufficient information presented to the trial court for it to have reason to know that the child was an Indian child pursuant to 25 C.F.R. § 23.107(c). Although the trial court did not conduct the necessary statutory inquiry into the status of the child after the termination petition was filed, there was no reversible error where the court properly conducted the inquiry at earlier stages in the proceedings and there was no information in the record to show that the child might be an Indian child.

3. Child Abuse, Dependency, and Neglect—permanent plan—ceasing reunification efforts—sufficiency of findings

In a permanency planning matter, the trial court did not err by ceasing respondent's visitation with her teenage daughter and eliminating reunification from the permanent plan based on evidence that respondent behaved inappropriately during visits and was not in compliance with her case plan and that the daughter showed improved behavior after no longer seeing her mother. A social

worker's testimony and reports from the department of social services (DSS) supported the challenged findings of fact as well as the court's determination that DSS's efforts to finalize the permanent plan were reasonable.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1)–(2) from orders entered on 3 April 2020 by Judge Jeanie Houston and on 16 November 2020 by Judge David V. Byrd in District Court, Ashe County. This matter was calendared for argument in the Supreme Court on 22 December 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Grier J. Hurley for petitioner-appellee Ashe County Department of Social Services.

Paul W. Freeman Jr. for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by Jacky Brammer, Assistant Parent Defender, for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent appeals from the trial court's order terminating her parental rights to her daughter C.C.G. (Carrie)[1] and from the trial court's earlier permanency-planning order which eliminated reunification from Carrie's permanent plan. *See* N.C.G.S. § 7B-1001(a1) (2019). Respondent has not challenged on appeal the trial court's conclusions that grounds existed to terminate her parental rights or that termination was in Carrie's best interests. Instead, respondent argues the trial court erred by denying her motion to continue the termination hearing, by failing to comply with the requirements of the Indian Child Welfare Act (ICWA), and by eliminating respondent's visitation with Carrie in a permanency-planning order. After careful review, we find no reversible error.

I. Factual and Procedural Background

¶ 2 On 15 March 2019, the Ashe County Department of Social Services (DSS) filed a petition alleging that Carrie was a neglected juvenile. The petition alleged that respondent had a long history with DSS dating back

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

to 2006 due to issues of domestic violence, substance abuse, mental health difficulties, and improper supervision and that DSS recently became involved with the family when it received a report in December 2018 alleging substance abuse, medical neglect, and improper care and supervision.

¶ 3 In an order entered 3 May 2019, the trial court adjudicated Carrie to be a neglected juvenile. The trial court agreed with DSS's recommendation that it was in Carrie's best interests to continue Carrie in respondent's custody with conditions that respondent comply with her Family Service Case Plan and that Carrie attend school regularly and without tardiness.

¶ 4 On 13 May 2019, DSS filed a motion for review due to respondent's noncompliance with both the adjudication order and her Family Service Case Plan. DSS alleged that Carrie continued to have unexcused absences and tardies from school. DSS also alleged that respondent had not complied with her Family Services Case Plan in that she did not attend the scheduled assessment for Carrie at Youth Villages; had not consistently attended her substance abuse sessions at Daymark; had a positive drug screen; and had been arrested for possession of schedule IV substances, schedule II substances, marijuana, and methamphetamine.

¶ 5 Following a review hearing on 15 May 2019, the trial court entered an order on 28 June 2019 granting DSS nonsecure custody of Carrie with placement in DSS's discretion. Respondent was granted a minimum of two hours of supervised visitation twice per month. The trial court concluded that the best primary plan of care for Carrie was reunification with a secondary plan of guardianship with an approved caregiver.

¶ 6 Pursuant to N.C.G.S. § 7B-906.1(a), the trial court conducted regular permanency-planning hearings. After the permanency hearing on 14 February 2020, the trial court concluded that supervised visitation between respondent and Carrie was not in Carrie's best interest and inconsistent with her health and safety. Therefore, the trial court suspended visitation and contact between respondent and Carrie. Further, the trial court changed the permanent plan to adoption with a secondary plan of custody or guardianship with an approved caregiver.

¶ 7 On 2 June 2020, DSS filed a petition to terminate respondent's parental rights alleging grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(1)–(3), (6). When respondent did not appear at the termination hearing on 16 October 2020, respondent's counsel made an oral motion to continue. The trial court denied the motion to continue. Following the hearing and presentation of evidence, the trial court

entered an order concluding that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(3) and that it was in Carrie's best interests that respondent's parental rights be terminated. Accordingly, the trial court terminated respondent's parental rights. Respondent appealed.

II. Analysis

A. Motion to Continue

¶ 8 **[1]** "[A] denial of a motion to continue is only grounds for a new [termination-of-parental-rights hearing] when [the respondent] shows both that the denial was erroneous, and that he [or she] suffered prejudice as a result of the error." *In re A.L.S.*, 374 N.C. 515, 517 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24–25 (1995)). Unless the motion to continue raises a constitutional issue, "a motion to continue is addressed to the discretion of the trial court." *Id.* at 516–17 (quoting *Walls*, 342 N.C. at 24). Therefore, to show error on a motion to continue that does not raise a constitutional issue, the respondent must show that the trial court abused its discretion. *Id.* at 517. "Abuse of discretion results where the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 517 (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

¶ 9 In this matter, respondent has not advanced a constitutional argument before the trial court or this Court. Instead, respondent asserts that the trial court abused its discretion because there was no evidence she received notice of the hearing, a guardian ad litem had been appointed for her, the trial court was deprived of her testimony, and the trial court had previously allowed continuances.

¶ 10 Based on the record before us, respondent has failed to show an abuse of discretion by the trial court. "[C]ontinuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *In re J.E.*, 377 N.C. 285, 2021-NCSC-47, ¶ 15 (quoting *In re S.M.*, 375 N.C. 673, 680 (2020)). "Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice." N.C.G.S. § 7B-1109(d) (2021).

¶ 11 In this matter, the record reflects that the notice of hearing was sent to respondent's counsel and respondent's guardian ad litem. Both respondent's counsel and respondent's guardian ad litem were present at the termination-of-parental-rights hearing. Neither tendered an affidavit or evidence in support of the motion to continue. Instead, they made

unsworn statements in support of the motion to continue. Neither argued that respondent intended to testify, that the preexisting appointment of a guardian ad litem entitled respondent to a continuance, or that the previously allowed continuances justified allowance of this continuance. Respondent's counsel and respondent's guardian ad litem instead represented that they believed respondent was aware of the hearing date and had made efforts to contact her but had not spoken to respondent. However, they had corresponded about the hearing date with respondent's mother, who had respondent's contact information and often provided a home for respondent.

¶ 12 After hearing from respondent's counsel and guardian ad litem, the trial court asked DSS's counsel if DSS had spoken to respondent. DSS's counsel replied that the social worker had spoken to her last week. The social worker then informed the trial court that she had spoken with respondent twice the week prior and that respondent "knows when the court date is." The social worker explained that respondent knew that the court date was today as she had spoken to respondent last week about the date and respondent was upset that the hearing was on her birthday.

¶ 13 Given the representations to the trial court and the record before us, we cannot conclude that the trial court's denial of the motion to continue was manifestly unsupported by reason or arbitrary. The burden falls to the party seeking the continuance to show sufficient grounds for granting the motion. *In re J.E.*, ¶ 15. It does not shift to another party or the trial court. *See id.* Thus, in the context of this case, where among other things the moving party has only offered unsworn statements and argument, we find no error by the trial court. *See State v. Beck*, 346 N.C. 750, 756–57 (1997) (finding trial court did not err by denying motion to continue where unsworn statements of defendant's trial counsel were not sufficient to justify delaying the trial).

¶ 14 Respondent has also failed to show any prejudice arising from the trial court's denial of her motion to continue. Respondent argues she was materially prejudiced because her testimony was a vital source of information regarding the nature of the parent/child relationship and integral to any consideration of her parental rights. However, when making the oral motion, respondent's counsel neither indicated respondent intended to testify nor provided an affidavit or offer of proof of respondent's potential testimony. Thus, as in other cases the Court has decided recently, there is nothing before this Court to show that respondent would have testified and that such testimony would have impacted the outcome of the proceeding. *See, e.g.*, *In re D.J.*, 378 N.C.

565, 2021-NCSC-105, ¶ 14; *In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶ 13; *In re A.L.S.*, 374 N.C. at 518. Therefore, we hold that the trial court did not err by denying the request for a continuance.

B. Indian Child Welfare Act

¶ 15 **[2]** Respondent argues the trial court failed to comply with its duties under the ICWA because the trial court had reason to know that Carrie was an Indian child. DSS and the guardian ad litem for Carrie (GAL) disagree, arguing that respondent conflates the existence of or possibility of a distant relation with an Indian with reason to know that a child is an Indian child.

¶ 16 Paragraph (c) of 25 C.F.R. § 23.107 specifies when a trial court has reason to know a child is an Indian child. It states:

> (c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:
>
> (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;
>
> (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
>
> (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
>
> (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;
>
> (5) The court is informed that the child is or has been a ward of a Tribal court; or
>
> (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

25 C.F.R. § 23.107(c) (2020).

¶ 17 "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) *a member of an Indian tribe* or (b) is eligible for membership in an Indian tribe *and* is the biological child of *a member of an Indian tribe*." 25 U.S.C. § 1903(4) (emphasis added). Thus, as we have previously explained,

> "The inquiry into whether a child is an 'Indian child' under ICWA is focused on only two circumstances: (1) Whether the child is a citizen of a Tribe; or (2) whether the child's parent is a citizen of the Tribe and the child is also eligible for citizenship." Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. at 38,804. The inquiry "is not based on the race of the child, but rather indications that the child and her parent(s) may have a political affiliation with a Tribe [as defined in 25 U.S.C. § 1903]." Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. at 38,806; *see also* Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. at 38,801 (" 'Indian child' is defined based on the child's political affiliation with a federally recognized Indian Tribe.").

In re M.L.B., 377 N.C. 335, 2021-NCSC-51, ¶ 16 (alteration in original).

¶ 18 Here, respondent relies on three documents in the record to support her argument that there is reason to know Carrie is an Indian child. First, respondent relies on a DSS court report reflecting an answer of "no" to the inquiry whether there is "any information to indicate that [Carrie] may be subject to the [ICWA]" and explaining, "[respondent] reported there is [a] possible distant Cherokee relation on her mother's side of the family." Second, respondent relies on an in-home family services agreement stating, "[respondent] reports Cherokee Indian Heritage." Third, respondent relies on another DSS court report reflecting an answer of "no" to the inquiry whether there is "any information to indicate that [Carrie] may be subject to the [ICWA]" and explaining, "[respondent] reported there is [a] possible distant Cherokee relation on her mother's side of the family but no further specifics are known."

¶ 19 None of these documents state Carrie is an "Indian child" and none contain information indicating that Carrie or her biological parents are members or citizens of an Indian tribe.[2] *See* 25 C.F.R. § 23.107(c)(1)–(2).

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2. At the termination-of-parental-rights hearing, the social worker also testified that there was no information that Carrie is a member of an Indian tribe and that there were

Indian heritage, which is racial, cultural, or hereditary does not indicate Indian tribe membership, which is political. *See* 25 U.S.C. § 1903(4); *In re M.L.B.*, ¶ 16. Thus, these statements do not provide reason to know that Carrie is an Indian child under 25 C.F.R. § 23.107(c).

¶ 20 However, respondent also contends the trial court erred by not asking at the termination-of-parental-rights hearing whether the participants had reason to know if Carrie was an Indian child.

¶ 21 Subsection 23.107(a) of Title 25 of the Code of Federal Regulations provides that "State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child" and that "[such] inquiry is made at the commencement of the proceeding and all responses should be on the record."

¶ 22 Child-custody proceeding is defined as follows:

> *Child-custody proceeding*. (1) "Child-custody proceeding" means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:
>
> (i) *Foster-care placement*, which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
>
> (ii) *Termination of parental rights*, which is any action resulting in the termination of the parent-child relationship;
>
> (iii) *Preadoptive placement*, which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or
>
> (iv) *Adoptive placement*, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

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no reports from family members that Carrie was possibly an Indian child. Therefore, there was no reason on the basis of the information that was available to the trial court at the time of the termination hearing for the trial court to know that Carrie was an Indian child.

> (2) *An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes.* There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings.

25 C.F.R. § 23.2 (2020) (last emphasis added).

¶ 23 The trial court's orders in the trial court's adjudication and disposition order entered on 3 May 2019 and order transferring custody to DSS entered on 28 June 2019 both specifically state "[t]he [c]ourt inquired of the parties and none of the parties know or have reason to know the child is an Indian child as defined at 25 U.S.C. [§] 1902(4); 25 C.F.R. [§] 23.2." Thus, the record[3] before us reflects that the trial court made the inquiry required by 25 C.F.R. § 23.107(a) at the hearing addressing and ultimately resulting in the removal of Carrie from respondent and rendering respondent without the right to have Carrie returned upon demand. However, the record does not reflect that the trial court made the inquiry required by 25 C.F.R. § 23.107(a) at a hearing after DSS moved for termination of the parent-child relationship. Nevertheless, as the determination of whether there is reason to know that Carrie is an Indian child can be made on the record and as discussed previously there is no reason to know that Carrie is an Indian child, we conclude that there is no reversible error. *See In re A.L.*, 378 N.C. 396, 2021-NCSC-92, ¶ 28 (remanding the case to the trial court because the determination of whether there is reason to know the juvenile is an Indian child could not be made on the record).

C. Visitation

¶ 24 **[3]** Respondent asks this Court to reverse the 3 April 2020 permanency-planning order which eliminated reunification from Carrie's permanent plan because the determination to cease visitation was either legal error or abuse of discretion.

¶ 25 In cases arising under the juvenile code, "to obtain relief on appeal, an appellant must not only show error, but that the error was material

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3. While respondent disputes the determination by the trial court that there is neither information that Carrie is an "Indian child" or reason to know that Carrie is an "Indian child," respondent does not dispute and does not offer any record support contrary to the trial court's finding that it inquired of the parties whether they had reason to know that Carrie is an "Indian child" at hearings prior to the termination-of-parental-rights hearing.

and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *In re L.E.W.*, 375 N.C. 124, 128 (2020) (cleaned up). To show error by the trial court concerning visitation in a permanency-planning order which eliminated reunification, we review for an abuse of discretion "with an abuse of discretion having occurred only upon a showing that the trial court's actions are manifestly unsupported by reason." *In re L.E.W.*, 375 N.C. at 134 (cleaned up). We also "review the order eliminating reunification together with an appeal of the order terminating parental rights." N.C.G.S. § 7B-1001(a2).

1. Challenge to reconsideration of visitation plan

¶ 26 According to respondent, the determination to cease visitation was legal error or abuse of discretion because the trial court at the February 2020 hearing had "substantially the same" information and facts before it that the trial court had at the 22 November 2019 hearing, where it found visitation was still in Carrie's best interests. However, respondent concedes that additional information was in the DSS court report and that the GAL court report and a social worker provided new testimony. In other words, the trial court received new information at the February 2020 hearing. Pursuant to N.C.G.S. § 7B-906.1(d)(2), at review and permanency-planning hearings, the trial court shall consider "whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with [N.C.]G.S. [§] 7B-905.1." N.C.G.S. § 7B-906.1(d)(2) (2021). As N.C.G.S. § 7B-906.1(d)(2) instructs the trial court to consider the visitation plan and the trial court received new information, we find no merit in respondent's argument.

2. Challenge to findings of fact 18 and 34

¶ 27 Respondent also challenges findings of fact 18 and 34, arguing that the social worker's testimony that supports these findings was not reliable. The trial court found in findings of fact 18 and 34 that:

> 18. [Carrie] had behavioral setbacks until September 2019. Since she has not seen [respondent] and is in the group home [Carrie] has made improvements. Prior to September 2019 [Carrie] had superficial self-harming behaviors and was aggressive with her peers. She has attended a day treatment program as referred through Youth Villages and is in therapy. [Carrie] has asked about [respondent] one time since September 2019.
>
> . . . .

> 34. Supervised visitation with [respondent] at this time is not in [Carrie's] best interest and is not consistent with her health and safety.

¶ 28 We review the trial court's challenged findings of fact in a permanency-planning order that ceases reunification to determine whether they are supported by the evidence received before the trial court. *In re L.M.T.*, 367 N.C. 165, 168 (2013).[4] At a review or permanency-planning hearing, "[t]he [trial] court may consider any evidence, including hearsay evidence as defined in [N.C.]G.S. [§] 8C-1, Rule 801, or testimony or evidence from any person that is not a party, that the [trial] court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C.G.S. § 7B-906.1(c). Appellate courts may not reweigh the underlying evidence presented at Subchapter I of the Juvenile Code hearings. *See*, *e.g.*, *In re J.A.M.*, 372 N.C. 1, 11 (2019). It is the role of the trial court in these matters to assess the reliability of the testimony and make a credibility determination. *See id.*

¶ 29 DSS and the GAL contend that the two challenged findings of fact are supported by the social worker's unobjected-to testimony. We agree. The social worker testified at the hearing that respondent's last visit with Carrie was 6 September 2019, that Carrie had some substantial behavior setbacks "up until about September," including self-harming and aggressive behaviors with some of her peers, and that "she just really turned it around," including improving her grade in math, ceasing talking like a baby, and being more compliant. The social worker testified that Youth Villages recommended day treatment, which was not available at her current placement. Thus, DSS transferred Carrie to a new placement in August with what they described as "an amazing program." The social worker further testified that she believed there was a correlation between Carrie's improvement in behavior and her not

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4. In past cases, we have used the term "competent evidence" when describing the standard of review applicable to the findings of fact in a permanency planning order. *See*, *e.g.*, *In re L.M.T.*, 367 N.C. 165, 168 (2013). In some contexts, competent evidence means admissible evidence pursuant to the rules of evidence. *See Evidence*, *Black's Law Dictionary* (11th ed. 2019). However, N.C.G.S. § 7B-906.1(c) makes clear that the evidence that the trial court receives and considers in a review or permanency planning hearing need not be admissible under the North Carolina Rules of Evidence. Further, our precedent and Rules of Appellate Procedure dictate when we can review the admissibility of evidence admitted by the trial court. Accordingly, for clarity, we are avoiding the phrase "competent evidence" in the context of permanency planning orders in favor of using the language the statute itself employs: "evidence."

having seen respondent since September. The social worker explained that Carrie wanted to be adopted and asked about respondent only once since September. The social worker testified that she thinks it would be detrimental to have respondent visiting and contacting Carrie. Since the foregoing testimony from the social worker supports findings of fact 18 and 34, they are conclusive on appeal. We, therefore, reject respondent's challenge to findings of fact 18 and 34.

3. Challenge to cessation of visitation

¶ 30 We next address respondent's challenge to the trial court's determination to cease visitation. Visitation shall be provided "that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." N.C.G.S. § 7B-905.1(a) (2021). In this matter, we are bound to challenged findings of fact 18 and 34, which are supported by the evidence before the trial court, and the unchallenged findings of fact from the 3 April 2020 permanency-planning order and the termination-of-parental-rights order.

¶ 31 Pursuant to the binding findings, "[u]pon entering foster care, [Carrie] exhibited behaviors such as walking on her tippy toes, talking in a baby voice, being noncompliant and throwing tantrums as well as self-harming behaviors." Carrie received medical evaluations and was diagnosed with post-traumatic stress disorder. Carrie was a teenager at the time. "During the period of time [Carrie] did not have contact with her [respondent,] these behaviors would improve." "When visits or contact with [respondent] occurred, [Carrie's] behaviors would regress." Carrie desired to be adopted and did not see her mother as part of her future.

¶ 32 Respondent only attended six visits with Carrie, and she "appeared at a visit impaired, fell asleep at a visit, made false promises to [Carrie,] and told [Carrie] to not comply with Ashe County DSS." Respondent's calls with Carrie were at times not appropriate and sometimes involved intensely questioning Carrie, making irrational comments, or giving Carrie false hope. Respondent continued to have positive drug screens, refused some drug screenings, did not attend a referred parenting class, and never completed her psychological evaluation. Respondent also absconded from the facility at which she was required to undergo treatment as a condition of her probation and refused to meet with the social worker in January 2020. Given the foregoing findings of fact, we are unable to say that the trial court abused its discretion by ceasing visitation with Carrie.

4. Challenge to finding of reasonable efforts by DSS

¶ 33 In the alternative, respondent argues that DSS failed to provide reasonable efforts to implement the child's permanent plan by not providing respondent with any visits with Carrie between late September 2019 and February 2020. Respondent contends that "because visitation is an essential part of reunification, there can be no reasonable efforts toward reunification or preventing foster care when DSS is not providing visitation with the child's mother, even though it is still in the child's best interests." We disagree.

¶ 34 Subsections 7B-906.1(e)(5) and 7B-906.2(c) direct the trial courts to consider and make written findings of fact regarding whether the county department of social services has exercised reasonable efforts since the initial permanency plan hearing to implement the permanent plan for the juvenile. The juvenile code defines "reasonable efforts" as

> The diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time. If a court of competent jurisdiction determines that the juvenile is not to be returned home, then reasonable efforts means the diligent and timely use of permanency- planning services by a department of social services to develop and implement a permanent plan for the juvenile.

N.C.G.S. § 7B-101(18) (2021).

¶ 35 Respondent thus challenges the trial court's determination "[t]hat Ashe County DSS has made reasonable efforts to finalize the permanent plan to timely achieve permanence for the juvenile and eliminate placement in foster care, reunify this family, and implement a permanent plan for the child."[5] The trial court's other findings and the DSS report incorporated by reference into its order support this determination. The trial court found that reunification efforts were made to finalize permanency, including contacting respondent, attempting to contact respondent, maintaining contact with Carrie and the placement providers, and

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5. Respondent also challenges the trial court's finding that respondent "has not provided emotional support for [Carrie]" and "[v]isitation and contact is detrimental to [Carrie]." This finding is supported by the testimony of the social worker as previously summarized.

facilitating an updated psychological evaluation for Carrie. The social worker also went to meet respondent in jail in January 2020 to discuss her family service agreement. Respondent, however, refused to meet with her. The DSS report further shows that, among other things, DSS had coordinated supervised visits between respondent and Carrie prior to late September 2019, scheduled a supervised visitation in late September that respondent cancelled, offered to provide respondent transportation assistance that respondent rejected, held Child and Family Team Meetings, and made multiple attempts to meet with and contact respondent, through phone calls and home and jail visits. Collectively, these findings show that DSS was diligently using and providing preventive or reunification services. N.C.G.S. § 7B-101(18). Therefore, respondent's argument is overruled.

¶ 36 Having considered respondent's arguments, we conclude that respondent has not shown any error by the trial court in ceasing respondent's visitation. Respondent also has not shown that even if an error occurred, such error was material and prejudicial. *See In re L.E.W.*, 375 N.C. at 128. Accordingly, we affirm the 3 April 2020 permanency-planning order eliminating reunification from the permanent plan.

III. Conclusion

¶ 37 For the reasons set forth above, we affirm the 3 April 2020 permanency-planning order eliminating reunification as a permanent plan and the 16 November 2020 termination-of-parental-rights order.

AFFIRMED.

IN RE G.D.C.C.

[380 N.C. 37, 2022-NCSC-4]

IN THE MATTER OF G.D.C.C.

No. 504A20

Filed 11 February 2022

Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect

The trial court properly terminated a mother's parental rights to her daughter based on neglect where, after an older sibling was sexually abused by the children's father, respondent-mother refused to believe that abuse had occurred and actively tried to discredit the sibling. Despite completing a case plan, respondent-mother failed to accept responsibility for her actions and to demonstrate any ability to protect her daughter from threats. The unchallenged findings of fact supported the court's determination that there was a likelihood of future neglect if the child were returned to her mother's care.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 29 September 2020 by Judge Resson O. Faircloth in District Court, Johnston County. This matter was calendared for argument in the Supreme Court on 22 December 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Holland & O'Connor, PLLC, by Jennifer S. O'Connor, for petitioner-appellee Johnston County Department of Social Services; and Mobley Law Office, P.A., by Marie H. Mobley, for appellee Guardian ad Litem.

J. Thomas Diepenbrock for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent appeals from an order terminating her parental rights in her minor child G.D.C.C. (Galena).[1] After careful review, we hold that the trial court's determination that there was a likelihood of future neglect if Galena was returned to respondent's care was supported by the findings of fact. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

1. Pseudonyms are used in this opinion to protect the juveniles' identities and for ease of reading.

I. Factual and Procedural Background

¶ 2 On 20 June 2016, the Johnston County Department of Social Services (DSS) obtained nonsecure custody of five-year-old Galena and filed a juvenile petition alleging that she was a neglected and dependent juvenile, which included the following factual allegations. Galena's older sister, Nadina,[2] had disclosed multiple accounts of sexual abuse by Galena's father.[3] Respondent, after learning of the allegations, still took Galena to spend the night at her father's house, disregarding Nadina's claims of sexual abuse. Respondent directed Nadina not to say anything during a child medical exam and tried to have Nadina call her father to apologize to him because he was upset. A child medical exam indicated Nadina was probably sexually abused, and her father failed a polygraph test. Respondent attempted to discredit Nadina by calling her a liar and accusing her of making up the allegations. Nadina was hospitalized on several occasions due to suicidal and homicidal ideations.

¶ 3 Following a hearing, the trial court entered an order on 13 December 2016 adjudicating Galena to be a neglected and dependent juvenile. In a separate disposition order entered the same day, the trial court ordered that Galena remain in DSS custody and that respondent cooperate with DSS and follow all recommendations.

¶ 4 DSS developed an Out-of-Home Family Services Agreement with respondent to address parenting education, individual counseling services, nonoffender services, and maintaining a safe and appropriate home. In a 4 January 2017 order, following a permanency-planning hearing, the trial court found that respondent had started but failed to follow through with individual counseling, had not begun parenting classes, and had not completed a psychological evaluation. By October 2017, respondent had completed parenting classes, but she continued to lack an understanding of her children's mental health and behavioral issues as well as the sexual abuse Nadina had suffered. On 11 May 2018, the trial court entered a permanency-planning order finding that respondent had participated in individual counseling on only a sporadic basis and "continue[d] to lack an understanding of her role and responsibility as to the juveniles' current situation and removal from her care."

¶ 5 On 17 April 2019, the trial court entered an amended permanency-planning order finding that respondent had completed an updated

2. Nadina is not part of this appeal.

3. Galena's father is not a party to this appeal.

psychological evaluation in April 2018. The doctor who evaluated respondent reported that despite months of therapy and psychoeducation regarding how a nonoffending parent should respond to a child victim, respondent continued to fail to believe Nadina's report of sexual abuse. Further, the trial court found that respondent failed to take responsibility for the emotional and psychological damage that her actions—such as trying to discredit Nadina and calling her a liar—had caused Nadina. The trial court found that although respondent had cooperated in part with her case plan, she had not demonstrated an ability to apply what she learned in her classes and would be unable to protect her children.

¶ 6 The trial court's findings in the next permanency-planning order entered on 31 May 2019 were consistent with those in the 17 April 2019 order. The trial court also found that respondent had stopped attending therapy. The trial court, therefore, changed the primary permanent plan to adoption, with a secondary permanent plan of custody/guardianship with a court-approved caretaker.

¶ 7 On 11 July 2019, DSS filed a petition to terminate respondent's parental rights in Galena alleging that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6). Following a termination-of-parental-rights hearing that occurred over the course of several days, the trial court entered an order on 29 September 2020 concluding that grounds existed to terminate respondent's parental rights in Galena pursuant to each of the grounds DSS had alleged. The trial court also concluded that it was in Galena's best interests that respondent's parental rights be terminated. As a result, the trial court terminated respondent's parental rights. Respondent timely appealed.[4]

II. Analysis

¶ 8 On appeal, respondent challenges the trial court's adjudication of the existence of grounds to terminate her parental rights pursuant to

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4. Respondent's notice of appeal may have been defective as it cited N.C.G.S. § 7B-1001(a1)(2), the statutory provision regarding appeals of orders eliminating reunification as a permanent plan; stated that respondent "hereby gives Notice of Appeal to the North Carolina Supreme Court of the Order eliminating reunification;" and was titled "NOTICE OF APPEAL Order Eliminating Reunification [TPR]." However, the notice did reference the termination-of-parental-rights order, stating that it was appealing "[t]he order terminating [respondent's] rights [that] was filed on September 29, 2020." Since neither the guardian ad litem nor DSS has challenged respondent's notice of appeal as defective, "we elect, in the exercise of our discretion, to treat the record on appeal as a petition seeking the issuance of a writ of certiorari and to allow that petition . . . in order to reach the merits of [respondent's] challenge to the trial court's termination orders." *In re S.G.S.*, 2021-NCSC-156, ¶ 8 n.6.

N.C.G.S. § 7B-1111(a)(1), (2), and (6). The North Carolina Juvenile Code sets out a two-step process for termination of parental rights: an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109 to -1110 (2021). At the adjudicatory stage, the trial court takes evidence, finds facts, and adjudicates the existence or nonexistence of the grounds for termination set forth in N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e). If the trial court adjudicates that one or more grounds exist, the trial court then proceeds to the dispositional stage where it determines whether termination of parental rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

A. Standard of Review

¶ 9 We review a trial court's adjudication pursuant to N.C.G.S. § 7B-1111 to determine whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. *In re E.H.P.*, 372 N.C. 388, 392 (2019). On appeal, this Court reviews "only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407 (2019). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). Further, "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407. We review the trial court's conclusions of law de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

B. Neglect

¶ 10 A trial court may terminate parental rights if it concludes the parent has neglected the juvenile within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2021). As defined in pertinent part by N.C.G.S. § 7B-101, a neglected juvenile is one "whose parent . . . [d]oes not provide proper care, supervision, or discipline . . . [or c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021).

> In some circumstances, the trial court may terminate a parent's rights based on neglect that is currently occurring at the time of the termination hearing. However, such a showing is not required if, as in this case, the child is not in the parent's custody at the time of the termination hearing. Instead, the trial court looks to evidence of neglect by a parent prior

> to losing custody of a child—including an adjudication of such neglect[—]as well as any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding. After weighing this evidence, the trial court may find that neglect exists as a ground for termination if it concludes the evidence demonstrates a likelihood of future neglect by the parent.

In re M.J.B. III, 377 N.C. 328, 2021-NCSC-50, ¶ 9 (cleaned up) (emphasis omitted).

¶ 11 In the present case, DSS obtained nonsecure custody of Galena on 20 June 2016, and Galena remained outside of respondent's custody for the entirety of the case. Thus, at the termination hearing, DSS needed to demonstrate both past neglect and a likelihood of future neglect by respondent. *See id.*

¶ 12 On appeal, respondent challenges the trial court's determination that there was a likelihood of future neglect if Galena was returned to respondent's care. Respondent does not contest the trial court's finding that Galena was neglected in the past and does not challenge any factual findings in the termination order. Instead, respondent argues that the findings of fact do not support a determination that there was likelihood of future neglect because many, if not most, of the findings do not address respondent's fitness to care for Galena at the time of the termination hearing. While respondent acknowledges that some of the findings do relate to her, she contends that they simply note her completion of the case plan and do not support a determination that there was a likelihood of future neglect. We disagree.

¶ 13 In the termination-of-parental-rights order, the trial court made the following findings, none of which respondent challenges: Nadina was sexually abused by her father; respondent has refused to believe Nadina's claims of sexual abuse by her father; respondent, by not believing Nadina's claims, has caused emotional and psychological damage to Nadina; respondent continued to contend that Nadina's self-harming behavior of cutting herself was only to get attention; throughout the entirety of the case, respondent attempted to discredit Nadina by calling her a liar and indicating that Nadina was making up the sexual-abuse allegations; respondent consistently failed to acknowledge her children's

special needs; respondent indicated she would not provide her children their prescribed medications if she felt that they did not need them; respondent had expressed at past hearings that she did not know whether or not Galena should be around her father; respondent stopped attending therapy in September 2018; and respondent lacked insight into the issues that led to DSS involvement and her role and responsibility in contributing to the situation.

¶ 14 Further, respondent failed to demonstrate any ability to recognize threats to Galena or an ability to protect Galena despite completing the case plan. While respondent had received training on how to respond to sexual abuse, she still testified that she "did not know" whether or not Galena should be around her father. Even after years of involvement by DSS, the trial court, and numerous professionals, respondent failed to acknowledge any concern with her ability to parent and protect the children, failed to accept any responsibility for her actions, and continued to deny that she had done anything wrong. Accordingly, the trial court found that respondent had not demonstrated that she had gained knowledge from her case plan about how to resolve the issues at home, had showed no changes in the positive, and was not able to protect Galena from her father or any other male.

¶ 15 These unchallenged findings, which are binding on appeal, support the trial court's determination that there was a likelihood of future neglect if Galena were returned to respondent's care. Respondent's completion of her case plan does not preclude a determination that neglect is likely to reoccur. *See In re D.W.P.*, 373 N.C. 327, 339–40 (2020) (noting that the completion of a case plan did not contradict a determination that there was a likelihood of future neglect when respondent consistently failed to recognize the pattern of abuse her child had suffered). After years of professional, court, and DSS involvement, the issues that led to Galena's removal remained: respondent still could not protect her children from threats and thus could not provide them an environment that was not injurious to their welfare. Therefore, we hold that the trial court's determination that there was a probability of future neglect was supported by the findings of fact. As respondent has made no other challenges to the trial court's adjudication of grounds to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), we find no error by the trial court as to this ground.

III. Conclusion

¶ 16 Since only one of the grounds outlined in N.C.G.S. § 7B-1111(a) is necessary to support a termination of parental rights, we decline to

address respondent's arguments challenging the trial court's conclusion that grounds existed to terminate her parental rights under N.C.G.S. § 7B-1111(a)(2) and (6). Here, the trial court's determination that grounds existed to terminate respondent's parental rights for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) was supported by the unchallenged findings of fact. Further, respondent does not challenge the trial court's determination that it was in Galena's best interests to terminate respondent's parental rights. Accordingly, we affirm the order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF J.R.F.

No. 36A21

Filed 11 February 2022

1. Termination of Parental Rights—grounds for termination—neglect—some progress—right before termination hearing

The trial court did not err by determining that a father's parental rights were subject to termination on the grounds of neglect where the child had previously been adjudicated as neglected and the unchallenged findings supported the conclusion that repetition of neglect was highly likely given the father's lack of stability, unaddressed substance abuse issues, and domestic violence issues. Although the father had made some progress in the month or two before the termination hearing, it was insufficient to outweigh his long history with these issues.

2. Termination of Parental Rights—best interests of the child—dispositional findings of fact—abuse of discretion analysis

The trial court did not abuse its discretion by determining that termination of a father's parental rights was in his child's best interests where the court made appropriate findings regarding each of the dispositional factors in N.C.G.S. § 7B-1110, the findings were based on a reasonable interpretation of competent evidence, and the findings specifically challenged by the father—regarding the father's bond with the child and the child's likelihood of adoption—were also supported by competent evidence.

IN RE J.R.F.

[380 N.C. 43, 2022-NCSC-5]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 16 November 2020 by Judge J. H. Corpening, II in District Court, New Hanover County. This matter was calendared for argument in the Supreme Court on 22 December 2021 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jane R. Thompson for petitioner-appellee New Hanover County Department of Social Services.

Sophie Goodman, for appellee Guardian ad Litem.

Christopher M. Watford for respondent-appellant father.

MORGAN, Justice.

¶ 1 Respondent-father appeals from a trial court's order terminating his parental rights to J.R.F. (Ronnie[1]), a minor child born in February 2014. Respondent-father challenges the two grounds for termination found by the trial court, as well as the trial court's conclusion that termination of respondent-father's parental rights was in Ronnie's best interests. We conclude that at least one of the grounds found by the trial court for the termination of respondent-father's parental rights was supported by clear, cogent, and convincing evidence. We further conclude that the trial court did not abuse its discretion in deciding that Ronnie's best interests would be served by the termination of respondent-father's parental rights. Accordingly, we affirm the order of the trial court entered on 16 November 2020 which terminated the parental rights of respondent-father.

I. Factual Background and Procedural History

¶ 2 Petitioner New Hanover County Department of Social Services (DSS) began working with Ronnie's family in May 2018[2] by addressing his parents' issues with substance abuse, domestic violence, mental health, parenting, and housing stability. These issues continued without improvement despite DSS's involvement, prompting DSS to file a juvenile petition on 12 October 2018 which alleged that Ronnie was a

1. We use a pseudonym to protect the juvenile's identity and for ease of reading.

2. Although the family lives in Brunswick County, New Hanover County DSS provided services to them due to a conflict of interest on the part of Brunswick County DSS.

neglected juvenile. The petition averred that respondent-father had violated multiple safety plans and displayed a deficit of basic parenting skills. The petition also alleged that respondent-father tested positive for cocaine and methamphetamines, continued to engage in mutual domestic violence incidents with Ronnie's mother, and suffered from untreated bipolar disorder. At the time that the petition was filed, Ronnie was living with his mother and half-siblings on a boat, which DSS described as "cluttered and unsafe for children." Ronnie had not received his recommended vaccinations since 2016, which prevented him from being placed in daycare or preschool. Instead, he was left unattended in the boatyard garage, where he had "access to multiple dangerous chemicals and tools" while his mother worked. The trial court awarded nonsecure custody to DSS on the same day that the agency filed the neglect petition.

¶ 3 The petition came on for hearing on 28 November 2018 during which the parents, represented by counsel, stipulated to the facts asserted by DSS in the agency's neglect petition. Based on these stipulations, the trial court adjudicated Ronnie as a neglected juvenile by way of an order entered on 27 December 2018. In the dispositional portion of its order, the trial court ordered respondent-father to: (1) comply with the terms of his Family Services Agreement; (2) complete a Comprehensive Clinical Assessment and comply with any recommendations; (3) execute a release with his service providers on behalf of DSS and Ronnie's guardian ad litem; (4) submit to random drug screens; (5) complete a domestic violence assessment and comply with any recommendations; (6) complete an anger management program; and (7) maintain stable housing and verifiable income.

¶ 4 The first permanency planning hearing occurred on 11 September 2019. In its resultant order from that hearing, the trial court made findings reflecting mixed progress on the part of respondent-father. While respondent-father participated in two Family Services Agreement meetings, participated in mental health and parenting classes, and completed an intake assessment with the Domestic Violence Offender Program, he also admitted that he had slapped Ronnie's mother and poked her with a broom, ingested Suboxone and methamphetamines, missed three drug screens, and tested positive for buprenorphine and buprenorphine metabolite after another drug screen, and that he was unemployed and living with friends. The trial court set the primary permanent plan as reunification with a secondary plan of guardianship, and directed respondent-father to begin or continue the tasks ordered in its 27 December 2018 order.

¶ 5 The next permanency planning hearing occurred on 8 January 2020, after which the trial court changed the primary plan to adoption with a secondary plan of reunification in an order entered two weeks later. In that order, the trial court found that respondent-father was not making adequate progress on his case plan within a reasonable amount of time. Respondent-father had not verified his employment and was only periodically attending therapy that was recommended pursuant to a Comprehensive Clinical Assessment during which respondent-father displayed a lack of candor. Although respondent-father had obtained negative results on several drug screens since September of 2019, he had refused two drug screens in October and November 2019 and had admitted on 22 November 2019 to using illicit substances. Respondent-father had obtained independent housing, but the house was in need of repairs and was unsafe for children.

¶ 6 On 4 February 2020, DSS filed a petition to terminate respondent-father's parental rights to Ronnie, asserting two grounds for termination: (1) respondent-father had neglected Ronnie and there was a substantial likelihood of repetition of neglect if Ronnie was returned to respondent-father's custody pursuant to N.C.G.S. § 7B-1111(a)(1); and (2) respondent-father had willfully left Ronnie in a placement outside the home for more than twelve months without making reasonable progress to correct the conditions leading to the child's removal pursuant to N.C.G.S. § 7B-1111(a)(2).

¶ 7 The termination petition was heard over the course of five separate sessions during September and October 2020 where the trial court received testimony from social workers, treatment providers, character witnesses, and respondent-father himself. On 16 November 2020, the trial court entered an order terminating the parental rights of respondent-father. The trial court concluded that both grounds for termination alleged by DSS existed and that termination of respondent-father's parental rights was in Ronnie's best interests. Respondent-father appeals the trial court's order terminating his parental rights to this Court.[3] N.C.G.S. § 7B-1001(a1) (2019) (*repealed by* S.L. 2021-18, § 2 (eff. 1 July 2021)).

II. Standard of Review

¶ 8 North Carolina trial courts employ a two-step process to adjudicate and dispose of actions filed to terminate the parental rights of a respondent-parent. First, once a petition has been filed to terminate the parental rights of a respondent-parent,

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3. The trial court's order also terminated the parental rights of Ronnie's mother and any potential unknown father. Only respondent-father appealed from that order.

> a trial court conducts a hearing to adjudicate the existence or nonexistence of any grounds alleged in the petition as set forth under N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e) (2019). Then, following an adjudication that at least one ground exists to terminate the parental rights of a respondent-parent, the trial court will determine whether terminating the parental rights of the respondent-parent is in the child's best interests. N.C.G.S. § 7B-1110(a) [(2019)].

In re A.M., 377 N.C. 220, 2021-NCSC-42, ¶ 13. In reviewing a trial court's actions at the adjudicatory stage, this Court must "determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law" that one or more grounds for termination exist. *In re E.H.P.*, 372 N.C. 388, 392 (2019). If clear, cogent, and convincing evidence supports a trial court's findings which support its determination as to the existence of a particular ground for termination of a respondent's parental rights, the resulting adjudication of the ground for termination will be affirmed. *Id.* Unchallenged findings are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 9 In our consideration of the dispositional stage, we review the trial court's assessment of a child's best interests for an abuse of discretion. The court's determination is subject to reversal only if it is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

III. Adjudication

¶ 10 **[1]** Respondent-father first challenges the two grounds for termination which were found to exist by the trial court. We begin by examining whether the trial court erred in deciding that respondent-father's rights were subject to termination based on neglect by evaluating whether that conclusion was supported by findings of fact based on clear, cogent, and convincing evidence as reflected in the trial court's order.

¶ 11 The North Carolina General Statutes provide that a respondent-parent's rights to a child may be terminated if the respondent-parent neglects the child such that the child meets the statutory definition of a "neglected juvenile." N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile, in relevant part, is one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . .

or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.

In re R.L.D., 375 N.C. 838, 841 (2020) (extraneity omitted). "[E]vidence of neglect by a parent prior to losing custody of a child — including an adjudication of such neglect — is admissible in subsequent proceedings to terminate parental rights," but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715 (1984). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *Id.*

¶ 12 In this case, respondent-father does not dispute the trial court's previous adjudication that Ronnie was a neglected juvenile, and instead focuses his challenge on the trial court's determination that "[r]epetition of neglect is highly likely given Respondent-[father's] lack of stability, unaddressed substance abuse issues and domestic violence issues." We note that respondent-father does not challenge any of the trial court's other findings of fact, thus rendering those unchallenged findings binding on appeal. *In re T.N.H.*, 372 N.C. at 407. We utilize these unchallenged findings to examine each of the three issues identified by the trial court as the basis for its finding that respondent-father's repetition of neglect was highly likely.

A. Lack of Stability

¶ 13 As respondent-father correctly notes, the trial court found that he "has maintained employment throughout the Department's case," and therefore, he met his case plan's goal of obtaining stable employment. However, he was unsuccessful in obtaining stable housing suitable for habitation for Ronnie, which was also a component of respondent-father's case plan. The trial court's unchallenged findings of fact reflect that respondent-father was incarcerated from 26 June

2019 to 30 August 2019 because the term of probation that he was serving upon his conviction for methamphetamine possession was revoked. In the slightly over twelve months between respondent-father's release from his incarceration and the termination of parental rights hearing, respondent-father resided at Last Call Ministries before moving into a home with several safety defects which rendered the home unfit for Ronnie. Respondent-father's drug relapse caused him to move back to Last Call Ministries to live because he could no longer afford rent.

¶ 14 Respondent-father moved into a second residence beginning in August 2020. A DSS social worker visited this home on 27 August 2020 and discovered that it needed major repairs; respondent-father represented that the repairs would be finished in two weeks. When the social worker returned a month later, the home was still undergoing construction and was unsafe to serve as a residence for Ronnie. By the end of the termination of parental rights hearing, two bedrooms in the home were completely repaired and furnished, but the kitchen and living room needed additional work.

¶ 15 As the trial court's binding findings demonstrate, respondent-father moved at least four times in the year preceding the termination hearing. Moreover, respondent-father had only occupied his newest residence for a few months by the time that the termination of parental rights hearing sessions had ended, and the residence still required additional repairs. These findings, based on testimonial and other trial and record evidence, support the trial court's determination that respondent-father lacked sufficient stability in his life, which in turn supports the trial court's conclusion that there was a substantial likelihood of repetition of neglect.

B. Substance Abuse

¶ 16 Respondent-father contends that his substance abuse issues were improperly characterized as "unaddressed" in light of the trial court's findings that he had negative urine and hair follicle drug screens on 18 August 2020, that he had completed an intake with treatment provider RHA[4] in August 2020, and that he had been meeting once a week with RHA's "Community Support Team."

¶ 17 While respondent-father's references to the transcript citations and the trial court's order correctly denote a degree of progress concerning

4. The record does not show the full name of the treatment provider. References to the treatment provider are only by the letters "RHA".

his substance abuse issues as of a month before the termination of parental rights hearing began, respondent-father's argument conveniently ignores the trial court's abundant findings regarding his substance abuse history throughout the case. Respondent-father tested positive for controlled substances on at least six separate dates after Ronnie entered DSS custody, including a urine test that was positive for buprenorphine and a positive hair follicle test for amphetamines and methamphetamines on 25 June 2019; four positive drug screens for methamphetamines on 15 January, 27 January, 11 February, and 14 February 2020; and a hair follicle test that was positive for amphetamines and cocaine on 21 April 2020. In addition, respondent-father refused to take a hair follicle test on 22 November 2019 because he knew that it would be positive, and he refused to submit to additional hair follicle tests in October of 2019 and February of 2020.

¶ 18 In the early stages of this case, it was recommended that respondent-father attend intensive outpatient therapy; however, he failed to participate in such therapy until 24 February 2020. Upon doing so, respondent-father did not complete this therapy, attending only four of thirty-six required sessions in February and March 2020. The trial court found that, when respondent-father completed his intake with RHA in August 2020, he "underreported his substance abuse history" and was not interested in RHA's intensive outpatient therapy program because it was only offered virtually.

¶ 19 In light of these findings of fact which respondent-father has chosen to overlook in recalling the pertinent findings on this issue, this Court determines that the trial court did not err in characterizing respondent-father's substance abuse issues as "unaddressed." Respondent-father fell substantially short of completing an intensive outpatient therapy program as recommended and continued to have positive drug tests as the case progressed. While respondent-father had begun to make progress in the month preceding the start of the termination hearing in this case, such progress did not adequately establish that his ongoing and unresolved substance abuse issues would not contribute to Ronnie's future neglect if the child was returned to respondent-father's care. Instead, the trial court's findings establish a pattern of respondent-father's drug relapses and distinct lack of candor when engaging with substance abuse treatment providers, which further buttressed the trial court's determination that neglect would likely be repeated because of "unaddressed" substance abuse issues on the part of respondent-father.

C. Domestic Violence

¶ 20 Respondent-father also asserts that he satisfactorily resolved his issues with domestic violence by severing his relationship with Ronnie's mother, which he testified was akin "to having a millstone removed from around his neck." Nonetheless, as with substance abuse, respondent-father did not begin to make progress on his domestic violence issues until shortly before the start of the termination of parental rights hearing.

¶ 21 The trial court's unchallenged findings reflect that domestic violence occurred between respondent-father and Ronnie's mother throughout this case: On 3 December 2018, respondent-father broke the windows in the mother's vehicle and bruises were observed on the mother's legs; on 23 July 2019, law enforcement was called after the parents engaged in an altercation during which respondent-father slapped Ronnie's mother and poked her with a broom; respondent-father was charged with the offense of assault on a female on 29 June 2020 after he threw a flower pot at Ronnie's mother when she showered him with wasp spray;[5] and in July 2020, Ronnie's mother reported to law enforcement that respondent-father had "beat her up at work."

¶ 22 Respondent-father twice enrolled in the Domestic Violence Offender Program. During his first attempt to complete the program, respondent-father participated in seventeen of twenty-six group sessions, but he was removed from the program in March 2020 after his fourth missed session. Respondent-father began the program for a second time in July 2020, and his participation was described as "serious, humble, articulate, insightful and sincere." The trial court's findings establish that if respondent-father was able to continue this progress in the program, he would finish it in January 2021.

¶ 23 The trial court's findings suggest that respondent-father was showing improvement in addressing his domestic violence issues. However, this progress only began a maximum of two months before the termination hearing—a pattern similar to respondent-father's delayed response in beginning to promisingly address his substance abuse issues—and did not constitute a time period sufficient to compel the trial court to find that respondent-father had made adequate sustained progress so as to preclude the possibility that domestic violence would contribute to Ronnie's future neglect.

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5. The charges stemming from this incident were ultimately dismissed.

D. Likelihood of Repetition of Neglect

¶ 24 The trial court's findings, taken together, reflect that although respondent-father made some progress with respect to stability, substance abuse, and domestic violence issues, any measurable improvement did not begin until July and August of 2020, merely a month or two before the start of the termination of parental rights hearing. Respondent-father did not begin to make meaningful progress toward the accomplishment of his case plan for almost two years while Ronnie was in DSS custody. By the time that the termination hearing began, respondent-father's progress had not been maintained for a sufficient period of time in order to show that he had ameliorated the conditions that led to Ronnie's initial neglect adjudication. Based on the evidence before it, the trial court did not err when it determined that "[r]epetition of neglect [was] highly likely" if Ronnie was returned to respondent-father's care. *See In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶23 (upholding the trial court's determination "that respondent-mother's last-minute progress was insufficient to outweigh her long-standing history of alcohol and substance abuse and domestic violence, as well as the impact these behaviors had on [her children]"). Accordingly, the trial court properly concluded that respondent-father's parental rights were subject to termination on the ground of neglect.

¶ 25 Because this Court has determined that one ground for termination of parental rights is supported here by findings based on clear, cogent, and convincing evidence, it is unnecessary to address respondent-father's arguments as to the remaining termination ground which was found to exist by the trial court under N.C.G.S. § 7B-1111(a)(2). *See In re A.R.A.*, 373 N.C. 190, 194 (2019) (noting that "a finding of only one ground is necessary to support a termination of parental rights.").

IV. Best Interests

¶ 26 **[2]** Respondent-father argues that the trial court abused its discretion when it determined that termination of his parental rights was in Ronnie's best interests. Under N.C.G.S. § 7B-1110, a court making a best interests determination

> shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights

> will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a) (2019). The court's dispositional findings are binding on appeal if supported by any evidence in the record. *E.g.*, *In re K.N.K.*, 374 N.C. 50, 57 (2020).

¶ 27 In this case, the trial court made the following finding of fact detailing its consideration of the best interests factors:

> 140. That [Ronnie] is six years old. There is a strong likelihood that he will be adopted. He has two prospective adoptive placements. He has no known medical conditions or emotional disorders that would hinder adoption. He has had no mental health or behavioral hospitalizations, and his placement has never been disrupted due to his behaviors. [Ronnie's mom] and [respondent-father] have a bond with [Ronnie], however, it has diminished over the last two years. Respondent-Parents have only seen [Ronnie] once per week for two hours for the last two years. It is not a true quality parental relationship. [Ronnie] desperately needs permanence. [Ronnie]'s need for permanence outweighs the parental bond that exists. . . . Termination of parental rights will aid in the accomplishment of the permanent plan of adoption for the Juvenile. There are no other known barriers to adoption.

Respondent-father challenges two aspects of this finding: the trial court's description of respondent-father's bond with Ronnie and the likelihood that Ronnie will be adopted.

A. Respondent-father's Bond with Ronnie

¶ 28 The trial court found that respondent-father had a bond with Ronnie, but that it had diminished over the course of the two years that Ronnie was in DSS custody. Respondent-father asserts that there was no evidence to support the trial court's determination that the bond between

respondent-father and Ronnie had diminished. Respondent-father notes that at disposition, the DSS social worker testified that Ronnie "has a very strong bond" and "a very close bond" with his parents.

¶ 29 While the social worker testified that the parental bond was "very strong" and very close," all of the other evidence during the hearing's best interests phase established a weaker connection between respondent-father and the juvenile. Ronnie's guardian ad litem testified that she merely observed a bond between Ronnie and respondent-father; she did not characterize the strength of the bond or represent that it was particularly strong. The DSS social worker also testified that Ronnie had recently told her that, if necessary, he was ready to "grow up in foster care, get married, have kids. . . . [A]nd he shared that foster care's kind of like having his own family." The trial court also made an unchallenged finding that Ronnie and respondent-father only had contact "once per week for two hours for the last two years." The record shows that these visits were sometimes contentious. At a visit in March 2020, Ronnie threw a toy across the room at respondent-father, tried to break a watch that respondent-father had given him, and crawled under the couch and would not engage with respondent-father. The guardian ad litem testified that, at a visit conducted shortly before the termination hearing concluded, she witnessed Ronnie biting respondent-father. It was within the trial court's purview as the trier of fact to infer from the aforementioned competent evidence and the findings of fact, in tandem with its assessment of the entirety of the evidence, that Ronnie's bond with respondent-father had diminished over the two years that Ronnie was in DSS custody. *See In re D.L.W.*, 368 N.C. 835, 843, (2016) (As the trier of fact, the district court determines "the reasonable inferences to be drawn" from the evidence.), *limited by In re R.L.D.*, 375 N.C. at 841 n. 3.

¶ 30 We additionally observe that in the remainder of the trial court's findings, the court acknowledged both that there was an existing parent-child bond and that "[Ronnie]'s need for permanence outweighs the parental bond that exists." As this Court has previously explained, even a strong "bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors." *In re Z.L.W.*, 372 N.C. 432, 437 (2019). The trial court, in its discretion, clearly believed that the statutory factor relating to the bond between the juvenile and the parent was outweighed in this case by other statutory factors delineated in N.C.G.S. § 7B-1110, and we discern no abuse of discretion in the trial court's determination.

B. Ronnie's Likelihood of Adoption

¶ 31 Respondent-father contends that the trial court's finding that Ronnie has a strong likelihood of adoption is unsupported by competent evidence, because the juvenile's current foster care placement was unwilling to adopt Ronnie, the juvenile's first prospective adoptive placement had met Ronnie on only two occasions, and the juvenile's second prospective adoptive placement was only willing to consider adoption if the first placement did not remain intact.

¶ 32 None of the concerns which respondent-father identifies regarding Ronnie's prospective adoptive placements affect the viability of Ronnie's adoptability. As the trial court also found, Ronnie "has no known medical conditions or emotional disorders that would hinder adoption. He has had no mental health or behavioral hospitalizations and his placement has never been disrupted due to his behaviors," and "[t]here are no other known barriers to adoption." These additional findings portend that Ronnie has a high likelihood of adoption, even if he had no potential adoptive placement at the time of the termination proceedings. *See In re M.A.*, 374 N.C. 865, 876 (2020) (upholding the trial court's findings that the children's likelihood of adoption was very high, even though no prospective adoptive placement had been identified, based on other evidence such as testimony that "there were no barriers to the children's adoption"). The record indicates that two of Ronnie's placements have expressly indicated a willingness to consider adopting him. Combining this fact with the trial court's findings regarding the lack of barriers to Ronnie's adoption, respondent-father's challenge to the trial court's finding addressing Ronnie's adoptability is unpersuasive.

C. Best Interests Determination

¶ 33 Finally, respondent-father contends that the trial court abused its discretion in concluding that termination of respondent-father's parental rights was in Ronnie's best interests. Respondent-father's argument is premised on his observation that "it appears that the trial court made such a momentous decision based on a misunderstanding of Ronnie's true circumstances."

¶ 34 This final contention is without merit. The trial court's termination order includes findings of fact regarding each of the dispositional factors in N.C.G.S. § 7B-1110, and these findings were drawn from a reasonable interpretation of the evidence before the trial court. The dispositional details contained in Finding of Fact 140 are either unchallenged and thus binding on respondent-father, *In re T.N.H.*, 372 N.C. at 407, or are supported by competent evidence as previously explained. "And this is so

notwithstanding evidence to the contrary." *State v. Johnson*, 278 N.C. 126, 138 (1971) (citations omitted). The trial court's conclusion that termination of respondent-father's parental rights was in Ronnie's best interests was the product of the trial court's application of the statutory factors identified in N.C.G.S. § 7B-1110, and respondent-father has failed to show that this conclusion is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. at 107 (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

V. Conclusion

¶ 35 The trial court's unchallenged findings of fact support its determination that respondent-father's parental rights were subject to termination based on the ground of neglect. Furthermore, the trial court did not abuse its discretion in concluding that, after considering the competent evidence in the record, termination of the parental rights of respondent-father was in Ronnie's best interests. We therefore affirm the 16 November 2020 order of the trial court terminating respondent-father's parental rights.

AFFIRMED.

IN THE MATTER OF K.M.S.

No. 302A21

Filed 11 February 2022

Termination of Parental Rights—no-merit brief—failure to legitimate

In a private termination action, the termination of a father's parental rights to his daughter on the ground of failure to legitimate was affirmed where his counsel filed a no-merit brief—identifying two potential issues for review, neither of which held merit—and the termination order was supported by clear, cogent, and convincing evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 27 May 2021 by Judge John K. Greenlee in District Court, Gaston County. This matter was calendared for argument in the Supreme Court on 22 December 2021 but determined on the record and brief without

oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief filed for petitioner-appellee mother.

No brief filed for appellee Guardian ad Litem.

W. Michael Spivey for respondent-appellant father.

NEWBY, Chief Justice.

¶ 1 Respondent-father appeals from the trial court's order terminating his parental rights to K.M.S. (Alice).[1] Counsel for respondent filed a no-merit brief under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude that the two issues identified by counsel in respondent's brief as arguably supporting the appeal are meritless, and we therefore affirm the trial court's order.

¶ 2 This case arises from a private termination action filed by petitioner, Alice's mother. Petitioner and respondent, Alice's father, met when petitioner was a senior in high school. Immediately after finishing high school, petitioner and respondent moved into an apartment, where they lived together for approximately nine months. Three months after she moved out of the apartment and about six weeks after she and respondent were no longer in a relationship, petitioner learned she was pregnant. The parties never married, though petitioner told respondent about the pregnancy. Respondent was unemployed while petitioner was pregnant. Respondent was present at Alice's birth on 23 June 2013, but no father is listed on Alice's birth certificate. Alice has lived with petitioner since her birth.

¶ 3 Respondent bought diapers for Alice when she was an infant. Respondent also testified that he provided formula, which petitioner contested. Respondent also made one car payment for petitioner. By the time Alice was one year old, respondent and petitioner's relationship "totally cease[d]." A year and a half after Alice was born, petitioner obtained a Chapter 50B restraining order against respondent because "[h]e was mentally abusive" and "was constantly in a rage and upset." Around the same time, respondent allegedly "tried to sign up [to pay child support] at [the Gaston County Department of] Social Services and didn't

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

know [petitioner]'s address." Though respondent recalled speaking to a social worker there and submitting paperwork, he did not execute an affidavit acknowledging his paternity nor did petitioner ever receive child support. Respondent has not seen Alice since she was about a year and a half old. Respondent acknowledged that he never pursued legal action to legitimate Alice. Respondent did file a complaint for custody of Alice and to pay child support, but paternity has not been established in that action.[2]

¶ 4 On 19 January 2021, petitioner filed a petition alleging a ground existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(5) (failure to legitimate). Respondent filed an answer on 11 March 2021 wherein he admitted that he had neither legitimated Alice through marriage to petitioner nor "established his paternity with respect to the juvenile through N.C.G.S. § 49-14, 110-132, 130[A]-101, 130A-118, or any other judicial proceeding." At the termination hearing, petitioner submitted into evidence an affidavit from the North Carolina Department of Health and Human Services (DHHS) stating that no affidavit of paternity had been received. Petitioner also testified that she never "receive[d] any kind of letter or correspondence . . . that [respondent] had filed a petition . . . to legitimate [Alice]."

¶ 5 Based on all the evidence, the trial court found respondent did not establish paternity under any of the five prongs set forth in the statute. *See* N.C.G.S. § 7B-1111(a)(5) (2019). Thus, the trial court concluded that a ground existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111. The trial court also concluded that terminating respondent's parental rights was in Alice's best interests. *See id.* § 7B-1110 (2019). Accordingly, the trial court terminated respondent's parental rights.

¶ 6 Counsel for respondent filed a no-merit brief on his client's behalf under Rule 3.1(e) of the Rules of Appellate Procedure, identifying two issues that could arguably support an appeal but also stating why those issues lacked merit. First, counsel noted that respondent objected

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2. In June of 2020, respondent's first attorney filed a complaint for custody. Shortly thereafter, however, the attorney discovered she had a conflict of interest and withdrew from the case. Respondent hired a second attorney, who filed a new complaint for custody on 3 December 2020. The trial court found that respondent "never took any action to prosecute his [c]omplaint in the first filed custody action." Moreover, the trial court found "that no hearing was ever held to make any substantive findings of fact or judicial decree relative to [respondent's] paternity of the juvenile in the second filed case." The guardian ad litem's report filed with the trial court states the second action "is stayed pending the outcome of the case at bar."

at the hearing to admission of the certified reply of DHHS to petitioner stating that no affidavit of paternity had been received. Counsel conceded, however, that the Juvenile Code requires that DHHS's "certified reply shall be submitted to and considered by the court." N.C.G.S. § 7B-1111(a)(5)(a). Because respondent did not argue at the trial court that the document was not DHHS's certified reply to petitioner's inquiry regarding whether an affidavit had been filed, counsel concluded this issue lacked merit.

¶ 7 Counsel next discussed whether the trial court's findings of fact were supported by clear, cogent, and convincing evidence and supported the conclusions of law. Counsel asserted the trial court's findings of fact "are supported by the testimony of both [petitioner and respondent]." Moreover, counsel noted that "[t]he trial court made findings that encompass all of the statutory factors" required to determine whether termination of respondent's parental rights was in Alice's best interests. Thus, counsel concluded that this second issue also lacked merit. Finally, counsel advised respondent of his right to file pro se written arguments on his own behalf and provided him the documents necessary to do so. Respondent has not submitted written arguments to this Court.

¶ 8 Rule 3.1(e) of the Rules of Appellate Procedure "plainly contemplates appellate review of the issues contained in a no-merit brief." *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). When a no-merit brief is filed pursuant to Rule 3.1(e), it "will, in fact, be considered by the appellate court and . . . an independent review will be conducted of the issues identified therein." *Id.* at 402, 831 S.E.2d at 345. This Court conducts a "careful review of the issues identified in the no-merit brief in light of our consideration of the entire record." *Id.* at 403, 831 S.E.2d at 345. Having reviewed the two issues identified by counsel in the no-merit brief, we are satisfied that the trial court's order terminating respondent's parental rights is supported by clear, cogent, and convincing evidence and is based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN RE K.S.

[380 N.C. 60, 2022-NCSC-7]

IN THE MATTER OF K.S.

No. 60PA21

Filed 11 February 2022

Child Abuse, Dependency, and Neglect—neglect—dismissal of claim—standard of review on appeal—de novo

In a neglect case, where the trial court's findings—which were based on the parties' stipulations—were unchallenged and therefore binding on appeal, the Court of Appeals erred in affirming the trial court's dismissal of the neglect claim because it failed to conduct a proper de novo review of the trial court's decision. Rather than determining whether the unchallenged findings of fact supported a legal conclusion of neglect, the Court of Appeals' use of speculative language demonstrated an improper deference to the trial court's conclusion where it stated that another judge "may have" adjudicated the juvenile as neglected, that the findings "might" support a neglect adjudication but did not "compel" one, and that it could not "say as a matter of law" that the trial court erred by dismissing the claim. The matter was remanded to the Court of Appeals to conduct a proper de novo review.

On discretionary review pursuant to N.C.G.S. § 7A-31 from a unanimous, unpublished decision of the Court of Appeals, No. COA20-271, 2020 WL 7974420 (N.C. Ct. App. Dec. 31, 2020) (unpublished), affirming in part, reversing in part, and remanding an order entered on 14 January 2020 by Judge Luis J. Olivera in District Court, Cumberland County. Heard in the Supreme Court on 8 November 2021.

Patrick A. Kuchyt for petitioner-appellant Cumberland County Department of Social Services; and Michelle FormyDuval Lynch for appellant Guardian ad Litem.

J. Thomas Diepenbrock for respondent-appellee mother.

BERGER, Justice.

¶ 1 When reviewing a lower court's order, the appellate court must be ever cognizant of the proper standard of review. Because we conclude the Court of Appeals failed to apply the proper standard of review, we vacate the decision below and remand to the Court of Appeals with instructions to conduct a de novo review.

I. Factual and Procedural Background

¶ 2 On May 26, 2019, Kelly[1] was born to respondent-mother and father. The Cumberland County Department of Social Services (DSS) filed a juvenile petition three days later alleging Kelly to be a neglected and dependent juvenile. On October 4, 2019, DSS filed an amended juvenile petition with additional factual allegations. Following a judicial settlement conference, DSS, respondent-mother, and the guardian ad litem executed a "Stipulation Agreement and Written Agreement for Consent Adjudication Order Per 7B-801(b1)" (Stipulation Agreement).

¶ 3 As part of the Stipulation Agreement, the parties agreed that the following factual allegations set forth in the amended petition were true and accurate at the time the amended petition was filed:

> 1. [DSS] received a Child Protective Services (CPS) referral on 05/27/2019 concerning the safety of [Kelly].
>
> 2. [Respondent-mother] named [father] as [Kelly's] biological father. [Father] signed the Affidavit of Paternity as to [Kelly] and his name appears on [Kelly's] birth certificate.
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> 3. [Respondent-mother] and [father] have two older children who are currently in the custody of [DSS] . . . . Furthermore, [respondent-mother and father] have an older child that was placed in the legal and physical custody of a relative . . . .
>
> 4. The oldest child . . . was adjudicated abused and neglected on 2/1/16 based on [father] physically abusing the child and the child having sustained severe injuries. The child was approximately three months old when the abuse occurred. [Father] pled guilty and was convicted of felony child abuse. . . .
>
> 5. On 1/18/17, the juvenile [Kori] . . . , a sibling of [Kelly] and a child of [respondent-mother and father] was adjudicated dependent, and on 5/10/18, the juvenile [Kori] . . . , a sibling of [Kelly] and another child of [respondent-mother and father] was adjudicated neglected. These

1. Pseudonyms are used in this opinion to protect the juveniles' identities.

adjudications were based on the adjudication of the older child . . . and [respondent-mother and father] had not alleviated the conditions for which that child was removed from their care. At the time of said adjudications, [respondent-mother and father] continued to be involved in a relationship with each other. . . .

. . . .

10. At the time of the filing of the original petition, [respondent-mother and father] stated they did not have essential necessities for [Kelly].

. . . .

12. [Respondent-mother and father] admitted to Ms. Frances Holstein [(Kelly's kinship placement)] in June 2019 that on June 15, 2019, they were involved in a verbal and physical altercation with each other in the presence of the juvenile [April] . . . when [respondent-mother] drove [father] and the juvenile [April] in a vehicle. Based on said admissions, [respondent-mother] hit [father] and [father] hit [respondent-mother]. In addition, [father] physically choked [respondent-mother] after grabbing her. During these admissions to Ms. Frances Holstein, [respondent-mother] admitted that she knew [father] was not allowed around [April] when [respondent-mother] allowed [father] into the vehicle with [April] . . ..

13. [Father] further admitted to Ms. Frances Holstein that the June 15, 2019 altercation occurred as a result of [father] telling the juvenile [April] that he would bite [April] back after [April] bit him, [respondent-mother] taking [father's] statement seriously, [respondent-mother] hitting [father], [respondent-mother] beginning to drive like a maniac with [April] in the vehicle, and [father] trying to grab [respondent-mother].

14. Pursuant to the last order of the [trial c]ourt in [the sibling's juvenile case], [father] was not allowed any contact with the juvenile [April] . . .

> and that remained the order of the [trial c]ourt at the time of the June 15, 2019 incident.
>
> 15. [Respondent-mother] admitted to the [ ] social worker that an altercation occurred in June 2019 between her and [father] when [respondent-mother] picked [father] up after [father] demanded a car ride.

¶ 4 In addition to the facts set forth above, the parties stipulated that the allegations that led to removal of the juvenile were true and accurate and existed at the time of the filing of the amended petition. Among those facts were the current and prior CPS history; father's conviction for felony child abuse of Kelly's sibling, April; unstable housing; and domestic violence issues between respondent-mother and father. Respondent-mother reserved her right to argue before the trial court whether the stipulated facts were sufficient to support an adjudication of neglect.

¶ 5 Based on these admissions by respondent-mother, in addition to the testimony of a social worker, the trial court adopted the above factual allegations as findings of fact. The trial court found that the evidence presented was sufficient to support an adjudication of dependency. Further, and without explanation, the trial court dismissed the claim of neglect. Respondent-mother appealed the adjudication of dependency, and DSS cross-appealed the trial court's dismissal of the claim of neglect.[2]

¶ 6 In affirming the trial court's dismissal of the claim of neglect, the Court of Appeals noted that "the parties do not challenge the evidentiary underpinnings of these findings of fact, but rather the legal import of these findings." *In re K.S.*, No. COA20-271, 2020 WL 7974420, at *5 (N.C. Ct. App. Dec. 31, 2020) (unpublished). Regarding the prior adjudications of Kelly's siblings, the Court of Appeals stated that the weight of such "is left to the discretion of the trial court." *In re K.S.*, 2020 WL 7974420, at *6. Concerning the verbal and physical altercation between respondent-mother and father and the violation of a court order, the Court of Appeals discussed how such "did not, as a matter of law, *compel* a conclusion that Kelly was neglected," because the altercation, standing alone, was not dispositive on the issue of neglect. *Id.*

¶ 7 The Court of Appeals concluded the trial court did not err in dismissing the neglect claim. In doing so, the Court of Appeals stated that

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2. This Court allowed discretionary review only on issues related to neglect. Thus, the issue of dependency is not before us.

"[w]hile another judge may have adjudicated Kelly as neglected based on the stipulated facts of the instant case," *id.*, it was not permitted to reach such a conclusion as "appellate courts may not reweigh the underlying evidence presented at trial[,]" *id.* (quoting *In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019)). The Court of Appeals went on to conclude "that the findings *might* support a conclusion of neglect; nevertheless, the findings do not *compel* such a conclusion, given the discretion we afford the trial courts in making such a determination." *In re K.S.*, 2020 WL 7974420, at *6. "In other words," the Court of Appeals stated, "we cannot say *as a matter of law* that the trial court erred by failing to conclude that Kelly was a neglected juvenile." *Id.*

II. Analysis

¶ 8 An appellate court reviews a trial court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984).[3] "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Conclusions of law made by the trial court are reviewable de novo on appeal. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019). An appeal de novo is one "in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Appeal De Novo*, Black's Law Dictionary (11th ed. 2019). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re T.M.L.*, 377 N.C. 369, 2021-NCSC-55, ¶ 15 (alteration in original) (quoting *In re C.V.D.C.*, 374 N.C. 525, 530, 843 S.E.2d 202, 205 (2020)).

¶ 9 A neglected juvenile is one "whose parent, guardian, custodian, or caretaker . . . [d]oes not provide proper care, supervision, or discipline[;] . . . [or who c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021). Traditionally, "there [must] be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or

3. We recognize that *In re Montgomery* and *In re C.B.C.* reviewed orders terminating parental rights pursuant to what is currently N.C.G.S. § 7B-1109. Although this case concerns an adjudication order entered pursuant to N.C.G.S. § 7B-800, *et seq.*, both determinations rely upon and relate to the definitions found in the current version of N.C.G.S. § 7B-101, and therefore, we employ the same standard of review.

discipline' in order to adjudicate a juvenile neglected." *In re E.P.*, 183 N.C. App. 301, 307, 645 S.E.2d 772, 775 (quoting *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997)), *aff'd per curiam*, 362 N.C. 82, 653 S.E.2d 143 (2007). "In neglect cases involving newborns, 'the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.' " *In re J.A.M.*, 372 N.C. at 9, 822 S.E.2d at 698–99 (quoting *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999)).

¶ 10 Here, the trial court's findings of fact are largely based on facts agreed upon by the parties in the Stipulation Agreement and, thus, are supported by sufficient evidence. Further, as neither party challenges any of those findings, they are presumed to be supported by competent evidence and are binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. With the facts in this case being supported by competent evidence and binding, the Court of Appeals was presented with the task of determining whether those facts supported the conclusion of law that Kelly was a neglected juvenile. Stated differently, the Court of Appeals was to decide whether the facts contained in the Stipulation Agreement supported the conclusion that respondent-mother did not provide proper care, supervision, or discipline; or that there is a substantial risk of future abuse or neglect. N.C.G.S. § 7B-101(15).

¶ 11 De novo review of an adjudication of neglect or dismissal of a claim of neglect does not allow a reweighing of the evidence. Nor does it require deference to the trial court. The Court of Appeals did not decide whether, from its review, the findings of fact support the conclusion of law that Kelly is a neglected juvenile pursuant to N.C.G.S. § 7B-101(15). Rather, the Court of Appeals stated that "another judge may have adjudicated Kelly as neglected based on the stipulated facts"; "the findings *might* support a conclusion of neglect"; and it could not "say *as a matter of law* that the trial court erred by failing to conclude that Kelly was a neglected juvenile." *In re K.S.*, 2020 WL 7974420, at *6. Such speculation is not appropriate under the applicable standard of review. Instead, under a de novo review, the Court of Appeals was tasked with determining whether or not, from its review, the findings of fact supported a conclusion of neglect.

¶ 12 The Court of Appeals failed to conduct a proper de novo review on the issue of neglect. It did not discuss whether the findings of fact derived from the Stipulation Agreement were sufficient to conclude as a matter of law that Kelly should be adjudicated a neglected juvenile. Rather, the Court of Appeals' analysis showed improper deference to

the trial court's conclusion of law. As such, we remand to the Court of Appeals with instructions to conduct a de novo review consistent with this opinion. By virtue of the result here, we need not address the remaining issues.

III. Conclusion

¶ 13 For the foregoing reasons, we vacate the decision of the Court of Appeals and remand with instructions to apply the proper standard of review.

VACATED AND REMANDED.

LUON NAY, EMPLOYEE
v.
CORNERSTONE STAFFING SOLUTIONS, EMPLOYER, AND STARNET INSURANCE COMPANY, CARRIER, (KEY RISK MANAGEMENT SERVICES, ADMINISTRATOR)

No. 409PA20

Filed 11 February 2022

Workers' Compensation—average weekly wages—calculation method—fair and just results—standards of review

In a workers' compensation case, the Supreme Court held that whether the Industrial Commission selected the correct method under N.C.G.S. § 97-2(5) for calculating an injured employee's average weekly wages is a question of law subject to de novo review on appeal, while the issue of whether a particular method produces "fair and just" results is a question of fact reviewable under the "any competent evidence" standard—unless the Commission's determination on that issue lacked evidentiary support or was based upon a misapplication of the legal standard presented in section 97-2(5) (whether the result most nearly approximates the amount the employee would be earning but for the injury), in which case the Commission's erroneous statutory construction is reviewable de novo. Thus, where the Commission determined plaintiff's average weekly wages based on an apparent misapplication of the law, the Court remanded the case for further proceedings, including the entry of a new order correctly applying the law.

Justice BARRINGER dissenting.

Chief Justice NEWBY joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 273 N.C. App. 135 (2020), reversing and remanding an opinion and award entered on 22 February 2019 by the North Carolina Industrial Commission. Heard in the Supreme Court on 4 October 2021.

Law Offices of Kathleen G. Sumner by Kathleen G. Sumner; David P. Stewart; and Jay Gervasi, P.A., by Jay A. Gervasi, for plaintiff-appellee.

Brewer Defense Group by Joy H. Brewer and Ginny P. Lanier for defendant-appellants.

Dickie McCamey & Chilcote, P.C., by Michael W. Ballance; Teague Campbell Dennis & Gorham, L.L.C., by Tracey L. Jones and Bruce Hamilton, for the North Carolina Association of Defense Attorneys and North Carolina Association of Self-Insurers, amici curiae.

Lennon, Camak & Bertics, PLLC, by Michael W. Bertics; Poisson Poisson Bower, PLLC, by E. Stewart Poisson, for the North Carolina Advocates for Justice, amicus curiae.

ERVIN, Justice.

¶ 1 This case involves the issue of whether the Commission's decision concerning the method that should be utilized to calculate an injured worker's average weekly wages pursuant to N.C.G.S. § 97-2(5) and the Commission's determination concerning the extent to which the results obtained by a particular method for determining the injured employee's average weekly wages are "fair and just to both parties" so as to "most nearly approximate the amount which the injured employee would be earning were it not for the injury" are questions of law or questions of fact. After careful consideration of the relevant facts in light of the applicable law, we modify and affirm the Court of Appeals' decision and remand this case to the Commission for further proceedings not inconsistent with this opinion, including the entry of a new order containing appropriate findings of fact and conclusions of law.

I. Factual and Procedural History

A. Substantive Factual Background

¶ 2 On 25 August 2015, plaintiff Luon Nay began working for defendant Cornerstone Staffing Solutions, a staffing agency owned and operated by Thomas Chandler. In the course of its business, Cornerstone places people seeking employment with companies in need of workers in the Charlotte-Mecklenburg and Rock Hill-York County regions. According to Mr. Chandler, Cornerstone often places workers in jobs with logistics and manufacturing companies that pay between ten and thirteen dollars per hour, with its employees being primarily people who are either unemployed and seeking full-time employment or are, while currently employed, seeking a better or higher-paying job. Mr. Chandler described many of the entities with whom Cornerstone places workers as "medium-size or small companies" that lack "broad Human Resources department[s]," with these entities having elected to use Cornerstone to hire their workers and take care of employment-related costs such as those involved in recruiting potential employees, performing drug tests and background checks, and the handling of "Medicare, Social Security, Workers' Comp," and any other expenses that are typically involved in the hiring of new workers.

¶ 3 At least ninety-five percent of the workers that Cornerstone places with other entities occupy "temp-to-perm" positions which will, hopefully, lead the entity with whom the worker has been placed to hire that worker to fill a permanent position at the end of a successful trial period. During the trial period, which typically lasts until the worker has worked for 520 hours with the entity with whom he or she has been placed, the worker is still technically employed by Cornerstone. After the worker has worked with the entity with whom he or she has been placed for at least 520 hours, the worker is typically either given full-time employment by the entity with whom Cornerstone has contracted or the assignment ends, with there being no guarantee that the worker will receive full-time employment at the conclusion of the 520-hour trial period.

¶ 4 Cornerstone placed plaintiff in a temp-to-perm position with FieldBuilders, an entity that creates and updates athletic fields and performs other landscaping tasks, with plaintiff having worked at FieldBuilders during the interval between 25 August 2015 and 7 December 2015. According to Mr. Chandler, a worker's schedule with FieldBuilders could be affected by the "[h]olidays, weather, [or] season." In the course of a typical week, plaintiff worked with FieldBuilders for eight hours a day for four to five days each week and was compensated

at the rate of eleven dollars per hour. On occasion, however, plaintiff worked as few as six hours or as many as ten hours each day.

¶ 5 On 24 November 2015, while working with FieldBuilders, plaintiff and another worker attempted to lift a heavy machine into a truck given their inability to load the machine using the truck's broken ramp. As plaintiff tried to raise the machine, he heard a noise and felt a pop on the right side of his lower back and immediately recognized that he had been injured. The lower back pain that plaintiff was experiencing gradually worsened throughout the day upon which he was injured and the day after that. Although plaintiff attempted to return to work on the following Monday, he was only able to work for about four hours before his lower back pain forced him to stop. On 1 December 2015, plaintiff sought medical treatment for his persistent back pain and was prescribed medication and physical therapy. After a treatment session on 22 December 2015, plaintiff stopped attending physical therapy due to increased lower back pain.

¶ 6 On 19 January 2016, Cornerstone filed a Form 19, which is titled "Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission," stating that plaintiff had worked with FieldBuilders for five days each week and that plaintiff had earned average weekly wages of $440.00. On 15 February 2016, Cornerstone filed Form 22, which is titled "Statement of Days Worked and Earnings of Injured Employee," reciting that plaintiff had worked for four days during the last week of August 2015, which was the first week during which he had been assigned to work with FieldBuilders; that plaintiff worked for five days each week during September 2015; that plaintiff worked for five days each week during October 2015; that plaintiff had worked for five days each week during three weeks in November 2015 and for four days during one week in November 2015; and that plaintiff had worked for three days during the first week of December 2015 and for one day during the second week of December, which was plaintiff's last day of work at FieldBuilders. Cornerstone's records indicated that plaintiff had earned a total of $5,805.25 during the sixteen weeks that he had been assigned to work at FieldBuilders.

¶ 7 On 8 March 2016, the Commission received a completed Form 18, which is titled "Notice of Accident to Employer and Claim of Employee, Representative, or Dependent," describing plaintiff's back injury. On 25 March 2016, Cornerstone filed a Form 63 with the Commission and began directing the medical care that plaintiff received and paying temporary total disability benefits to plaintiff. In June 2016, plaintiff returned to Cornerstone for the purpose of seeking another job placement

and was placed with an entity known as JMS, at which plaintiff worked for eight hours per day cleaning and polishing metal. After plaintiff had worked with JMS for three weeks, he was told that there was no more work for him at that placement and that Cornerstone had been unable to find another entity with which to place him.

B. Procedural History

¶ 8 On 21 July 2017, plaintiff filed a Form 33, which is titled "Request That Claim Be Assigned for Hearing," in which he claimed that Cornerstone had unilaterally lowered the amount of temporary total disability benefits that he had been receiving with respect to his back injury and that the parties had been unable to reach agreement with respect to the amount of benefits that plaintiff was entitled to receive. On 9 February 2018, plaintiff's claim came on for hearing before Deputy Commissioner David Mark Hullender. At the hearing, plaintiff contended that his average weekly wage was $419.20, which yielded a compensation rate of $279.48, while Cornerstone and defendant Starnet Insurance Company contended that plaintiff's average weekly wage was $111.64, which yielded a compensation rate of $74.43. The parties stipulated that Cornerstone had paid benefits to plaintiff at the rate of $258.03 per week between 1 December 2015 and 5 July 2016 and that Cornerstone had lowered plaintiff's compensation rate to $74.43 per week after that point, with this figure having been derived by dividing the $5,805.25 in total earnings that plaintiff had received while working with FieldBuilders by fifty-two weeks. In an opinion and award filed on 7 June 2018, Deputy Commissioner Hullender found that the lower weekly compensation rate for which Cornerstone had advocated was the correct one. Plaintiff noted an appeal from Deputy Commissioner Hullender's order to the Commission.

¶ 9 On 22 February 2019, the Commission filed an opinion and award finding, in pertinent part, that "[d]efendants' modification of [p]laintiff's average weekly wage and compensation rate to $111.64 and $74.43, respectively, . . . was appropriate." In making this determination, the Commission reviewed the five methods for calculating an injured employee's average weekly wages set out in N.C.G.S. § 97-2(5), which states that

> [Method 1:] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52[.]

> [Method 2: [B]ut if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.
>
> [Method 3:] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.
>
> [Method 4:] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> [Method 5:] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C.G.S. § 97-2(5) (2021). In its findings of fact, the Commission determined that the first and second methods set out in N.C.G.S. § 97-2(5) had no application to plaintiff given that he had not been employed by Cornerstone for the fifty-two week period immediately preceding his injury. In addition, in Finding of Fact 13, the Commission determined that the third method set out in N.C.G.S. § 97-2(5) was not appropriate for use in this case given that

> [u]se of the 3rd method in this claim would produce an inflated average weekly wage that is not fair to [d]efendants because [p]laintiff was employed in a

> temporary capacity with no guarantee of permanent employment, length of a particular assignment, or specific wage rate, and he was assigned to a client account whose work was seasonal. Thus, the 3rd method would not take into account that [p]laintiff was on a temporary assignment that in all likelihood would not have approached 52 weeks in duration.

After declining to use the fourth method on the grounds that "no sufficient evidence was presented of wages earned by a similarly situated employee," the Commission determined in Finding of Fact 15 that "exceptional reasons exist, and [p]laintiff"s average weekly wage should be calculated pursuant to the 5th method," so that the $5,805.25 in total wages that plaintiff had earned while working with FieldBuilders over the course of the sixteen-week period prior to his injury should be divided by fifty-two in order to calculate plaintiff's average weekly wage. According to the Commission, "[t]he figure of $111.64 is an average weekly wage that is fair and just to both sides" because "[i]t takes into account that [p]laintiff was working a temporary assignment that most likely would have ended once he worked 520 hours" and that the average weekly wage that the Commission believed to be appropriate "annualize[d] the total wages that [p]laintiff likely could have expected to earn in the assignment." After making these findings of fact, the Commission repeated many of these determinations in its conclusions of law, concluding that the "calculation of [p]laintiff's average weekly wage via the 3rd method does not yield results that are fair and just to both parties," that the use of the "first [four] methods of calculating [p]laintiff's average weekly wage" would not be appropriate, and that "exceptional reasons exist in this case, so [that p]laintiff's average weekly wage should be calculated based upon the 5th method as this is the only method which would accurately reflect [p]laintiff's expected earnings but for his work injury" and because the use of the fifth method "produces results that are fair and just to both parties." Plaintiff noted an appeal to the Court of Appeals from the Commission's order.

¶ 10 In seeking relief from the Commission's order before the Court of Appeals, plaintiff argued that (1) the Commission had erred by determining that the fifth method for calculating his average weekly wage was appropriate for use in this case, (2) that the use of the third method for calculating plaintiff's average weekly wage would be fair and just to both parties, and (3) that the use of the fifth method for calculating plaintiff's average weekly wage was unfair, unjust, and provided defendants with a windfall. In reversing the Commission's order and remanding this

case to the Commission for further proceedings, the Court of Appeals began by holding that the Commission's decision to use the fifth method for calculating defendant's average weekly wage set out in N.C.G.S. § 97-2(5) was subject to de novo review given that the Commission's determination that this approach would be "fair and just" to both parties was "actually [a] conclusion[ ] of law to the extent that [it] declared a particular method of calculating [plaintiff's] average weekly wages to be fair or unfair." *Nay v. Cornerstone Staffing Sols.*, 273 N.C. App. 135, 142 (2020). In support of this determination, the Court of Appeals relied upon *Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 331–32 (2004), for the proposition that "[t]he determination of [a] plaintiff's average weekly wages requires application of the definition set forth in the Workers' Compensation Act, and the case law construing that statute" so as to "raise[ ] an issue of law, not fact." *Nay*, 273 N.C. App. at 141 (second alteration in original). In addition, the Court of Appeals cited *Tedder v. A & K Enterprises*, 238 N.C. App. 169, 173 (2014), in which it had relied upon *Boney* for the proposition that "review [of] the Commission's calculation of [the plaintiff]'s average weekly wages [is] *de novo*." *Nay*, 273 N.C. App. at 141–42. As a result, given its conclusion that the choice of a method for determining a plaintiff's average weekly wages was a conclusion of law, the Court of Appeals "review[ed] de novo the Commission's declaration that a Method 3 calculation of [plaintiff's] average weekly wages under N.C.G.S. § 97-2(5) was unfair in Finding of Fact 13, and that a Method 5 calculation of [plaintiff's] average weekly wages under N.C.G.S. § 97-2(5) was fair in Finding of Fact 15." *Nay*, 273 N.C. App. at 142.

¶ 11 After having identified what it believed to be the correct standard of review, the Court of Appeals addressed the issue of which method for calculating a plaintiff's average weekly wages would be "fair and just" to both parties and should, for that reason, have been used in calculating the relevant amount. *Id.* at 142–43. According to the Court of Appeals, "[r]esults fair and just . . . consist of such average weekly wages as will most nearly approximate the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury." *Id.* (quoting *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660 (1956)). The Court of Appeals further noted that, in the event that it "determine[d] Method 3 to be fair, [it] need not consider Method 5" given that "[t]he five methods [listed in N.C.G.S. § 97-2(5)] are ranked in order of preference, and each subsequent method can be applied *only if* the previous methods are inappropriate." *Id.* (citing *Tedder*, 238 N.C. App. at 173–74).

¶ 12 In the Court of Appeals' view, a calculation of plaintiff's average weekly wages utilizing the third method would be "fair and just" given that this determination was intended to reflect the amount that plaintiff would be earning in the absence of his compensable injury, with calculation of plaintiff's "average weekly wages according to what he earned from Cornerstone [divided by] the number of weeks he worked for the staffing agency fairly approximat[ing] what he would have earned but for the injury." *Id.* at 143. In determining that the third method for calculating plaintiff's average weekly wages would be fair and just to both parties, the Court of Appeals noted "the lack of a definite employment end date for [plaintiff] with Cornerstone is important" and the fact that plaintiff had "continued his relationship with Cornerstone after his injury and could have continued to earn money from Cornerstone indefinitely." *Id.* As a result, the Court of Appeals held that a calculation of plaintiff's average weekly wages using the third method "averages [his] earnings over the course of his employment at Cornerstone, not a hypothetical 52 week period"; that this calculation produced results that were fair and just to both parties; and that the Commission's decision should be reversed and this case remanded to the Commission for recalculation of plaintiff's average weekly wage. *Id.* at 143–44. This Court allowed defendants' request for discretionary review of the Court of Appeals' decision on 3 February 2021.

II. Analysis

A. Parties' Arguments

¶ 13 In seeking to persuade us to overturn the Court of Appeals' decision, defendants begin by arguing that the Court of Appeals erred by utilizing a de novo standard in reviewing the Commission's decision concerning the manner in which plaintiff's average weekly wages should be calculated. In support of this contention, defendants direct our attention to this Court's decision in *Liles*, 244 N.C. at 660, in which we stated that the question of whether a method for calculating an injured employee's average weekly wages produces results that are "fair and just" "is a question of fact"; that, "in such a case[,] a finding of fact by the Commission controls [the] decision"; and that "this [principle] does not apply if the finding of fact is not supported by competent evidence or is predicated on an erroneous construction of the statute." In addition, defendants direct our attention to several earlier decisions in which we utilized the "any competent evidence" standard in reviewing the Commission's findings of fact. *See Munford v. W. Constr. Co.*, 203 N.C. 247, 249 (1932) (stating that, since the "evidence indicated both shortness of time and casual nature of the employment[,] . . . regard sh[ould] be had to the average wages

earned by others," with these considerations being "questions of fact for the [C]ommission to pass on"); *Mion v. Atl. Marble & Tile Co.*, 217 N.C. 743, 747 (1940) (stating that the Commission's findings "appear[ed] to be supported by the evidence except with respect to the average weekly wage"); *Early v. W. H. Basnight & Co.*, 214 N.C. 103, 107 (1938) (using the "any competent evidence" standard in reviewing the lawfulness of the Commission's findings of fact). According to defendants, this Court's precedent "requires application of the any competent evidence standard as opposed to the *de novo* review erroneously applied by the Court of Appeals" in reviewing a challenge to the lawfulness of the Commission's decision with respect to the manner in which an injured employee's average weekly wages should be calculated.

¶ 14 In addition, defendants argue that the Court of Appeals erred to the extent that it interpreted *Boney*, 163 N.C. App. 330; *McAninch v. Buncombe Cnty. Schs.*, 347 N.C. 126 (1997); and *Tedder*, 238 N.C. App. 169, as supporting the use of a de novo standard of review in evaluating the validity of plaintiff's challenge to the Commission's average weekly wages calculation. Similarly, as a matter of public policy, defendants assert that the use of a de novo standard of review in examining the Commission's decision concerning the manner in which an injured employee's average weekly wages should be calculated would "create uncertainty and increased litigation with respect to the correct calculation of average weekly wage."

¶ 15 Finally, defendants argue that the Commission's determination that the use of the third method to calculate plaintiff's average weekly wages would be unfair to defendants was a finding of fact that should be upheld on the grounds that it had adequate evidentiary support. In defendants' view, the record contains evidence tending to show that the amount of work that plaintiff would have expected to be assigned while working with FieldBuilders could have potentially been impacted by the weather or the season of the year; that plaintiff's assignment with FieldBuilders was temporary and would, "in all likelihood, . . . not have approached 52 weeks"; and that there is "no evidence [that] plaintiff ever earned or would have earned an annual salary close to" $21,798.40, which is the salary that correlates with plaintiff's contended average weekly wages of $419.20, so that "provid[ing] him benefits at this rate" would give plaintiff a "substantial, unfounded windfall." Similarly, defendants contend that the record contains sufficient evidence to support the Commission's determination that the use of the fifth method to calculate plaintiff's average weekly wages would be fair to both parties on the theory that plaintiff would not have worked for an entire year with

Cornerstone given that he would have "either been hired permanently by FieldBuilders and/or he would have experienced gaps in employment because another assignment could not be identified due to many different variables." As a result, defendants urge us to reverse the Court of Appeals' decision and reinstate the Commission's order.

¶ 16 In seeking to persuade us to affirm the Court of Appeals' decision in this case, plaintiff argues that the Court of Appeals correctly utilized a de novo standard of review in evaluating the Commission's calculation of plaintiff's average weekly wages because the issue of whether a particular calculation is "fair and just to both parties" is either a question of law or a mixed question of law and fact. More specifically, plaintiff argues that, "[a]lthough there is some language in *Boney* supporting the proposition that the fair and just determination is, at least in part, a question of fact, it is nevertheless clear that the *Boney* Court properly employed a *de novo* standard of review" when it reviewed the Commission's conclusions, citing *Boney*, 163 N.C. App. at 331–32. According to plaintiff, the Court of Appeals, citing *Tedder*, 238 N.C. App. 169, and *Frank v. Charlotte Symphony*, 255 N.C. App. 269 (2017), and this Court, citing *Liles*, 244 N.C. 653, *McAninch*, 347 N.C. 126, and *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419 (1966), *overruled on other grounds by Derebery v. Pitt Cnty. Fire Marshall*, 318 N.C. 192 (1986), have utilized a de novo standard of review in evaluating the validity of challenges to the Commission's average weekly wages calculation. In addition, plaintiff argues that average weekly wages of $419.20 would be fair and just to both parties given that this amount is "based upon [plaintiff's] actual weekly earnings," which are "the very same weekly earnings used by [Cornerstone's] carrier to compute the weekly workers' compensation premium to cover the 'temp to perm' employees of [Cornerstone]." Finally, plaintiff urges us to uphold the Court of Appeals' decision on public policy grounds and contends that, if the Court of Appeals' decision were to be reversed, injured workers would receive compensation based upon average weekly wages that would only be "a fraction" of the amount that they actually earned during their period of employment.

B. Standard of Review

¶ 17 "The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402 (1977). "The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, 'even though there [is] evidence that would support findings to the contrary.' " *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496 (2004)

(alteration in original) (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402 (1965)). The Commission's conclusions of law, on the other hand, are subject to de novo review on appeal. *Id.*

¶ 18 Subsection 97-2(5) "sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed" and "establishes an order of preference for the calculation method to be used," with the Commission to refrain from using the fifth method "unless there has been a finding that unjust results would occur by using the [four] previously enumerated methods." *McAninch*, 347 N.C. at 129–30. "[T]he primary intent of this statute is that results are reached which are fair and just to both parties." *Id.* at 130 (citing *Liles*, 244 N.C. at 660). As we have already noted, the ultimate issue before us in this case is whether the Commission's selection of a method for calculating an injured employee's average weekly wages and the extent to which the method that the Commission has selected is "fair and just" is a question of law or a question of fact. In order to make this determination, we must begin by reviewing the relevant decisions of this Court and the Court of Appeals.

¶ 19 In *Liles*, this Court reviewed a Commission order entered in a case in which a worker had worked part-time for his employer until the time of the worker's death and in which the Commission used the third method (which is now the fourth method) described in N.C.G.S. § 97-2(5) for the purpose of calculating his average weekly wages. 244 N.C. at 658. In reaching this result, the Commission "conclude[d] as a matter of law that results fair and just to both parties [could] not be obtained" using the preceding statutory methods on the grounds that, in light of "the casual nature or terms of [the injured worker's] employment it would be impractical to compute his average weekly wage by basing [the] same on his average earnings for the previous 52 weeks" and that the injured worker's average weekly wages should be set at $34.88 "based upon the earnings of a person of the same grade and character employed in the same class of employment in the same locality or community." *Id.* at 656. On appeal, this Court held that the Commission had improperly "determined the 'average weekly wages' of a part-time employee to be the amount he would have earned had he been a full-time employee" given that there was "no factual basis" for the Commission's use of the third (now fourth) method in light of the fact that the worker had been employed on a part-time basis and that there was "no evidence that any part-time worker, the nature of whose employment was similar to that of [the worker], earned 'average weekly wages' " that approximated those calculated under the third (now fourth) method. *Id.* at 658–59. In the course of making this determination, we stated that

> all provisions of [N.C.]G.S. [§] 97-2(e) must be considered in order to ascertain the legislative intent; and the dominant intent is that results fair and just to both parties be obtained. Ordinarily, whether such results will be obtained by the said second method is a question of fact; and in such case a finding of fact by the Commission controls [the] decision. However, this does not apply if the finding of fact is not supported by competent evidence or is predicated on an erroneous construction of the statute.
>
> The words "fair and just" may not be considered generalities, variable according to the predilections of the individuals who from time to time compose the Commission. These words must be related to the standard set up by the statute. Results fair and just, within the meaning of [N.C.]G.S. [§] 97-2(e), consist of such 'average weekly wages' as will most nearly approximate the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury.

Id. at 660. After concluding that "the evidence does not warrant a finding of fact or conclusion of law that the said second method would not obtain results fair and just to both parties," we held that the Commission erred by applying the third [now fourth] method rather than the second method, with the extent to which "fair and just" results had been obtained being dependent upon whether the Commission had correctly construed the relevant statutory language in accordance with its spirit and the underlying legislative intent. *Id.* at 660–61. As a result, a careful reading of our opinion in *Liles* indicates that we did not give significant deference to the Commission's decision concerning the manner in which the plaintiff's average weekly wages should be calculated in that case.

¶ 20 Approximately four decades later, we considered a case involving an injured worker who had been employed as a cafeteria worker for the Buncombe County Schools during the school year and as a babysitter, housekeeper, and painter during the summer months. *McAninch*, 347 N.C. at 128. In that case, the injured worker and the school system had entered into an agreement pursuant to which the defendant was required to pay the worker an amount of compensation based upon average weekly wages of $163.37, a rate that "did not reflect any wages [that] the [worker had] earned from other employment undertaken during

the ten-week summer vacation." *Id.* After the Commission affirmed the average weekly wages determination to which the parties had agreed, the Court of Appeals reversed the Commission's decision, holding that the Commission should have included the extra income that the worker had earned performing her additional jobs in its calculation and should have computed the plaintiff's average weekly wages by "aggregating her wages from defendant with her summer earnings and then dividing that sum by fifty-two." *Id.* at 129. This Court, in turn, reversed the Court of Appeals' decision, *id.* at 134, on the theory that the Court of Appeals' "recalculation of plaintiff's average weekly wages . . . through application of the fifth computation method constituted an improper contravention of the Commission's factfinding authority, and specifically its finding of fairness in this case," *id.* at 131.

¶ 21 In reaching this result, we quoted from our prior decision in *Barnhardt*, 266 N.C. at 427–29, in which we held that the fifth method for calculating an injured employee's average weekly wages did not give the Commission the "implied authority" to aggregate wages from multiple sources of employment in the course of calculating an injured employee's average weekly wages for the reason that such a result would be unfair to the employer. *McAninch*, 347 N.C. at 133. According to our decision in *Barnhardt*, "had the Legislature intended to authorize the Commission in the exceptional cases to combine those wages with the wages from *any* concurrent employment, we think it would have been equally specific," with it being unlikely "that the legislature would have left such intent solely to a questionable inference." *Id.* at 133–34 (quoting *Barnhardt*, 266 N.C. at 427–29). As a result, we concluded that "the definition of 'average weekly wages' and the range of alternatives set forth in the five methods of computing such wages . . . do not allow the inclusion of wages or income earned in employment or work other than that in which the employee was injured." *Id.* at 134.

¶ 22 Our decision in *Barnhardt* involved a worker who had performed both part-time work as a cab driver and part-time work as a machine maintenance man. 266 N.C. at 420. After having become permanently disabled while working as a cab driver, the plaintiff sought workers' compensation benefits from the cab company. *Id.* In determining the amount of workers' compensation benefits to which the plaintiff was entitled, the Commission utilized the fourth (now fifth) method for calculating the plaintiff's average weekly wages, having combined the wages that the plaintiff had earned while working for both the cab company and the entity for which the plaintiff performed machine maintenance work. *Id.* at 422. In vacating and remanding the Commission's order, we

stated that "[N.C.]G.S. § 97-2(5) contains no specific provision which would allow wages from any two employments to be aggregated in fixing the wage base for compensation" before noting that

> [u]nusually severe or totally disabling injuries are not the *exceptional reasons* contemplated by method (4) [now five].
>
> It seems reasonable to us that the Legislature, having placed the economic loss caused by a workman's injury upon the employer for whom he was working at the time of the injury, would also relate the amount of that loss to the average weekly wages which that employer was paying the employee. Plaintiff, of course, will greatly benefit if his wages from both jobs are combined; but, if this is done, Cab Company and its carrier, which has not received a commensurate premium, will be required to pay him a higher weekly compensation benefit than Cab Company ever paid him in wages. Whether an employer pays this benefit directly from accumulated reserves, or indirectly in the form of higher premiums, to combine plaintiff's wages from his two employments would not be fair to the employer.

Id. at 427 (citations omitted). In reaching this conclusion, we both interpreted N.C.G.S. § 97-2(5) and applied our understanding of the relevant legal principles to the facts of this case without making any obvious use of the "any competent evidence" standard of review.

¶ 23 In *Boney*, 163 N.C. App. 330, the Court of Appeals discussed the standard of review that a reviewing court should utilize in evaluating the validity of a challenge to the Commission's average weekly wages determination. As an initial matter, the Court of Appeals described the Commission's determination that the worker's "average weekly wage of $194.88 yield[ed] a weekly compensation rate of $129.93" as a conclusion of law, noting that the "determination of the plaintiff's 'average weekly wages' requires application of the definition set forth in the Workers' Compensation Act, N.C.[G.S.] § 97-2(5) (2001), and the case law construing that statute and thus raises an issue of law, not fact." *Id.* at 331–32 (cleaned up) (quoting *Swain v. C & N Evans Trucking Co.*, 126 N.C. App. 332, 335–36 (1997)). On the other hand, however, the Court of Appeals stated that the issue of "[w]hether the results of calculating the average weekly wage by the applicable enumerated method would

be unfair to either employer or employee is a question of fact, and the Commission's determination on this issue would control, unless there was no competent evidence in the record to support the determination." *Id.* at 333. At the conclusion of its analysis, the Court of Appeals refrained from determining whether the Commission had erred in selecting a method for calculating the plaintiff's average weekly wages and, instead, remanded the case to the Commission for recalculation of the worker's average weekly wages given the Commission's failure to "clearly state what method it used to calculate [the worker]'s average weekly wage," *id.*, with the Court of Appeals having instructed the Commission that, if it found on remand that "that the calculation of [the worker]'s average weekly wage by use of the second method in N.C.G.S. § 97-2(5) would create an unfair result," it was authorized to "use an appropriate method to calculate [the worker]'s average weekly wage 'as will most nearly approximate the amount which [the worker] *would be earning* were it not for the injury' under the fifth method," *id.* at 334 (quoting *Liles*, 244 N.C. at 660).

¶ 24 In *Tedder*, 238 N.C. App. 169, the Court of Appeals reversed the Commission's average weekly wages calculation after utilizing what it described as a de novo standard of review. *Id.* at 173. In *Tedder*, the Commission had determined that the plaintiff had been hired by the employer to work for a limited period of seven weeks at a rate of $625 per week, during which time the plaintiff had injured his back. *Id.* at 172. After determining that the use of the first four methods for the purpose of calculating the plaintiff's average weekly wages would be inappropriate, the Commission had utilized the fifth method and determined that plaintiff's average weekly wages should be set at $625, even though the plaintiff would have only earned that amount for the seven-week period during which he had been employed by the defendant. *Id.* at 175. After citing *Boney* for the proposition that a "determination of the plaintiff's 'average weekly wages' require[d] application of the definition set forth in the Workers' Compensation Act, and the case law construing that statute[,] and thus raises an issue of law, not fact," the Court of Appeals stated that it would "review the Commission's calculation of [plaintiff]'s average weekly wages *de novo*," *id.* at 173 (quoting *Boney*, 163 N.C. App. at 331–32 (second alteration in original)), before reversing the Commission's decision with respect to that issue on the grounds that "it squarely conflicts with [N.C.G.S. § 97-2(5)]'s unambiguous command to use a methodology that 'will most nearly approximate the amount which the injured employee would be earning were it not for the injury,' " *id.* at 175 (quoting N.C.G.S. § 97-2(5) (2013)). According to the Court of Appeals, the Commission's decision to utilize the fifth method for the

purpose of calculating the plaintiff's average weekly wages created "a financial windfall for [the plaintiff] and an unjust result for" the employer in contravention of "the guiding principle and primary intent of the statute—obtaining 'results that are fair and just to both employer and employee.' " *Id.* at 177 (quoting *Conyers v. New Hanover Cnty. Schs.*, 188 N.C. App. 253, 256 (2008)). As a result, the Court of Appeals remanded this case to the Commission for the making of a new average weekly wages calculation.

¶ 25 The difference between a question of law, on the one hand, and a question of fact, on the other, is well-established, although often difficult to determine. As a general proposition, questions of fact involve "things in space and time that can be objectively ascertained by one or more of the five senses or by mathematical calculation," *State ex rel. Utils. Comm'n v. Pub. Staff–N.C. Utils. Comm'n*, 322 N.C. 689, 693 (1988), while questions of law involve a "determination requiring the exercise of judgment or the application of legal principles," *State v. Sparks*, 362 N.C. 181, 185 (2008) (quoting *In re Helms*, 127 N.C. App. 505 (1997)). Although this Court has not, to the best of our knowledge, previously determined whether the selection of the proper method for calculating an injured employee's average weekly wages is a question of law or a question of fact, it appears to us that the making of the required determination involves "the application of legal principles" to the facts, making it, as the Court of Appeals correctly determined in *Boney*, a question of law that requires the Commission to properly apply the relevant statutory principles based upon findings of fact that are supported by "any competent evidence." *See Boney*, 163 N.C. App. at 331–32.

¶ 26 As we have already noted, this Court held in *Liles* that the extent to which the use of a particular calculation method produces a result that is "fair and just" was a question of fact, subject to the caveat that "the finding of fact is . . . supported by competent evidence" and does not rest upon "an erroneous construction of the" relevant statutory provision. *Liles*, 244 N.C. at 660. For that reason, we are unable to interpret *Liles* as requiring a single, universally-valid standard of review which applies to all issues that might arise concerning the "fairness and justness" of a particular Commission determination; on the contrary, the language in which *Liles* is couched, when read literally and in context, requires a reviewing court to undertake a much more nuanced analysis than either party seems to suggest. As a result, in the absence of a showing that the use of a particular method for calculating an injured employee's average weekly wages does or does not produce "fair and just" results lacks

sufficient evidentiary support or rests upon an erroneous application of the relevant legal standard, which is whether the result reached by the Commission "most nearly approximate[s] the amount which the injured employee *would be earning* . . . in the employment in which he [or she] was working at the time of his injury," *id.*, the applicable standard of review is whether the Commission's decision with respect to that issue is supported by any competent evidence. In the event that the issue before the Court is whether the Commission's determination rests upon a misapplication of the applicable legal standard, that determination is, according to *Liles* and its progeny, a question of law subject to de novo review.

¶ 27 The approach that we deem to be appropriate appears to properly reconcile the various decisions of this Court that the parties have discussed in their briefs. After acknowledging in *Liles* that "[t]he words 'fair and just' may not be considered generalities, variable according to the predilections of the individuals who from time to time compose the Commission," and must, instead, "be related to the standard set up by the statute," we reversed the Commission's average weekly wages decision on the grounds that the Commission's decision improperly applied the applicable legal standard without giving any apparent deference to the Commission's decision. *Id.* Similarly, in *Barnhardt*, we held that it "would not be fair to the employer" to combine wages from the worker's two jobs in calculating his average weekly wage, on the grounds that, "had the Legislature intended to authorize the Commission in the exceptional cases to combine those wages with the wages from *any* concurrent employment, . . . it would have been equally specific," and that it was "not likely that the legislature would have left such intent solely to a questionable inference." 266 N.C. at 427. In the same vein, our decision in *McAninch* relied upon a determination that the average weekly wages calculation that the Court of Appeals had deemed appropriate could not be squared with the relevant statutory language. In other words, neither *Liles*, *Barnhardt*, nor *McAninch* employs a simple sufficiency of the evidence analysis; instead, all of them focus upon the extent to which particular "fairness and justness" determinations reflect a proper understanding of the relevant statutory language. As a result, it is clear that the understanding of the applicable standard of review set out above is completely consistent with the prior decisions of this Court, which subject what are essentially issues of statutory construction to de novo review regardless of whether they are made in the context of the selection of the appropriate method for determining an injured employee's average weekly wages or determining whether the use of a particular

method would produce results that are "fair and just" in light of the applicable legal standard.

¶ 28 In its order, the Commission determined that the use of the third method for calculating plaintiff's average weekly wages set out in N.C.G.S. § 97-2(5) "would produce an inflated average weekly wage that is not fair to [d]efendants because [p]laintiff was employed in a temporary capacity with no guarantee of permanent employment, length of a particular assignment, or specific wage rate, and he was assigned to a client account whose work was seasonal" and that average weekly wages of $111.64 would be "fair and just to both sides" given that it took "into account that [p]laintiff was working a temporary assignment that most likely would have ended once he worked 520 hours" and that "annualize[d] the total wages that [p]laintiff likely could have expected to earn in the assignment." As we understand his brief, plaintiff's challenge to the validity of the Commission's determinations rests upon an assertion that the approach adopted by the Commission cannot be squared with the applicable legal standard that has been enunciated by this Court. Although the record does contain sufficient evidence to support the specific factual assertions set out in the Commission's order, its analysis does not, at least in our opinion, reflect a proper understanding of that legal standard, which focuses upon whether, based upon a consideration of all relevant facts and circumstances, the chosen method for calculating plaintiff's average weekly wages "most nearly approximate[s] the amount which the injured employee *would be earning* . . . in the employment in which he [or she] was working at the time of his [or her] injury," *Liles*, 244 N.C. at 660 (emphasis added), given that dividing the wages that plaintiff earned over sixteen weeks by fifty-two, instead of sixteen, assumes that plaintiff would have only worked for Cornerstone for a fraction of a year in the absence of his injury, an assumption that might not be a plausible one given the existence of evidence tending to show that temporary employees sometimes worked more than 520 hours at specific assignments and the Commission's failure to find that plaintiff would not have received further work assignments from Cornerstone had he not sustained a compensable back injury (regardless of what the situation might have been with an "average" employee). As a result, since the Commission appears to have found the facts on the basis of a misapprehension of the applicable law, *McGill v. Town of Lumberton*, 215 N.C. 752, 754 (1939) (stating that it is still the rule that "[f]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light"), and since the Court of Appeals appears to have made its own factual determinations in the course of reversing the Commission's decision rather than simply

reviewing the Commission's decision using the applicable standard of review, we believe that the most appropriate disposition would be for this case to be remanded to the Commission for the entry of a order that contains findings and conclusions based upon a correct understanding of the applicable law.

III. Conclusion

¶ 29 Thus, for the reasons set forth above, we hold that the issue of whether the Commission selected the correct method for determining plaintiff's average weekly wages pursuant to N.C.G.S. § 97-2(5) is a question of law subject to de novo review and that the issue of whether a particular method for making that determination produces results that are "fair and just" is a question of fact subject to the "any competent evidence" standard of review in the absence of a showing that the Commission's determination lacked sufficient evidentiary support or rested upon a misapplication of the relevant legal principle, in which case the relevant issue of statutory construction is subject to de novo review on appeal. We further hold that the findings and conclusions that the Commission made in support of its average weekly wages determination in this case appear to rest upon a misapplication of the applicable legal standard. As a result, we modify and affirm the Court of Appeals' decision and remand this case to the Commission for further proceedings not inconsistent with this opinion, including the entry of a new opinion and award containing appropriate findings of fact and conclusions of law.

MODIFIED AND AFFIRMED.

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

Justice BARRINGER dissenting.

¶ 30 The issue before this Court is whether the Industrial Commission correctly calculated plaintiff's average weekly wage under N.C.G.S. § 97-2(5). The majority's answer to this question should be troubling for staffing agencies and similar entities who hire part-time or temporary workers. In a workers' compensation action, the determination of which method calculates an average weekly wage that is fair and just to both employee and employer is a question of fact. This Court's precedent has never indicated otherwise. Here, the Commission found that the fifth method, not the third method, produced results fair and just to both parties. Competent evidence supported this finding. As a result, this

Court should affirm the Commission's opinion and award. Accordingly, I respectfully dissent.

I. Background

¶ 31 Defendant, Cornerstone Staffing Solutions, provides temporary staffing to businesses primarily located in and around Charlotte, North Carolina, and Rock Hill, South Carolina. Client businesses contract directly with defendant, and defendant then sends its employees to work for the client businesses for a limited period of time, generally 520 hours. Defendant recruits, hires, and manages the payroll of these employees, even though they complete work for the client business. Defendant's employees are paid only for time spent working for a client business. On average, employees work only ten weeks for defendant. Some employees go on to be hired by the client business, either during or at the end of the 520 hours. Others stop working of their own volition or do not receive further work because defendant is unable to place them with another client business. Employment with defendant is limited by the needs of the client businesses and the qualifications of defendant's employees.

¶ 32 Plaintiff, Luon Nay, began working for defendant on 25 August 2015. Prior to working for defendant, plaintiff had not been able to find work for eight months. Defendant assigned plaintiff to work for Field Builders, a client business that creates and updates ball fields at schools and performs landscaping work. While on assignment with Field Builders, plaintiff suffered a compensable workplace injury. As a result, plaintiff ceased working for defendant on 7 December 2015 after working over 496.25 hours and earning wages of $5,805.25.

¶ 33 Plaintiff was medically released to full duty work in June of 2016—meaning he could accept any job without restriction. Plaintiff went back to work for defendant and was placed with another client. Three weeks later, however, that client had no more work for plaintiff. Plaintiff requested defendant find him another job, but defendant informed him that at the present time there were no jobs available, even though plaintiff had no medical restrictions. A week later, plaintiff checked again, and again there was no work for him. Later, plaintiff attempted to find work through another staffing agency, but it too was unable to place him.

¶ 34 After plaintiff's injury, defendant began paying disability benefits to plaintiff. Initially, defendant calculated plaintiff's average weekly wage by dividing plaintiff's total wages of $5,805.25 across the fifteen-week period plaintiff worked for defendant, which produced an average weekly wage of $387.02. However, given the temporary nature of plaintiff's employment, defendant subsequently modified its calculation to $111.64,

which was reached by dividing plaintiff's total wages across the previous fifty-two weeks. Plaintiff requested a hearing before the Commission to challenge this recalculation.

¶ 35 After a hearing, the presiding deputy commissioner entered an opinion and award finding that defendant had correctly calculated plaintiff's average weekly wage as $111.64. To reach this finding, the deputy commissioner found that given the temporary nature of employment with defendant, plaintiff's employment would not have "extended over a 52-week period if he had not been injured" and that there was no evidence of a similarly situated employee whose wages could be used to calculate plaintiff's average weekly wage. Thus the first four methods of calculating an average weekly wage laid out in N.C.G.S. § 97-2(5) did not produce results fair and just to both parties, and the deputy commissioner had to use the fifth method. Under this method, the deputy commissioner took into account the temporary nature of plaintiff's work and divided plaintiff's total wages by fifty-two weeks to reach an average weekly wage of $111.64.

¶ 36 Plaintiff appealed to the full Commission which entered an opinion and award using the same calculation as the deputy commissioner. The full Commission found that plaintiff's employment with defendant "most likely would have ended once he worked 520 hours," and thus an average weekly wage of $111.64 calculated under the fifth method produced fair and just results.

¶ 37 Plaintiff appealed the opinion and award of the full Commission to the Court of Appeals. Reversing and remanding the Commission's opinion and award, the Court of Appeals held that the determination of which method calculates a fair and just average weekly wage was a question of law, subject to de novo review. *Nay v. Cornerstone Staffing Sols.*, 273 N.C. App. 135, 141–42 (2020). Next, the Court of Appeals examined the evidence and drew different inferences from it than those drawn by the Commission, finding that plaintiff "could have continued to earn money from Cornerstone indefinitely." *Id.* at 143. As a result, the Court of Appeals concluded that the third method produced an average weekly wage that was fair and just to both parties. *Id.* at 143–44. Defendant petitioned this Court for review.

II. Analysis

¶ 38 At issue in this case is whether the Commission correctly calculated plaintiff's average weekly wage under N.C.G.S. § 97-2(5). Subsection 97-2(5) requires that the calculation of an employee's average weekly wage produce "results fair and just to both parties." N.C.G.S. § 97-2(5) (2021).

Results fair and just to both parties are reached when the Commission calculates an average weekly wage that "most nearly approximate[s] the amount which the injured employee would be earning were it not for the injury, in the employment in which he was working at the time of his injury." *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660 (1956) (citing N.C.G.S. § 97-2(5)).

¶ 39 This calculation requires the Commission to determine not only the rate of pay at the time of the injury but also the total number of hours the employee *would have worked* in a year for the employer if not for the injury. *See McAninch v. Buncombe Cnty. Schs.*, 347 N.C. 126, 128–31 (1997) (recognizing that because the plaintiff worked only forty-two weeks out of the year for the employer in whose employ she was injured, her average weekly wage would be calculated by extending her earnings from the forty-two weeks across an entire year). Determining the length of time an employee would have worked for an employer but for the injury is especially important in cases involving temporary or seasonal workers, where a failure to recognize the limited duration of employment would result in a windfall—with the employer paying far more in disability benefits than the employee would ever have earned if not for the injury.

¶ 40 To perform this calculation, N.C.G.S. § 97-2(5) "sets forth in priority sequence" five methods for calculating an employee's average weekly wage. *McAninch*, 347 N.C. at 129; N.C.G.S. § 97-2(5). The Commission must consider each method in turn, starting with the first method and only moving on to the next prescribed method if it finds that the previous one would not fairly or justly reflect the wages which the employee would have been earning if not for the injury. *McAninch*, 347 N.C. at 129–30; *Liles*, 244 N.C. at 657–60. Whichever method the Commission first finds to accurately estimate the average weekly wage that the employee would be earning were it not for the injury is the one the Commission must use to calculate the employee's disability benefit. *McAninch*, 347 N.C. at 129–30; *Liles*, 244 N.C. at 660.

¶ 41 When a party appeals a decision by the full Commission to the North Carolina appellate courts, the appellate courts review the decision to "determine, first, whether there is competent evidence to support the Commission's findings of fact and, second, whether the findings of fact support the conclusions of law." *McAninch*, 347 N.C. at 131. Since this Court started reviewing the Commission's decisions, it has treated the calculation of an employee's average weekly wage as a question of fact. This case should be no different.

A. The Calculation of an Average Weekly Wage that Obtains Fair and Just Results Is a Question of Fact.

¶ 42 Our precedent uniformly holds that whether a certain method calculates an average weekly wage that is fair and just is a question of fact. Most recently, in *McAninch v. Buncombe County Schools*, we held that, "the primary intent of [N.C.G.S. § 97-2(5)] is that results are reached which are fair and just to both parties. Ordinarily, whether such results will be obtained is a question of fact; and in such case a finding of fact by the Commission controls [the] decision." 347 N.C. at 130 (cleaned up). *McAninch*, when laying out this standard, quoted *Liles v. Faulkner Neon & Electric Co.*, which, over forty years prior to *McAninch*, stated that N.C.G.S. § 97-2(5)'s: "dominant intent is that results fair and just to both parties be obtained. Ordinarily, whether such results will be obtained by the said second method is a question of fact; and in such a case a finding by the Commission controls [the] decision." 244 N.C. at 660. Notably, *Liles* did not distinguish between the question of whether results are fair and just and the question of whether a selected calculation obtains results that are fair and just, or hold that the first inquiry involves a question of fact and the second a question of law. Instead, it simply held that there is one single question of fact: whether the use of a given calculation method will produce results fair and just. *Id.*

¶ 43 Going back even further, *Early v. W. H. Basnight & Co.*, 214 N.C. 103 (1938), one of this Court's first decisions reviewing an Industrial Commission award, likewise treated as a question of fact the Commission's determination that "exceptional reasons" existed such that it needed to use the last method provided in the statute for calculating the employee's average weekly wage. *Id.* at 106–07. In no case has this Court reviewed the calculation method chosen by the Commission under a different standard. How many hours and at what rate are quintessential questions of fact. *See State ex rel. Utils. Comm'n v. Pub. Staff-N.C. Utils. Comm'n*, 322 N.C. 689, 693 (1988) ("Facts are things in space and time that can be objectively ascertained by one or more of the five senses or by mathematical calculation."). Accordingly, our review of the Commission's calculation in this case should simply involve determining whether it was supported by competent evidence.[1]

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1. Of course, as *Liles* also notes, this Court will reverse the Commission's opinion and award if it is "predicated on an erroneous construction of the statute." *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660 (1956). However, this statement has no bearing on whether the calculation of an average weekly wage according to the fifth (or any other) method is a question of fact—which *Liles* already answered in the affirmative. *Id.* Rather, it was merely a recognition of the fundamental principle that it is emphatically the

B. The Commission's Findings are Supported by Competent Evidence.

¶ 44 Applying the correct standard of review to this case confirms that the full Commission's opinion and award should be affirmed. The Commission found as fact that none of the other methods in N.C.G.S. § 97-2(5) produced a fair and just result, and therefore, exceptional reasons existed for calculating plaintiff's average weekly wage pursuant to the fifth method. Further, in performing this calculation, the Commission complied with this Court's previous interpretations of N.C.G.S. § 97-2(5) by considering only the wages that plaintiff earned from the employment in which he was injured and disregarding all other sources or potential sources of income. *See Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427–29 (1966), *overruled on other grounds by Derebery v. Pitt Cnty. Fire Marshall*, 318 N.C. 192 (1986). Accordingly, the opinion and award should be affirmed.

¶ 45 Plaintiff does not challenge the Commission's findings that the first, second, and fourth methods were improper for calculating plaintiff's average weekly wage. Additionally, plaintiff does not challenge the following findings by the Commission: Plaintiff suffered a compensable injury while working for defendant, a staffing agency. At the time of the injury, plaintiff was on a work assignment for one of defendant's clients, Field Builders. Plaintiff worked more than 496.25 hours for defendant from 25 August 2015 until 7 December 2015 and earned $5,805.25 total. Ninety-five percent of defendant's employees were placed in "temp-to-perm" positions. In a temp-to-perm position, an employee was eligible to be hired by the client after working 520 hours but had no guarantee of receiving an offer from the client.

¶ 46 Plaintiff does challenge the following findings by the Commission:

> [E]mployees for [defendant] worked an average of 10 weeks in the 52 weeks prior to [p]laintiff's work injury . . . .
>
> . . . The 3rd method, which applies when the period of employment prior to the injury extended over a period fewer than 52 weeks, calls for the earnings of the employee to be divided by the actual number

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province and duty of an appellate court to say what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

> of weeks and parts thereof that the employee earned wages, provided that the result is fair and just to both sides. Use of the 3rd method in this claim would produce an inflated average weekly wage that is not fair to [d]efendant[ ] because [p]laintiff was employed in a temporary capacity with no guarantee of permanent employment, length of a particular assignment, or specific wage rate, and he was assigned to a client account whose work was seasonal. Thus, the 3rd method would not take into account that [p]laintiff was on a temporary assignment that in all likelihood would not have approached 52 weeks in duration.
>
> . . . [T]he payroll data submitted into evidence merely shows the temporary and sporadic nature of a temporary employees' employment with [defendant].
>
> . . . The Full Commission finds that exceptional reasons exist, and [p]laintiff's average weekly wage should be calculated pursuant to the 5th method. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that [p]laintiff would have at least worked 520 hours in his assignment with [Field Builders] but for his [24 November 2015] work injury. Thus, [p]laintiff's total earnings of $5,805.25 should be divided by 52 weeks, which yields an average weekly wage of $111.64 and compensation rate of $74.43. The figure of $111.64 is an average weekly wage that is fair and just to both sides in this claim. It takes into account that [p]laintiff was working a temporary assignment that most likely would have ended once he worked 520 hours . . . .

¶ 47 Reviewing the record demonstrates that these findings were supported by competent evidence. Thomas Chandler, CEO and owner of defendant, testified that defendant's clients would sign a contract with defendant agreeing not to hire an employee until the employee worked for 520 hours. Agreements like this were standard in the industry, though some companies used the term thirteen weeks—the weekly equivalent of 520 hours. Sometimes, a client would want to hire an employee full-time before the 520 hours were completed. In that situation, the client still had to pay defendant for the full 520 hours. However, many

employees did not stay with defendant for the full 520 hours, as the average amount of time employees worked for defendant was ten weeks.

¶ 48 Chandler testified that if an employee was not hired by a client after working a particular job assignment for 520 hours, the client rarely had the employee stay on, as the client would have to pay a premium to retain the employee through defendant. Typically, employees who were not hired were either let go or the assignment ended. When not assigned to a client, employees might wait a significant amount of time before another position became available. Thus, as Chandler noted, it was not "fair to say that there[was] pretty much always a job available." Since employees could only be placed in positions for which they were qualified, an employee's language barrier might prevent him or her from finding a position. Plaintiff testified that he spoke very little English.

¶ 49 Chandler further testified that plaintiff was working for Field Builders, a company that creates or updates ball fields at schools and performs landscaping work. Field Builders's work can be impacted by the weather, the season, and holidays. Plaintiff had exceeded thirteen weeks with Field Builders and had completed over ninety-five percent of his 520 hours when he ceased working.

¶ 50 Plaintiff was injured in December 2015 but was medically released to full duty work in June of 2016—allowing him to accept any job without restriction. Initially, defendant found plaintiff work with a client for three weeks. However, after that job ended, defendant was unable to place plaintiff with another client. Later, a different staffing agency was also unable to find plaintiff work. Additionally, plaintiff was unable to find a job for the eight months preceding his employment with defendant.

¶ 51 This competent evidence supported the Commission's findings that plaintiff would have stopped working for defendant around 7 December 2015, regardless of the injury. As the Commission repeatedly stated, "[p]laintiff would have at least worked 520 hours in his assignment with Field[ ]Builders but for his November 24, 2015 work injury," "[p]laintiff was working a temporary assignment that most likely would have ended once he worked 520 hours," and plaintiff's employment with defendant "in all likelihood would not have approached 52 weeks in duration." Supporting this finding was the evidence that plaintiff had completed over ninety-five percent of the required 520 hours. Accordingly, either plaintiff would have reached 520 hours and been hired by Field Builders, or his position would have ended. If plaintiff had gone to work for Field Builders, any income he earned from them would not have counted

toward his average weekly wage calculation since Field Builders was a different employer than defendant. *See Joyner v. A. J. Carey Oil Co.*, 266 N.C. 519, 521 (1966) ("When an employee who holds two separate jobs is injured in one of them, his compensation is based only upon his average weekly wages earned in the employment producing the injury."). Conversely, if the position ended, the Commission could reasonably infer that plaintiff would have ceased working for defendant since, when plaintiff returned to defendant in June of 2016 with no work restrictions, defendant was unable to find plaintiff a job, other than three weeks with one client. As such, the third method would not produce results fair and just to defendant because it would compensate plaintiff for far more hours than he would have worked for defendant if he was not injured. Rather, a fair and just average weekly wage would reflect the Commission's finding that plaintiff would not have worked significantly longer for defendant. The Commission's chosen calculation under the fifth method—dividing plaintiff's wages by fifty-two weeks—obtained that outcome.

¶ 52 Perhaps different factual inferences could be drawn from the evidence. However, that is not the role of the appellate courts. Appellate courts review the Commission's resolutions of questions of fact simply to determine if they are supported by competent evidence; they do not "have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433–34 (1965). Competent evidence in this case supported the Commission's findings. Accordingly, we should affirm the opinion and award.

III. Conclusion

¶ 53 "The rule is well settled to the effect that, if in any reasonable view of the evidence it will support, either directly or indirectly, or by fair inference, the findings made by the commission, they must be regarded as conclusive." *McGill v. Town of Lumberton*, 218 N.C. 586, 591 (1940) (cleaned up). Here, a reasonable view of the evidence and fair inferences support the finding of the Commission that plaintiff's average weekly wage should be calculated according to the fifth method. Further, a careful review of this Court's precedent demonstrates that the Commission's finding rested on a proper interpretation of N.C.G.S. § 97-2(5). There is no need to remand this case to the Commission for further findings or a reperformance of a calculation that it has already correctly performed. Accordingly, I respectfully dissent.

Chief Justice NEWBY joins in this dissenting opinion.

NEW HANOVER CNTY. BD. OF EDUC. v. STEIN

[380 N.C. 94, 2022-NCSC-9]

THE NEW HANOVER COUNTY BOARD OF EDUCATION
v.
JOSHUA H. STEIN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, AND NORTH CAROLINA COASTAL FEDERATION, INC., AND SOUND RIVERS, INC.

No. 339A18-2

Filed 11 February 2022

Appeal and Error—swapping horses on appeal—statute enacted during pendency of appeal—new claim raised

Where a case arising from a school board's constitutional challenge to the attorney general's administration of funds received pursuant to an agreement with a hog farming company (following the contamination of water supplies by swine waste lagoons) was on remand at the Court of Appeals for further proceedings not inconsistent with the Supreme Court's prior opinion, the Court of Appeals erred by concluding that the school board's amended complaint sufficed to state a claim for relief pursuant to a statute that was enacted during the pendency of the appeal (N.C.G.S. § 147-76.1). The school board could not raise an entirely new claim for the first time on appeal—based on a statute that did not even exist at the time its amended complaint was filed—from the trial court's order granting summary judgment to the attorney general.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 132 (2020), reversing and remanding an order entered on 12 October 2017 by Judge Paul C. Ridgeway in Superior Court, Wake County, granting summary judgment in favor of defendant Joshua H. Stein, Attorney General. On 14 April 2021, the Supreme Court allowed the Attorney General's petition for discretionary review as to additional issues and plaintiff New Hanover County Board of Education's conditional petition for discretionary review. Heard in the Supreme Court on 9 November 2021.

Stam Law Firm, PLLC, by Paul Stam and R. Daniel Gibson, for plaintiff-appellee.

Joshua H. Stein, Attorney General, by James W. Doggett, Deputy Solicitor General, and Marc Bernstein, Special Deputy Attorney General, for defendant-appellant.

The Southern Environmental Law Center, by Mary Maclean Asbill, Brooks Rainey Pearson, and Blakeley E. Hildebrand, for intervenor-appellants.

Ward and Smith, P.A., by Christopher S. Edwards and Marcus Gadson, for amicus curiae Marcus Gadson.

ERVIN, Justice.

¶ 1 This case arises from the Board of Education's challenge to the Attorney General's administration of an environmental enhancement grant program funded by payments made by Smithfield Foods, Inc., and several of its subsidiaries pursuant to a 2000 agreement between the Smithfield companies and the Attorney General. After the Board of Education filed an amended complaint alleging that the payments received from the Smithfield companies in accordance with the agreement amounted to civil penalties that should have been made available to the public schools pursuant to article IX, section, 7 of the North Carolina Constitution, the trial court granted summary judgment in favor of the Attorney General. On appeal, the Court of Appeals reversed, finding that the record disclosed the existence of genuine issues of material fact that precluded the entry of summary judgment in the Attorney General's favor. This Court reversed the Court of Appeals' decision on the grounds that the record did not disclose the existence of any genuine issues of material fact and that the Attorney General was entitled to judgment as a matter of law given that the undisputed evidence demonstrated that the funds provided by the Smithfield companies did not constitute civil penalties for purposes of article IX, section 7, of the North Carolina Constitution and remanded this case to the Court of Appeals for further proceedings not inconsistent with its opinion. On remand, the Court of Appeals allowed the Board of Education's motion for supplemental briefing and filed an opinion holding that the funds made available by the agreement were subject to a newly enacted statute requiring all funds received by the State to be deposited in the State treasury and that the Board of Education's amended complaint sufficed to state a claim against the Attorney General pursuant to this statute. As a result, the determinative issue before this Court at this point is whether the Board of Education's amended complaint suffices to support a claim pursuant to N.C.G.S. § 147-76.1. After careful consideration of the record in light of the applicable law, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the

Superior Court, Wake County, with instructions to reinstate its earlier order granting summary judgment in favor of the Attorney General.

I. Factual Background

A. Substantive Facts

¶ 2 After a five-year period during which hog waste lagoons in eastern North Carolina ruptured or overflowed and spilled millions of gallons of waste into the State's waterways, then-Attorney General Michael F. Easley entered into an agreement with Smithfield Foods, Inc., the state's largest hog-farming operation, and several of its subsidiaries[1] on 25 July 2000, pursuant to which the Smithfield companies agreed to

> (1) undertake immediate measures for enhanced environmental protection on Company-owned Farms and provide assistance to Contract Farmers in undertaking these same measures;
>
> (2) commit $15 million for the development of Environmentally Superior Technologies for the management of swine waste and to facilitate the development, testing, and evaluation of potential technologies on Company-owned Farms;
>
> (3) install Environmentally Superior Technologies on each Company-owned Farm in North Carolina and provide financial and technical assistance to Contract Farmers for the installation of these technologies
>
> (4) commit $50 million to environmental enhancement activities;
>
> (5) cooperate fully with the Attorney General to ensure compliance with applicable laws, regulations, policies and standards; and
>
> (6) in cooperation with the Attorney General and all other interested parties, take a leadership role in enhancing the effectiveness of the Albemarle-Pamlico National Estuary Program . . . .

1. The subsidiaries involved in the agreement include Brown's of Carolina, Inc.; Carroll's Foods, Inc; Murphy Farms, Inc.; Carroll's Foods of Virginia, Inc.; and Quarter M Farms, Inc.

In order to provide $50 million for use in funding environmental enhancement activities in accordance with the agreement, the Smithfield companies agreed "to pay each year for 25 years an amount equal to one dollar for each hog in which the Companies . . . have had any financial interest in North Carolina during the previous year, provided, however, that such amount shall not exceed $2 million in any year," with these funds to "be paid to such organizations or trusts as the Attorney General will designate" as long as they were used "to enhance the environment of the State, including eastern North Carolina, to obtain environmental easements, construct or maintain wetlands and such other environmental purposes, as the Attorney General deems appropriate." In carrying out his obligations under the agreement, the Attorney General was authorized to consult with representatives from the Smithfield companies, the North Carolina Department of Environmental Quality,[2] and "any other groups or individuals he deems appropriate and may appoint any advisory committees he deems appropriate."

¶ 3 On 18 October 2002, the Smithfield companies, with the consent of then-Attorney General Roy A. Cooper, entered an escrow agreement with RBC Centura Bank[3] pursuant to which the Smithfield companies agreed to deposit all funds provided in accordance with the agreement into a bank account in which those funds would be held for disbursement directly to recipients by the Attorney General. In accordance with the terms of the agreement, the Smithfield companies made an annual deposit into the relevant account around the anniversary of the date upon which they entered into their agreement with the Attorney General.

¶ 4 In January 2003, then-Attorney General Cooper established the Environmental Enhancement Grants Program for the purpose of "improv[ing] the air, water and land quality of North Carolina by funding environmental projects that address the goals of the agreement between Smithfield and the Attorney General." On an annual basis, the program solicits applications from governmental agencies and nonprofit entities, which are then reviewed by a panel consisting of representatives of the North Carolina Department of Justice, the North Carolina Department of Environmental Quality, the North Carolina Department of Natural and Cultural Resources, various academic institutions, and certain nonprofit organizations involved in conservation efforts. After the panel makes

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2. At the time the agreement was signed, the North Carolina Department of Environmental Quality was known as the North Carolina Department of Environment and Natural Resources.

3. In 2012, RBC Centura Bank was acquired by PNC Financial Services.

recommendations to the Attorney General concerning the manner in which the available grant funds should be disbursed, representatives of the Smithfield companies have the opportunity to make recommendations to the Attorney General as well. At the conclusion of this process, the Attorney General selects the recipients of the grants to be awarded in the exercise of his discretion and may designate up to $500,000 for use by the individual grant recipients. During the period from 2000 to 2016, the Attorney General awarded more than $25 million pursuant to the agreement for the purpose of funding more than 100 separate initiatives that addressed a variety of environmental problems, with the work to be performed using these grant payments having included rehabilitating abandoned waste lagoons, conserving wildlife habitats, improving water quality, reducing pollution from agricultural and stormwater runoff, funding environmental research, and restoring forests, shorelines, wetlands, and streams across North Carolina.

B. Procedural History

1. The First Appeal

¶ 5 On 18 October 2016, Francis X. De Luca filed a complaint in the Superior Court, Wake County, in which he alleged that the payments made by the Smithfield companies pursuant to the agreement constituted penalties for purposes of article IX, section 7, of the North Carolina Constitution, which requires that the "proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State . . . shall be faithfully appropriated and used exclusively for maintaining free public schools." In his complaint, Mr. De Luca requested that the Attorney General "be preliminarily and permanently enjoined from distributing payments made pursuant to [the agreement] to anyone other than to the Civil Penalty and Forfeiture Fund" and that the Attorney General be required to recover all program-related funds that had been distributed to grant recipients within the last three years and deposit those monies into the Civil Penalties and Forfeiture Fund. On 25 January 2017, Mr. De Luca filed an amended complaint that added the New Hanover County Board of Education as an additional party plaintiff and substituted the current Attorney General, Joshua H. Stein, acting in his official capacity, as a party defendant.

¶ 6 On 12 October 2017, the trial court entered an order granting summary judgment in favor of the Attorney General on the grounds that payments made pursuant to the program did not constitute "penalties," "forfeitures," or "fines" that had been collected for "any breach of the penal laws of the State" subject to article IX, section 7, of the North

Carolina Constitution. On the same date, the trial court entered an order allowing the North Carolina Coastal Federation, Inc., and Sound Rivers, Inc., to intervene as party-defendants. Mr. De Luca and the Board of Education noted an appeal from the trial court's summary judgment order to the Court of Appeals.

¶ 7 On 4 September 2018, a divided panel of the Court of Appeals filed an opinion holding that, while Mr. De Luca lacked standing to assert a claim against the Attorney General pursuant to article IX, section 7, of the North Carolina Constitution, the Board of Education was entitled to assert such a claim on the theory that, in the event that its claim against the Attorney General proved successful, it was entitled to receive a portion of the funds at issue in this case. *De Luca v. Stein*, 261 N.C. App. 118, 128 (2018). In addition, the Court of Appeals held that the record disclosed the existence of "genuine issues of material fact" concerning the extent to which payments made pursuant to the agreement were intended to penalize the Smithfield companies or to deter them from violating the State's environmental laws in the future, rendering them subject to the requirements of article IX, section 7, of the North Carolina Constitution. *Id.* at 136. As a result, the Court of Appeals reversed the trial court's summary judgment order and remanded this case to the Superior Court, Wake County, for a trial on the merits with respect to the Board of Education's claim. *Id.*

¶ 8 After the Attorney General and the environmental intervenors noted an appeal to this Court on the basis of a dissent by former Judge Wanda Bryant and after we granted petitions for discretionary review with respect to additional issues filed by all of the parties to this case, this Court filed an opinion on 3 April 2020 in which it reversed the Court of Appeals' decision and remanded this case to the Court of Appeals for further proceedings not inconsistent with its opinion. *New Hanover Cty. Bd. of Educ. v. Stein*, 374 N.C. 102 (2020). Although this Court agreed that the Board of Education was authorized to assert a claim against the Attorney General pursuant to article IX, section 7, of the North Carolina Constitution, we noted that it did not have standing "to assert that the Attorney General lacked the authority to enter the agreement at all and appropriately made no such argument." *Id.* at 117. In addition, we held that the Court of Appeals had erred by determining that the record disclosed the existence of a genuine issue of material fact concerning the extent, if any, to which payments made pursuant to the agreement constituted penalties for purposes of N.C. Const. art. IX, § 7, and concluded that the trial court had not erred by granting summary judgment in favor of the Attorney General with respect to the Board

of Education's civil penalties clause claim. *Id.* at 123. As a result, we reversed the Court of Appeals' decision and remanded this case to the Court of Appeals "for any additional proceedings not inconsistent with this opinion." *Id.* at 123–24.

¶ 9 In a footnote that appeared at the end of our opinion, we acknowledged that the General Assembly had recently enacted N.C. Sess. L. 2019-250, which took effect on 1 July 2019, *id.* at 124 n.8, and that the statutory provision in question had amended chapter 147, article 6, of the North Carolina General Statutes by adding a new section that provided, in pertinent part, that, "[e]xcept as otherwise provided by law, all funds received by the State, including cash gifts and donations, shall be deposited in the State treasury," N.C.G.S. § 147-76.1(b) (2021); that, "[e]xcept as otherwise provided by subsection (b) of this section, the terms of an instrument evidencing a cash gift or donation are a binding obligation of the State," N.C.G.S. § 147-76.1(c); and that "[n]othing in this section shall be construed to supersede, or authorize a deviation from the terms of an instrument evidencing a gift or donation setting forth the purpose for which the funds may be used," N.C.G.S. § 147-76.1(c). After noting that "the parties [had] agreed that the provisions of newly-enacted N.C.G.S. § 147-76.1 would not have the effect of mooting this appeal," we stated that we would not attempt to construe the new statute or to apply it to the facts of this case and expressed "no opinion as to what effect, if any, N.C.G.S. § 147-76.1 has on the agreement or any past or future payments made thereunder." *Stein*, 374 N.C. at 260.[4]

2. The Second Appeal

¶ 10 On 26 May 2020, the Board of Education filed a motion with the Court of Appeals seeking leave to file a supplemental brief addressing the applicability of N.C.G.S. § 147-76.1 to this case. The Court of Appeals allowed the Board of Education's motion for supplemental briefing on 18 June 2020. In its supplemental brief, the Board of Education argued that N.C.G.S. § 147-76.1 applied to payments made pursuant to the agreement on the grounds that those payments constituted "funds received by the State" in the form of a "cash gift" and that the Attorney General was required to deposit payments made pursuant to the agreement in the State treasury. After acknowledging that the General Assembly had not

4. On 18 May 2020, this Court entered an order denying the Board of Education's petition for rehearing while modifying the wording contained in Footnote No. 8 as it appeared in our original opinion. The language quoted in the text of this opinion reflects the wording change that resulted from the modification that we made to the relevant footnote. *See* 374 N.C. 260 (2020).

enacted § 147-76.1 until after the amended complaint had been filed, the Board of Education argued that appellate courts "must apply the law in effect at the time it renders its decision," citing *State v. Currie*, 19 N.C. App. 241, 243 (1973), *aff'd*, 284 N.C. 562 (1974). As a result, the Board of Education urged the Court of Appeals to hold that § 147-76.1 applied to the agreement and required the Attorney General to deposit all payments that had been received from the Smithfield companies since 1 July 2019 and all future payments received pursuant to the agreement into the State treasury.

¶ 11 In response, the Attorney General argued that, while it was "unclear if new section 147-76.1 applies to Smithfield's funding of the grant program," he would, "out of an abundance of caution," transfer the only payment that had been received from the Smithfield companies since 1 July 2019 to the State treasury and committed to ensuring that all future payments received from the Smithfield companies would be deposited into the State treasury as well. The Attorney General also asserted that N.C.G.S. § 147-76.1 had "no effect on the only claim that the [Board of Education had] assert[ed] in its complaint," which was that payments made pursuant to the agreement were "subject to [the civil penalties clause] of the Constitution and must go to the Civil Penalty and Forfeiture Fund." For that reason, the Attorney General contended that "[n]othing about the enactment of section 147-76.1 or the deposit of the funding for the grant program into the state treasury" altered this Court's decision with respect to the civil penalties issue, so that "this case [was] over," and that, by asking the Court of Appeals to "apply" § 147-76.1 to this case, the Board of Education was asking the Court of Appeals "to do nothing less than resolve a new claim" that was completely unrelated to the claim asserted in the amended complaint despite the fact that "no such claim [had been] pleaded" in the Board of Education's amended complaint.

¶ 12 In addition, the Attorney General contended that, even if any claim that the Board of Education might assert pursuant to N.C.G.S. § 147-76.1 was properly before the Court of Appeals, that claim lacked merit. More specifically, the Attorney General contended that the Board of Education lacked standing to assert a claim pursuant to § 147-76.1 on the theory that, unlike article IX, section 7, of the North Carolina Constitution, § 7, N.C.G.S. § 147-76.1 did not confer any "financial interest" upon the Board of Education, with "some generalized grievance about the operation of the grant program" being insufficient to support the assertion of a claim pursuant to 147-76.1. Moreover, the Attorney General argued that a decision to deposit funds received pursuant to the agreement into the State

treasury would have no effect upon the operation of the grant program because § 147-76.1(b) expressly provided that "the terms of an instrument evidencing a cash gift or donation are a binding obligation of the State." For that reason, the Attorney General contended that the terms of his agreement with the Smithfield companies, including the provisions giving him the authority to administer the grant program, remained in effect even after the funds provided pursuant to the agreement had been deposited into the State treasury. Finally, the Attorney General claimed that, in the event that the Board of Education was merely seeking to have funds received pursuant to the agreement deposited into the State treasury, any such claim had been rendered moot by virtue of the fact that the relevant funds had already been placed there.

¶ 13 On 15 December 2020, a divided panel of the Court of Appeals filed an opinion in which it reversed the trial court's summary judgment order and remanded this case to Superior Court, Wake County, for the entry of an order compelling the Attorney General to transfer "all funds presently held" and "all funds received under the [a]greement in the future" into the State treasury as required pursuant to N.C.G.S. § 147-76.1. *New Hanover Cty. Bd. of Educ. v. Stein*, 275 N.C. App. 132, 141 (2020). After noting that this Court had remanded this case to the Court of Appeals for "any additional proceedings not inconsistent with this opinion" and that compliance with this instruction "include[d] determination of the applicability of [§ 147-76.1]," the Court of Appeals concluded that it was entitled to resolve the issue posited in the Board of Education's supplemental brief on the merits without the necessity for a remand to Superior Court, Wake County, given that "[n]either party asserts there are any disputed facts" and that the issue of the applicability of § 147-76.1 to the monies that the Attorney General received pursuant to the agreement raised "purely a question of law." *Id.* at 136–38.

¶ 14 In reaching this conclusion, the Court of Appeals began by observing that the Attorney General had agreed that he had accepted the funds that had been made available pursuant to the agreement on behalf of the State and that N.C.G.S. § 147-76.1 provided that "all funds received by the State, including cash gifts and donations, shall be deposited into the State treasury." *Id.* at 137; § 147-76.1(b). In light of that set of facts, the Court of Appeals concluded that "[t]he statute clearly mandates these are public funds, [that] they belong to taxpayers of the State, and [that they] are required 'to be deposited into the State treasury.' " *Stein*, 275 N.C. App. at 137 (quoting § 147-76.1(b)). According to the Court of Appeals, the fact that § 147-76.1 had not been enacted until after the filing of the amended complaint had no bearing upon the proper resolution of this

case given that the Attorney General did not raise this issue on appeal and that, in any event, "[o]ur courts have held[ ] '[t]he general rule is an appellate court *must* apply the law in effect at the time it renders its decision.' " *Id.* (quoting *Currie*, 19 N.C. App. at 243). After acknowledging that current law should not be applied in the event that doing so "would result in manifest injustice or there is a statutory direction or legislative history to the contrary," *Bradly v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974), the Court of Appeals noted that the Attorney General had not argued that applying § 147-76.1 to the facts of this case would be manifestly unfair and that there was no "legislative history to indicate that [§ 147-76.1] does not apply to these admittedly public funds." *Stein*, 275 N.C. at 137.

¶ 15 The Court of Appeals rejected the Attorney General's contention that the Board of Education's claim pursuant to N.C.G.S. § 147-76.1 represented a new claim for relief that had not been alleged in the amended complaint on the grounds that "[t]he Board's allegations are sufficient to provide the Attorney General with notice of the transactions and occurrences showing entitlement to relief and is well within the scope of [the Court of Appeals'] jurisdiction." *Id.* In support of this determination, the Court of Appeals pointed out that pleadings only needed to contain a "short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief," N.C.G.S. § 1A-1, Rule 8(a), so that "[t]he only question is whether the complaint 'gives notice of the events and transactions' that allows 'the adverse party to understand the nature of the claim.' " *Stein*, 275 at 138 (quoting *Haynie v. Cobb*, 207 N.C. App. 143, 149 (2010)). In addition, the Court of Appeals directed the parties' attention to N.C.G.S. § 1A-1. Rule 54(c), which provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings[,]" N.C.G.S. § 1A-1, Rule 54(c), and this Court's opinion in *Holloway v. Wachovia Bank & Trust Co.*, in which we held that "[t]he prayer for relief does not determine what relief ultimately will be awarded" but that, "[i]nstead, the court should grant the relief to which a party is entitled, whether or not demanded in his pleading," 339 N.C. 338, 346 (1994). As a result, the Court of Appeals held that, "[i]f the party makes a demand for relief, it is 'not crucial that the wrong relief has been demanded' " given that the purpose of Rule 54(c), "is to provide 'whatever relief is supported by the complaint's factual allegations and proof at trial.' " *Stein*, 275 N.C. at 138 (quoting *Holloway*, 339 N.C. at 346).

¶ 16 In applying these legal principles to the facts of this case, the Court of Appeals stated that "[t]he Board's original prayer for relief seeks deposit of [the funds received pursuant to the agreement] into the State treasury in the Civil Penalty and Forfeiture Fund," that the Smithfield companies are "depositing $2 million dollars of admittedly public funds per year into a private bank account for public environmental purposes," and that, "under the [a]greement, the Attorney General purports to exercise sole authority to allocate and distribute these sums to his chosen recipients." *Id.* at 139. In addition, the Court of Appeals noted that the Board of Education had "requested a preliminary and permanent injunction against the Attorney General to prevent future distribution of these funds" and alleged that there was "a current and ongoing course of future payments of public funds under the [a]greement." *Id.* According to the Court of Appeals,

> [w]hether the funds should be deposited into the State treasury for further appropriation and distribution or be earmarked for the Civil Penalty and Forfeiture Fund is immaterial as juxtaposed with deposits of public funds into a private bank account with distributions therefrom and recipients thereof within the Attorney General's sole discretion and control.

Id. As a result, the Court of Appeals held that the allegations contained in the amended complaint sufficed to state a claim for relief pursuant to N.C.G.S. § 147-76.1. *Id.*

¶ 17 In addition, the Court of Appeals noted that it had recently held that the General Assembly, rather than the Governor, had the authority to decide how certain federal block grant awards should be spent; that "North Carolina courts have not permitted members of the executive branch to exercise unbridled appropriation or expenditure of unbudgeted public funds"; and that N.C.G.S. § 147-76.1 "mandates the location and depository where the public money is to be deposited and held." *Stein*, 275 N.C. App. at 140 (citing *Cooper v. Berger*, 268 N.C. App. 468 (2019), *aff'd* 376 N.C. 22 (2020)). In light of that set of circumstances, the Court of Appeals concluded that "[t]he State Treasurer must receive, hold, and account for the disbursement of these funds in accordance with the stated environmental purposes of the [a]greement" and that " '[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law . . . .' " *Id.* (quoting N.C. Const. art. V, § 7(1)). As a result, the Court of Appeals reversed the trial court's summary judgment order and remanded this case to Superior Court, Wake County, "for entry of an order to compel [the Smithfield companies] and

the Attorney General to transfer and deposit all funds presently held and those to be paid and received from [the Smithfield companies] under the [a]greement in the future into the State treasury in compliance with [§ 147-76.1]." *Id.* at 141.[5]

¶ 18 In dissenting from the Court of Appeals' decision, Judge Bryant concluded that the Board of Education lacked standing to assert a claim against the Attorney General pursuant to N.C.G.S. § 147-76.1. *Id.* at 142 (Bryant, J., dissenting). In Judge Bryant's view, the Board of Education had failed to advance any claim pursuant to § 147-76.1 at the time of its initial appeal, that the Board of Education could not have done so because the relevant legislation had not been enacted at that time, and that this Court had not addressed the issue at the time of its initial consideration of this case. *Id.* According to Judge Bryant, "[t]he issue raised by the Board concerning [N.C.G.S. § 147-76.1] is novel" and "is not, therefore, an 'additional proceeding' as contemplated by the Supreme Court's mandate" but is, instead, "an entirely new proceeding which a trial court of competent jurisdiction must rule on before this Court may consider arguments." *Id.* at 142–43.

¶ 19 In addition, Judge Bryant disagreed with the Court of Appeals' reliance upon N.C.G.S. § 1A-1, Rules 8 and 54(c), on the theory that "[t]he Rules of Civil Procedure apply to our trial courts," citing N.C.G.S. § 1A-1, Rule 1 ("Scope of Rules"), and that, while the appellate courts "are authorized to determine whether the trial courts properly applied the Rules of Civil Procedure," they "are not authorized to substitute those rules for the rules which govern [their] review on appeal." *Id.* at 143–44. As a result, Judge Bryant concluded that the Court of Appeals had prematurely addressed the effect of § 146-76.1 upon the funds received pursuant to the agreement and should have refused to consider that issue on ripeness grounds. *Id.* at 144.

¶ 20 The Attorney General and environmental intervenors noted appeals to this Court from the Court of Appeals' decision based upon Judge Bryant's dissent. In addition, the Attorney General, the environmental intervenors, and the Board of Education filed separate petitions

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5. Although the Court of Appeals remand order mandated that *all* funds presently held by the Attorney General pursuant to the agreement be deposited in the State treasury, the Board of Education acknowledges that this portion of the Court of Appeals' decision was erroneous given that the enacting legislation specified that § 147-76.1 would "appl[y] to funds received on or after" 1 July 2019 and asks that the Court refrain from affirming the Court of Appeals decision with respect to funds received by the Attorney General prior to 1 July 2019. *See* 2019 N.C. Sess. Laws 250, § 5.7.(c).

seeking discretionary review with respect to additional issues. On 14 April 2021, this Court allowed the discretionary review petitions filed by the Attorney General and the Board of Education while dismissing the environmental intervenors' discretionary review petition as moot.

II. Substantive Legal Analysis

A. Standard of Review

¶ 21 This Court reviews decisions of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); *State v. Melton*, 371 N.C. 750, 756 (2018). In determining whether a complaint states a claim for which relief can be granted, we use a de novo standard of review, taking as true the factual allegations contained in the complaint. *See, e.g.*, *Krawiec v. Manly*, 370 N.C. 602, 604 (2018) (taking as true the factual allegations contained in a complaint in reviewing an order concerning a motion to dismiss for failure to state a claim for which relief can be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6)); *see also Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400 (2003), *aff'd per curiam*, 357 N.C. 567 (2003) (holding that appellate courts "must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct").

B. The Board's Complaint

¶ 22 An analysis of the extent to which the Board of Education's amended complaint states a claim for relief pursuant to N.C.G.S. § 147-76.1 must begin with an examination of N.C.G.S. § 1A-1, Rule 8, which provides that a pleading must contain (1) "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief" and (2) "[a] demand for judgment for the relief to which [the plaintiff] deems himself entitled." As we have previously stated, "when the allegations in the complaint give sufficient notice of the wrong complained of[,] an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under *some* legal theory." *Stanback v. Stanback*, 297 N.C. 181, 202 (1970) (emphasis added), *overruled on other grounds by Dickens v. Puryear*, 302 N.C. 437, 448 (1981); *see also Sutton v. Duke*, 277 N.C. 94, 100 (1970). "[T]he policy behind notice pleading is to resolve controversies on the merits, after an opportunity for discovery, instead of resolving them based on the technicalities of pleadings." *Ellison v. Ramos*, 130 N.C. App. 389, 395 (1998). In evaluating whether a complaint adequately states a claim for relief for purposes of N.C.G.S. § 1A-1, Rule 12(b)(6), we take the

allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 439 (1974); *see also Kaleel Builders, Inc v. Ashby*, 161 N.C. App. 34, 37 (2003) (noting that, in reviewing a trial court's decision to dismiss a claim for failure to state a claim for which relief can be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), "we read all allegations in the light most favorable to plaintiff").

¶ 23 In seeking to persuade us that the amended complaint fails to state a claim for relief pursuant to N.C.G.S. § 147-76.1, the Attorney General argues that, even though the applicable standard of review is a liberal one, it "does not relieve plaintiffs of the burden of making factual allegations that provide defendants with sufficient notice of the specific claims that plaintiffs might assert." In support of this assertion, the Attorney General directs our attention to *Sutton*, in which we recognized that the General Assembly intended "to require a more specific statement, or notice in more detail" by enacting N.C.G.S. § 1A-1, Rule 8, compared to the requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure. *Sutton*, 277 N.C. at 100.

¶ 24 According to the Attorney General, the amended complaint failed to provide notice that the Board of Education was asserting a claim pursuant to N.C.G.S § 147-76.1, which had been enacted three years after the filing of the amended complaint, or any other claim relating to the location in which funds provided under the agreement were being deposited other than the Civil Penalties and Forfeiture Fund. On the contrary, the Attorney General argues that "the only ground that the Board identifies that provides it with standing to sue the Attorney General relates to a claim under the civil-penalty clause" of the state constitution. More specifically, the Attorney General notes that the factual allegations set out in the amended complaint revolve around the Board of Education's contention that the payments that the Smithfield companies had made pursuant to the agreement constituted civil penalties and that the only relief that the Board of Education had requested was that the payments that the Smithfield companies had made pursuant to the agreement should be deposited in the Civil Penalties and Forfeiture Fund. In the Attorney General's view, the absence of any allegation that the funds provided by the Smithfield companies under the agreement were being held outside the State treasury necessitated a conclusion that the Attorney General had not been provided with sufficient notice that the Board of Education was contending that the trial court should have ordered the Attorney General to deposit any funds that had been received pursuant to the agreement in the State treasury.

¶ 25 The Attorney General asserts that the Court of Appeals' reliance upon N.C.G.S. § 1A-1, Rule 54(c), which directs trial courts to award a prevailing party the relief to which it was entitled "even if the party has not demanded such relief in its pleadings," has no bearing upon the proper resolution of this case given that "it is 'well-settled' that relief granted under Rule 54 'must be consistent with the claims pleaded.' " *N.C. Nat'l Bank v. Carter*, 71 N.C. App. 118, 121 (1984)). In the Attorney General's view, the Board of Education's request for relief in the form of an order that funds paid by the Smithfield companies pursuant to the agreement be deposited in the State treasury was not consistent with its original claim that the monies that the Smithfield companies had paid pursuant to the agreement violated article IX, section 7, of the North Carolina Constitution given that "a violation of the civil-penalty clause cannot be remedied simply by placing the proceeds of civil penalties into the state treasury."

¶ 26 In seeking to convince us that the amended complaint did, in fact, sufficiently allege a claim for relief predicated upon N.C.G.S. § 147-76.1, the Board of Education contends that it had "allege[d] that the Attorney General [was] receiving and disbursing State funds." According to the Board of Education, a complaint should not be dismissed simply because it fails to cite the statutory provision upon which the claim that it asserts rests and that a complaint is sufficient in the event that it alleges the relevant facts even though the claim being asserted is either mislabeled or not labeled at all, citing in support of that proposition *Enoch v. Inman*, 164 N.C. App. 415, 417–18 (2004). In the Board of Education's view, as long as the complaint alleges facts that give the opposing party sufficient notice to permit it to understand the nature of the claim that is being asserted, that claim has been sufficiently stated.

¶ 27 According to the Board of Education, the "elements" of a claim pursuant to N.C.G.S § 147-76.1 are "(1) receipt of State funds and (2) those funds not being deposited into the State Treasury or those funds not being properly appropriated." In the Board of Education's view, the allegation in the amended complaint that the Smithfield companies "pa[id] North Carolina and deliver[ed] to the Attorney General of North Carolina up to $2 million per year" that was "distribute[d] . . . to grant recipients for Supplemental Environmental Programs" sufficed to put the Attorney General on notice that he had improperly received and spent State money, thereby effectively informing the Attorney General that a claim has been stated pursuant to § 147-76.1 despite the absence of any reference to the relevant statutory provisions in the relevant pleading. Similarly, the Board of Education argues that the amended complaint

sufficiently requests that the funds that the Smithfield companies provided under the agreement be deposited in the State treasury on the theory that a trial court should provide "whatever relief is supported by the complaint's factual allegations and proof at trial." *Holloway*, 339 N.C. at 346. As a result, the Board of Education contends that, since the factual allegations set out in the amended complaint show that it is entitled to relief pursuant to § 147-76.1, the Court of Appeals appropriately ordered the Attorney General to deposit funds received pursuant to the agreement into the State treasury.

¶ 28 In an amicus curiae brief submitted in support of the Board of Education, Professor Marcus Gadson of the Campbell Law School argues that "the policy behind the notice theory of the present [pleading] rules is to resolve controversies on the merits, following opportunity for discovery, rather than resolving them on technicalities of pleading." *Smith v. City of Charlotte*, 79 N.C. App. 517, 528 (1986). According to Professor Gadson, the Board of Education's allegation that "the Attorney General ha[d] distributed [the funds provided the Smithfield companies] to grant recipients" was, in the event that all reasonable inferences are made in the Board of Education's favor, sufficient to "suggest[] that the Attorney General has taken the funds and then given them to grant recipients without the intermediate step of putting the money in the [State] treasury first." In addition, Professor Gadson claims a complaint is "not insufficient because it does not provide facts to expressly correspond to each element of a . . . claim" and that the proper test for determining the sufficiency of a complaint is "whether it is clear from the complaint's face that the [plaintiff] can never satisfy each element." Finally, Professor Gadson contends that a complaint should survive a dismissal motion in the event that "no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where the allegations contained therein are sufficient to give a defendant notice of the nature and basis of plaintiffs' claim so as to enable him to answer and prepare for trial." *Forbis v. Honeycutt*, 301 N.C. 699, 702 (1979). According to Professor Gadson, the Board of Education's complaint passes muster in light of these criteria.

¶ 29 We agree with the Attorney General that the Board of Education's amended complaint did not suffice to state a claim for relief pursuant to N.C.G.S. § 147-76.1. The fundamental flaw in the arguments advanced by both the Board of Education and Professor Gadson is their reliance upon decisions addressing the role of the *trial court* in evaluating the sufficiency of pleadings. In *Enoch*, for example, the *trial court* dismissed a complaint alleging racial discrimination by a local government employee

on the grounds that the plaintiff had based her claim on the Fourteenth Amendment to the United States Constitution rather than 42 U.S.C. § 1983, which is the means by which relief can be sought for federal constitutional violations by state and local government officials. *Enoch*, 164 N.C. App. at 417. Similarly, the issue before the Court in *Holloway* was whether the plaintiffs' failure to explicitly request an award of punitive damages in their prayer for relief precluded the recovery of such damages even though the factual allegations set out in the complaint and evidence elicited *at trial* supported an award of punitive damages. *Holloway*, 339 N.C. at 342. Finally, in *N.C. Consumer Power*, upon which Professor Gadson relies for the "cardinal principle that the Court should give the Board the benefit of all reasonable inferences when evaluating the complaint," this Court was faced with whether the *trial court* had erroneously denied the defendant's dismissal motion in the face of an assertion that the plaintiff had failed to allege the existence of a justiciable controversy. 285 N.C. at 439.

¶ 30 In this case, however, the trial court was never asked to consider whether the Board of Education's complaint sufficed to state a claim pursuant to N.C.G.S. § 147-76.1 and could not have done so because the relevant statutory provision *did not exist* at the time that the trial court decided to grant summary judgment in the Attorney General's favor. As a result, this case does not involve "mislabel[ing]" or a "fail[ing] to label" a claim properly; instead, the Board of Education could not have asserted a claim based upon § 147-76.1 before the trial court because the amended complaint was filed years before the relevant statutory provision was enacted. In other words, the Court of Appeals lacked the authority to address and decide a wholly new claim that had been asserted for the first time on remand from this Court's initial decision. As Judge Bryant recognized in her dissenting opinion, "[t]he Rules of Civil Procedure apply to our trial courts" and "[w]e are not authorized to substitute those rules [for the rules that] govern our review on appeal[,]" i.e., the North Carolina Rules of Appellate Procedure. *Stein*, 275 N.C. App. at 143–44.

¶ 31 Although the Board of Education argues that it did not mislabel the claims that it asserted against the Attorney General "[b]ecause the law changed while [its] appeal was pending," it cites no authority in support of the proposition that a plaintiff may assert for the first time in the appellate division that a complaint alleges the existence of a cause of action that did not exist at the time the plaintiff filed his or her complaint in the trial division. Aside from the chaotic conditions that could result in the appellate courts in the event that the procedures utilized by the

Court of Appeals in this case became commonplace, allowing such a result to occur would effectively deprive the trial court of the ability to perform its primary role—either through the judge or a jury—as the finder of fact, since the trial court would not have had the opportunity to decide the issue of whether the record contains sufficient factual support for the proposed claim for relief. *See Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517 (2004) (stating that, "[o]n appeal, this Court is bound by the facts *found by the trial court* if supported by the evidence") (emphasis added); *Nate v. Ethan Allen*, 199 N.C. App. 511, 521 (2009) (noting that "[i]t is not the role of the appellate courts to make findings of fact."); *see also Winston Affordable Hous., LLC v. Roberts*, 374 N.C. 395, 403–04 (2020) (remanding a case to the trial court for additional factfinding after determining that the trial court had erroneously concluded that the plaintiff had waived the right to assert certain breach of contract claims).

¶ 32 In addition, the Court of Appeals' decision cannot be sustained upon the basis of the legal theory upon which the Board of Education has relied in attempting to persuade us to affirm that decision. As this Court has previously held, "[u]nder the notice theory of pleading a statement of a claim is adequate if it gives sufficient notice of the claim asserted *to enable the adverse party to answer and prepare for trial . . .* and to show the type of case brought." *Sutton*, 277 N.C. at 102 (emphasis added). Although "the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a *legally recognized claim*." *Estate of Savino v. Charlotte-Mecklenburg Hospital Authority*, 375 N.C. 288, 297 (2020) (emphasis added) (quoting *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205 (1988)). In spite of the fact that the amended complaint sufficed to put the Attorney General on notice that the Board of Education contended that he had violated article IX, section 7, of the North Carolina Constitution, we are completely unable to see how the allegations set out in the amended complaint would have permitted the Attorney General to "prepare for trial" with respect to a claim that did not, at that time, exist or how the Board of Education could have pled or proved the elements of a "legally recognized claim" based upon a statutory provision that had not yet been enacted or even proposed.

¶ 33 In addition, after carefully analyzing the allegations set out in the amended complaint and after assuming, without in any way deciding, that the Board of Education has properly stated the elements of any claim for relief that might be available to it pursuant to N.C.G.S. § 147-76.1, we conclude that the Board of Education would have been

required to allege that the Attorney General had failed to deposit the funds that the Smithfield companies have paid in accordance with the agreement into the State treasury. The amended complaint is, however, completely devoid of any such allegation. Instead, the amended complaint simply alleges that the Attorney General had failed to deposit the relevant funds into the Civil Penalty and Forfeiture Fund, which is an entirely different kettle of fish. In addition, any contention that the allegation in the amended complaint that "the Attorney General has distributed these sums to grant recipients for Supplemental Environment[al] Programs" necessarily "suggests that the Attorney General has taken the funds and then given them to grant recipients without the intermediate step of putting the money in the treasury first" involves a logical leap that we are unable to take and rests upon an after-the-fact attempt to imply the existence of a factual allegation that would not have had any bearing upon the claim that the Board of Education actually asserted in the amended complaint had it been made.

¶ 34 The Court of Appeals' determination that the amended complaint suffices to assert a claim for relief pursuant to N.C.G.S § 147-76.1 seems even more dubious when one considers that the original cause of action that the Board of Education asserted in the amended complaint was constitutional, rather than statutory, in nature. In *Enoch*, the Court of Appeals determined that the factual allegations underlying the plaintiff's claim that a local employee had violated her federal constitutional rights in contravention of the Fourteenth Amendment sufficed to support a claim for relief pursuant to 42 U.S.C. § 1983, a statute that provides the exclusive remedy for the infringement of federal constitutional rights by a state or local employee. *Enoch*, 164 N.C. App. at 418–19; *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731 (1989). Simultaneously, however, the Court of Appeals rejected the plaintiff's contention that her complaint sufficed to state a claim for relief pursuant to 42 U.S.C. § 1981, which confers upon "[a]ll persons within the jurisdiction of the United States" the right to enter into and enforce contracts and to the "full and equal benefit of all laws and proceedings for the security of persons and property . . . ," reasoning that "the wrong complained of" in the complaint was repeatedly characterized as resting upon an alleged violation of the plaintiff's federal constitutional rights, with there being "no indication" that the plaintiff was attempting to enforce a statutory right pursuant to 42 U.S.C. § 1981. Id. at 428–29 (quoting *Stanback*, 297 N.C. at 202). Similarly, the "wrong complained of" in the amended complaint is an alleged violation of the Board of Education's constitutional rights as a beneficiary of the Civil Penalties and Forfeitures Fund, into which it believed that the funds provided by the Smithfield companies

under the agreement had to be deposited, with there being "no indication" that the Board of Education sought to enforce any substantive right pursuant to § 147-76.1 (to the extent that it had the ability to assert such a claim at all)[6] or any other statutory provision.

¶ 35 Furthermore, we reject the Court of Appeals' determination that it was entitled to consider the applicability of N.C.G.S. § 147-76.1 on remand because "[t]he general rule is that an appellate court must apply the law in effect at the time it renders its decision." *Currie*, 19 N.C. App. at 243. The language upon which the Court of Appeals relied in making this statement is derived from the decision of the Supreme Court of the United States in *Thorpe v. Housing Authority of Durham*, in which the Supreme Court considered whether a regulation that had been promulgated by the Department of Housing and Urban Development, which required that a tenant facing eviction from a federally assisted housing project be provided with notice of the reasons for the proposed eviction and an opportunity to respond to the allegations upon which the proposed eviction rested, applied to eviction proceedings that had been initiated before the regulation took effect. 393 U.S. 268, 269–70 (1969). In addressing this issue, the Supreme Court quoted Chief Justice John Marshall for the proposition that, "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and *positively changes the rule which governs*, the law must be obeyed, or its obligation denied." *Id.* at 282 (emphasis added) (quoting *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). The principle stated in *Thorpe* upon which the Court of Appeals relied in *Currie* and in this case has no application here.

¶ 36 The issue that the Board of Education attempted to raise in the amended complaint was whether payments made by the Smithfield companies in accordance with the agreement constituted civil penalties for purposes of article IX, section 7, of the North Carolina Constitution, which is an issue that this Court definitively resolved in its earlier decision in this case. As far as we have been able to ascertain, nothing in N.C.G.S. § 147-76.1 "positively changes the rule which governs" the

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6. As we have already discussed, the Board of Education has failed to cite any authority tending to suggest that it has any substantive rights under or the ability to assert a claim pursuant to § 147-76.1. Although we do not reach the question of the Board of Education's standing to assert a claim against the Attorney General pursuant to § 147-76.1, the absence of statutory language authorizing the Board of Education to assert such a claim casts further doubt upon the validity of its argument that the allegations that it made in support of the state constitutional claim asserted in the amended complaint sufficed to support a separate state statutory claim.

proper resolution of the civil penalties issue. For that reason, nothing in *Currie* or the decisions upon which it relies provides any support for a determination that the enactment of a statute during the pendency of an appeal that does not have any direct bearing upon the proper resolution of the issue that is before the appellate court on appeal allows a party to assert a completely new claim for the first time in an intermediate appellate court on remand from the decision of a state court of last resort. As a result, the enactment of § 147-76.1 does not constitute a change in the applicable legal principles governing the claim asserted in the amended complaint that was addressed in the first round of appellate decisions in this case.

¶ 37 Our decision to reverse the Court of Appeals and order the reinstatement of the trial court's original summary judgment order does not, contrary to the contentions that have been advanced by the Board of Education and Professor Gadson, completely deprive the Board of Education of the ability to assert any claim that might be available to it pursuant N.C.G.S. § 147-76.1. Instead, the Board of Education remains free under our decision in this case to file a new complaint in the Trial Division of the General Court of Justice asserting any claims that might otherwise be available to it pursuant to § 147-76.1 or any other statutory provision. *See Stein*, 275 N.C. App. at 144 (Bryant, J., dissenting) (noting that "the appropriate venue for the Board's claim under [§ 147-76.1] is the trial court."). Instead, our decision in this case reflects nothing more than a recognition that the Board of Education is not free to raise a completely new claim for the first time on appeal from a trial court order granting summary judgment in favor of the opposing party, a result that reaffirms the long-standing principle that a party cannot "swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring*, 207 N.C. 6, 10 (1934). As a result, we hold that the Court of Appeals erred by considering and granting the Board of Education's request for relief pursuant to N.C.G.S. § 147-76.1.

¶ 38 We are unable to conclude our consideration of this case without taking notice of the unusual procedural posture in which it arrived at this Court. After "revers[ing] the decision of the Court of Appeals and remand[ing] this case to the Court of Appeals for any additional proceedings not inconsistent with [that] opinion[,]" in our original decision, *Stein*, 374 N.C. at 124, we stated in a footnote that,

> [a]lthough 2019 N.C. Sess. Laws 250, § 5.7.(c) provided that newly-enacted N.C.G.S. § 147-76.1 became effective on 1 July 2019, and would be applicable to all funds received on or after that date, the parties agreed that

> the provisions of newly-enacted N.C.G.S. § 147-76.1 would not have the effect of mooting this appeal. As a result, we will refrain from attempting to construe N.C.G.S. § 147-76.1 or to apply its provisions to the facts of this case. We express no opinion as to what effect, if any, N.C.G.S. § 147-76.1 has on the agreement or on any past or future payments made thereunder.

Id. at 260.[7] On remand, the Court of Appeals determined that the language contained in this footnote had "remanded to [the Court of Appeals] the task of determining additional proceedings regarding [§ 147-76.1]." *Stein*, 275 N.C. App. at 139. In reaching this conclusion, the Court of Appeals misapprehended the purpose for which we included Footnote No. 8 in our original opinion. Instead of requesting the Court of Appeals to consider any issues relating to § 147-76.1 on remand, Footnote No. 8 simply acknowledged the enactment of § 147-76.1 while expressing no opinion concerning the manner in which that newly enactment statutory provision should be construed or applied with respect to funds received from the Smithfield companies pursuant to the agreement. Although this Court does, on occasion, remand cases to the lower courts for the consideration of additional issues, *see, e.g.*, *Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 514 (2013) (noting that, "[w]hen this Court implements a new analysis to be used in future cases, we may remand the case to the lower courts to apply that analysis"), we did not take any such step in this case and clarify that, in the event that we remand a case to the Court of Appeals or a trial court "for further proceedings not inconsistent with [its] opinion," such language should not be interpreted as an invitation to consider new claims that are unrelated to any contention that had been advanced before this Court, the Court of Appeals, or the trial court to that point in the litigation.

III. Conclusion

¶ 39 Thus, for the reasons set forth above, we hold that the Court of Appeals erred by concluding that the Board of Education's amended complaint sufficed to support a claim for relief pursuant to N.C.G.S. § 147-76.1 and remanding this case to Superior Court, Wake County, for the entry of an order requiring compliance with the Court of Appeals' interpretation of that newly enacted statutory provision. In light of this determination, we need not address the other arguments that have been

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7. See Footnote 4 above.

advanced for our consideration by the parties. As a result, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to Superior Court, Wake County, with instructions to reinstate the trial court's order granting summary judgment in favor of the Attorney General.

REVERSED AND REMANDED.

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

LORETTA NOBEL
v.
FOXMOOR GROUP, LLC, MARK GRIFFIS, AND DAVE ROBERTSON

No. 337A20

Filed 11 February 2022

Unfair Trade Practices—in or affecting commerce—solicitation of investments—single market participant

Plaintiff was not entitled to protection under the Unfair and Deceptive Trade Practices Act where defendant encouraged her to loan money to his company—based on representations of the strength of the business and a promise to provide health insurance—and then reneged on the promissory note that was issued, because soliciting funds to raise capital did not constitute a business activity in or affecting commerce. The investment interactions related to the internal operations of the company and occurred solely within a single market participant.

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, 272 N.C. App. 300, 846 S.E.2d 761 (2020), affirming in part and reversing in part a judgment entered 30 November 2018 by Judge Charles H. Henry in Superior Court, New Hanover County. Heard in the Supreme Court 4 October 2021.

Amanda B. Mason and Sarah C. Thomas for plaintiff-appellant.

James E. Lea, III, for defendant-appellee.

BERGER, Justice.

¶ 1 On November 30, 2018, the trial court, sitting without a jury, determined that defendant had violated the North Carolina Unfair or Deceptive Trade Practices Act (the Act). On July 7, 2020, a divided panel of the Court of Appeals reversed the trial court's decision as to plaintiff's claims under the Act. *Nobel v. Foxmoor Grp., LLC*, 272 N.C. App. 300, 846 S.E.2d 761, *review denied in part*, 375 N.C. 495, 847 S.E.2d 884 (2020).[1] Plaintiff appeals to this Court pursuant to N.C.G.S. § 7A-30(2), arguing that the Court of Appeals erroneously concluded plaintiff's claims were beyond the scope of the Act. Upon review, we affirm the decision of the Court of Appeals.

I. Factual and Procedural Background

¶ 2 In November 2010, Dave Robertson (defendant)[2] and Mark Griffis formed Foxmoor Group, LLC (Foxmoor). The business was intended to operate as a trucking company, and Foxmoor's annual report filed with the Secretary of State listed the nature of the business as "agricultural and transportation." Griffis and defendant were the sole members and managers of Foxmoor.

¶ 3 In an effort to raise capital for the newly formed company, Griffis and defendant reached out to plaintiff and encouraged her to invest in Foxmoor. Plaintiff was a personal friend of Griffis and defendant. The three interacted in various social and professional settings, and Griffis and defendant assisted plaintiff financially at one point. On December 12, 2011, plaintiff emailed Griffis to further inquire about "how an investment [in Foxmoor] might work." Griffis subsequently notified plaintiff of an opportunity to invest either $75,000 or $150,000 in the company. Plaintiff informed Griffis and defendant that she was only able to invest $25,000 at that time. The parties agreed, and plaintiff sent a personal

1. Defendant Robertson petitioned this Court for discretionary review pursuant to N.C.G.S. § 7A–31. Defendant's petition was denied, and the only issue before this Court is plaintiff's appeal based upon a dissent at the Court of Appeals.

2. Only defendant filed a timely notice of appeal from the trial court to the Court of Appeals. As to the other two original defendants, Griffis and Foxmoor Group, LLC, their appeals were dismissed by order of the Court of Appeals on January 31, 2020. Accordingly, the claims against defendant Robertson are the only claims on appeal before this Court.

check addressed to "Foxmoor Transport" on January 9, 2012. Although there is no evidence that a promissory note was executed by the parties at that time, the check from plaintiff to Foxmoor had the word "loan" written in the memo line. Plaintiff received payments of $3,510 in March, April, and May 2012, towards satisfaction of the $25,000 loan.

¶ 4 Griffis and defendant met with plaintiff throughout April and May 2012, and they informed plaintiff that the company had been performing well. Griffis and defendant offered plaintiff an opportunity to make an additional $75,000 investment in Foxmoor. On May 24, 2012, plaintiff agreed to provide an additional $75,000 investment in Foxmoor. Plaintiff again sent a personal check made out to "Foxmoor Group, LLC" with "investment" written in the memo line.

¶ 5 Also on May 24, 2012, Griffis executed a promissory note evidencing indebtedness to plaintiff for "the principal sum of $75,000, together with interest of $93,000." The promissory note required Foxmoor to make monthly payments to plaintiff to satisfy the debt beginning on July 1, 2012. Additionally, and in light of their personal friendship, Griffis included an attachment to the promissory note extending health insurance to plaintiff for four years. That same day, plaintiff's $75,000 check was deposited into Foxmoor's account.

¶ 6 In June 2012, plaintiff received a check from Foxmoor in the amount of $7,000. Defendant advised plaintiff that half of the $7,000 amount constituted the first payment on the $75,000 loan, with the remainder being an installment of the initial $25,000 loan. Plaintiff did not receive any additional payments from defendant, Griffis, or Foxmoor, and she was not provided health insurance. When plaintiff inquired into the status of the missed payments, Griffis and defendant informed plaintiff that any further attempt to receive repayment would result in the company filing for bankruptcy. Foxmoor was administratively dissolved by the Secretary of State on March 4, 2014.

¶ 7 In December 2015, plaintiff filed the present action, alleging, *inter alia*, that defendant, Griffis, and Foxmoor, "by their conduct, acting individually and corporately, engaged in unfair and deceptive trade practices in and affecting commerce, all in violation of N.C.G.S. § 75-1, *et. seq*." Following a bench trial, the trial court determined that defendant, Griffis, and Foxmoor had violated the Act and awarded treble damages in the amount of $493,500.

¶ 8 Defendant timely appealed from the trial court's judgment to the Court of Appeals. The majority of a divided panel of the Court of Appeals

reversed the portion of the trial court's judgment that allowed for plaintiff to recover under the Act. *Nobel*, 272 N.C. App. 300, 310, 846 S.E.2d 761, 768. The Court of Appeals majority reasoned that the conduct at issue related to an investment for the purpose of funding Foxmoor and therefore was not "in or affecting commerce." *Id.* Based on a dissenting opinion, plaintiff appealed to this Court, arguing that the majority opinion of the Court of Appeals erred in holding that plaintiff's claim fell outside of the purview of the Act. We disagree.

II. Analysis

¶ 9 Whether an act found to have occurred is an unfair or deceptive practice which violates N.C.G.S. § 75–1.1 is a question of law for the court. *Hardy v. Toler*, 288 N.C. 303, 308–09, 218 S.E.2d 342, 345–46 (1975).

> Ordinarily it would be for the jury to determine the facts, and based on the jury's finding, the court would then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce. Therefore, it does not invade the province of the jury for this Court to determine as a matter of law on appeal that acts expressly found by the jury to have occurred and to have proximately caused damages are unfair or deceptive acts in or affecting commerce under N.C.G.S. § 75–1.1.

Ellis v. N. Star Co., 326 N.C. 219, 226, 388 S.E.2d 127, 131 (1990) (cleaned up).

¶ 10 Pursuant to N.C.G.S. § 75-1.1(a), "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75-1.1 (2019). This Court has stated that the purpose of North Carolina's Unfair and Deceptive Trade Practices Act is to provide

> civil legal means to maintain [ ] ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

Bhatti v. Buckland, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991) (cleaned up).

¶ 11 To recover under the Act, a plaintiff must establish that: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). " 'Commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. 75-1.1(b). This Court has explained that the term " '[b]usiness activities' . . . connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). "Although th[e] statutory definition of commerce is expansive, the [Act] is not intended to apply to all wrongs in a business setting." *Id.* at 593, 403 S.E.2d at 492.

¶ 12 In *HAJMM*, this Court held that the plaintiff there could not recover under the Act because the issuance of corporate securities to raise capital was not a business activity "in or affecting commerce." *Id.* at 594–95, 403 S.E.2d at 493. There, the conduct complained of involved the issuance of revolving fund certificates. *Id.* This Court held that "the legislature simply did not intend for the trade, issuance and redemption of corporate securities or similar financial instruments to be transactions 'in or affecting commerce' as those terms are used in N.C.G.S. § 75-1.1(a)[.]" *Id.* In so concluding, this Court noted that utilization of financial mechanisms for capitalization merely enable an entity to organize or continue ongoing business activities in which it is regularly engaged and cannot give rise to a claim under the Act. *Id.* Thus, actions solely connected to a company's capital fundraising are not " 'in or affecting commerce,' even under a reasonably broad interpretation of the legislative intent underlying these terms." *Id.*

¶ 13 Plaintiff attempts to distinguish *HAJMM*, arguing that the type of security used to raise capital in *HAJMM* is different than the promissory note at issue here. However, this argument overlooks the purpose for which both the security in *HAJMM* and the promissory note here were issued. In this case, as in *HAJMM*, defendant's dealings with plaintiff did not involve the normal business activity of the purported company. Instead, the transactions in both instances involved investments "to provide and maintain adequate capital for [the] enterprise." *Id.* at 593, 403 S.E.2d at 493.

¶ 14 Investments and other mechanisms associated with financing business entities are "unlike [the] regular purchase and sale of goods, or

whatever else [an] enterprise was organized to do" and "are not 'business activities' as that term is used in the Act." *Id.* at 594, 403 S.E.2d at 493. Instead, investments are "extraordinary events done for the purpose of raising capital" for a business entity to continue its business purpose and day-to-day activities. *Id.* To be sure, the nature of the personal relationship between the parties and defendant's use of that relationship to advance his own personal gain certainly suggests bad faith on the part of defendant; however, "the [Act] is not intended to apply to all wrongs in a business setting." *Id.* at 593, 403 S.E.2d at 492. As in *HAJMM*, the underlying activity at issue here concerns a business entity's acquisition of capital. Thus, while defendant's conduct in securing the loans from plaintiff may be morally suspect, it was not "in or affecting commerce" because plaintiff's investment did not constitute a "business activity" as defined by this Court.

¶ 15 Moreover, this Court has clarified that the Act concerns two types of business transactions: "(1) interactions between businesses, and (2) interactions between businesses and consumers." *White v. Thompson*, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010). The internal operations of a business entity are not within the purview of the Act. *Id.* at 53, 691 S.E.2d at 680 ("[T]he Act is not focused on the internal conduct of the individuals within a single market participant, that is, within a single business.") Instead, the Act's provisions seek to regulate interactions between businesses and those involving businesses and consumers. Thus, if an alleged unfair or deceptive action remains confined within a single business, the Act is inapplicable. *See Dalton*, 353 N.C. at 658, 548 S.E.2d at 712 (noting the "longstanding presumption against unfair and deceptive practices claims as between employers and employees"); *see also Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999) (concluding that the unfair conduct of the defendant-employee was within the Act's coverage because it occurred outside of the employer-employee relationship).

¶ 16 In the case before us, plaintiff does not fall under either category of market participants for which the Act protects. While a personal relationship existed between plaintiff and defendant, there is no evidence that plaintiff was a consumer of Foxmoor, nor engaged in any commercial transaction with the company. *See Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981) (concluding that the purpose of the Act is "to establish an effective private cause of action for aggrieved consumers in this State."). Instead, plaintiff's involvement with the company, albeit initially through her friendship with defendant, was limited to the loans she provided for the purpose of capitalization. Thus, plaintiff was an investor in Foxmoor. The investments provided by plaintiff, and any

related exchanges, concern the internal operations of Foxmoor, and plaintiff's claim is based solely on the interaction between her, as an investor, and the company's member manager. This interaction occurred entirely within a single market participant, i.e., within a single business, thus taking it outside the ambit of the Act.

¶ 17 Because the loan at issue here was a capital raising device, it was not "in or affecting commerce" for purposes of the Act. Moreover, the conduct occurred solely within a single market participant, and plaintiff, as an investor, is not a market participant protected under the Act. Accordingly, the Court of Appeals did not err in reversing the trial court with respect to plaintiff's unfair and deceptive trade practices claim.

AFFIRMED.

Justice EARLS dissenting.

¶ 18 The majority holds that when the co-founder and manager of a limited liability company repeatedly defrauds an acquaintance in an effort to convince her to invest money in the business, and then misappropriates the company's funds for his own personal use, those actions are not "unfair or deceptive acts or practices in or affecting commerce." N.C.G.S. § 75-1.1(a) (2021). To reach this conclusion, the majority adopts the curious and counterintuitive position that these actions are not "business activities" or conduct "in or affecting commerce" because they involve "[i]nvestments and other mechanisms associated with financing business entities." This premise is untethered from the UDTPA's text and is inconsistent with the General Assembly's obvious intent to protect the public from unscrupulous dealings in business interactions, which it attempted to achieve by enacting a broad "remedial statute[ ]." *Taylor v. Volvo N. Am. Corp.*, 339 N.C. 238, 258 (1994). Accordingly, I respectfully dissent.

¶ 19 In this case, plaintiff Loretta Nobel sued defendant Dave Robertson, the co-founder and co-manager of Foxmoor Group LLC (Foxmoor), a company purportedly involved in the trucking industry. Nobel alleged that Robertson repeatedly deceived her regarding the activities and health of Foxmoor, misled her about the terms of investments she was considering making in the company, and lied to her in promising that Foxmoor would provide her with health insurance and a regular stream of interest-bearing repayments in exchange for her investment. Robertson did all this in an effort to convince Nobel to give him more money, supposedly to fund Foxmoor.

¶ 20 Nobel was not a sophisticated institutional investor. She was a retiree facing "financial difficulties" who had been living in Ecuador and knew Robertson and Foxmoor's other co-founder socially. When she agreed to invest in Foxmoor, she alleges she tapped into her retirement savings account and handed over her personal credit card information. Robertson and his co-founder used portions of the funds obtained from Nobel to purchase cruise tickets, pay for cosmetic surgery, and book a stay at a luxury hotel. When Nobel expressed concern that she had not been repaid as promised, Robertson threatened bankruptcy.

¶ 21 North Carolina's Unfair and Deceptive Trade Practices Act (UDTPA) prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C.G.S. § 75-1.1(a) (2021). For the purposes of the UDTPA, the General Assembly defined "commerce" to include "all business activities, however denominated, [except] professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b). The UDTPA contains only one other enumerated exception, a provision excluding certain acts undertaken "in the publication or dissemination of an advertisement." N.C.G.S. § 75-1.1(c). Neither of these exceptions applies here.

¶ 22 Like all remedial statutes, the UDTPA is to "be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope." *Hicks v. Albertson*, 284 N.C. 236, 239 (1973). One purpose of the UDTPA, a purpose also underlying the provision allowing successful plaintiffs treble damages, is to "encourage private enforcement of violations of [the UDTPA] and to encourage settlements." *Taylor*, 339 N.C. at 257–58.

¶ 23 On its face, nothing in the UDTPA gives any reason to think that when a corporate manager acting in his capacity as a manager interacts with an independent member of the public in an effort to obtain financing to operate that company, the manager's conduct is not "in or affecting commerce." The UDTPA applies to "*all* business activities," with two statutorily defined exceptions not relevant here. N.C.G.S. § 75-1.1(b) (emphasis added). Words included in a statute are "presumed . . . to convey their natural and ordinary meaning." *In re McLean Trucking Co.*, 281 N.C. 242, 252 (1972). Surely, the "natural and ordinary meaning" of the phrase "business activit[ies]" and "in and affecting commerce" encompasses efforts to obtain the funds needed to sell goods or services for profit. Dictionaries only confirm the obvious. *See*, *e.g.*, Activity, Black's Law Dictionary (11th ed. 2019) (defining "commercial activity" as "[a]n activity, such as operating a business, conducted to make a profit"). So does reality: undergraduate and post-graduate business schools

routinely teach courses and offer concentrations in subjects like corporate finance because it is a business activity.[1]

¶ 24 The structure of the UDTPA further confirms the General Assembly's intent to sweep broadly. As previously described, the UDTPA contains two enumerated carve-outs. Typically, when the General Assembly sees fit to include specific exceptions in a statute, we presume the General Assembly did not intend to create other, unenumerated exceptions. *See*, *e.g.*, *Evans v. Diaz*, 333 N.C. 774, 779–80 (1993) ("Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list."). There is no reason to think the General Assembly meant otherwise in choosing what activities to exempt from the purview of the UDTPA.

¶ 25 Admittedly, this Court departed somewhat from the plain text of the UDTPA in *HAJMM*, where we held that the "[i]ssuance and redemption of securities are not . . . business activities" within the meaning of the UDTPA because they are "done for the purpose of raising capital in order that the enterprise can either be organized for the purpose of conducting its business activities or, if already a going concern, to enable it to continue its business activities." *HAJMM Co. v. House of Raeford Farms*, *Inc.*, 328 N.C. 578, 594 (1991). We explained that the phrase "business activities" was "a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *Id.* As then-Justice Martin noted in a vigorous dissent, the majority

> cites no authority, and our statute and cases provide none, to support its argument that "commerce" means only the "regular, day-to-day activities or affairs" of a business. The plain words of the statute state otherwise. . . . How can raising funds to operate a business not be a business activity?

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1. *See*, *e.g.*, University of North Carolina Kenan-Flagler Business School, *MBA Corporate Finance Concentration*, https://www.kenan-flagler.unc.edu/programs/mba/full-time-mba/academics/concentrations-electives/corporate-finance/; North Carolina State University, *Business Administration (BS): Finance Concentration*, http://catalog.ncsu.edu/undergraduate/management/business/business-administration-bs-finance-concentration/; Duke University Fuqua School of Business, *MBA Program* (describing concentrations in corporate finance and investments) https://areas.fuqua.duke.edu/finance/academic-programs/mba-program/; North Carolina Central University, *Business Administration*, *Financial Analytics Concentration*, *BBA*, https://www.nccu.edu/academics/undergraduate-programs/business-administration-financial-concentration-bba.

> . . . .
>
> The acquisition of capital in one form or another is the lifeblood today for business. . . . [In its holding] the majority loses touch with the reality of the business world. Limiting the meaning of "business activities" to the day-to-day affairs of the business eliminates most of the raising of business capital from the protection of the statute. The most important area of business life is no longer subject to the Act . . . . Surely this could not have been the intent of the legislature.
>
> . . . .
>
> The statute in plain words says that "commerce" includes "all business activities." *Id.* No matter how one twists it, the issuance of the certificate and defendant's refusal to redeem it were business activities within the meaning of the Act.

Id. at 596–97 (1991) (Martin, J., dissenting in part). Nevertheless, Nobel does not ask us to reconsider *HAJMM*, and the majority is correct that it remains good law.

¶ 26 Still, the majority errs in choosing to expand the holding of *HAJMM* beyond the circumstances addressed in that case, in contravention of the UDTPA's text, structure, and animating purpose. *HAJMM* involved a stock certificate issued to a limited partnership, not a promissory note offered to a non-professional individual investor. *HAJMM*, 328 N.C. at 580. This is a salient distinction. One of the primary justifications for the rule announced in *HAJMM* was the Court's belief that the General Assembly did not intend to "create overlapping supervision, enforcement, and liability in this area, which is already pervasively regulated by state and federal statutes and agencies." *Id.* at 593. Yet it is unclear whether this transaction is subject to the North Carolina Securities Act. While the existence of these regulations was "not the only basis" for the decision in *HAJMM*, *id.* at 594, the potential absence of regulatory oversight in this case risks undermining the "overall purpose" of the UDTPA which was to "supplement federal legislation, so that local business interests could not proceed with impunity." *Marshall v. Miller*, 302 N.C. 539, 549 (1981).

¶ 27 Further, the line between a company's "business purpose and day-to-day activities" and a company's efforts relating to the "acquisition of capital" is not as clear on the facts of this case as the majority suggests.

Besides stray references to "trucking" and "transportation" contained in documents Foxmoor filed with the State, it is unclear if Foxmoor ever endeavored to provide any kind of good or service to the public in an effort to earn a profit. Put another way, there is no evidence Foxmoor had any "business purpose" or "day-to-day activities" other than the "acquisition of capital" from people like Nobel.[2] To the extent Foxmoor did sell a product or service to the public, it appears to have been the (ultimately illusory) opportunity to own an income-generating asset. Robertson's conduct in selling that product to Nobel should not be immunized by his self-serving (and seemingly false) description of the nature of his business.

¶ 28 I also disagree with the majority's reliance on *White v. Thompson*, 364 N.C. 47 (2010), another case in which this Court discerned an exception to the UDTPA not immediately apparent on the face of the act. Even if *White* means that the UDTPA does not apply to actions that "remain[ ] confined within a single business," it is difficult to discern how a company receiving funding from an entirely unaffiliated investor is an "interaction occurr[ing] entirely within a single market participant." As Judge Arrowood correctly explained in his dissent below, Nobel "is neither a partner nor has any ownership stake in [Foxmoor]. Instead, [she] acted as an outside investor, and is therefore better viewed as a separate market participant." *Nobel*, 272 N.C. App. at 312. Prior to giving money to Foxmoor, Nobel had absolutely no connection to the company. She was not an owner, director, manager, or employee.[3] Further, at least some of the conduct she asserts violated the UDTPA occurred *before* she executed the promissory note—it was that conduct which induced her to invest. Thus, applying the UDTPA under these circumstances would in no way "intrude into the internal operations of a single market participant." *White*, 364 N.C. at 53.

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2. This ambiguity is not limited to companies as haphazardly operated as Foxmoor. Some companies that sell goods or services interact with consumers in ways that could fairly be characterized as both a "day-to-day activity" and an effort to "acqui[re] . . . capital"—for example, when a company accepts payment for goods or services in the form of an alternative currency it then holds as an asset on its balance sheet in the hopes that the value of the currency appreciates. *See*, *e.g.*, Anne Sraders, *Corporate crypto 101: How companies are using Bitcoin and other digital currency*, Fortune Magazine (29 July 2021), https://fortune.com/2021/07/29/companies-using-bitcoin-btc-crypto-101/.

3. By contrast, if Robertson had been sued by his co-founder, who was also Foxmoor's co-manager, the exception recognized in *White* would obviously apply.

¶ 29 In interpreting and applying *HAJMM* and *White*'s interpretation of the UDTPA, we should do our best to respect the General Assembly's decision to enact a broad remedial statute designed to protect the general public. The fact that a statute is broadly written is never itself justification for curtailing its sweep. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) ("It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts. . . . This principle applies not only to adding terms not found in the statute, but also to imposing limits . . . that are not supported by the text.") (cleaned up). Here, the defendant's conduct is clearly encompassed within the plain language of the UDTPA, even as that language has been construed in our precedents. Accordingly, I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER ANTHONY CLEGG

No. 101PA15-3

Filed 11 February 2022

1. Jury—selection—Batson challenge—overruled by trial court—clear error—purposeful discrimination

The trial court's decision overruling defendant's *Batson* challenge was clearly erroneous where the totality of the evidence demonstrated it was more likely than not that the State's peremptory strike to remove an African-American woman from the jury in an armed robbery trial was improperly motivated by race. Although the trial court properly rejected the State's race-neutral reasons for striking the juror and accepted defendant's statistical evidence of peremptory strikes against Black potential jurors in this case and statewide, the trial court should have ruled for defendant when there were no race-neutral reasons remaining. In addition, the court imposed an improperly high burden of proof on defendant, considered a reason for the strike not offered by the prosecutor, and failed to consider the State's disparate questioning of comparable white and Black prospective jurors.

2. Criminal Law—Batson violation—conviction vacated—time already served—no new trial

Where the trial court improperly denied defendant's *Batson* claim—after defendant proved purposeful discrimination by the State in its use of a peremptory strike to remove an African-American woman from the jury—its order was reversed and defendant's conviction for armed robbery was vacated. However, no new trial was warranted where defendant had already served his sentence and completed post-release supervision, because N.C.G.S. § 15A-1335 prohibited the imposition of a sentence more severe than the prior sentence imposed minus time served.

Justice EARLS concurring.

Justice BERGER dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of an order entered on 15 July 2019 by Judge Paul Ridgeway in Superior Court, Wake County, based on this Court's 14 August 2018 Order, 371 N.C. 443, (2018), remanding the case to the trial court in reconsideration of defendant's *Batson* challenge and retaining jurisdiction. On 26 February 2020, the Supreme Court allowed in part defendant's supplemental petition for discretionary review. Heard in the Supreme Court on 6 October 2021.

Joshua Stein, Attorney General, by Amy Kunstling Irene, Special Deputy Attorney General for the State-appellee.

Dylan J.C. Buffum Attorney at Law, PLLC, by Dylan J.C. Buffum, for defendant-appellant.

David Weiss and Elizabeth Hambourger, for amici curiae Common Cause and Democracy North Carolina.

HUDSON, Justice.

¶ 1 Over 140 years ago, the Supreme Court of the United States held that exclusion of African Americans from juries on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment of the

United States Constitution. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880). Just over a century later, in *Batson v. Kentucky*, that same Court established a three-step process through which courts analyze claims of racial discrimination in jury selection. 476 U.S. 79, 96–98 (1986); *see Foster v. Chatman*, 578 U.S. 488, 499–500 (2016) (summarizing the *Batson* process). Today, we must decide whether the prosecutor's exclusion of an African-American potential juror constitutes a substantive violation of the defendant's constitutional right to equal protection under *Batson* when the trial court found that "both race-neutral justifications offered by the prosecutor fail." We hold that it does, and therefore reverse the ruling of the trial court below, vacate defendant's conviction, and remand the case back to the trial court for any further proceedings.

I. Background

A. Jury Selection and Trial

¶ 2 On 8 April 2014, defendant Christopher A. Clegg, an African-American man, was indicted for robbery with a dangerous weapon and possession of a firearm by a felon. Beginning on 4 April 2016, defendant was tried by a jury in Wake County Superior Court, Judge Paul C. Ridgeway presiding. During jury selection, defense counsel raised a challenge under *Batson v. Kentucky* (*Batson* challenge) after the prosecutor used peremptory strikes to remove two African-American women from the jury: Viola Jeffreys and Gwendolyn Aubrey. 476 U.S. 79. In response, the prosecutor proffered race-neutral reasons for the strikes. Specifically, the prosecutor asserted that he struck Ms. Jeffreys and Ms. Aubrey "based on their body language[] and . . . their failure to look at me when I was trying to communicate with them." The prosecutor also claimed that he struck Ms. Jeffreys due to potential bias toward defendant arising from her previous employment at Dorothea Dix Hospital, and that he struck Ms. Aubrey due to her answer of "I suppose" in response to a question asking whether she could be fair and impartial. Defense counsel then argued that these reasons were pretextual. The trial court subsequently ruled that defendant had failed to establish that race was a significant factor in the peremptory strikes, and therefore overruled his *Batson* challenge. After the completion of jury selection and the resolution of a few other preliminary issues, the case proceeded to trial.

¶ 3 At trial, the State's evidence, as presented through several witnesses and exhibits, tended to show that in the early morning hours of 25 January 2014, defendant, brandishing a gun, robbed a sweepstakes business located at the Timber Landing Business Center in Garner, North Carolina. Defendant neither testified nor offered witnesses or

evidence of his own at trial. On 6 April 2016, the jury found defendant guilty of robbery with a dangerous weapon and not guilty of possession of a firearm by a felon. Defendant was sentenced to a term of sixty-six to ninety-two months' imprisonment, with credit for 767 days of pre-trial incarceration. On 8 April 2016, defendant appealed his conviction to the North Carolina Court of Appeals.

B. Court of Appeals

¶ 4 On appeal, defendant raised two issues. First, he argued that the trial court erred by overruling his *Batson* challenge. Second, he argued that the trial court erred by admitting prejudicial victim impact testimony in violation of Rules 401, 402, and 403 of the North Carolina Rules of Evidence. The State contended that the trial court had acted properly on both issues.

¶ 5 On 5 September 2017, in a unanimous, unpublished opinion, the Court of Appeals rejected both of defendant's arguments. *State v. Clegg*, 2017 WL 3863494 (N.C. Ct. App. Sept. 5, 2017) (unpublished). First, the Court of Appeals considered defendant's *Batson* challenge. The court first summarized the three-step process of a *Batson* challenge:

> First, the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge. If the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation for the peremptory challenge. Finally, the trial court must decide whether the defendant has proved purposeful discrimination.

Clegg, 2017 WL 3863494 at *2 (citing *State v. Taylor*, 362 N.C. 514, 527 (2008), *cert. denied*, 558 U.S. 851 (2009)). The Court of Appeals noted, though, that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot." *Id.* (citing *State v. Bell*, 359 N.C. 1, 12 (2004)).

¶ 6 The Court of Appeals then reviewed the trial court's handling of defendant's *Batson* challenge. "Because the trial court heard the State's reasons for striking Jeffreys and Aubrey prior to making a ruling on defendant's *Batson* objections," thus rendering the preliminary issue of defendant's prima facie case moot for *Batson* purposes, the Court of Appeals moved directly to step two: reviewing the prosecution's proffered reasons for the peremptory strikes. *Id.* at *3. As a preliminary

matter, the court "note[d] that there is a discrepancy between the State's characterization of its *voir dire* of Aubrey and what the transcript reveals." *Id.* at *4. Specifically, the court noted that while the prosecutor's given rationale for striking Ms. Aubrey claimed that she had answered "I suppose" to a question about whether she could be fair and impartial, the transcript reveals that she actually gave that answer to a question about whether she was confident that she would be able to focus on the trial. Consequently, the court "review[ed] the State's argument in light of this clarification." *Id.* The court subsequently ruled that "[t]he State's concerns of both Jeffreys' and Aubrey's failure to make eye contact and their ability to be fair and focused on the trial constitute neutral explanations for each peremptory strike." Accordingly, the court found "no discriminatory intent inherent in the State's explanations and thus agree[d] with the trial court's determination that the State's justifications were race neutral." *Id.*

¶ 7 The Court of Appeals then "move[d] to the third step of the *Batson* inquiry and consider[ed] whether the trial court erred by finding that there was no *Batson* error." *Id.* at *11. Here, the court noted defendant's argument that the proffered reasoning regarding Aubrey's ability to focus was revealed as pretextual because a white juror, David Williams, also indicated that he might be distracted from the trial due to work concerns. But "[t]he distinguishing factor between Aubrey and David Williams[,]" the court ruled, "appears to be the State's additional stated bases for striking Aubrey[:] . . . her body language and failure to make eye contact." *Id.* The court likewise dismissed defendant's argument that the prosecutor's proffered reasoning for striking Ms. Jeffreys—her previous employment at Dorothea Dix, a psychiatric hospital—was pretextual. Specifically, the court ruled that because "there was a competency evaluation of defendant ordered and defense counsel stated that she had also requested an in-custody evaluation of the defendant[,] . . . the State's basis for striking Jeffreys due to her work history is rationally related to defendant's potential competency issues." *Id.* "Moreover, [the court] note[d,] . . . the State explained that it also exercised its peremptory strike on Jeffreys based on her body language and failure to make eye contact." *Id.* "As such," the court found that "defendant has failed to carry his burden of proving purposeful discrimination[,]" and therefore held that "defendant's *Batson* challenge was properly denied." *Id.* at *6.

¶ 8 Second, the Court of Appeals likewise ruled that the trial court did not commit plain error by admitting the victim impact testimony of Patrice Williams, who was present at the robbery. *Id.* at *6–7. Because defendant does not raise this issue before this Court, we do not consider

it further here. In sum, the Court of Appeals held that the trial court committed no error. *Id.* at *7.

C. Special Order and Batson Rehearing

¶ 9 On 10 October 2017, defendant filed a notice of appeal with this Court under N.C.G.S. § 7A-30(1), asserting that the case presented a substantial constitutional question under the Equal Protection Clause of the U.S. Constitution and Article I Sections 19 (equal protection) and 26 (jury service) of the North Carolina Constitution. In response, the State filed a motion to dismiss defendant's appeal for lack of a substantial constitutional question. Also on 10 October 2017, defendant filed a petition for discretionary review with this Court under N.C.G.S. § 7A-31(c), asserting that the case fulfilled all three of the statutory bases for discretionary review: (1) significant public interest; (2) legal principles of major significance to the jurisprudence of the State; and (3) conflict with a decision of the Supreme Court. In both the notice of appeal and petition for discretionary review, defendant focused exclusively on the *Batson* challenge issue.

¶ 10 On 14 August 2018, this Court responded to defendant's petition via special order. The order directed "that this case be remanded to the trial court for reconsideration of defendant's *Batson* challenge based upon the existing record and the entry of a new order addressing the merits of defendant's *Batson* challenge in light of the United States Supreme Court decision in *Foster v. Chatman*, [578] U.S. [488], 136 S. Ct. 1737, 195 L. Ed. 1 (2016), which was decided after the trial court's decision in this case." 371 N.C. 443 (2018). The order further instructed that "[a]fter the entry of the order on remand, the trial court should certify that order to this Court, which retains jurisdiction and will undertake any necessary additional proceedings at that time." That same day, this Court allowed the State's motion to dismiss defendant's notice of appeal.

¶ 11 On 17 December 2018, in accordance with this Court's order, the trial court held a new hearing regarding defendant's *Batson* challenge. Judge Ridgeway, the same judge as at the initial trial, also presided over this new *Batson* hearing. In briefing and at the hearing, defense counsel (different from original trial) and the prosecutor (same as at original trial) presented arguments regarding the application of the U.S. Supreme Court's ruling in *Foster* to defendant's *Batson* challenge.

¶ 12 First, defense counsel argued that two findings from Foster "are especially important in this case": (1) "that when a prosecutor mischaracterizes a juror's answers, this is strong evidence that the justification is, in fact, pretext[;]" and (2) "that in order to prevail in step three of

Batson, the defendant does not need to disprove each and every reason given by the prosecutor."

¶ 13 Both of these elements, defense counsel argued, relate directly to the State's striking of Ms. Aubrey. First, as noted by the Court of Appeals, defense counsel argued that the prosecutor repeatedly mischaracterized Ms. Aubrey's answers by claiming that she answered "I suppose" to a question about whether she could be fair and impartial, when she actually gave that answer to a question about whether she was confident that she would be able to focus at trial. Second, defense counsel argued that because the prosecutor's first justification for the strike was shown to be pretextual, defendant did not need to undermine every other reason provided by the prosecutor, including body language and lack of eye contact. Further, defense counsel sought to undermine the prosecutor's reliance on body language and eye contact because defense counsel at trial disputed those findings and the trial court made no contemporary findings of their veracity.

¶ 14 Next, defense counsel argued that the prosecution's proffered reasons for striking Ms. Jeffreys likewise fall short. Regarding the prosecutor's "body language and eye contact" reasoning, defense counsel noted that the prosecutor always referred to Ms. Aubrey and Ms. Jeffreys collectively when discussing body language, never distinguishing between the two Black women and never offering more specific details about what exactly was troubling to him about their body language. Regarding the Dorothea Dix reasoning, defense counsel argued that "[i]f the prosecutor [was] genuinely concerned about [jurors'] experience with mental health being a disqualifying factor for him in making his peremptory strikes[,] . . . he would have asked at least one other juror [about it]."

¶ 15 Finally, defense counsel emphasized the burden of proof in a *Batson* challenge: "the defendant needs to show…that it is more likely than not that race was a substantial motivating factor for the strike[,]" not the sole reason for the strike. Based on the evidence presented that the prosecutor's proffered reasons were pretextual, defense counsel argued that defendant had met that burden.

¶ 16 In response, the prosecutor argued that his proffered race-neutral reasons for the peremptory strikes of Ms. Aubrey and Ms. Jeffreys pass *Batson* scrutiny. First, the prosecutor noted "some very obvious distinctions between the record here and the *Foster* case," namely: (1) that the victim and witnesses here are also African American; (2) that the jury here included one juror who identified as mixed race (African-American father and Chinese mother); and (3) that the prosecutor here did not blatantly and persistently focus on race during jury selection.

¶ 17 Next, the prosecutor repeated his proffered race-neutral reasons for striking Ms. Jeffreys and Ms. Aubrey. Regarding Ms. Jeffreys, the prosecutor argued that because defendant's "mental health was an underlying issue and concern for the defense," Jeffreys's experience as a nurse to mental health patients may render her "sympathetic to the Defendant despite overwhelming evidence of his guilt." The prosecutor further noted that while all of the potential jurors were asked about their occupation, "Ms. Jeffreys was the only one who said she worked or used to work in the mental health field."

¶ 18 Regarding Ms. Aubrey, the prosecutor again noted "her body language and her lack of eye contact." He then emphasized that her short and equivocal answers of "I suppose" and "I think so" to his questions about her ability to focus on the trial created concern regarding "whether or not she could be an engaged juror throughout this process."

¶ 19 Then, the prosecutor addressed his initial mistake regarding to which question Ms. Aubrey had answered "I suppose":

> . . . Your Honor, I'll be the first to tell you that this is the first and only time . . . I've had to address [a *Batson*] challenge. And I was completely flustered when this was brought up during trial. And it did cause me to misspeak with respect to the answer or the question that Ms. Aubrey was answering. And as [defense counsel] pointed out from the record, as part of my race neutral justification for Ms. Aubrey, I said when I asked her if she could be fair and impartial, her answer was "I suppose.". . . I wasn't confident that she was confident that she could be fair and impartial. And that's—that's the State misspeaking. That is a product of simply getting confused. That's a standard question I ask during jury selection; can somebody be fair and impartial. And I also ask can people focus on the proceedings. And that was simply confusing those questions and her answer.

¶ 20 Later, when addressing this same mistake, the prosecutor and the trial court had the following exchange:

> The [c]ourt: I think it's more misremembering than misspeaking. That's all right.
>
> Mr. Wiggs: Right.

> The [c]ourt: I mean, I think you don't—taking it in the light most favorable to you or to the prosecutor—were you the prosecutor?
>
> Mr. Wiggs: I was.
>
> The [c]ourt: Okay. Then taking it in the light most favorable, you didn't remember that the answer was given to another question rather than this question. So it's not misspeaking, it's misremembering.

¶ 21 Finally, the prosecutor noted several previous cases from this Court, the Court of Appeals, and the U.S. Supreme Court, emphasizing the low bar that prosecutors must meet in responding to a *Batson* challenge, and the wide variety of race-neutral reasons that may suffice in meeting that bar. Concluding, the prosecutor asked the trial court to again deny defendant's *Batson* challenge.

¶ 22 On 15 July 2019, the trial court issued its new order on defendant's *Batson* challenge. As requested, the court considered the race-neutral justifications offered by the prosecutor for the two peremptory strikes in question in light of *Foster*, noting that "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose."

¶ 23 First, the trial court reviewed the prosecutor's strike of Ms. Jeffreys. The court found that the prosecutor's reasoning regarding Jeffreys's previous employment at Dorothea Dix Hospital "is supported by the record and constitutes an appropriate reason for the strike."

¶ 24 Second, the trial court reviewed the prosecutor's strike of Ms. Aubrey. Here, the court addressed the discrepancy between the prosecutor's stated reasoning and the record regarding Ms. Aubrey's "I suppose" answer:

> 7. It is evident from the record that both the trial court's and the prosecutor's memory of the answers given by Ms. Aubrey was conflated. She did not say "I suppose" in response to a question of whether she could be "fair and impartial." Rather, in answering a question from the [c]ourt as to whether there was "anything going on in your life that would make it difficult or impossible for you to serve," Ms. Aubrey said "other than missing work, no." The [c]ourt then inquired whether Ms. Aubrey worked "daytime," and Ms. Aubrey responded "day and night." Shortly thereafter, the prosecutor asked Ms. Aubrey the following questions:

Prosecutor: Okay. Ms. Aubrey, do you feel confident you can focus on what's going on here?

Ms. Aubrey: I suppose.

Prosecutor: I want you to be confident about it. You just don't want to be a juror, or do you feel like if you were here, you could focus and do what we need you to do?

Ms. Aubrey: I think so.

8. In retrospect, had the prosecutor, in offering his race-neutral basis for exercising the strike of Ms. Aubrey, stated that he was concerned that she had answered "I suppose" to the question of whether she could focus, when coupled with her concern that she worked "day and night" and would miss work, that, in the [c]ourt's view, would have constituted a neutral justification for the strike.

9. However, as it stands, the State's offered reason for striking Ms. Aubrey based on her "I suppose" answer is not supported by the record because the prosecutor associated that answer with whether she could be "fair and impartial," not whether she could focus.

10. The *Foster* Court instructs that when reasons that are offered by a prosecutor as a basis for exercising a strike contradict or mischaracterize the record, those reasons must be rejected in evaluating whether race was a motivating factor in exercising a strike. *Foster*, *supra*, at 1750 (prosecutor's reasons were "contradicted by the record"); 1753 (prosecutor's justifications were "mischaracterization of the record"); 1753 ("[m]any of the State's secondary justifications similarly came undone when subjected to scrutiny").

11. Moreover, a trial court is not permitted to consider race-neutral reasons for exercising a strike that are not articulated by the prosecutor. *Miller-El v. Dretke*, 545 U.S. 231, 250–52 (2005) ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution

> of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.")
>
> 12. Strict application of the rules articulated in *Foster* and *Miller-El* to the race-neutral (but misremembered) reasons provided by the prosecutor justifying Ms. Aubrey's strike would require the [c]ourt to exclude and not consider the reason articulated by the prosecutor – that Ms. Aubrey said that "she supposed" she could be fair and impartial – because that reason is contradicted by the record.

¶ 25 After thus rejecting the "I suppose" rationale for Ms. Aubrey's strike, the trial court then considered "the only [remaining] race-neutral reason articulated by the prosecutor[:] . . . the 'body language' and 'lack of eye contact' rationale." Here, the court noted that "[t]he 'body language' rationale was disputed by trial counsel for the defendant, and the trial court made no specific findings regarding Ms. Aubrey's body language or demeanor." The court then noted that this "circumstance is similar to one that arose in *Snyder v. Louisiana*, 552 U.S. 472 (2008)," in which the U.S. Supreme Court rejected the validity of a peremptory strike of an African-American juror on the basis of alleged "nervousness" when "the record does not show that the trial judge actually made a determination concerning [the potential juror's] demeanor." *Snyder*, 552 U.S. at 479. "Hence," the trial court stated, "without findings of fact by the trial court, the *Snyder* Court appears to instruct that for appellate purposes the 'body language' race-neutral justification offered by the prosecutor cannot be viewed as sufficient." "As such," the trial court ruled, "both race-neutral justifications offered by the prosecutor fail—one because the prosecutor mis-remembered the question to which Ms. Aubrey responded 'I suppose,' and the other because the trial court failed to make sufficient findings of fact to establish a record of Ms. Aubrey's body language."

¶ 26 Next, the trial court reviewed the arguments presented by defendant that the State's peremptory strikes constitute a *Batson* violation. First, the court noted defendant's statistical evidence regarding jury selection in this case. Specifically, the court observed:

> Three of the 22 venire members were non-white. The prosecutor used 4 of 7 peremptory strikes allotted to each party by statute. Among those venire members whom the State struck, 2 were African[-]American women. Hence, the State struck 2 of the 3 non-white

> members of the venire, which also turned out to be all the non-white female venire members. The remaining two peremptory strikes exercised by the State were of white males.

¶ 27 The trial court then considered "[t]he evidence proffered by the [d]efendant relating to statewide disparities in the exercise of peremptory challenges[.]" Specifically, the court observed "that in non-capital cases studied from 2011-2012, [North Carolina] prosecutors struck black venire members at about twice the rate of white" (citing D. Pollitt & B. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1964 (2016)).

¶ 28 Next, the trial court considered defendant's side-by-side comparison of the questioning of white and Black potential jurors regarding their ability to focus during trial. Specifically, regarding the allegedly disparate questioning of Mr. David Williams and Ms. Aubrey on this issue, the court "[did] not find this side-by-side comparison particularly pertinent because Mr. Williams had previously stated that, with respect to his supervisory duties, 'I can juggle things around,' whereas Ms. Aubrey did not indicate any flexibility in her 'day and night' work schedule that might ease her concern about missing work."

¶ 29 Finally, the trial court turned to the third step of the *Batson* analysis: "determin[ing] whether the defendant has shown purposeful discrimination" (internal citation omitted). Again, the trial court ruled that "[d]efendant has shown that the race-neutral justifications offered by the prosecutor cannot be supported by the record—either because the prosecutor mis-remembered the potential juror's answer or because the trial court failed to make an adequate record of the body language of the prospective juror." Further, the court noted that "[t]he [d]efendant has also shown evidence of statistical disparities in the exercise of peremptory challenges by prosecutors in statewide jury selection studies in data collected from 1990 to 2012."

¶ 30 The trial court then stated its ultimate conclusion:

> However, the [c]ourt cannot conclude from this record that in this case, the State has engaged in "purposeful discrimination." As the [d]efendant points out, the applicable standard is, given all relevant circumstances, "whether it was more likely than not that the challenge was improperly motivated." *Johnson v. California*, 545 U.S. 162, 170 (2005). Even on this relaxed "more likely than not" standard, this

> [c]ourt concludes that essential evidence of purposeful discrimination—which is the [d]efendant's burden to prove—is lacking.

¶ 31 In support of this conclusion, the trial court noted that "[t]he cases in which the [U.S.] Supreme Court has found that the state exercised peremptory challenges in a purposefully discriminatory fashion are strikingly different from the case at hand." By way of example, the court noted that both *Foster* and *Miller-El* included glaring evidence of racial discrimination by prosecutors, including: (1) a finding that the prosecutor's explanations were "misrepresentations" and "contradicted by the record," *Foster*, 578 U.S. at 505; (2) "a jury list . . . found in the prosecutor's file with each black prospective juror highlighted in bright green," *id.* at 1744; (3) Black prospective jurors being subjected to a "trick question" that was not asked of white prospective jurors, *Miller-El*, 545 U.S. at 255; and (4) "a specific policy [in the prosecutor's office] of systematically excluding blacks from juries" evidenced by a training manual that "outlined the reasoning for excluding minorities from jury service." *Id.* at 266.

¶ 32 By comparison, the trial court found "this case . . . markedly distinguishable from the facts of this controlling authority." Specifically, the court noted:

> Unlike that authority, here the direct evidence of purposeful discrimination is not a "mischaracterization" of the record with "no grounding in fact." Rather, it appears to be an instance of a prosecutor misremembering whether the prospective juror had said "I suppose" in responding to a question of whether she could be fair and impartial, or whether she could focus given her "day and night" employment and concern about missing work. And, unlike the controlling authority, no evidence has been presented of a systemic policy of the prosecutor's office to exclude black jurors, or of a trial strategy in this specific case to exclude black jurors. In other words, the [c]ourt concludes that the quantum of evidence in this case, both direct and circumstantial, is insufficient to support the conclusion that the prosecutor engaged in purposeful discrimination by excluding 2 of 3 nonwhite jurors.

¶ 33 Therefore, the trial court concluded "that defendant has not established that it is more likely than not that the State engaged in purposeful

discrimination in excluding prospective jurors Jeffreys and Aubrey[.]" Accordingly, "the [c]ourt again order[ed] that [d]efendant's *Batson* objections must be OVERRULED." Finally, in accordance with this Court's 14 August 2018 Order, the trial court forwarded its order to this Court for further proceedings.

¶ 34 On 23 August 2019, defendant filed a supplementary petition for discretionary review with this Court based on the trial court's rehearing order. In this petition, defendant argued that this Court should "summarily reverse the trial court's order, vacate the judgments and order a new trial because the record unequivocally demonstrates that the State failed to meet [its] burden to proffer a race neutral reason" for its peremptory strike of Ms. Aubrey. Alternatively, defendant argued that "this Court should certify the decision below for plenary review because this case presents important principles of *Batson* jurisprudence" and "presents the perfect vehicle to review the appropriate standard [for] evaluating the evidence at trial and [the] standard of review on appeal." On 26 February 2020, this Court denied defendant's request for summary reversal but allowed his petition "for the purpose of affording plenary review of the issues raised in that petition."

¶ 35 Before this Court, defendant argued that the trial court erred in finding that he "failed to meet his burden to show purposeful discrimination because the State failed to articulate a reason for the peremptory strikes of Black jurors that was legitimate, facially valid[,] reasonably specific[,] or related to the case to be tried." Defendant further contended that the trial court clearly erred by "viewing the evidence in the light most favorable to the state," and ignoring or justifying evidence from which improper discriminatory intent could be inferred.

¶ 36 In response, the State argued that: (1) it had given facially valid, race-neutral reasons for its peremptory challenges at step two of the *Batson* test; and (2) the trial court did not clearly err at step three of the *Batson* test by overruling defendant's *Batson* objection. The parties elaborated upon these points at oral arguments before this Court on 6 October 2021.

II. Analysis

¶ 37 **[1]** Now, we must consider whether the trial court's ruling regarding defendant's *Batson* challenge was clearly erroneous. *See Snyder*, 552 U.S. at 477 ("On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous"); *State v. Chapman*, 359 N.C. 328, 339 (2005) ("Thus, the standard of review is whether the trial court's [*Batson*] findings are clearly

erroneous"). Such "clear error" is "deemed to exist when, on the entire evidence[,] the Court is left with the definite and firm conviction that a mistake has been committed." *State v. Bennett*, 374 N.C. 579, 592 (2020) (cleaned up). In order to make this determination, we first summarize the applicable history and precedent regarding racial discrimination in jury selection and *Batson* challenges.

A. *Batson* History and Precedent

¶ 38 Juries are at the heart of our constitutional democracy. *See* U.S. Const. amend. VI (establishing the right to a jury in criminal trials); U.S. Const. amend VII (establishing the right to a jury in civil suits); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (noting "that trial by jury in criminal cases is fundamental to the American scheme of justice . . ."). Principally, juries "safeguard[] a person accused of crime against the arbitrary exercise of power by a prosecutor or judge." *Batson*, 476 U.S. at 86 (citing *Duncan*, 391 U.S. at 156). More broadly, though, jury service also "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law." *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (citing *Duncan*, 391 U.S. at 187 (Harlan, J., dissenting)). "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Id.*

¶ 39 Because juries are so fundamental to our system, racial discrimination in jury selection is deeply harmful. "Purposeful racial discrimination in the selection of the venire . . . denies [a criminal defendant] the protection that a trial by jury is intended to secure." *Batson*, 476 at 86; *see also Miller-El*, 545 U.S. at 237 ("Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury."). In addition to the defendant, such discrimination also harms the excluded juror, who is unduly denied the civic responsibility and opportunity of jury participation. *See Batson*, 476 U.S. at 87 (noting that "by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror"). Even more broadly, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.* "That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality and undermines public confidence in adjudication." *Miller-El*, 545 U.S. at 238 (cleaned up). In short, racial discrimination in jury selection "is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940).

¶ 40 Accordingly, our courts have long sought to protect the sanctity of juries from the stain of racism. In 1880, the U.S. Supreme Court held that state laws limiting jury service to white men violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *Strauder*, 100 U.S. at 310. Even after *Strauder*, though, "critical problems persisted." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2239 (2019). Specifically, "[e]ven though laws barring blacks from serving on juries were unconstitutional after *Strauder*, many jurisdictions [still] employed various discriminatory tools to [exclude] black persons from . . . jury service." *Id.*

¶ 41 Peremptory strikes were one such tool. *See id.* ("And when [other] tactics failed, or were invalidated, prosecutors could still exercise peremptory strikes in individual cases to remove most or all black prospective jurors."). "Peremptory strikes have very old credentials . . . traced back to the common law[,]" and "traditionally may be used to remove any potential juror for any reason—no questions asked." *Id.* at 2238. With this unquestioned discretion, though, also comes the potential for veiled discrimination. *See Miller-El*, 545 U.S. at 238 (noting "the practical difficulty of ferreting out discrimination in selections [that are] discretionary by nature"). Indeed, "[i]n the century after *Strauder*, the freedom to exercise peremptory strikes for any reason meant that the problem of racial exclusion from jury service remained widespread and deeply entrenched[,]" putting the practice squarely in conflict with well-established principles of equal protection. *Flowers*, 139 S. Ct. at 2239 (cleaned up).

¶ 42 In *Batson v. Kentucky*, the U.S. Supreme Court resolved this conflict in favor of equal protection. 476 U.S. at 89 (holding that "the State's privilege to strike individual jurors through peremptory challenges[] is subject to the commands of the Equal Protection Clause"). Specifically, the Court held that "[a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." *Id.* (cleaned up). And contrary to a previous ruling suggesting that proof of repeated strikes of Black prospective jurors over a number of cases was necessary to establish an equal protection violation, the *Batson* Court held that "a defendant may [show] purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*." *Id.* at 95; *cf. Swain v. Alabama*, 380 U.S. 202, 227 (1965) (establishing the systematic discrimination requirement overruled in *Batson*).

¶ 43 The *Batson* Court further established a three-step process by which courts analyze claims of racially motivated peremptory strikes, now

called "*Batson* challenges." First, a defendant bringing a *Batson* challenge must "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 93–94. "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." *Id.* at 96.

¶ 44 Second, "[o]nce the defendant makes a prima facie showing, the burden shifts to the State to come forward with a [race-]neutral explanation for challenging [the] jurors." *Id.* at 97. Although there may be "any number of bases on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause[,]. . . the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." *Id.* at 98, n.20 (cleaned up).

¶ 45 Third, in light of both parties' submissions, "[t]he trial court then [must] determine if the defendant has established purposeful discrimination." *Id.* at 98. At this step, the judge must assess "whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Flowers*, 139 S. Ct. at 2244.

¶ 46 In the years since *Batson*, the U.S. Supreme Court has further clarified each step of this framework. Several of these clarifications are pertinent to our analysis here. Generally, "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder*, 552 U.S. at 478. Next, regarding a step one, defendants may "present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race[,]" including:

> statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case; evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case; side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case; a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing; relevant history of the State's peremptory strikes in past cases; or other relevant circumstances that bear upon the issue of racial discrimination.

Flowers, 139 S. Ct. at 2243 (cleaned up).

¶ 47 Regarding step two, the U.S. Supreme Court has noted that a prosecutor's proffered reasoning need not be "persuasive, or even plausible. At this second step of the inquiry, the issue is only the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (cleaned up). However, while a prosecutor may raise demeanor-based rationales for a peremptory strike, without "a specific finding [by the trial judge] on the record concerning [the potential juror's] demeanor," a reviewing court "cannot presume that the trial judge credited the prosecutor's assertion [regarding the potential juror's demeanor]." *Snyder*, 552 U.S. at 479. Likewise, a prosecutor's "shifting explanations" or "misrepresentations of the record" may be considered indications of pretext. *Foster*, 578 U.S. at 512.

¶ 48 Finally, the U.S. Supreme Court has provided useful guidance for both trial courts engaging in *Batson* step three and for appellate courts reviewing *Batson* rulings. First, "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, [a court may consult] all of the circumstances that bear upon the issue of racial animosity." *Snyder*, 552 U.S. at 478. Notably, *Batson* analysis "does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El*, 545 U.S. at 252. Next, appellate courts reviewing a trial court's *Batson* ruling "need not . . . decide that any one [fact] alone would require reversal. All that [it] need[s] to decide . . . is that all of the relevant facts and circumstances taken together establish that the trial court . . . committed clear error in concluding that the State's peremptory strike of [one] black prospective juror . . . was not motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2251. Finally, while a trial court's *Batson* determination is granted significant deference upon review, "deference does not by definition preclude relief." *Miller-El*, 545 U.S. at 240.[1]

¶ 49 This Court has likewise provided clarification of its framework for analyzing claims of racial discrimination in jury selection. Principally,

1. Notably, while the trial court's firsthand ability to assess a prosecutor's demeanor and credibility render this significant appellate deference appropriate, there are also human factors that render an appellate court's removed consideration of a *Batson* challenge useful; namely, while a trial judge may feel understandably or unconsciously hesitant to imply that a prosecutor engaged in racial discrimination while that prosecutor is standing right in front of her, appellate judges enjoy a review of the written record further removed from such immediate interpersonal dynamics.

this Court has adopted the *Batson* test for review of peremptory challenges under the North Carolina Constitution. *See State v. Fair*, 354 N.C. 131, 140 (2001) ("Our courts have adopted the *Batson* test for review of peremptory challenges under the North Carolina Constitution."); *State v. Taylor*, 362 N.C. 514, 527 (discussing the *Batson* test and noting that "this Court subsequently adopted that same test"); *State v. Waring*, 364 N.C. 443, 474 (2010) ("Our review of race-based . . . discrimination during petit jury selection has been the same under both the Fourteenth Amendment to the United States Constitution and Article 1, Section 26 of the North Carolina Constitution"). Regarding the first step, "a prima facie showing of racial discrimination is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge." *Hobbs*, 374 at 350 (cleaned up). Regarding the second step, "[t]he State's explanation must be clear and reasonably specific, but does not have to rise to the level of justifying a challenge for cause. Moreover, unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 352 (internal quotations omitted). Finally, in engaging in our own analysis, this Court seeks to be "sensitive to *Batson*'s requirements" and must align itself with applicable guidance from the U.S. Supreme Court. *Waring*, 364 N.C. at 475.

B. Case at Bar

¶ 50 With this history and precedent as our guide, we now consider defendant's present *Batson* challenge. "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder*, 552 U.S. at 477; *see also Waring*, 364 N.C. at 475 ("The trial court's ruling will be sustained unless it is clearly erroneous."). As noted above, such "clear error" is "deemed to exist when, on the entire evidence[,] the Court is left with the definite and firm conviction that a mistake has been committed." *Bennett*, 374 N.C. at 592 (cleaned up). We are left with such a conviction here, and therefore hold that the trial court's order overruling defendant's *Batson* challenge was clearly erroneous.

1.* Batson *Step One: Prima Facie Showing

¶ 51 In the first step of a *Batson* challenge, "a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[.]" *Snyder*, 552 U.S. at 476; *see Taylor*, 362 N.C. at 527 ("First, the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge"). "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient

to permit the trial judge to draw an inference that discrimination has occurred." *Johnson*, 545 U.S. at 170; *see State v. Hobbs*, 374 N.C. 345, 350 (2020) (quoting *Johnson* for this proposition). "A prima facie showing of racial discrimination is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State." *Hobbs*, 374 N.C. at 350 (cleaned up).

¶ 52 In response to this initial challenge, the prosecutor may argue that the defendant has failed to establish prima facie showing of discrimination. "However, once a prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Bell*, 359 N.C. at 12 (cleaned up); *see also Hobb*s, 374 N.C. at 354 ("Where the State has provided reasons for its peremptory challenges, thus moving to *Batson*'s second step, and the trial court has ruled on them, completing *Batson*'s third step, the question of whether a defendant initially established a prima facie case of discrimination becomes moot.").

¶ 53 Here, immediately after the prosecutor completed his questioning of potential jurors, defense counsel raised a *Batson* challenge regarding the prosecutor's peremptory strikes of Ms. Jeffreys and Ms. Aubrey. In support of her challenge, defense counsel noted both the State's disproportionate use of peremptory strikes against Black prospective jurors and the lack of other distinguishing factors between the excluded Black potential jurors and accepted white potential jurors. Specifically, defense counsel stated:

> [S]o far, there have been four challenges by the State and if my numbers are correct, there were two white males and two black females. Ms. Viola Jeffreys who was originally placed in Seat No. 5 and then subsequently Ms. Gwendolyn Aubrey who was placed in Seat No. 5, both women are African-American. They are the only African-Americans seated in the jury box at this point in time.[2] Both have been cut by the State. I'm at a loss as to what it was that caused the State to determine that they should be cut in light of the comparables in the jury pool. The only distinction I see is color. Therefore, we would object to and challenge the State's peremptory challenges made thus far.

2. Later, when asked to self-identify his race, Juror #12 stated "My dad is black and my mom is Chinese . . . [s]o I'm whatever you call that."

¶ 54 The trial court then gave the prosecutor an opportunity to address the *Batson* challenge. Rather than asserting that defendant had not established prima facie showing of discrimination, the prosecutor instead began providing justifications for the challenged peremptory strikes. As the trial court identified in its subsequent response, this moved directly to the second step of the *Batson* analysis:

> All right. This is a three-step process and the first step is for the defense to make a prima facie argument. Mr. Wiggs, you moved directly to the second step, which is fine, which is that you offered neutral—with what you purport to be neutral justification.

Accordingly, step one of defendant's *Batson* challenge was rendered moot, and "we need not examine whether defendant met his initial burden." *Hobbs*, 374 N.C. at 355 (cleaned up). The trial court, therefore, did not err in concluding the same.[3]

2. Batson *Step Two: Race-Neutral Reasoning*

¶ 55 Second, "[o]nce the defendant makes prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 97; *see Fair*, 354 N.C. at 140 ("If this showing is made, the court advances to the second step, where the burden shifts to the state to offer a facially valid, race-neutral rationale for its peremptory challenge"). As noted above, this step "does not demand an explanation that is persuasive, or even plausible[,]" but only one that is facially race-neutral. *Purkett*, 514 U.S. at 768; *see Fair*, 354 N.C. at 140 (stating this same proposition). "As long as the state's reason appears facially valid and betrays no inherent discriminatory intent, the reason is deemed race-neutral." *Fair*, 354 N.C. at 140.

¶ 56 Here, during the initial *Batson* inquiry before trial, the prosecutor contended that he struck both Ms. Jeffreys and Ms. Aubrey for their body language and lack of eye contact. He further asserted that he struck Ms. Jeffreys because of her potential bias toward defendant arising from her previous employment at Dorothea Dix Hospital, and that he struck Ms. Aubrey because she answered "I suppose" to a question asking whether she could be fair and impartial. The trial court subsequently found that these reasons "constitute neutral justifications for exercising peremptory challenges" in satisfaction of *Batson* step two.

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3. The Court of Appeals also correctly, if implicitly, held step one of the *Batson* inquiry to be moot when it noted that "the trial court heard the State's reasons for striking Jeffreys and Aubrey prior to making a ruling on defendant's *Batson* objections," and subsequently moved to step two. *Clegg*, 2017 WL 3863494 at *3.

¶ 57 Later, at the *Batson* rehearing, the prosecutor offered slightly different reasons for his peremptory strikes of Ms. Jeffreys and Ms. Aubrey. Regarding Ms. Jeffreys, the prosecutor again asserted that the peremptory strike "was based primarily on her stated occupation as being retired from Dorothea Dix Hospital, with the understanding that she was a nurse to mental health patients who were suffering from mental health diseases." Because defendant's "mental health was an underlying issue and concern for the defense," the prosecutor contended, "it was the State's belief [that Ms. Jeffreys] would possibly be sympathetic to the defendant despite overwhelming evidence of his guilt." The prosecutor did not mention Ms. Jeffreys's body language or lack of eye contact at the rehearing.

¶ 58 Regarding his strike of Ms. Aubrey, the prosecutor proffered two rationales at the rehearing. The first was the same as before trial: "her body language and her lack of eye contact." Second, the prosecutor noted that Ms. Aubrey had replied "I suppose" to a question regarding whether she felt confident that she could focus on the trial. The prosecutor further noted that when he asked Ms. Aubrey a follow-up question on this issue, she replied "I think so." These short and equivocal answers, combined with "her body language and her lack of eye contact," the prosecutor asserted, created concern about "whether or not [Ms. Aubrey] could be an engaged juror throughout [the trial]."

¶ 59 The prosecutor then addressed the shift in this reasoning between the initial *Batson* inquiry and the rehearing. Noting that he was "completely flustered when this was brought up during trial[,]" the prosecutor conceded that he "missp[oke] with respect to the…question that Ms. Aubrey was answering." He then confirmed that Ms. Aubrey had in fact answered "I suppose" not to a question about being fair and impartial, but about being confident in her ability to focus on the trial, and that he had "confus[ed] those questions and her answer."

¶ 60 In assessing the prosecutor's proffered reasons at the rehearing, the trial court again accepted the justifications as race-neutral in satisfaction of the State's burden of production under *Batson* step two. Regarding the proffered reason for the strike of Ms. Jeffreys, the trial court stated during the rehearing that her previous employment at Dorothea Dix was a "distinguishing race[-]neutral fact" and "an appropriate ground for a peremptory challenge." The court further stated in its written rehearing order that "[a]s to juror Viola Jeffreys, the State offered a race-neutral reason for exercising the strike."

¶ 61 The trial court likewise found the prosecutor's rehearing reasoning for striking Ms. Aubrey to be race-neutral. Specifically, the

court's rehearing order stated that "had the prosecutor, in offering his race-neutral basis for exercising the strike of Ms. Aubrey, stated that he was concerned that she had answered 'I suppose[]' to the question of whether she could focus, . . . that, in the [c]ourt's view, would have constituted a neutral justification for the strike." The court later likewise described the "body language" and "lack of eye contact" justification as another "race-neutral reason articulated by the prosecutor."

¶ 62 We cannot find that the trial court erred in determining that the prosecutor met his burden of production under *Batson* step two. To be clear, as clarified by the U.S. Supreme Court in *Purkett*, the inquiry here is limited only to whether the prosecutor offered reasons that are race-neutral, not whether those reasons withstand any further scrutiny; that scrutiny is reserved for step three. *See* 514 U.S. at 767–68; *Johnson*, 545 U.S. at 171 ("Thus, even if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three."). The prosecutor's proffered reasons here—body language and lack of eye contact, concern of bias, concern of partiality, and concern of lack of focus—are all facially race-neutral. Accordingly, the trial court's findings here and subsequent decision to move to step three of the *Batson* analysis was not erroneous.

3. Batson *Step Three: Determining Discrimination*

¶ 63 Under *Batson*'s third and final step, "[t]he trial court…[has] the duty to determine if the defendant has established purposeful discrimination." 476 U.S. at 98; *see Waring*, 364 N.C. at 475 ("Finally, the trial court must then determine whether the defendant has met the burden of proving purposeful discrimination") (cleaned up). At this stage, the trial judge must consider all of the relevant circumstances and reasoning submitted by both parties to "determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Flowers*, 139 S. Ct. at 2241. In conceptualizing this framework as a whole, a common judicial analogy proves illustrative: in step one (and in subsequent rebuttal),[4] the defendant places his reasoning on the scale; in step two (and in subsequent rebuttal),[5] the State places its counter-reasoning on the scale; in step three, the court carefully weighs all of the reasoning from both sides to ultimately "decid[e] whether it

4. After the prosecutor proffers race-neutral reasoning in step two, "[o]ur courts allow the defendant to submit evidence to show that the state's proffered reason is merely a pretext for discrimination." *Fair*, 354 N.C. at 140. Trial courts may subsequently allow the prosecutor an opportunity for surrebuttal before making their ultimate ruling under step three.

5. *See* note 4 above.

was more likely than not that the challenge was improperly motivated." *Johnson*, 545 U.S. at 170; *see Hobbs*, 374 N.C. at 351 (quoting *Johnson* for this proposition). If so, the defendant has established a *Batson* violation.

¶ 64 Here, the trial court's rehearing order carefully described its step three analysis weighing the reasoning submitted by defendant and the prosecutor. First, the court ruled that the prosecutor's peremptory strike of Ms. Jeffreys (on the basis of concern of potential bias) did not constitute a *Batson* violation. Specifically, the court stated:

> The record reflects that, in prior proceedings in this case, the [d]efendant's competency had been called into question and evaluations ordered. The State's stated basis for striking Ms. Jeffreys due to her work history in the mental health field is rationally related to the defendant's potential competency issues, and thus the [c]ourt finds this reason is supported by the record and constitutes an appropriate justification for the strike.

Because we later conclude that the trial court clearly erred in overruling defendant's *Batson* challenge regarding Ms. Aubrey, and "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose[,]" we decline to consider whether the trial court's ruling regarding Ms. Jeffreys was also clearly erroneous. *Snyder*, 552 U.S. at 478.

¶ 65 Second, the trial court weighed the reasoning provided by both defendant and the prosecutor regarding the peremptory strike of Ms. Aubrey. After reviewing the transcript from the initial *Batson* inquiry, the trial court stated that "[i]t is evident from the record that both the trial court's and the prosecutor's memory of the answers given by Ms. Aubrey was conflated. She did not say 'I suppose' in response to a question of whether she could be 'fair and impartial.' " Rather, the court went on to observe from the record, she provided that answer in response to the prosecutor's question about whether she felt confident that she could focus on the trial. The trial court then stated the following:

> 8. In retrospect, had the prosecutor, in offering his race-neutral basis for exercising the strike of Ms. Aubrey, stated that he was concerned that she had answered "I suppose" to the question of whether she could focus, when coupled with her concern that she worked 'day and night' and would miss work, that, in the [c]ourt's view, would have constituted a neutral justification for the strike.

> 9. However, as it stands, the State's offered reason for striking Ms. Aubrey based on her "I suppose" answer is not supported by the record because the prosecutor associated that answer with whether she could be "fair and impartial," not whether she could focus.

¶ 66 The trial court then observed that under the U.S. Supreme Court's ruling in *Foster*, "when reasons that are offered by a prosecutor as a basis for exercising a strike contradict or mischaracterize the record, those reasons must be rejected in evaluating whether race was a motivating factor in exercising the strike," citing *Foster*, 578 U.S. at 505, 510. "Moreover," the court continued, "a trial court is not permitted to consider race-neutral reasons for exercising a strike that are not articulated by the prosecutor," citing *Miller-El*, 545 U.S. at 250–52. Accordingly, the trial court ruled that "[s]trict application of the rules articulated in *Foster* and *Miller-El* to the race-neutral (but mis-remembered) reasons provided by the prosecutor justifying Ms. Aubrey's strike . . . require the [c]ourt to exclude and not consider the reason articulated by the prosecutor – that Ms. Aubrey said that 'she supposed' she could be fair and impartial – because that reason is contradicted by the record."

¶ 67 Having thus rejected the prosecutor's "I suppose" rationale, the trial court then moved on to consider what it noted was "the only [remaining] race-neutral reason articulated by the prosecutor[:] . . . the 'body language' and 'lack of eye contact' rationale." However, the trial court found that this reasoning, too, was invalid. Specifically, the court noted that "[t]he 'body language' rationale was disputed by trial counsel for the [d]efendant, and the trial court made no specific findings regarding Ms. Aubrey's body language or demeanor." Under the U.S. Supreme Court's ruling in *Snyder*, the trial court stated, "the 'body-language' race-neutral justification offered by the prosecutor cannot be viewed as sufficient" in the absence of any corroborating findings of fact by the trial court. "As such," the trial court ruled, "both race-neutral justifications offered by the prosecutor fail – one because the prosecutor mis-remembered the question to which Ms. Aubrey responded 'I suppose,' and the other because the trial court failed to make sufficient findings of fact to establish a record of Ms. Aubrey's body language." In other words, the prosecution had placed two reasons on the scale, and the trial court deemed them both weightless.

¶ 68 The trial court then considered the evidence proffered by defendant tending to show racial discrimination. Specifically, the court weighed defendant's statistical evidence "both relating to the trial at issue and [to] North Carolina at large." With respect to this trial, that evidence

identified that of the twenty-two members of the jury pool, three were people of color. Further, of the prosecutor's four peremptory strikes, two were used strike two of those three potential jurors of color, "which also turned out to be all the" women of color. Proportionally, then, the State struck about ten percent of the eligible white jurors and about sixty-six percent of the eligible jurors of color, resulting in a jury of eleven white members and one member of mixed race. When asked by defense counsel to identify their race, none of the selected jurors self-identified as African American.[6]

¶ 69 The trial court then noted defendant's evidence of racial disparities in the exercise of peremptory strikes across North Carolina. Specifically, the court noted that this evidence indicated "that in noncapital cases studied from 2011–12, prosecutors struck black venire members at about twice the rate of white." (citing Pollitt & Warren, 94 N.C. L. Rev. at 1964).

¶ 70 Finally, the trial court weighed defendant's "side-by-side comparison of questioning of white jurors and African[-]American jurors." Specifically, the court considered defendant's comparison of the prosecutor's questioning of Ms. Aubrey with that of fellow prospective juror Mr. David Williams regarding their ability to focus during trial. The court noted the following exchange from the record:

> Prosecutor: I don't need specifics, but, you know, is there a possibility that your mind could drift somewhere else when we need you to be focusing on the proceedings here?
>
> Mr. Williams: I have 11 employees out in the field, so –
>
> Prosecutor: Okay. Ms. Aubrey, do you feel confident you can focus on what's going on here?
>
> Ms. Aubrey: I suppose.
>
> Prosecutor: I want you to be confident about it. You just don't want to be a juror or do you feel like if you were here, you could focus and do what we need you to do?
>
> Ms. Aubrey: I think so.

¶ 71 Upon review, though, the trial court did not find this comparison "particularly pertinent because Mr. Williams had previously stated that,

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6. *See* note 2.

with respect to his supervisory duties, 'I can juggle things around[,]' whereas Ms. Aubrey did not indicate any flexibility in her 'day and night' work schedule that might ease her concern about missing work."

¶ 72 The trial court then moved to its final determination regarding defendant's *Batson* challenge. "Here," the court ruled, "[d]efendant has shown that the race-neutral justifications offered by the prosecutor cannot be supported by the record – either because the prosecutor mis-remembered the potential juror's answer or because the trial court failed to make an adequate record of the body language of the prospective juror." "The [d]efendant has also shown," the court continued, "evidence of statistical disparities in the exercise of peremptory challenges by prosecutors in statewide jury selection studies in data collected from 1990 to 2012." Reaching its ultimate conclusion, though, the court stated:

> However, the [c]ourt cannot conclude from this record that in this case, the State has engaged in "purposeful discrimination." As the [d]efendant points out, the applicable standard is, given all relevant circumstances, "whether it was more likely than not that the challenge was improperly motivated." *Johnson v. California*, 545 U.S. 162, 170 (2005). Even on this relaxed "more likely than not" standard, this [c]ourt concludes that essential evidence of purposeful discrimination—which is the defendant's burden to prove—is lacking.

¶ 73 To support this conclusion, the trial court reasoned that "[t]he cases in which the [U.S.] Supreme Court has found that the state exercised peremptory challenges in a purposefully discriminatory fashion are strikingly different from the case at hand." As examples, the court discussed *Foster* and *Miller-El*, in which the prosecutors had exhibited "smoking-gun" evidence of racial discrimination such as, respectively, highlighting the names of all Black potential jurors on their juror list and asking Black potential jurors a "trick question" not asked of white potential jurors. *See Foster*, 578 U.S. at 493–95; *Miller-El*, 545 U.S. at 255. The trial court reasoned that because this case was "markedly distinguishable" from those cases and involved "an instance of a prosecutor mis-remembering" rather than a " 'mischaracterization' of the record[,]" "the quantum of evidence in this case . . . is insufficient to support the conclusion that the prosecutor engaged in purposeful discrimination."

¶ 74 Our review of the trial court's *Batson* step three analysis reveals several errors that collectively leave this Court "with the definite and

firm conviction that a mistake has been committed[,]" thus rendering the trial court's determination clearly erroneous. *Bennett*, 374 N.C. at 592. As noted above, "[w]e need not and do not decide that any one of those [errors] alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of [a] black prospective juror . . . was not 'motivated in substantial part by discriminatory intent.' " *Flowers*, 139 S. Ct. at 2235 (quoting *Foster*, 578 U.S. at 512). Before discussing the trial court's errors, though, it is first worth noting several points of analysis on which the trial court was correct.

¶ 75 First, the trial court acted properly in rejecting the prosecutor's proffered "I suppose" reasoning. As the U.S. Supreme Court illustrated in *Foster*, proffered reasons that are contradicted by the record are unacceptable in supporting a challenged peremptory strike. *See* 578 U.S. at 505. ("Moreover, several of Lanier's reasons…are similarly contradicted by the record"). Likewise, shifting explanations indicate pretext and should be viewed with suspicion. *See id.* at 507 ("As an initial matter, the prosecutor's principal reasons for the strike shifted over time, suggesting that those reasons may be pretextual.").

¶ 76 Here, the prosecutor's "fair and impartial" reasoning during the initial *Batson* inquiry was contradicted by the record, and his "focus" reasoning during the rehearing amounted to a shifting explanation. Whether the initial misstatement was the product of accidental "misremembering," as the trial court found, or intentional "mischaracterizing" does not change the fact that the proffered reason was plainly unsupported by the record. Accordingly, the trial court properly rejected this rationale.[7] To the extent that the trial court viewed this misstatement "in the light most favorable to the prosecutor," as it offhandedly remarked during the rehearing, though, that would reflect a fundamental misunderstanding of the *Batson* framework and constitute error. However, because the trial court articulated the correct burden of proof in its written order, we do not consider this remark further.

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7. While the dissent claims that "the trial court may have taken the holding in *Miller-El* too literally" in rejecting the State's proffered reasoning here (¶ 142), we understand the trial court to have simply concluded that the U.S. Supreme Court meant what it said when it held that "[i]f the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El*, 545 U.S. at 252. Notably, the Court of Appeals made this same misstep when it provided its own "clarification" to the State's actual proffered reason. *See Clegg*, WL 3863494 at *4.

¶ 77 Second and similarly, the trial court properly rejected the prosecutor's "body language and lack of eye contact" reasoning. As the U.S. Supreme Court indicated in *Snyder*, while demeanor-based reasoning can be rightly credited "where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike[,]" without such corroboration "we cannot presume that the trial judge credited the prosecutor's assertion" regarding the potential juror's demeanor. 552 U.S. at 479. Here, not only did the trial judge not corroborate the prosecutor's assertion regarding Ms. Aubrey's body language and eye contact, defense counsel specifically refuted it. Because the trial court made no specific findings of fact regarding Ms. Aubrey's body language, it properly rejected this reasoning at the rehearing.

¶ 78 What's more, the prosecutor's demeanor-based reasoning here was even less specific—and therefore less credible—than that rejected in *Snyder*. In *Snyder*, the prosecutor claimed that the rejected juror was "nervous," a description that at least minimally invokes a commonly understood set of more specific behaviors. *Id*. Here, the prosecutor merely stated that he struck Ms. Aubrey due to her "body language" without ever specifying anything in particular that might have been concerning about her body language. Further, during the initial pre-trial *Batson* inquiry, the prosecutor never distinguished between Ms. Jeffreys and Ms. Aubrey when discussing body language—he only referred to the two Black women collectively, twice referring to "*their* body language" without any further specification. This complete lack of specificity significantly undermines the credibility of the prosecutor's reasoning.

¶ 79 Historical context provides even more reason for courts engaging in a *Batson* analysis to view generalized "body language and lack of eye contact" justifications with significant suspicion. For example, as recently as 1995, prosecutorial training sessions conducted by the North Carolina Conference of District Attorneys included a "cheat sheet" titled "*Batson* Justifications: Articulating Juror Negatives." *See* Pollitt & Warren, 94 N.C. L. Rev. at 1980 (noting a North Carolina trial court's summary of this document in a 2012 Order on a defendant's motion for appropriate relief). This document provided prosecutors with a list of facially race-neutral reasons that they might proffer in response to *Batson* objections. *See id.*; *see also* Jacob Biba, *Race Neutral*, The Intercept, Nov. 8, 2021, https://theintercept.com/2021/11/08/north-carolina-jury-racial-discrimination/ (describing the prosecutorial training and *Batson* Justification worksheet); Tonya Maxwell, *Black juror's dismissal, death penalty, revisited in double homicide*, The Asheville Citizen-Times, Nov. 3, 2016, https://www.citizen-times.com/story/news/local/

2016/11/03/black-jurors-dismissal-death-penalty-revisited-double-homicide/93168824/ (same). The list included both "body language" and "lack of eye contact," in addition to "attitude," "air of defiance," and "monosyllabic" responses to questions.[8]

¶ 80 Of course, North Carolina is not unique here. When placed within our well-established national history of prosecutors employing peremptory challenges as tools of covert racial discrimination, this historical context cautions courts against accepting overly broad demeanor-based justifications without further inquiry or corroboration. *See Flowers*, 139 S. Ct. at 2239–40 ("And when [other discriminatory] tactics failed, or were invalidated, prosecutors could still exercise peremptory strikes in individual cases to remove most or all black prospective jurors."). Accordingly, the trial court properly rejected the prosecutor's unconfirmed and generalized "body language and lack of eye contact" rationale below.

¶ 81 Third and finally, the trial court acted properly in considering defendant's statistical evidence regarding the disproportionate use of peremptory strikes against Black potential jurors in both this case and statewide. As recently identified by the U.S. Supreme Court in *Flowers*, such data is included among the many types of evidence that a defendant may present, and a court may consider, within a *Batson* challenge. 139 S. Ct. at 2243 (listing examples of the variety of evidence defendants may present in *Batson* challenges).

¶ 82 Despite the areas in which the trial court acted properly, though, several other areas of its *Batson* step three analysis were erroneous. Like the U.S. Supreme Court in *Flowers*, we do not identify any one of the trial court's mistakes as independently requiring reversal. Rather, we determine that "all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of [Ms. Aubrey] was not motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2251. Specifically, we note four interrelated errors: (1) overruling defendant's *Batson* challenge after rejecting all of the race-neutral reasons provided by the prosecutor; (2) applying an improperly high burden of proof; (3) independently considering reasoning not offered by the prosecutor; and (4) giving inadequate consideration to racially disparate questioning and acceptance of comparable jurors.

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8. Here, in justifying his peremptory strike of Ms. Aubrey, the prosecutor repeatedly noted that her answers were "short."

¶ 83 First, the trial court erred by ruling that defendant had not met his *Batson* burden after determining that "both race-neutral justifications offered by the prosecutor fail." Under the *Batson* framework, after the defendant and the State have offered their reasoning, the trial court must determine, in light of these submissions, "whether it was more likely than not that the [peremptory] challenge was improperly motivated." *Johnson*, 545 U.S. at 170. If the trial court finds that all of the prosecutor's proffered race-neutral justifications are invalid, it is functionally identical to the prosecutor offering no race-neutral justifications at all. In such circumstances, the only remaining submissions to be weighed—those made by the defendant—tend to indicate that the prosecutor's peremptory strike was "motivated in substantial part by discriminatory intent." *Flowers*, 139 S. Ct. at 2251. As a consequence, then, a *Batson* violation has been established.

¶ 84 Here, after careful analysis, the trial court explicitly ruled that "both race-neutral justifications by the prosecutor fail." At that point, the only valid reasoning remaining for the court to consider was evidence presented by defendant tending to show that the peremptory challenge of Ms. Aubrey was motivated in substantial part by discriminatory intent: disparate data, disparate questioning, and disparate acceptance of substantially comparable jurors. Accordingly, after finding that both race-neutral justifications for the prosecutor's peremptory strike of Ms. Aubrey failed, the trial court should have ruled on this record that defendant met his burden under *Batson*. Ruling otherwise was erroneous.

¶ 85 Second, the trial court erred by holding defendant to an improperly high burden of proof. Under *Batson*, defendants must "establish purposeful discrimination." 476 U.S. at 98. The U.S. Supreme Court has described this requirement as showing that a peremptory strike was "motivated in substantial part by discriminatory intent[,]" *Flowers*, 139 S. Ct. at 2251, or "whether it was more likely than not that the challenge was improperly motivated." *Johnson*, 545 U.S. at 170.

¶ 86 Here, while the trial court properly *recited* this burden, it failed to apply it with fidelity. Instead, it looked for smoking-gun evidence of racial discrimination similar to what has been present in previous U.S. Supreme Court cases that have found *Batson* violations, namely *Foster*, 578 U.S. 488, and *Miller-El*, 545 U.S. 231. After noting the glaring evidence of discrimination present in those cases, the trial court found that "[t]his case is markedly distinguishable from the facts of this controlling authority."

¶ 87 While that may be true, it is not the *facts* of those decisions that make them controlling authority—it's the *law*. Highlighted names and trick

questions are not required for a defendant to show that a peremptory was "motivated in substantial part by discriminatory intent."[9] *Flowers*, 139 S. Ct. at 2251. Rather, as defendant did here, a defendant may present a wide variety of direct and circumstantial evidence in supporting a *Batson* challenge. *See id.* at 2243 (listing examples of acceptable evidence); *Hobbs*, 374 N.C. at 356 (same). By implicitly holding defendant to an improperly high burden, the trial court erred in its *Batson* step three analysis.

¶ 88 Third, the trial court erred by considering within its *Batson* step three analysis reasoning not presented by the prosecution on its own accord. In *Miller-El*, the U.S. Supreme Court held that "[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." 545 U.S. at 252. Indeed, the trial court here noted as much both during the rehearing and in its subsequent order. During the rehearing, for instance, the trial court stated:

> [T]he [c]ourt cannot interpose [a] valid basis for the exercise of [a] peremptory challenge when the State fails to raise it . . . I would find that had the State said ["Ms. Aubrey] works day and night . . . and she's sitting there slouching in her chair,["] . . . it would be one thing. But I don't think I can interpose that objection for the prosecutor in this case and say look, [had they] said that, . . . that would have been the basis of my ruling. So I think I'm stuck with what they said.

¶ 89 In its subsequent order, though, the trial court did not "st[i]ck with what they said." For instance, when considering the prosecutor's questioning of Ms. Aubrey and Mr. Williams, the court ruled that the comparison was "not . . . particularly pertinent because Mr. Williams had previously stated that, with respect to his supervisory duties, 'I can juggle things around[,]' . . . whereas Ms. Aubrey did not indicate any flexibility in her 'day and night' work schedule that might ease her concern about missing work." But the prosecution had never advanced this "day and night" argument on its own accord—not at the initial *Batson*

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9. Notably, the jury selections at question in both *Foster* and *Miller-El* took place in the late 1980s, either before or immediately after *Batson* was first decided. *See* 578 U.S. at 492 (summarizing the initial crime and trial process); 545 U.S. at 235–236 (same). Given the historical context noted above, it is unsurprising that *Batson* cases arising from trials in the late twentieth century may reveal more blatant evidence of racial discrimination in jury selection than those arising from trials today.

inquiry, and not the subsequent rehearing. While the prosecution certainly *could* have argued that Ms. Aubrey's "day and night" work schedule might impact her ability to focus during trial, it did not. Accordingly, the trial court erred by considering this reasoning within its step three analysis.

¶ 90 Fourth and finally, the trial court erred by failing to adequately consider the disparate questioning and disparate acceptance of comparable white and Black prospective jurors. *See Flowers*, 139 S. Ct. at 2246 ("We next consider the State's dramatically disparate questioning of black and white prospective jurors in the jury selection process."). As typical during jury selection, the prosecutor in this case collectively asked all of the then-seated jurors whether they felt confident that they could focus during the trial. Specifically, the prosecutor asked:

> [D]o you all feel like you can, if you serve as a juror, . . . pay attention to the testimony and the evidence while you're in the courtroom [and] focus exclusively on what's going on in the courtroom? I know we all have distractions in our lives, but is there anything that's such a major distraction that your mind may be somewhere else when you should be focusing on what's going on? I'm not asking you to tell me exactly what it is, but anybody have any kind of issues like that going on?

Notably, in response to an earlier question from the trial court about "anything going on in [their lives] that would make it difficult or impossible for [them] to serve," several of the jurors had indicated that they had potential work- or family-related logistical challenges, such as having to find coverage at work (Juror #6) or having one or more young children at home (Jurors # 9 and # 12), among others. Nevertheless, when none of the then-seated jurors responded to the prosecutor's question about focus, the prosecutor took them at their word and immediately moved on to another topic without further questioning.

¶ 91 Later, the prosecutor used peremptory strikes to remove three of the initial jurors (including Ms. Jeffreys), leading to the seating of three replacement jurors, including Ms. Aubrey and Mr. David Williams. Like the initial batch of jurors, the trial court asked the three replacements whether they had anything going on in their lives that would make it difficult or impossible for them to serve. Ms. Aubrey responded: "[o]ther than missing work, no[,]" before clarifying in response to a follow-up question by the court that she worked both "[d]ay and night." Mr. Williams

responded: "I'm an irrigation contractor and this is our season, and I'm one of the service techs. But I can juggle things around." Later, the prosecutor asked the three replacement jurors the same question he had previously posed to the initial batch:

> Is there anything going on in your personal life . . . that would maybe take you away mentally from being engaged in what's going on here in the courtroom? Again, I don't need to know specifics, but, you know, is there a possibility that your mind could drift somewhere else when we need you to be focusing on the proceedings here?

In response, like all of the initial jurors previously, Ms. Aubrey remained silent. Then, Mr. Williams spoke up, and the following exchange took place:

> [Mr. Williams]: I have 11 employees out in the field, so —
>
> Mr. Wiggs: Okay. Ms. Aubrey, do you feel confident that you can focus on what's going on here?
>
> [Ms. Aubrey]: I suppose.
>
> Mr. Wiggs: I want you to be confident about it. You just don't want to be a juror or do you feel like if you were here, you could focus and do what we need you to do?
>
> [Ms. Aubrey]: I think so.
>
> Mr. Wiggs: Okay. Thank you.

Later, without asking any further questions to either Ms. Aubrey or Mr. Williams, the prosecutor used a peremptory strike to remove Ms. Aubrey from the jury pool, but did not remove Mr. Williams.

¶ 92 On review, this exchange stands out for two reasons: first for what the prosecutor *did* do, and second for what he did *not* do. First, out of the fifteen potential jurors that the prosecutor had asked about their ability to focus up to this point (twelve initial and three replacements), Ms. Aubrey was the only one the prosecutor singled out for further specific questioning. And while Ms. Aubrey was the only potential juror who noted that she worked both "day and night," she was far from the only one who had substantially similar work- or family-related logistical challenges that might impact her ability to focus. Accordingly,

Ms. Aubrey's "day and night" comment alone cannot bear the weight of justifying this disparate questioning. Indeed, "[a] *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El*, 545 U.S. at 247, n.6. In any event, as noted above, if the prosecutor was concerned about Ms. Aubrey working day and night, he never stated as much.

¶ 93 Second, this exchange stands out because of what the prosecutor did *not* do: follow up with Mr. Williams. After the prosecutor asked the question about focus, Mr. Williams, unique among the fifteen jurors up to this point, volunteered information that could most reasonably be understood as indicating that he had a professional obligation that might impact his ability to focus during trial: "I have 11 employees out in the field, so —".[10] Indeed, Mr. Williams had previously noted that he was self-employed and that "this is our season[.]" Instead of following up with Mr. Williams about this comment, though, the prosecutor instead, without explanation, turned immediately to Ms. Aubrey: "Okay. Ms. Aubrey, do you feel confident you can focus on what's going on here?" Ms. Aubrey then replied "I suppose[,]" and later, "I think so[,]" responses that are perfectly normal in jury selection and perhaps even more honest and conversational than a flat "yes." Indeed, if Ms. Aubrey *had* answered with a flat "yes," given the historical context noted above, one can realistically imagine a prosecutor seeking to justify a peremptory strike on the grounds that such an answer was too short, cold, or confident.

¶ 94 While "disparate questioning or investigation alone does not constitute a *Batson* violation[,]" it "can . . . , along with other evidence, inform the trial court's evaluation of whether discrimination occurred." *Flowers*, 139 S. Ct. at 2248. When viewed in the context of the full record, this exchange illustrates disparate questioning and exclusion of Ms. Aubrey compared to substantially comparable white potential jurors who were unquestioned and accepted by the prosecutor. Accordingly, the trial

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10. The State has suggested that it is possible that, instead of indicating why he might *not* be able to focus during trial, Mr. Williams' comment may have been providing a reason why he *could* focus during trial: because he "ha[d] 11 employees out in the field" who might be able to cover for him in his absence. While this explanation is not completely without merit, given the full context of the record (including the fact that none of the other fourteen jurors felt compelled go out of their way to provide the prosecutor with a reason to prove why they *could* focus in response to a question asking for potential reasons why they could not) it appears more likely that Mr. Williams was beginning to suggest that he might not be able to focus. In any event, even accepting both potential meanings as reasonable, the most notable aspect of this exchange is that the prosecutor never followed up with Mr. Williams to clarify what exactly his comment was suggesting.

court should have fully considered this evidence within the totality of defendant's submissions. Its failure to do so was erroneous.

¶ 95 "To reiterate, we need not and do not decide [whether] any of these four [errors] alone would require reversal." *Id.* at 2251. Rather, we determine that when these errors are considered cumulatively and within the context of the full record of this case, we are "left with the definite and firm conviction that a mistake has been committed." *Bennett*, 374 N.C. at 592. Accordingly, we hold that the trial court's ruling overruling defendant's *Batson* challenge was clearly erroneous.

III. Remedy

¶ 96 **[2]** Having determined that a *Batson* violation indeed occurred, we must now consider a just remedy. Because the finding of a *Batson* violation during jury selection necessitates the reversal of a defendant's subsequent conviction by that jury, *see Batson*, 476 U.S. at 100 (noting that the finding of a violation "require[s] that petitioner's conviction be reversed"); *Flowers*, 139 S. Ct. at 2252 (Alito, J., concurring) (agreeing with the majority opinion "that petitioner's capital conviction cannot stand"), it would ordinarily follow that a defendant would receive a new trial.

¶ 97 Here, however, defendant has already served his entire sentence of active imprisonment from his now-reversed conviction, and has been discharged from all post-release supervision. N.C.G.S. 15A-1335 provides that "[w]hen a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served."

IV. Conclusion

¶ 98 Today, as surely as in 1880 and 1986, racial discrimination in jury selection violates a defendant's constitutional right to equal protection of the law. *See Strauder*, 100 U.S. 303; *Batson*, 476 U.S. 79. Furthermore, it undermines the credibility of our judicial system as a whole, thus tearing at the very fabric of our democratic society. *See Batson*, 476 at 87 ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."). Accordingly, the *Batson* framework establishes a process through which we seek to root out any remaining vestiges of racial discrimination in jury selection through the use of peremptory strikes.

¶ 99 In reality, the finding of a *Batson* violation does not amount to an absolutely certain determination that a peremptory strike was the product

of racial discrimination. Rather, the *Batson* process represents our best, if imperfect, attempt at drawing a line in the sand establishing the level of risk of racial discrimination that we deem acceptable or unacceptable.[11] If a prosecutor provides adequate legitimate race-neutral explanations for a peremptory strike, we deem that risk acceptably low. If not, we deem it unacceptably high.

¶ 100 Here, that risk was unacceptably high. After the prosecutor struck two Black women from the jury, defendant raised a *Batson* challenge presenting evidence tending to indicate that racial discrimination was a substantial motivating factor. The prosecutor then proffered two race-neutral justifications for each peremptory strike. Upon review of the peremptory strike of Ms. Gwendolyn Aubrey, the trial court found that "both race-neutral reasons offered by the prosecutor fail." At that point, the only valid reasoning remaining for the trial court to consider was defendant's evidence of discrimination. As a consequence, the totality of the evidence presented for the court to consider established that it was sufficiently likely that the strike was motivated in substantial part by discriminatory intent. This constitutes a substantive violation of defendant's constitutional right to equal protection under the Fourteenth Amendment of the United States Constitution, and the trial court clearly erred in ruling to the contrary. Accordingly, the trial court's order overruling defendant's *Batson* objection is reversed, defendant's conviction is vacated, and the case is remanded to the trial court for any further proceedings.

REVERSED AND REMANDED.

Justice EARLS concurring.

¶ 101 I join fully in the majority's opinion. I agree that the prosecutor's use of a peremptory challenge to exclude Ms. Aubrey, an African-American prospective juror, from the jury empaneled to hear this case violated the Equal Protection Clause of the Fourteenth Amendment. Indeed, "[e]qual

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11. *See People v. Gutierrez*, 2 Cal. 5th 1150, 1182–83 (2017) (Liu, J., concurring) ("In most cases, courts cannot discern a prosecutor's subjective intent with anything approaching certainty. But the issue is not whether the evidence of improper discrimination approaches certainty or even amounts to clear and convincing proof. The ultimate issue is whether it was more likely than not that the challenge was improperly motivated. This probabilistic standard is not designed to elicit a definitive finding of deceit or racism. Instead, it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection causes to the defendant, to the excluded juror, and to public confidence in the fairness of our system of justice.") (cleaned up).

justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019). I also agree that it is proper to reverse the trial court's order overruling Mr. Clegg's *Batson* objection and for his conviction to be vacated. Mr. Clegg has served his sentence and completed post-release supervision. By statute, where a conviction has been set aside "the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served." N.C.G.S. § 15A-1335 (2021). The State's interest in prosecuting and punishing Mr. Clegg for the crimes with which he was charged has already been fully satisfied.

¶ 102 I would further hold that the prosecutor's use of a peremptory challenge to exclude Ms. Jeffreys, another African-American woman, also violated the Fourteenth Amendment under *Batson*. It is important to address this question because the constitutional interest involved here is not simply the Fourteenth Amendment right of the defendant to a trial free from racial discrimination. "The *Batson* decision was grounded in the criminal defendant's right to equal protection of the laws . . . . *Batson* also concluded, however, that race-based exclusion of jurors violates the equal protection rights of the excluded jurors . . . ." Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 Colum. L. Rev. 725, 726 (1992) (footnote omitted) (citing *Batson v. Kentucky*, 476 U.S. 79, 85–87 (1986)). The United States Supreme Court recently reaffirmed this understanding, which flows directly from the Court's holding in *Strauder*:

> In the words of the *Strauder* Court: 'The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.' For those reasons, the Court ruled that the West Virginia statute excluding blacks from jury service violated the Fourteenth Amendment.

Flowers, 139 S. Ct. at 2239 (cleaned up) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)). On numerous other occasions the

United States Supreme Court has made clear that the equal protection rights of excluded jurors are also recognized and can be asserted by third parties. *See, e.g.*, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629–30 (1991) (prospective jurors have an equal protection right to be free of race-based jury selection in civil cases as well as criminal cases); *Powers v. Ohio*, 499 U.S. 400, 425 (1991) (rights of excluded jurors can be invoked by one civil litigant against another, and by a criminal defendant of a different race from that of the excluded juror).

¶ 103 In *Powers*, the Court explained that while an individual does not have a right to be chosen to sit on any particular jury, they do have a right not to be excluded from jury service because of their race. *Powers*, 499 U.S. at 409.

> It is suggested that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror. We do not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. Race cannot be a proxy for determining juror bias or competence. "A person's race simply 'is unrelated to his fitness as a juror.' "

Id. at 410 (quoting *Batson*, 476 U.S. at 87). Thus, "[a] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character." *Id.* at 413–14. Although not evidence in the record of this case, the following material submitted with an amicus brief in the *Batson* case is illustrative of the harm to prospective jurors:

> In November of 1984, a person summoned for jury service in Brooklyn, New York, wrote a letter to the District Attorney complaining about race discrimination in jury selection. The person wrote that in a murder case against a Hispanic defendant, a majority of the prospective jurors were black, but an all-white jury was chosen, and it appeared to the writer that black jurors were being excluded on the basis of race. The writer asked: 'If we Blacks don't have common sense and don't know how to be fair and impartial, why send these summonses to us? Why are we subject to fines of $ 250.00 if we don't appear and told it's our civic duty if we ask to be excused? Why

> bother to call us down to these courts and then overlook us like a bunch of naive or better yet ignorant children? We could be on our jobs or in schools trying to help ourselves instead of in courthouse halls being made fools of.'

Underwood, *Ending Race Discrimination*, at 745. While it is inevitably a burden, "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers*, 499 U.S. at 407. One of the principal justifications for retaining the jury system is that it provides an opportunity for ordinary citizens "to participate in the administration of justice." *Id.* at 406 (citing *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968)). Therefore, to be excluded from that opportunity based on one's race creates a unique kind of irreparable harm. *See also Edmonson*, 500 U.S. at 628 ("If peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation.")

¶ 104 Considering this harm, we should examine the parties' arguments and decide whether the prosecutor's decision to use a peremptory challenge to exclude Ms. Jeffreys was an equal protection violation. As the majority explains, on remand the trial court found that the prosecutor had offered a race-neutral reason for excluding Ms. Jeffreys, namely that she was previously employed as a nurse at Dorothea Dix Hospital and therefore may be sympathetic to Mr. Clegg's mental health issues. This is a race-neutral explanation supported by the record and satisfies the State's burden of production under *Batson's* second step.

¶ 105 In examining whether this explanation is persuasive, under *Batson*'s third step, additional facts are significant to provide context. The trial court found that Ms. Jeffreys's employment at Dorothea Dix Hospital was "rationally related to the Defendant's potential competency issues." However, Mr. Clegg's competency issues had already been resolved pre-trial, as the court had already determined that he was competent to stand trial and there was no reason to believe that the jury would hear about or have anything to decide about his competency. Significantly, the prosecutor did not ask any other juror if they had experience with mental health or competency issues. *See Miller-El v. Dretke*, 545 U.S. 231, 246 (2005) ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for

discrimination[.]" (first alteration in original) (quoting *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000))). These facts alone are sufficient to demonstrate that the prosecutor's race-neutral explanation is pretextual.

¶ 106 However, the trial court erred in failing to acknowledge and factor into its analysis statistics cited by Mr. Clegg on remand which showed that prior to his trial in 2016, from 2011 to 2012, Wake County prosecutors struck Black prospective jurors at 1.7 times the rate of white prospective jurors in all jury trials in North Carolina during that year. This information is relevant to determining whether discrimination has occurred in this particular case. *See State v. Hobbs*, 374 N.C. 345, 359–60 (2020) (trial court erred in failing to weigh historical evidence of racial discrimination in jury selection); *see also Flowers v. Mississippi*, 139 S. Ct. at 2245 ("Most importantly for present purposes, after *Batson*, the trial judge may still consider historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction, just as *Swain* had allowed.)

¶ 107 Considering the very localized and specific statistical evidence of the racially disparate use of peremptory challenges by prosecutors, the statewide data that was acknowledged by the trial court, the lack of any documented reason to exclude Ms. Jeffreys beyond a reason that appears to be pretextual, and the fact that the prosecutor here used two of his four peremptory challenges to strike all of the Black female prospective jurors,[1] it was clearly error for the trial court to conclude that Mr. Clegg failed to carry his burden of demonstrating racial discrimination in the prosecutor's use of a peremptory challenge to exclude Ms. Jeffreys from the jury. *Cf. Snyder v. Louisiana*, 552 U.S. 472, 485, 478 (2008) (a trial court's finding of discrimination against one juror is evidence of discrimination against other jurors).

¶ 108 The State also asserted that it excluded Ms. Jeffreys, as it did Ms. Aubrey, because of her "body language and failure to make eye contact" without further elaboration of what about Ms. Jeffreys' body language explained the decision to exclude her from the jury. The trial court concluded that this justification could not be supported by the record because there was not "an adequate record of the body language of the prospective juror."

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1. The State exercised four peremptory strikes: Viola Jeffreys, Gwendolyn Aubrey, Joseph Barello, and Brian Williams. The State struck 10%–11% of eligible white jurors (2/19) and 66% of eligible non-white jurors (2/3). All the women of color called to serve were stricken by the State.

¶ 109 In addition to the inadequate record, I would follow other courts that have found such explanations insufficient to constitute a valid, race-neutral explanation. *See*, *e.g.*, *State v. Giles*, 407 S.C. 14, 20–22 (2014) (explanation provided by proponent of a peremptory challenge at second step of *Batson* process must be clear and reasonably specific to be legally sufficient); *Zakour v. UT Med. Grp., Inc.*, 215 S.W.3d 763, 775 (Tenn. 2007) (finding explanation that six prospective female jurors were stricken because of their body language, without providing more detail, was not clear, reasonably specific, legitimate and reasonably related to the particular case being tried); *Spencer v. State*, 238 So. 3d 708, 712 (Fla. 2018) (under Florida law, second step of *Batson* requires prosecutor to identify "clear and reasonably specific" race-neutral explanation that is related to case being tried (quoting *State v. Slappy*, 522 So.2d 18, 22 (Fla. 1988))), *cert. denied*, 138 S. Ct. 2637. I would therefore hold that that a general reference to a person's body language without more and particularly without documentation of such facts on the record, is not a valid race-neutral explanation of a peremptory challenge that satisfies the second step of *Batson* even under the standard set by the United States Supreme Court in its decision in *Purkett v. Elem*, 514 U.S. 765 (1995).

¶ 110 The *Purkett* Court took a very broad approach to the second step, suggesting that virtually any race-neutral explanation, if "plausible," is satisfactory. *Purkett*, 514 U.S. at 768. However, the Court has also explained that 'seat-of-the-pants instincts' may often be just another term for racial prejudice." *Batson*, 476 U.S. at 106 (Marshall, J., concurring). The Washington Supreme Court has specifically identified "body language" and "failing to make eye contact" as reasons for a peremptory challenge that historically have been "associated with improper discrimination in jury selection" and required that if any party intends to offer such a reason for a peremptory challenge, notice must be provided to the court and the other parties "so the behavior can be verified and addressed in a timely manner." Wash. Gen. R. 37(i). Moreover, "[a] lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge." *Id.* Therefore, I agree with the Louisiana Supreme Court and others that have held that a general explanation, such as body language cannot be a satisfactory race-neutral explanation because "[s]uch an all inclusive reason falls far short of an articulable reason that enables the trial judge to assess the plausibility of the proffered reason for striking a potential juror." *Alex v. Rayne Concrete Serv.*, 2005-1457 (La. 1/26/07); 951 So. 2d 138, 153. Indeed, "[i]f trial courts were required to find any reason given not based on race satisfactory, only those who admitted point-blank that

they excluded veniremen because of their race would be found in violation of the Fourteenth Amendment's guarantee of equal protection." *Id.* at 154 (quoting *State v. Collier*, 553 So. 2d 815, 821 (La. 1989)).

¶ 111 More generally, guaranteeing that juries are selected without racial bias is important to the administration of justice not only for the rights of the litigants and the rights of prospective jurors, but also for the legitimacy of the court system itself. *Taylor v. Louisiana*, 419 U.S. 522, 530–31 (1975) (fair representation of juries is essential to (1) guard against the exercise of "arbitrary power" and by invoking the "commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor," (2) uphold "public confidence in the fairness of the criminal justice system," and (3) share the administration of justice which "is a phase of civic responsibility").

¶ 112 When racial bias infects jury selection, it is an affront to individual dignity and removes important voices from the justice system. Writing nearly one hundred years ago, Chief Justice Taft explained:

> The jury system postulates a conscious duty of participation in the machinery of justice . . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.

Balzac v. Porto Rico, 258 U.S. 298, 310 (1922). More recently, when expanding *Batson* to the civil context, Justice Kennedy explained why eliminating racial bias in courtroom is fundamental:

> Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.
>
> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.

Edmonson, 500 U.S. at 628. Just four years ago, in overturning a conviction rendered by a jury that was found to have based its decision explicitly on the defendant's race, the Court again explained the significance of the jury in our legal system and our democracy:

> The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.

Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017). Given the importance of fair jury selection processes, it is incumbent on this Court to take reasonable steps to address the obstacles we face. We must acknowledge that this Court's *Batson* jurisprudence has not been effective. This case is the first case where we have reversed a conviction on *Batson* grounds. The record is clear:

> Since 1986, and as of September 6, 2016, the Supreme Court of North Carolina has decided seventy-four cases on the merits in which it adjudicated eighty-one *Batson* claims raised by criminal defendants over alleged racial discrimination against minority jurors in the State's exercise of peremptory challenges at criminal trials. To date, that [C]ourt has not found a substantive *Batson* violation in any of those cases. In seventy-one of those seventy-four cases, that [C]ourt found no *Batson* error whatsoever. In the three remaining cases, that [C]ourt held the trial court erred at *Batson*'s first step in finding no prima facie case existed and conducted or ordered further review. However, none of these three cases has ultimately resulted in the holding of a substantive *Batson* violation.

Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson*

Record, 94 N.C. L. Rev. 1957, 1961 (2016) (footnotes omitted). Faced with a similarly stark record, the Washington Supreme Court observed in 2013 that its experience was "rather shocking and underscores the substantial discretion that is afforded to trial courts under *Batson*. And while this alone does not prove that *Batson* is failing, it is highly suggestive in light of all the other evidence that race discrimination persists in the exercise of peremptories." *State v. Saintcalle*, 178 Wash. 2d 34, 46, 309 P.3d 326, 335, *cert. denied*, 571 U.S. 1113 (2013), *and overruled in part on other grounds by Seattle v. Erickson*, 188 Wash. 2d 721, 398 P.3d 1124 (2017); *see also Miller-El*, 545 U.S. at 268–70 (Breyer, J., concurring) (reviewing the body of evidence showing that *Batson* has done very little to prevent prosecutors from exercising race-based challenges).

¶ 113 Justice Marshall predicted that "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge." *Batson*, 476 U.S. at 105 (Marshall, J., concurring). In brief, and perhaps stating the obvious, the *Batson* framework makes it very difficult for litigants to prove intentional discrimination, "even where it almost certainly exists." *Erickson*, 188 Wash. 2d at 735–36, 398 P.3d at 1131–32 (quoting *Saintcalle*, 178 Wash. 2d at 46, 309 P.3d at 335). *Batson* also completely fails to address peremptory strikes that occur due to implicit or unconscious bias,[2] as Marshall pointed out when referencing prosecutors' and judges' "conscious or unconscious" bias. *Batson*, 476 U.S. at 106 (Marshall, J., concurring). Other natural human inclinations also make it difficult for counsel to assert that a member of the bar is acting out of purposeful discrimination[3] and judges are reluctant to sustain such objections. *Cf. People v. Gutierrez*, 2 Cal. 5th 1150, 1183, 395 P.3d 186, 208 (2017) (Liu, J., concurring) ("[I]t is more likely than not that one or more strikes were improperly motivated. But I do not think the finding of a violation should brand the prosecutor a liar or a bigot. Such loaded terms obscure the systemic values that the constitutional prohibition on racial discrimination in jury selection is designed to serve.").

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2. *See*, *e.g.*, Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 Law & Hum. Behav. 261, 266–67 (2007).

3. Mr. Batson had to insist that his counsel "object anyway" to the prosecutor's use of peremptory challenges during jury selection at his trial. Sean Rameswaram, *Object Anyway*, More Perfect Podcast (July 16, 2016), interview of James Batson, https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/object-anyway.

¶ 114 Appellate judges are similarly uncomfortable overturning jury verdicts, especially when the crimes charged are extremely serious. The fact that the first time this Court has ever vacated a conviction on *Batson* grounds occurs here where Mr. Clegg has already completely served his time is indicative of why the *Batson* framework has failed to adequately address the constitutional violation acknowledged by the United States Supreme Court in *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880).

¶ 115 Indeed, in 1986 Justice Marshall stated that "[t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring). The Arizona Supreme Court has taken this observation seriously and, by general rule, has eliminated the use of peremptory challenges in civil and criminal trials. *See* Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, Ariz. Sup. Ct. No. R-21-0020 (Aug. 30, 2021). Washington State's General Rule 37, adopted by the Washington Supreme Court in 2018, establishes a new standard and identifies presumptively invalid reasons for peremptory challenges that have been associated with improper discrimination in the past. Wash. Gen. R. 37(i); *see also State v. Jefferson*, 192 Wash. 2d 225, 242, 429 P.3d 467, 476 (2018) (identifying *Batson's* deficiencies and asserting the court's "inherent authority to adopt such procedures to further the administration of justice"). The Connecticut Supreme Court established a jury selection task force to review the problems with *Batson* that it carefully outlined in its opinion in *State v. Holmes*, 334 Conn. 202, 221 A.3d 407 (2019), and to propose necessary solutions. *See Holmes*, 334 Conn. at 250, 221 A.3d at 436–37.

¶ 116 Social science research indicates that

> compared to diverse juries, all white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives. In contrast, diverse juries were significantly more able to assess reliability and credibility, avoid presumptions of guilt, and fairly judge a criminally accused. By every deliberation measure heterogeneous groups outperformed homogeneous groups. These studies confirm what seems obvious from reflection: more diverse juries result in fairer trials.

Id. at 235 (cleaned up) (quoting *Saintcalle*, 178 Wash. 2d at 50, 309 P.3d at 337).[4] As in other jurisdictions, "this appeal presents us with an occasion to consider whether further action on our part is necessary to promote public confidence in the perception of our state's judicial system with respect to fairness to both litigants and their fellow citizens." *Id.* at 236. If we are to give more than lip service to the principle of equal justice under the law, we should not bury our heads in the sand and pretend that thirty-five years of experience with *Batson* will magically change. There are a variety of tools at our disposal, we urgently need to use them.

Justice BERGER dissenting.

¶ 117 "[T]he back and forth of a *Batson* hearing can be hurried, and prosecutors can make mistakes when providing explanations [for the use of peremptory challenges]. That is entirely understandable, and *mistaken explanations should not be confused with racial discrimination.*" *Flowers v. Mississippi*, 139 S. Ct. 2228, 2250, 204 L. Ed. 2d 638, 663 (2019) (emphasis added). This is plainly apparent because "*Batson* prohibits purposeful discrimination, not honest, unintentional mistakes." *Aleman v. Uribe*, 723 F.3d 976, 982 (9th Cir. 2013).

¶ 118 Trial court judges are uniquely positioned to consider and evaluate whether peremptory strikes are the product of purposeful discrimination. The Supreme Court has "recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province." *Flowers*, 139 S. Ct. at 2244, 204 L. Ed. 2d at 656 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1208 (2008)). Because "the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson v. Kentucky*, 476 U.S. 79, 98 n.21, 106 S. Ct. 1712, 1724 n.21 (1986).

¶ 119 Consistent with precedent, the trial court evaluated the explanations provided by the prosecutor for the strikes of Ms. Viola Jeffreys and Ms. Gwendolyn Aubrey. Based upon the entire record, the trial court

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4. *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997 (2003); Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 Soc. Issues & Pol'y Rev., no. 1, 2008, at 65–102; Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. of Personality & Soc. Psych., no. 4, 2006, at 597–612.

determined that the mistaken explanation provided was indeed "an instance of a prosecutor misremembering," not purposeful discrimination. The majority agrees that the explanation provided by the prosecutor was a mistake, yet reaches its desired result by distorting precedent, and mischaracterizing the record and the trial court order.

¶ 120 The question presented by this case is whether a mistaken explanation offered by an attorney during step two of a *Batson* inquiry is sufficient for the opponent of a peremptory strike to demonstrate purposeful racial discrimination. The mistaken explanation provided by the prosecutor cannot, by definition, be purposeful discrimination.

¶ 121 Because the trial court's order should be affirmed, I respectfully dissent.

I. Factual Background

¶ 122 There is no question in this case as to defendant's guilt.[1] It is uncontroverted that on January 25, 2014, defendant robbed a Wake County business at gun point. Defendant threatened to kill the employee, a black female, and he pointed a firearm at her stomach. After only receiving $85 from the cash register, defendant pressed the firearm against the employee's neck. Defendant then noticed a safe, and he pointed the firearm at the employee's left temple and ordered her to open it. Defendant fled the scene when the employee did not have the combination to the safe.

¶ 123 Defendant was tried and convicted of robbery with a dangerous weapon. During jury selection, defendant objected to use of peremptory challenges by the prosecutor against two black females, Ms. Viola Jeffreys and Ms. Gwendolyn Aubrey. The prosecutor struck Ms. Jeffreys due to her work history with Dorothea Dix Hospital. When the prosecutor explained his strike of Ms. Aubrey, the prosecutor provided a mistaken explanation. The prosecutor said that "when I asked her if she could be fair and impartial, her answer was 'I suppose.' I wasn't confident that she was confident that she could be fair and impartial." The problem, however, is that Ms. Aubrey was not asked if she could be fair and impartial; instead, Ms. Aubrey answered "I suppose" when responding to a question concerning her ability to focus during the trial.

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1. The only two arguments made by defendant in the Court of Appeals concerned the *Batson* argument at issue here, and his contention that the victim-impact testimony was not relevant.

II. Analysis

¶ 124 Peremptory challenges "are challenges which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto[.]" *State v. Smith*, 291 N.C. 505, 526, 231 S.E.2d 663, 676 (1977). "The essential nature of the peremptory challenge denotes that it is a challenge exercised without a reason stated, without inquiry and without being subject to the court's control." *Id.* Peremptory challenges "permit rejection for a real or imagined partiality," *id.*, subject to the limitations set forth in the *Batson* line of cases.

¶ 125 Under *Batson*, "[o]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two)." *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 1770–71 (1995). "The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.' " *State v. Hobbs*, 374 N.C. 345, 353, 841 S.E.2d 492, 499 (2020) (quoting *Foster v. Chatman*, 578 U.S. 488, 513, 136 S. Ct. 1737, 1754 (2016)).

¶ 126 It is in step three of the *Batson* analysis that the trial court determines whether purposeful discrimination was the motivation for the peremptory strike. *Flowers*, 139 S. Ct. at 2241, 204 L. Ed. 2d at 655. "It is the honesty of the prosecutor's explanation—and that alone—which a trial judge must assess at the third step of the *Batson* analysis." *Lamon v. Boatwright*, 467 F.3d 1097, 1102 (7th Cir. 2006).

¶ 127 "As in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.' " *Batson*, 476 U.S. at 93, 106 S. Ct. at 1721 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S. Ct. 643, 646–47 (1967)). The burden of proof "rests with, and never shifts from, the opponent of the strike." *Johnson v. California*, 545 U.S. 162, 171, 125 S. Ct. 2410, 2417 (2005) (quoting *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1769 (per curiam)).

¶ 128 A "trial judge's assessment of the prosecutor's credibility is often important." *Flowers*, 139 S. Ct. at 2243–44, 204 L. Ed. 2d at 656. The Supreme Court has "recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province." *Id.* at 2244, 204 L. Ed. 2d at 656 (quoting *Snyder*, 552 U.S. at 477, 128 S. Ct. at 1208). "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder*, 552 U.S. at 479, 128 S. Ct. 1203; *accord State v. Lawrence*, 352 N.C. 1, 14, 530 S.E.2d 807, 816 (2000). This Court has stated that "where there are two permissible

views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985)); *see also Hobbs*, 374 N.C. at 366–67, 841 S.E.2d at 508 (Newby, J., dissenting).

¶ 129 Because "the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98 n.21, 106 S. Ct. 1712 n.21; *see also Flowers*, 139 S. Ct. at 2244, 204 L. Ed. 2d at 656 ("The [Supreme] Court has described the appellate standard of review of the trial court's factual determinations in a *Batson* hearing as highly deferential.") (cleaned up); *Foster*, 578 U.S. at 500, 136 S. Ct. at 1747 (the third step "turns on factual determinations, and, in the absence of exceptional circumstances, we defer to state court factual findings unless we conclude that they are clearly erroneous.") (cleaned up); *Hernandez v. New York*, 500 U.S. 352, 364, 368 111 S. Ct. 1859, 1868–69, 1871 (1991) (discussing the Supreme Court's "respect for factual findings made by state courts" and the "deference to state-court factual determinations, in particular on issues of credibility."); and *Lawrence*, 352 N.C. at 14, 530 S.E.2d at 816 (because the third *Batson* step "is essentially a question of fact, the trial court's decision as to whether the prosecutor had a discriminatory intent is to be given great deference[.]").

A. Viola Jeffreys

¶ 130 Again, the two prospective jurors at issue here are Ms. Viola Jeffreys and Ms. Gwendolyn Aubrey. Ms. Jeffreys was struck due to her work history with Dorothea Dix Hospital. The relevant portions of the transcript are set forth below.[2]

> THE COURT: Ms. Jeffreys, can you tell us about yourself, ma'am?
>
> [Ms. Jeffreys]: I live on [REDACTED].
>
> . . . .
>
> THE COURT: And do you work, employed, either at home or outside the home?
>
> [Ms. Jeffreys]: No, retired.

2. The trial court initially questioned prospective jurors before allowing the parties to engage in voir dire.

THE COURT: What type of work did you do before you retired?

[Ms. Jeffreys]: I was a nurse aide at Dorothea Dix.

. . . .

[The State]: Ms. Jeffreys, I'm going to call you out. I wanted to ask you about your work as a nurse's aide, is that right, at Dorothea Dix?

[Ms. Jeffreys]: Dorothea Dix, yes.

[The State]: How long did you do that?

[Ms. Jeffreys]: 14 years.

[The State]: And when did you stop working there?

[Ms. Jeffreys]: I stopped there about seven months ago.

[The State]: You stopped working there about seven months ago?

[Ms. Jeffreys]: It had been about two years. I'm sorry. About two years.

[The State]: About two years ago was when you stopped working at Dorothea Dix? And I guess I kind of know what a nurse's aide does, but can you elaborate a little bit?

[Ms. Jeffreys]: They care of the patient. We give them baths and make sure they take medicine, stuff like that.

[The State]: What type of ailments and –

[Ms. Jeffreys]: Mostly diabetes. . . . Patients that have diabetes or something like that.

¶ 131 It is uncontroverted that defendant argued pretrial motions related to his mental health issues. During voir dire, the prosecutor explained that he struck Ms. Jeffreys because of "the underlying issues that have been brought out so far, I found that maybe she would not be able to fairly assess the evidence in this case." On remand, the prosecutor provided the same basis for use of the peremptory challenge— that based

on mental health issues put forth by defendant, Ms. Jeffreys may be sympathetic to defendant's case because of her work history at a mental health institution.

¶ 132 The trial court found that the prosecutor had provided a race-neutral reason for striking Ms. Jeffreys "based upon [her] employment history as a nurse's aide at Dorothea Dix Hospital." The trial court further found that "[d]efendant's competency had been called into question and evaluations ordered [, and] the State's stated basis for striking Ms. Jeffreys due to her work history in the mental health field is rationally related to [d]efendant's potential competency issues." Finally, the trial court found that the reason for striking Ms. Jeffreys was "supported by the record and constitutes an appropriate justification for the strike."

¶ 133 The prosecutor's questions of Ms. Jeffreys were focused on her work at Dorothea Dix, which was a state-operated psychiatric hospital. Ms. Jeffreys was the only prospective juror who indicated she worked or had worked in a mental health facility.

¶ 134 In overruling defendant's *Batson* challenge as it relates to Ms. Jeffreys, the trial court concluded as a matter of law that defendant "had not established that it is more likely than not that the State engaged in purposeful discrimination[.]" The trial court's determination as to Ms. Jeffreys was not clearly erroneous and should be affirmed.

¶ 135 The majority mentions Ms. Jeffreys more than thirty times in its opinion, but they do not analyze or even consider the legitimate reasons for her strike because doing so destroys their narrative. To be clear, there is no determination by the majority that the prosecutor's strike of Ms. Jeffreys was motivated by race. However, the majority uses carefully selected portions of the record, including Ms. Jeffreys's demographic information, to lump her in with the discussion of Ms. Aubrey, implying that both strikes were based on race. While the cherry-picked facts and circumstances may be helpful to their desired result, analysis of Ms. Jeffreys' strike is required for a proper review. *See Flowers*, 139 S. Ct. at 2251, 204 L. Ed. 2d at 664 (in a *Batson* analysis, an appellate court is to review "all of the relevant facts and circumstances taken together."); *see also State v. Bennett*, 374 N.C. 579, 339 (2005) ("clear error" review is based "on the entire evidence.").[3] The majority's failure to include an intellectually honest analysis of Ms. Jeffreys' strike demonstrates just one reason why the opinion is jurisprudentially suspect.

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3. The majority actually quotes this portion of *Bennett* in its analysis, yet declines to analyze the strike of Ms. Jeffreys.

B. Gwendolyn Aubrey

¶ 136 Similarly, defendant has failed to demonstrate purposeful discrimination in the use of a peremptory challenge for prospective juror Ms. Gwendolyn Aubrey. When the prosecutor explained his strike of Ms. Aubrey, the prosecutor provided a mistaken explanation. The prosecutor said that "when I asked her if she could be fair and impartial, her answer was 'I suppose.' " I wasn't confident that she was confident that she could be fair and impartial." The voir dire of Ms. Aubrey is set forth below.[4]

> THE COURT: Ms. Aubrey, can you tell us a little bit about yourself, ma'am?
>
> [Ms. Aubrey]: I live in south Raleigh. I work in the food service industry. I've not served on a jury before.
>
> THE COURT: Married? Single?
>
> [Ms. Aubrey]: Single.
>
> . . . .
>
> THE COURT: And anything going on in your life that would make it difficult or impossible for you to serve?
>
> [Ms. Aubrey]: Other than missing work, no.
>
> THE COURT: Missing work. Yes, ma'am. You work daytime?
>
> [Ms. Aubrey]: Day and night.
>
> THE COURT: Yes, ma'am. All right. There will be more questions about that, I'm sure, but thank you for bringing that concern to our attention.
>
> . . . .
>
> [The State]: As far as the new potential jurors, any of you ever been the victim of a crime before? Friends or family ever been the victim of any crime? . . .
>
> [Ms. Aubrey]: I had my car broken into once.
>
> [The State]: And you said you did or somebody—

4. As with Ms. Jeffreys, the trial court initially questioned prospective jurors before allowing the parties to engage in voir dire.

[Ms. Aubrey]: I did.

[The State]: Can you say when that was?

[Ms. Aubrey]: I don't know. Maybe like late '90s.

[The State]: Okay. Did you have any of your belongings taken from you?

[Ms. Aubrey]: Yes, sir, I did.

[The State]: Do you know if anybody was charged?

[Ms. Aubrey]: No.

[The State]: Did you ever get any of your belongings back?

[Ms. Aubrey]: No.

[The State]: Was it reported to law enforcement?

[Ms. Aubrey]: No, sir, it wasn't.

[The State]: It was not reported? Okay.

. . . .

[The State]: Can you tell me just a little bit about how you're familiar with firearms?

[Ms. Aubrey]: I had an ex-boyfriend who was a gun enthusiast and taught me how to shoot a gun.

[The State]: Do you own any firearms now?

[Ms. Aubrey]: No, sir.

[The State]: Do you ever shoot or handle weapons, firearms, now?

[Ms. Aubrey]: No, sir.

. . . .

[The State]: Okay. And Judge Ridgeway asked you about things going on in your life, and I just want to kind of follow up on that. We all have our normal responsibilities in life. Is there anything going on in your personal life—and I don't need to know specifically—you know, that would maybe take you away mentally from being engaged in what's going on here

> in the courtroom? Again, I don't need to know specifics, but, you know, is there a possibility that your mind could drift somewhere else when we need you to be focusing on the proceedings here?
>
> . . . .
>
> [The State]: Okay. Ms. Aubrey, do you feel confident you can focus on what's going on here?
>
> [Ms. Aubrey]: I suppose.
>
> [The State]: I want you to be confident about it. You just don't want to be a juror or do you feel like if you were here, you could focus and do what we need you to do?
>
> [Ms. Aubrey]: I think so.
>
> [The State]: Okay. Thank you.

¶ 137 The State then excused Ms. Aubrey from the panel. Defense counsel objected to the use of peremptory challenges against Ms. Jeffreys and Ms. Aubrey, stating, "[t]he only distinction I see is color."

¶ 138 The prosecutor then argued to the trial court:

> Judge, what I would tell you, first of all, I want to note that I think it's very offensive that there's an allegation being made that I'm excusing jurors for racial reasons. What I can tell you is that both the potential jurors in Seat No. 5, body language to me, they would not look at me. The most recent juror, Ms. Jeffreys—excuse me. Ms. Jeffreys was the first juror. The most recent juror, when I asked her if she could be fair and impartial, her answer was "I suppose." I wasn't confident that she was confident that she could be fair and impartial. The first juror, Ms. Jeffreys, talked about her experience as a nurse's aide with Dorothea Dix. With some of the underlying issues that have been brought out so far, I found that maybe she would not be able to fairly assess the evidence in this case.
>
> As Ms. Darrow pointed out, there's been an equal number of white jurors and African-American jurors that have been excused. Based on their answers, based on their body language, based on their failure to look at me when I was trying to communicate with

> them, and also based on their answers with respect to the last juror, her not being confident that she could be fair and impartial, frankly, I think that would be potential reason to challenge her for cause.
>
> Other than that, Judge, that's how the State is viewing the excusal of those jurors.

¶ 139 At trial, the objection lodged by defense counsel was overruled. Upon remand, the trial court found that "[i]t is evident from the record that both the trial court and the prosecutor's memory of the answers given by Ms. Aubrey [were] conflated." The trial court further found that

> [i]n retrospect, had the prosecutor, in offering his race-neutral basis for exercising the strike of Ms. Aubrey, stated that he was concerned that she had answered "I suppose" to the question of whether she could focus, when coupled with her concern that she worked "day and night" and would miss work, that, in the Court's view, would have constituted a neutral justification for the strike.

¶ 140 In other words, the prosecutor and the trial court were mistaken about the question posed by the State and the response given by Ms. Aubrey, and that but for the mistaken explanation, the record revealed that there was a race-neutral explanation for the strike of Ms. Aubrey. This portion of the trial court's order is far different from what the majority characterizes as the trial court "rejecting the 'I suppose' rationale." Nonetheless, the trial court, citing *Miller-El v. Dretke*, 545 U.S. 231, 125 S. Ct. 2317 (2002), determined that it could not consider the incorrectly stated, but plainly apparent, reason for striking Ms. Aubrey.

¶ 141 The trial court then analyzed other reasons proffered by the prosecutor for the strike, including body language and lack of eye contact by Ms. Aubrey, purported disparities in use of peremptory challenges,[5] and a comparison of the questions posed to white and black prospective

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5. The trial court also referenced a study of peremptory challenges in capital trials from 1990 to 2010 and non-capital cases from 2011–2012 in paragraphs 18 and 22. One could argue that this data is stale. Both of these studies are more than ten years old, and, presumably, some of the data used in the capital case study is more than thirty years old. Certainly, North Carolina's people, population, and attitudes have changed over the last thirty years. The majority seemingly acknowledges this point in footnote 9. Perhaps it is time for an updated, independent study of jury selection commissioned by the Administrative Office of the Courts.

jurors.[6] As to body language and lack of eye contact, the trial court made no findings of fact during the original trial. Citing *Snyder v. Louisiana*, 552 US 472 (2008), the trial court determined that in the absence of a finding of fact on a prospective juror's demeanor, the State's race-neutral explanation for striking Ms. Aubrey had to fail.

¶ 142 While the trial court may have taken the holding in *Miller-El* too literally when it determined that it could not consider the mistaken explanation provided by the prosecutor, the trial court's ultimate conclusion was correct. The trial court clearly set forth its reasoning, making the types of credibility determinations contemplated by the Supreme Court of the United States and by this Court, and the trial court's decision is entitled to great deference.

¶ 143 The majority acknowledges what is plainly apparent from the record and the trial court's order - that the prosecutor's explanation for the strike of Ms. Aubrey was a "mistake." If "*Batson* and its progeny direct trial judges to assess the *honesty*-not the accuracy-of a proffered race-neutral explanation," *Lamon*, 467 F.3d at 1101(emphasis in original), and the majority acknowledges this was a mistake, the strike cannot be the result of purposeful discrimination. *See Bethea v. Commonwealth*, 297 Va. 730, 754, 831 S.E.2d 670, 682 (2019) (a "prosecutor's race-neutral reason cannot at the same time be both an unintentional mistake and a pretextual, purposeful misrepresentation.").

¶ 144 Defendant has not shown purposeful discrimination or bad faith in the prosecutor's mistaken explanation; it is only theorized by the majority. Yet, the majority finds the prosecutor's mistaken explanations here were "shifting" and "plainly unsupported by the record." The majority then erroneously postulates that because the race-neutral explanations failed, the only remaining evidence must be given weight and that it must be assigned to defendant. It is the factfinder that assigns weight to evidence, and the factfinder can assign as much or as little weight as it determines appropriate. That is not a higher burden.

¶ 145 Moreover, the majority's disparate questioning analysis is internally inconsistent. The majority here expressly recognizes that there is an explanation for the prosecutor's questioning of Mr. Williams that "is not

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6. It seems obvious, but jury selection typically involves general questioning of prospective jurors to probe basic information. Based on responses, individual prospective jurors may, not shall, receive follow-up questions. The majority focuses on disparate questioning in its findings. However, "disparate questioning or investigation alone does not constitute a *Batson* violation." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2248, 204 L. Ed. 2d 638, 661 (2019). The proper standard is "dramatically disparate questioning" *id.*, which is not present here.

completely without merit." Indeed, the trial court found that the side-by-side comparison between Mr. Williams and Ms. Aubrey was not "particularly pertinent" as Mr. Williams had previously mentioned he could juggle things around while Ms. Aubrey "did not indicate any flexibility in her 'day and night' work schedule that might ease her concern about missing work." This should be dispositive as to any further analysis given the well-established deferential standard of review that this Court is required to apply. But, the majority again impermissibly speculates and draws its own inferences from the cold record rather than deferring to the findings of the trial court. In so doing, the majority encroaches on the authority vested in the trial court.

¶ 146 To be sure, "[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Flowers*, 139 S. Ct. at 2242, 204 L. Ed. 2d at 655. But this Court is not equipped, nor is it our role, to find facts and weigh evidence. Even if one were to assume this is a close case, which it is not, "where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985)); *see also Hobbs*, 374 N.C. at 366–67, 841 S.E.2d at 508 (Newby, J., dissenting).

III. Conclusion

¶ 147 From its unique position, the trial court observed the strikes of Ms. Jeffreys and Ms. Aubrey and heard the explanations for the strikes offered by the State. In a comprehensive order, the trial court made detailed findings of fact and conclusions of law, ultimately overruling defendant's objections to the peremptory strikes. The majority, however, declines to give the trial court any measure of deference, adopting its own view of the evidence. In so doing, the majority ignores the caution advised by the Supreme Court that "mistaken explanations should not be confused with racial discrimination." *Flowers*, 139 S. Ct. at 2250, 204 L. Ed. 2d at 663.

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

STATE v. McLYMORE

[380 N.C. 185, 2022-NCSC-12]

STATE OF NORTH CAROLINA
v.
DATORIUS LANE McLYMORE

No. 270PA20

Filed 11 February 2022

1. Homicide—jury instructions—self-defense—common law right—replaced by statutory right

The trial court in a murder prosecution properly instructed the jury that N.C.G.S. § 14-51.4 precluded defendant from invoking his right to self-defense where he was committing a felony (possession of a firearm by a felon) at the time he used defensive force against the victim. Although defendant claimed that he had asserted his common law right to self-defense at trial and that section 14-51.4 only disqualified him from invoking his statutory right to self-defense codified in section 14-51.3, the General Assembly's enactment of section 14-51.3 clearly abrogated and replaced the common law right such that defendant could have only claimed his statutory right.

2. Appeal and Error—preservation of issues—jury instruction—self-defense—specific grounds for objection

In a murder prosecution, where the trial court instructed the jury that N.C.G.S. § 14-51.4 precluded defendant from claiming self-defense because he was committing a felony (possession of a firearm by a felon) at the time he used defensive force against the victim, defendant preserved for appellate review his argument that the court erred by not instructing the jury that section 14-51.4 only applied if the State could prove an immediate causal nexus between defendant's use of defensive force and his commission of the felony. Defendant's objection at trial—that the court erred in delivering an instruction on section 14-51.4 and, alternatively, the court misstated the scope and applicability of the felony disqualifier—encompassed defendant's argument on appeal and therefore met the specificity requirement of Appellate Rule 10 (parties must state the specific grounds for their objection unless those grounds were apparent from the context).

3. Homicide—jury instruction—self-defense—section 14-51.4—applicability—prejudice analysis

In a murder prosecution, where the trial court instructed the jury that N.C.G.S. § 14-51.4 precluded defendant from claiming self-defense because he was committing a felony (possession of a

firearm by a felon) at the time he used defensive force against the victim, the court erred by failing to add that section 14-51.4 only applied if the State could prove an immediate causal nexus between defendant's use of defensive force and his commission of the felony. However, the court's error did not prejudice defendant where the evidence showed he had committed a different felony (robbery with a dangerous weapon) immediately after his fatal confrontation with the victim; the jury's verdict convicting defendant of both murder and the robbery charge indicated that the immediate causal nexus between defendant's use of force and the disqualifying felonious conduct had been established at trial.

Chief Justice NEWBY concurring in the result.

Justice BARRINGER joins in this concurring opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, No. COA19-428, 2020 WL 2130670 (N.C. Ct. App. May 5, 2020) (unpublished), finding no error in a judgment entered on 26 July 2018 by Judge Claire V. Hill in Superior Court, Cumberland County. Heard in the Supreme Court on 1 September 2021.

Joshua H. Stein, *Attorney General*, *by Marc X. Sneed*, *Special Deputy Attorney General*, *for the State-appellee.*

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

EARLS, Justice.

¶ 1 This case requires us to decide whether the trial court committed reversible error in instructing the jury that the defendant, Datorius Lane McLymore, could not claim self-defense to justify his use of deadly force because he was also in violation of N.C.G.S. § 14-415.1, which makes it a Class G felony for an individual with a prior felony conviction to possess a firearm. In answering this question, we must interpret the scope and meaning of certain provisions of North Carolina's "Stand Your Ground" Law. Specifically, we must interpret a provision which states in relevant part that a defendant may not claim self-defense if he or she "used defensive force and . . . [w]as attempting to commit, committing, or escaping after the commission of a felony." N.C.G.S. § 14-51.4 (2021). We conclude

that this provision requires the State to prove an immediate causal nexus between a defendant's attempt to commit, commission of, or escape after the commission of a felony and the circumstances giving rise to the defendant's perceived need to use force.

¶ 2 Because it failed to instruct the jury on this causal nexus requirement, the trial court's jury instructions were erroneous. Further, although McLymore admitted that he had previously been convicted of a felony offense and was possessing a firearm at the time he used deadly force, the trial court's failure to properly instruct the jury denied him the opportunity to dispute the existence of a causal nexus between his violation of N.C.G.S. § 14-415.1 and his use of force and to assert any affirmative defenses. Because we do not interpret N.C.G.S. § 14-51.4(1) to categorically prohibit individuals with a prior felony conviction from ever using a firearm in self-defense, we cannot say that the trial court's failure to instruct on the causal nexus requirement was not prejudicial with respect to McLymore's purported violation of N.C.G.S. § 14-415.1.

¶ 3 However, at trial, McLymore was also convicted of another felony offense, robbery with a dangerous weapon. This outcome and the uncontroverted facts conclusively establish that McLymore's commission of robbery with a dangerous weapon immediately followed the confrontation during which he used deadly force. Under these circumstances, McLymore could not have been prejudiced by the trial court's issuance of the erroneous jury instruction because, based on the jury's verdict, the immediate causal nexus between his use of force and his commission of the disqualifying felony of robbery with a dangerous weapon was established. Thus, under N.C.G.S. § 14-51.4(1), he was disqualified from claiming the justification of self-defense. Accordingly, we modify and affirm the decision of the Court of Appeals.

I. Background.

¶ 4 In April 2014, McLymore was working as a door-to-door magazine salesman. After completing a sale, he used the proceeds to purchase laundry detergent and food. Shortly thereafter, he quit his job with the sales company. Later that day, his supervisor at the sales company, David Washington, met McLymore at a local hotel. The two left together in Washington's vehicle. When Washington asked McLymore about the proceeds from his magazine sale, McLymore responded that he "spent it on food and washing powder." According to McLymore, while the vehicle was stopped at a traffic light, Washington punched McLymore in his jaw, grabbed him by the shirt, and pushed him against the door. In response, McLymore pulled out a gun, "closed [his] eyes[,] and fired two"

shots at Washington, killing him. McLymore then pulled Washington's body out of the driver's seat, left it on the ground, and fled the scene in Washington's vehicle. McLymore evaded police for over an hour before being apprehended.

¶ 5 On 5 January 2015, McLymore was indicted for the first-degree murder of Washington, felonious speeding to elude arrest, and robbery with a dangerous weapon for taking Washington's vehicle. At trial, McLymore admitted that he had previously been convicted of multiple felony offenses including common law robbery, larceny of a firearm, and assault inflicting serious bodily injury. The trial court also admitted evidence that twenty days before McLymore shot Washington, McLymore was involved in another alleged robbery, during which he entered the victim's house, fought with the victim over money, and then took the victim's gun and shot him. The State presented evidence that McLymore used this same gun to shoot Washington.

¶ 6 At trial, McLymore did not dispute that he killed Washington. Instead, he claimed that he justifiably used deadly force in self-defense. During the charge conference, the trial court explained that it would instruct the jury on self-defense but that "it is disqualifying for self-defense under *State [v.] Crump* that he was a felon in possession of a firearm, which is a disqualifying felony [under N.C.G.S. § 14-51.4(1)]." McLymore objected, arguing that N.C.G.S. § 14-51.4(1) did not apply because he was claiming perfect self-defense under the common law, and that even if N.C.G.S. § 14-51.4(1) did apply, it would violate his rights to interpret this provision to categorically bar individuals with prior felony convictions from ever using a firearm in self-defense. The trial court overruled his objection and instructed the jury, in relevant part, that

> [t]he Defendant is not entitled to the benefit of self-defense if he was committing the felony of possession of a firearm by a felon. . . . [T]he State must prove beyond a reasonable doubt, among other things, that the Defendant did not act in self-defense, or that the Defendant was committing the felony of possession of a firearm by felon if the Defendant did act in self-defense.

The jury found McLymore guilty of all charged offenses. He was sentenced to life without the possibility of parole.

¶ 7 On appeal, the Court of Appeals rejected McLymore's argument that N.C.G.S. § 14-51.4 "only applies to statutory self-defense" as created by N.C.G.S. § 14-51.3 and not "common law self-defense," which

McLymore attempted to invoke at trial.[1] *State v. McLymore*, No. COA19-428, 2020 WL 2130670, at *6 (N.C. Ct. App. May 5, 2020) (unpublished). According to the Court of Appeals, while another provision of the statutory law of self-defense expressly provided that it was "not intended to repeal or limit any other defense that may exist under the common law," the General Assembly chose not to "carve out a [ ] common law exception" to sections 14-51.3 and 14-51.4. *Id.* at *7. Therefore, the Court of Appeals concluded that sections 14-51.3 and 14-51.4 wholly "supplant[ ]" the common law of self-defense

> in situations where (1) the defendant "was attempting to commit, committing, or escaping after the commission of a felony"; (2) the defendant "[i]nitially provokes the use of force against himself or herself" unless he or she was "in imminent danger of death or serious bodily harm"; or (3) "the person who was provoked continues or resumes the use of force" after the defendant withdraws.

Id. (alteration in original) (quoting N.C.G.S. § 14-51.4 (2019)). Applying the precedent it had established in *State v. Crump*, 259 N.C. App. 144 (2018), in which the Court of Appeals held that N.C.G.S. § 14-51.4(1) only required proof that a defendant was committing a felony at the time he or she used assertedly defensive force, the Court of Appeals concluded that McLymore was not entitled to invoke the statutory right to self-defense because "when [McLymore] shot Washington, he was committing the offense of possession of a firearm by a felon which is punishable as a Class G felony under N.C.[G.S. §] 14-415.1." *McLymore*, 2020 WL 2130670, at *7.

¶ 8 This Court allowed McLymore's petition for discretionary review.

II. Sections 14-51.3 and 14-51.4 supplant the common law of self-defense.

¶ 9 **[1]** McLymore first argues that the Court of Appeals erred in concluding that N.C.G.S. § 14-51.4(1) applies in his case. McLymore contends that he invoked the *common law* right to self-defense, which he argues continues to exist separate and apart from the *statutory* right to self-defense created by N.C.G.S. § 14-51.3. Thus, in McLymore's view,

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1. The Court of Appeals also held that the trial court did not plainly err when it admitted evidence relating to the earlier incident when McLymore allegedly shot a man during a robbery. *State v. McLymore*, No. COA19-428, 2020 WL 2130670, at *6 (N.C. Ct. App. May 5, 2020) (unpublished). This issue, however, is not before this Court.

even if N.C.G.S. § 14-51.4(1) bars him from invoking the statutory right to self-defense, it does not disqualify him from justifying the use of defensive force by invoking what he asserts is his still-existing common law right to self-defense. In response, the State contends that the General Assembly has exercised its authority to displace the common law through statutory enactment and that once the General Assembly chose to codify the right to self-defense, the common law right to self-defense was entirely extinguished.

¶ 10 No one disputes that the General Assembly possesses the authority to displace the common law through legislative action. As we have previously explained, "the General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter." *McMichael v. Proctor*, 243 N.C. 479, 483 (1956). Instead, the question is whether the General Assembly intended to add to the common law right to perfect self-defense or abrogate it in its entirety.

¶ 11 Although not expressly stated, the General Assembly's intention to abolish the common law right to perfect self-defense is unmistakable. Our caselaw describes the common law of perfect self-defense as follows:

> The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed:
>
> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the

> circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530 (1981). Section 14-51.3 closely tracks this earlier common law definition of the right to self-defense in providing that an individual may use force "against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force." N.C.G.S. § 14-51.3(a) (2021). Further, as the Court of Appeals correctly explained, section 14-51.3 notably lacks a "carve out" explicitly conveying the General Assembly's intention to preserve the common law. *McLymore*, 2020 WL 2130670, at *7. Together, these facts indicate that the General Assembly meant to replace the existing common law right to perfect self-defense with a new statutory right.

¶ 12 Accordingly, we conclude that after the General Assembly's enactment of N.C.G.S. § 14-51.3, there is only one way a criminal defendant can claim perfect self-defense: by invoking the statutory right to perfect self-defense. Section 14-51.3 supplants the common law on all aspects of the law of self-defense addressed by its provisions.[2] Section 14-51.4 applies to "[t]he justification described in . . . [N.C.]G.S. [§] 14-51.3." N.C.G.S. § 14-51.4 (2021). Therefore, when a defendant in a criminal case claims perfect self-defense, the applicable provisions of N.C.G.S. § 14-51.3—and, by extension, the disqualifications provided under N.C.G.S. § 14-51.4—govern. Because McLymore claimed perfect self-defense, and the only right to perfect self-defense available in North Carolina was the right provided by statute, the trial court did not err in delivering an instruction on the felony disqualifier contained in N.C.G.S. § 14-51.4(1), which applies under the circumstances of this case.

III. The trial court erroneously stated the law of self-defense, but this error could not have prejudiced McLymore.

¶ 13 Because we interpret subsection 14-51.4(1) to apply to McLymore's claim of perfect self-defense, we next consider the scope of the felony disqualifier. According to McLymore, the trial court erred in failing to instruct the jury that the State was required to prove an immediate causal nexus between his commission of a felony offense and the circumstances giving rise to his perceived need to use defensive force. In his view, it

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2. However, to the extent the relevant statutory provisions do not address an aspect of the common law of self-defense, the common law remains intact. *See McMichael v. Proctor*, 243 N.C. 479, 483 (1956) ("So much of the common law as has not been abrogated or repealed by statute is in full force and effect within this State.").

would be absurd and contrary to the General Assembly's intent to interpret N.C.G.S. § 14-51.4(1) to categorically bar any individual previously convicted of a felony from ever using a firearm in self-defense. In response, the State argues first that McLymore failed to preserve the causal nexus argument and second that N.C.G.S. § 14-51.4(1), by its plain terms, does not require the State to prove anything more than that McLymore was committing a felony offense when he used defensive force. In the alternative, the State argues that even if N.C.G.S. § 14-51.4(1) incorporates a causal nexus requirement, McLymore could not have been prejudiced by the trial court's misstatement of the law of self-defense.

¶ 14 We conclude that McLymore has preserved the causal nexus argument and that N.C.G.S. § 14-51.4(1) does incorporate a causal nexus requirement. The Court of Appeals' decision to the contrary in *State v. Crump*, 259 N.C. App. 144 (2018) and subsequent decisions relying on *Crump's* causal nexus holding are overruled. Accordingly, the trial court committed an instructional error when it misstated the requirements of the felony disqualifier at McLymore's trial. However, for the reasons described below, we agree with the State that McLymore could not have been prejudiced.

A. McLymore preserved his causal nexus argument.

¶ 15 **[2]** At trial, McLymore objected to the trial court's issuance of a jury instruction addressing the requirements of N.C.G.S. § 14-51.4(1). Broadly, he offered two grounds for his objection. First, he asserted that it was inappropriate to *deliver* any instruction on the felony disqualifier because he was invoking the common law right to self-defense, rather than the statutory right to self-defense. We have already rejected this argument. Second, he asserted that the trial court *misstated* the law of self-defense by instructing the jury that if it found he was violating N.C.G.S. § 14-415.1 when he used force against Washington, he was disqualified from attempting to justify his use of force by claiming self-defense. McLymore's objection to the substance of the trial court's self-defense instruction was sufficient to preserve the causal nexus argument for appellate review.

¶ 16 Rule 10 of the North Carolina Rules of Appellate Procedure contains a "specificity requirement." *State v. Bursell*, 372 N.C. 196, 199 (2019). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Accordingly, if a party fails to state the grounds

for an objection and the grounds are not "apparent from the context," *id.*, a party's objection does not preserve an issue for appellate review. Applying Rule 10, we have held that an issue was unpreserved when the substance of a party's objection at trial was either irreconcilable with or unrelated to the substance of the defendant's argument on appeal. *See, e.g.*, *State v. Fair*, 354 N.C. 131, 152 (2001) (holding that the defendant failed to preserve issue for appellate review because "defendant stated in no uncertain terms at trial that the evidence proffered was not character evidence, [yet] he now seeks to establish error on appeal by asserting that the evidence was indeed character evidence"); *State v. Jones*, 342 N.C. 523, 535 (1996) (holding that "a general objection to the admission of" certain evidence did not preserve entirely unrelated argument raised on appeal asserting that the "chain of custody of the [evidence] was broken").

¶ 17 Rule 10's specificity requirement serves two purposes. First, the specificity requirement "encourage[s] the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial." *State v. Odom*, 307 N.C. 655, 660 (1983); *see also Bursell*, 372 N.C. at 199 ("The specificity requirement in Rule 10(a)(1) prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required."). Second, the specificity requirement helps to "contextualize[ ] the objection for review on appeal, thereby enabling the appellate court to identify and thoroughly consider the specific legal question raised by the objecting party." *Bursell*, 372 N.C. at 199. However, Rule 10 does not bind a party on appeal only to arguments identical to the ones offered in support of an objection at trial. If a party's objection puts the trial court and opposing party on notice as to what action is being challenged and why the challenged action is thought to be erroneous—or if the what and the why are "apparent from the context," N.C. R. App. P. 10(a)(1)—the specificity requirement has been satisfied.

¶ 18 In this case, the grounds McLymore offered in support of his objection at trial were related to and fairly encompass the causal nexus theory he advances on appeal. McLymore did not fail to "bring [this alleged error] to the trial court's attention." *State v. Wiley*, 355 N.C. 592, 615 (2002). At trial and at every subsequent stage of this proceeding, McLymore has argued that the trial court erred in delivering an instruction on N.C.G.S. § 14-51.4. In the alternative, he has consistently argued that if delivering an instruction on N.C.G.S. § 14-51.4 were appropriate,

then the trial court misstated the scope and applicability of the felony disqualifier. This objection put the trial court on notice that McLymore believed (1) that the trial court would err if it delivered an instruction explaining the felony disqualifier in the way it had proposed, and (2) that this instruction was erroneous because it would mean that McLymore, and all individuals with a prior felony conviction, were categorically prohibited from ever using a firearm in self-defense. The trial court was afforded an opportunity to reconsider how it was characterizing N.C.G.S. § 14-51.4, and the State was afforded an opportunity to explain why it believed the trial court's description of the law was accurate.

¶ 19 Further, the trial transcript demonstrates that the connection between McLymore's objection and the existence (or lack thereof) of the causal nexus requirement was readily "apparent from the context." N.C. R. App. P. 10(a)(1). At trial, in response to McLymore's objection, the State argued that "based on recent case law, the *State v. Crump* [decision], the statutory disqualification would apply since the Defendant was a felon in possession of a firearm at the time of the offense." The trial court then expressly relied on the holding of *Crump* to justify its decision to instruct the jury that "if they find that [McLymore] was committing the felony of possession of a firearm by a felon, then that disqualifies him from the self-defense." These explicit references to *Crump's* holding make clear that the parties and the trial court were all on notice at trial of the argument that N.C.G.S. § 14-51.4(1) incorporates a causal nexus requirement.

¶ 20 Accordingly, the requirements of N.C. R. App. P. 10(a)(1), including the specificity requirement, were met in this case. McLymore preserved the causal nexus argument for appellate review.

B. Subsection 14-51.4(1) incorporates a causal nexus requirement.

¶ 21 **[3]** Having determined that McLymore preserved the causal nexus argument, we next consider whether N.C.G.S. § 14-51.4(1) requires the State to prove an immediate causal nexus between the defendant's commission of a felony offense and the circumstances giving rise to his or her use of force. We conclude that it does.

¶ 22 Section 14-51.4 provides that "[t]he justification described in [N.C.]G.S. [§] 14-51.2 and [N.C.]G.S. [§] 14-51.3 is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony." N.C.G.S. § 14-51.4 (2021). Admittedly, the plain language of the statute does not support McLymore's position. However, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the

manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *State v. Holloman*, 369 N.C. 615, 628 (2017) (quoting *State v. Barksdale*, 181 N.C. 621, 625 (1921)). A literal interpretation of N.C.G.S. § 14-51.4(1) would produce absurd consequences inconsistent with the General Assembly's "manifest purpose."

¶ 23 Subsection 14-51.4(1) was enacted by the General Assembly in 2011 as part of a statute titled in relevant part "An Act to Provide When a Person May Use Defensive Force." S.L. 2011-268, 2011 N.C. Sess. Laws 1002. Commonly known as the "Stand Your Ground" Law, the Act "restate[d] the law [of self-defense] in some respects and broaden[ed] it in others." John Rubin, *The New Law of Self Defense?*, North Carolina Criminal Law: A UNC School of Government Blog (Aug. 17, 2011), https://nccriminallaw.sog.unc.edu/the-new-law-of-self-defense. Notably, the Act established that an individual who is lawfully in his or her home, motor vehicle, or workplace "does not have a duty to retreat from an intruder," even before using deadly force, under most circumstances. N.C.G.S. §§ 14-51.2(f). Similarly, under most circumstances there is no duty for a person to retreat "in any place he or she has the lawful right to be." 14-51.3(a) (2021); *see also State v. Coley*, 375 N.C. 156, 161 (2020) ("Under [the Act] a person does not have a duty to retreat but may stand his ground against an intruder."). The overall consequence of the Act was to make self-defense more widely available as a justification for the use of force in North Carolina.

¶ 24 The State contends that a literal interpretation of the felony disqualifier reflects "a sensible broadening of the common-law defensive force concept of fault, with the intended purpose being to limit the protections of the Act to the law-abiding." The State is correct that the common law of self-defense required consideration of a defendant's "fault" when determining if the defendant could justify his or her use of force as self-defense. However, a literal interpretation of the felony disqualifier is fundamentally inconsistent with common law principles.

¶ 25 At common law, a defendant's "fault" was assessed solely by reference to that defendant's role in precipitating the confrontation during which he or she used force. A defendant was entitled to use self-defense only "if he has not himself *created the necessity for the assault or brought the trouble upon himself* by some unlawful act." *State v. Pollard*, 168 N.C. 116, 122 (1914) (emphases added). Thus, with very few exceptions, a defendant whose actions led to the confrontation during which he or she used force was precluded from claiming that his or her use of force was justified as an exercise of the right to

self-defense. *See State v. Bell*, 338 N.C. 363, 387 (1994). But, at common law, no group of defendants was categorically prohibited from invoking the right to self-defense—a defendant was prohibited from invoking self-defense only if it was in some sense the defendant's "fault" that the confrontation occurred.

¶ 26 In this light, McLymore's proposed interpretation of N.C.G.S. § 14-51.4(1) is the one that reflects "a sensible broadening of the common-law defensive force concept of fault." It reflects the reasonable presumption that a defendant who uses force in a confrontation which resulted from his or her "attempting to commit, committing, or escaping after the commission of a felony" contributed to the circumstances giving rise to the need to use force. N.C.G.S. § 14-51.4(1). This interpretation would expand the common law while adhering to its basic principles. By contrast, the State's proposed interpretation of N.C.G.S. § 14-51.4(1) would reflect a profound rupture with the common law. The State's proposed interpretation would transform the meaning of "fault" by eliminating the need to examine the defendant's culpability for creating the circumstance giving rise to the defendant's need to use defensive force.

¶ 27 Under the State's proposed interpretation, "a woman in possession of a little more than one and a half ounces of marijuana, a felony in North Carolina, could not rely on self-defense to justify the use of defensive force if her abusive boyfriend, for reasons unrelated to her marijuana possession, began to beat and threaten to kill her." John Rubin, *The Statutory Felony Disqualification for Self-Defense*, North Carolina Criminal Law: A UNC School of Government Blog (June 7, 2016), https://nccriminallaw.sog.unc.edu/statutory-felony-disqualification-self-defense. An individual who had previously been convicted of a felony and kept an antique rifle in his or her attic could not rely on self-defense to justify the use of defensive force if he or she was threatened by an armed intruder, even if the individual did not use that rifle or any other firearm in repelling the intrusion. In each of these cases, the individual claiming self-defense would in no way be at "fault" as that concept was understood at common law. Nonetheless, absent a causal nexus requirement, each individual would be required to choose between submitting to an attacker and submitting to a subsequent criminal conviction.

¶ 28 Of course, the General Assembly does possess the authority to alter or abrogate even fundamental common law principles through statutory enactment. Still, statutes which alter common law rules should be interpreted against the backdrop of the common law principles being displaced. *See Seward v. Receivers of Seaboard Air Line Ry.*, 159 N.C. 241, 245–46 (1912) ("Whether the statute affirms the rule of the common

law on the same point, or whether it supplements it, supersedes it, or displaces it, the legislative enactment must be construed with reference to the common law, for in this way alone is it possible to reach a just appreciation of its purpose and effect." (quoting Henry Campbell Black, Handbook on the Construction and Interpretation of the Laws (1886))). It is doubtful that the General Assembly intended to completely disavow a fundamental common law principle in a statute which otherwise closely hews to the common law.

¶ 29 The State's proposed interpretation of N.C.G.S. § 14-51.4(1) also raises substantial constitutional concerns. If self-defense is an "inherent right," *State v. Holland*, 193 N.C. 713, 718 (1927), a statute which precludes defendants from claiming self-defense for reasons entirely unconnected to the circumstances giving rise to their need to use force would potentially tread upon rights guaranteed by the North Carolina Constitution. *See* N.C. Const. art. I, § 1 ("[A]ll persons . . . are endowed by their Creator with certain inalienable rights[ ] . . . among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."); *Cf. Perkins v. State*, 576 So. 2d 1310, 1314 (Fla. 1991) (Kogan, J., concurring) ("The right to fend off an unprovoked and deadly attack is nothing less than the right to life itself."). Although "[t]he state clearly has a compelling state interest in disallowing the use of self defense when a person's own unprovoked, aggressive, and felonious acts set in motion an unbroken chain of events leading to a killing or other injury," an interpretation of N.C.G.S. § 14-51.4(1) which allowed the State to deprive an individual of "the right to defend life and liberty" for other less compelling reasons would be on much shakier constitutional ground. *Perkins*, 576 So. 2d at 1314–15 (Kogan, J., concurring).

¶ 30 The State's proposed categorical bar on the use of self-defense for those engaged in the commission of any felony is inconsistent with longstanding common law principles, incongruous with legislative intent, raises significant constitutional issues, and would produce absurd results. *Cf. Mayes v. State*, 744 N.E.2d 390, 393 (Ind. 2001) ("A literal application of the contemporaneous crime exception would nullify claims for self-defense in a variety of circumstances and produce absurd results in the process."). Accordingly, we hold that in order to disqualify a defendant from justifying the use of force as self-defense pursuant to N.C.G.S. § 14-51.4(1), the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force. The State must introduce evidence that "but for the defendant" attempting to commit, committing, or escaping after the commission of a felony, "the confrontation

resulting in injury to the victim would not have occurred." *Mayes*, 744 N.E.2d at 394. Here, the trial court did not instruct the jury on this causal nexus requirement. Therefore, the jury instructions it delivered were erroneous.

C. The trial court's error was not prejudicial because the jury necessarily established an immediate causal nexus between McLymore's use of force and his commission of a felony offense.

¶ 31 To establish that the trial court's instructional error requires vacating his first-degree murder conviction, McLymore must demonstrate "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2021). Ordinarily, due process requires allowing the jury to determine whether or not a defendant was engaged in disqualifying conduct bearing an immediate causal nexus to the circumstances giving rise to his or her use of force. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (explaining every criminal defendant's right to a have a jury determine "every fact necessary to constitute the crime with which he is charged"). However, under the circumstances of this case, we are able to conclude that the trial court's instructional error could not have prejudiced McLymore.

¶ 32 The State's primary argument is that McLymore could not have been prejudiced because he had previously been convicted of a felony offense and was in possession of a firearm when he shot Washington. Under North Carolina law, it is a Class G felony for "any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction." N.C.G.S. § 14-415.1(a) (2021). McLymore does not dispute that he had previously been convicted of multiple felony offenses and that he was possessing the firearm he used to shoot Washington. Still, these facts do not conclusively establish that McLymore could not have been prejudiced by the trial court's failure to instruct the jury on the causal nexus requirement.

¶ 33 McLymore was not indicted for violating N.C.G.S. § 14-415.1. He was not afforded the opportunity to raise any affirmative defenses to the State's assertion that he was committing a felony offense, such as the defense of necessity. *See State v. Mercer*, 373 N.C. 459, 463 (2020) ("[I]n narrow and extraordinary circumstances, justification may be available as a defense to a charge under N.C.G.S. § 14-415.1."). Further, the jury was not afforded the opportunity to decide whether McLymore's

possession of the firearm was causally connected to the initiation of a confrontation between himself and Washington, which is the operative question under N.C.G.S. § 14-51.4(1). To accept the State's argument on this ground would be to effectively hold that all individuals with a prior felony conviction are forever barred from using a firearm in self-defense under any circumstances. This would be absurd.

¶ 34 However, the jury did determine beyond a reasonable doubt that McLymore was engaged in the commission of a different felony offense when he shot Washington: robbery with a dangerous weapon in violation of N.C.G.S. § 14-87. At trial, the trial court instructed the jury that

> [i]f you find from the evidence beyond reasonable doubt that on or about the alleged date the Defendant had in the Defendant's possession a firearm and took and carried away property from the person or presence of a person without that person's voluntary consent by endangering or threatening that person—threatening that person's life with the use or threatened [use] of a firearm, the Defendant knowing that the Defendant was not entitled to take the property and intending to deprive the person of its use permanently, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The jury found McLymore guilty of robbery with a dangerous weapon.[3] Because one of the elements of robbery with a dangerous weapon was McLymore's use or threatened use of a firearm, the jury finding McLymore guilty of this offense meant that the jury determined beyond

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3. "The essential elements of robbery with a dangerous weapon are: '(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened.' " *State v. Haselden*, 357 N.C. 1, 17 (2003) (quoting *State v. Call*, 349 N.C. 382, 417 (1998)); *see also* N.C.G.S. § 14-87 (2021). Further, "[t]o be found guilty of robbery with a dangerous weapon, the defendant's threatened use or use of a dangerous weapon must precede or be concomitant with the taking, or be so joined by time and circumstances with the taking as to be part of one continuous transaction." *State v. Olson*, 330 N.C. 557, 566 (1992). Thus, because self-defense is not a defense to this charge, and because the jury's determination of guilt necessarily means the jury found McLymore's use of a firearm temporally and causally connected to the felony offense, McLymore cannot argue that there is a reasonable possibility that a properly instructed jury would have returned a different verdict on the charge of robbery with a dangerous weapon.

a reasonable doubt that McLymore's felonious conduct was immediately causally connected to the circumstances giving rise to his shooting Washington. Based upon the outcome of McLymore's trial, it is indisputable that there existed an immediate causal nexus between his felonious conduct and the confrontation during which he used assertedly defensive force, and the felony disqualifier applies to bar his claim of self-defense.

¶ 35 Stated another way, while the jury instruction the trial court gave on this issue was erroneous, a permissible jury instruction would state:

> the Defendant is not entitled to the benefit of self-defense if he was attempting to commit, committing, or escaping after the commission of, the felony of robbery with a dangerous weapon. . . . [T]he State must prove beyond a reasonable doubt, among other things, that the Defendant did not act in self-defense, or that the Defendant was attempting to commit, committing, or escaping after the commission of the felony of robbery with a dangerous weapon if the Defendant did act in self-defense but that there was an immediate causal connection between Defendant's use of force and his felonious conduct.

Because the State did prove to the jury's satisfaction that McLymore committed the felony offense of robbery with a deadly weapon, and based on the uncontroverted facts, McLymore cannot establish that he was prejudiced in any way by the trial court's issuance of the legally erroneous jury instruction.

IV. Conclusion.

¶ 36 The trial court misstated the law of self-defense by failing to instruct the jury that the felony disqualifier contained in N.C.G.S. § 14-51.4(1) requires the State to prove an immediate causal nexus between the defendant's disqualifying felonious conduct and the circumstances giving rise to the defendant's use of defensive force. Nonetheless, McLymore cannot prove prejudice in this case because the jury determined beyond a reasonable doubt that his commission of robbery with a dangerous weapon was immediately causally connected to his shooting Washington. Accordingly, we modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

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

Chief Justice NEWBY concurring in the result.

¶ 37 I agree with the majority's determination that sections 14-51.3 and 14-51.4 supplant the common law with respect to perfect self-defense. However, because defendant failed to preserve his causal nexus argument for appellate review, this Court should not address it. Further, even if defendant did preserve his causal nexus argument, section 14-51.4 does not require the State to prove a causal nexus between a defendant's commission of a felony and his use of self-defense. Therefore, I do not join the portion of the majority's opinion that places a causal nexus element into section 14-51.4.

¶ 38 "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1).

> The specificity requirement in Rule 10(a)(1) prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required. Moreover, a specific objection discourages gamesmanship and prevents parties from allowing evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assigning error to them if the strategy does not work. Practically speaking, Rule 10(a)(1) contextualizes the objection for review on appeal, thereby enabling the appellate court to identify and thoroughly consider the specific legal question raised by the objecting party.

State v. Bursell, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019) (citations, internal quotation marks, and alterations omitted). Further, "[t]his Court has long held that where a *theory* argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (emphasis added) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

¶ 39 During the charge conference in the present case, defendant made the following objection to the trial court's proposed jury instructions:

> [Defendant] has a common-law right of self-defense. It's not abdicated by the statute. The statute speaks

> of a justification under the statute of self-defense under common law is not abdicated by that statute. We'd also object under that [defendant] has a constitutional right to defend his own life and under the due process clause of the Fifth Amendment and the 14th Amendment, we believe that the limitation of his right to defend his own life with that application—with the Court's application—or interpretation and application of the statute would infringe upon that due process right. And finally, that to do so is a constitutional violation of that right.

¶ 40 Defendant's objection provided two specific theories for why the trial court should instruct the jury on common-law self-defense: (1) section 14-51.4 does not disqualify the use of common-law self-defense; and (2) if section 14-51.4 does supplant the common law, then the trial court's application of section 14-51.4 to limit defendant's right to defend his own life would violate the Due Process Clause of both the Fifth and Fourteenth Amendments.

¶ 41 On appeal, however, defendant now asserts a new theory: the trial court's instruction was erroneous because it did not state that section 14-51.4 requires the State to prove a causal nexus between defendant's commission of a felony and his use of defensive force. The majority's conclusion that this new theory was either encompassed within defendant's broad due process argument or apparent from the context is unfortunate. Based upon the majority's reasoning, a defendant could generally assert before the trial court that an instruction violates his due process rights and later present on appeal any number of theories to support the overbroad challenge. This is precisely what Rule 10's specificity requirement seeks to avoid. *See* N.C. R. App. P. 10(a)(1); *Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5. Therefore, since defendant's causal nexus argument is not preserved for appellate review, the Court should not address it.

¶ 42 Even if defendant's causal nexus argument were preserved, it is without merit. The primary endeavor of courts in construing a statute is to give effect to legislative intent. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002); *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). If the statutory language is clear and unambiguous, a court should give the words their plain and definite meaning. *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993). When, however, "a statute is ambiguous, judicial construction must be used to ascertain the legislative will."

Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 136–37 (1990). Furthermore, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (quoting *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921)).

¶ 43 The relevant portion of section 14-51.4 states that "[t]he justification described in . . . [N.C.]G.S. [§] 14-51.3 is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony." N.C.G.S. § 14-51.4 (2021). This language is unambiguous and clearly does not include a causal nexus requirement. Nonetheless, the majority claims that it would be absurd to interpret section 14-51.4 literally because it would effectively bar all convicted felons from ever using a firearm in self-defense. The majority, however, ignores the fact that section 14-51.4 in no way prevents felons from legally defending themselves with other weapons. This result is not absurd.[1] Rather, it reflects a policy decision to limit the use of self-defense to the law-abiding. Such an intent is certainly sensible given the State's substantial interests in protecting its citizens and deterring recidivism. *See State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 27; *Mazda Motors of Am., Inc.*, 296 N.C. at 361, 250 S.E.2d at 253 ("If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary and the plain meaning of the statute controls.").

¶ 44 Here defendant's behavior was far from law-abiding. At trial, defendant admitted that he was a convicted felon due to his previous convictions of common-law robbery, larceny of a firearm, and assault inflicting serious bodily injury. He also admitted that on 24 March 2014, he entered Andre Womack's house, engaged in an altercation with Womack over money, took Womack's gun, and shot Womack. The next month, defendant used the same gun to rob[2] and kill David Washington. Defendant's unlawful possession of the gun enabled him to commit murder.

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1. While this result, on the facts before us, is not so absurd as to require an interpretation of the statute different than its plain language, we note that defendant did not preserve any constitutional arguments. Accordingly, we express no opinion on whether this interpretation violates any federal or state constitutional rights.

2. The jury found defendant guilty of robbery with a dangerous weapon.

¶ 45 At the time that defendant killed Washington, he was committing the felonies of possession of a firearm by a felon, *see* N.C.G.S. § 14-415.1(a) (2021), and robbery with a dangerous weapon, *see* N.C.G.S. § 14-87(a) (2021). Section 14-51.4 thus disqualifies defendant's use of perfect self-defense. Therefore, I concur in the result only.

Justice BARRINGER joins in this concurring opinion.

STATE OF NORTH CAROLINA
v.
JAMES CLAYTON CLARK, JR.

No. 286A20

Filed 11 February 2022

1. Evidence—expert testimony—that victim was "sexually abused"—impermissible vouching of child victim's credibility

The trial court committed plain error in a trial for taking indecent liberties with a child by allowing testimony from the State's expert witness—a nurse tendered as an expert in child abuse and forensic evaluation of abused children—that the minor victim had been "sexually abused" where there was no physical evidence of the crime and the statements of the victim were the only direct evidence. Pursuant to the standard set forth in *State v. Towe*, 366 N.C. 56 (2012), where the improper testimony bolstered the victim's credibility upon which the case turned, it had a probable impact on the jury's guilty verdict and therefore constituted fundamental error.

2. Evidence—expert testimony—indecent liberties—identifying defendant as perpetrator—impermissible vouching of victim's credibility

The trial court committed plain error in a trial for taking indecent liberties with a child by allowing the State's expert witness to implicitly identify defendant as the perpetrator of the crime when describing her treatment recommendations for the victim (including that the victim should have no contact with defendant). Where there was no physical evidence of the crime and the case therefore hinged on the statements of the victim, the admission improperly vouched for the victim's credibility.

Chief Justice NEWBY dissenting.

Justice BARRINGER joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, No. COA 19-634, 2020 WL 1274899 (N.C. Ct. App. Mar. 17, 2020), finding no error in part in a judgment entered on 18 July 2018 by Judge Jeffrey B. Foster Jr. in Superior Court, Pitt County. On 14 August 2020, the Supreme Court allowed, in part, defendant's petition for discretionary review. Heard in the Supreme Court on 19 May 2021.

Joshua H. Stein, Attorney General, by Lisa B. Finkelstein, Assistant Attorney General, for the State-appellee.

Paul F. Herzog for defendant-appellant.

HUDSON, Justice.

¶ 1 James Clayton Clark, Jr. (defendant) appeals from a divided decision of the Court of Appeals, arguing the majority erred in upholding his conviction for taking indecent liberties with a child on the basis that the trial court erred in allowing the State's expert to testify that the minor child was "sexually abused" in the absence of physical evidence confirming her opinion. Defendant further argues that testimony by the State's expert identifying defendant as the perpetrator of the charged offense constituted plain error and that the dissenting opinion in the Court of Appeals correctly determined that the record of this case is sufficient to determine that Mr. Clark's trial counsel committed ineffective assistance of counsel. For the reasons stated, we affirm in part and reverse in part the decision of the Court of Appeals, and remand for a new trial.

I. Factual and Procedural Background

¶ 2 In the summer of 2015, six-year-old "Jane"[1] started bed-wetting, having nightmares, and withdrawing socially. Around a year later, Jane told her stepmother that defendant, Jane's aunt's boyfriend at the time, called Jane into the bathroom, "grabbed her forcefully by her arm," and "attempted to put her hand inside of his underwear in his pants." The alleged incident occurred in the summer of 2015 while Jane was staying with her aunt.[2] Jane told her stepmother that she was "afraid of

1. A pseudonym is used to protect the identity of the child victim.

2. The charging indictment alleged the date of the offense to be "BETWEEN 06-01-2015 and 8-31-2015."

[defendant]" because "he had tried to force her to do something that she felt like was wrong."

¶ 3 Jane's stepmother reported the incident to law enforcement the following day, and the Pitt County Sheriff's Office interviewed Jane. The sheriff's office scheduled an appointment for Jane with the TEDI Bear Children's Advocacy Center (CAC) and subsequently recommended she receive trauma-based therapy. In her testimony, Jane's stepmother stated that Jane's behavioral problems "improved greatly" after over one year of therapy, yet there remained "a distance that wasn't there before."

¶ 4 At trial, Jane testified that defendant "called [her] into the bathroom…grabbed [her] hand...tried to make -- make [her] touch his private…was pulling [her] hand to his pants." According to Jane's testimony, she eventually got loose from defendant's grip and returned to playing with her cousins. Defendant was the only adult present at the time of the incident, but Jane could not remember how he reacted after the incident. Jane also testified that she informed her aunt and biological mother about the alleged abuse, but neither took any action. A year later, Jane told her stepmother about the incident.

¶ 5 Andora Hankerson testified about her experience as a forensic interviewer and that she interviewed Jane at CAC on 12 September 2016 about the alleged abuse. Ms. Hankerson testified to the following brief summary of the interview based on the written report from CAC:

> Rapport was established with [Jane] and she was able to engage in the process. [Jane] was able to demonstrate the difference between truth and lie. She promised to discuss true things during her interview. The alleged offender, she stated the alleged offender called [Jane] into the bathroom, grabbed her hand, and tried to make her touch his private part. The incident occurred at her Aunt['s] house.

Ms. Hankerson also testified about her training to recognize whether a child had been "coached" by a parent or another person and, over defendant's objection, testified that she saw no indications Jane had been "coached" based on the 12 September 2016 interview.

¶ 6 The nurse who evaluated Jane at CAC, Ann Parsons, also testified. Ms. Parsons was tendered as an expert witness in child abuse and forensic evaluation of abused children. Ms. Parsons testified that after performing a physical examination, she determined Jane "was healthy" and "looked normal for [her] age from head to toe." In her evaluations, Ms.

Parsons considered "questions about [Jane's] behaviors, how was she doing at school, how's she sleeping, does she seem afraid of anything, how's her appetite, has she been more aggressive," and emphasized that "[a]fter having been dry for a period of time, she was wetting the bed." Ms. Parsons testified that she determined "[Jane] had been sexually abused." She testified the diagnosis was based "predominantly [on] the history of her disclosures to family, law enforcement and Ms. [ ] Hankerson at TEDI Bear, and her behavioral change."

¶ 7 Defendant did not object to Ms. Parson's testimony about her diagnosis of Jane as "sexually abused." Ms. Parsons also testified, again without objection, about her treatment recommendations for Jane, specifically that Jane have (1) "primary care with her regular doctor, mental health evaluation," (2) "an evidence-based trauma-focused treatment program," (3) "no contact with [defendant] during the investigation, and [(4)] any future contact with [defendant] only to address therapeutic needs as determined by [Jane's] therapist." A report summarizing these recommendations was published to the jury without objection.

¶ 8 At the conclusion of the evidence, the jury found the defendant guilty of taking indecent liberties with a child. Defendant was sentenced to twenty-nine months in prison and required to register as a sex offender for thirty years. Defendant appealed.

¶ 9 In a divided opinion authored by then-Judge Berger, the North Carolina Court of Appeals held that the trial court did not commit plain error by permitting Ms. Parsons to use the word "disclosure" in describing Jane's allegations, by permitting her to testify regarding treatment recommendations that identified defendant, and by permitting her to testify that, in her opinion, Jane had been sexually abused. *State v. Clark*, No. COA 19-634, 2020 WL 1274899, at *2–5 (Mar. 17, 2020) (unpublished). The majority further held the trial court did not commit plain error by allowing Ms. Hankerson to testify that Jane had not been "coached." Finally, the majority dismissed defendant's ineffective assistance of counsel claim without prejudice. *Id.* at *5.

¶ 10 First, the majority found no plain error in the trial court's admission of Ms. Parsons's use of the term "disclosure" in her testimony. *Id.* at *3. The majority reasoned "[t]here is nothing about use of the term 'disclose,' standing alone, that conveys believability or credibility." *Id.* at *3 (citing *State v. Betts*, 267 N.C. App. 272, 281 (2019)). Second, the majority determined that Ms. Parsons's recommendations identifying defendant "in no way amounted to an assertion that Defendant was, in fact, responsible for Jane's alleged sexual abuse," but merely that Jane

"subjectively believes defendant to be her abuser." *Id.* Finally, the majority held it was improper to allow Ms. Parsons's testimony stating "[Jane] had been sexually abused" but concluded defendant failed to establish the error sufficiently prejudiced him so as to constitute plain error. *Id.* at *4. The majority concluded the admission of Ms. Parsons's improper testimony did not result in plain error because "the State presented substantial evidence from which the jury could find Defendant guilty,"[3] and the jury had ample opportunity to assess Jane's credibility. *Id.*

¶ 11 The majority also addressed defendant's argument that the trial court erred in permitting Ms. Hankerson to testify that Jane showed no indication of having been "coached." *Id.* Again, the majority found no abuse in the trial court's discretion, explaining that Ms. Hankerson provided "helpful [testimony] in assisting the trier of fact and did not improperly bolster Jane's testimony." *Id.* at *5.

¶ 12 Finally, the majority declined to address the ineffective assistance of counsel claim on direct appeal, dismissing the claim without prejudice to defendant's right to assert the claim in a subsequent motion for appropriate relief. *Id.*

¶ 13 Judge Arrowood dissented from the majority's dismissal of defendant's ineffective assistance of counsel claim, arguing the claim could be determined on the face of the record and that, in his view, defendant is entitled to a new trial. *Id.* at *6 (Arrowood, J., dissenting). In dissent, Judge Arrowood asserted that defendant satisfied this standard, citing to his counsel's failure to object to Ms. Parsons's testimony that "[Jane] had been sexually abused" and "her implication of defendant as the perpetrator of the abuse." *Id.* Judge Arrowood further maintained that trial counsel's failure to object prejudiced defendant because Jane was the only direct witness of the alleged abuse and, absent any physical evidence, her credibility was "crucial to the outcome of the case." *Id.* at *7. Accordingly, the dissenting opinion would have held that there was a reasonable probability that but for trial counsel's failure to object to expert testimony that impermissibly bolstered the victim's credibility, there is a reasonable probability there would have been a different result at trial. Thus, in his view, defendant was entitled to a new trial.

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3. The majority cited to the following evidence: "(1) Jane's testimony at trial; (2) a video-recorded interview with Jane at the CAC; (3) evidence of Jane's lasting behavioral problems after the incident—including bed-wetting, nightmares, and social withdrawal; and (4) the consistency of Jane's accounts of the incident to her family, law enforcement, and medical personnel at the CAC." *Clark*, 2020 WL 1274899 at *4.

¶ 14 Defendant timely appealed as of right on the basis of the dissenting opinion under N.C.G.S. § 7A-30. This Court allowed discretionary review of two further issues pursuant to N.C.G.S. § 7A-31.

II. Analysis

¶ 15 Defendant argues three issues on appeal: (1) testimony by the State's expert, Ann Parsons, that Jane was "sexually abused," with respect to the absence of physical evidence confirming Parsons's opinion, constituted plain error in violation of *State v. Towe*, 366 N.C. 56 (2012), (2) testimony by the State's expert witness, Ms. Parsons, identifying Jamie Clark as the perpetrator of the charged offense, constituted plain error, and (3) the dissenting opinion correctly determined that the record of this case is sufficient to determine that Mr. Clark's trial counsel provided ineffective assistance of counsel. We agree in part, specifically in issues (1) and (2), and reverse the decision of the Court of Appeals on those issues.

A. Testimony of the State's expert that Jane was "sexually abused"

¶ 16 **[1]** Defendant first argues that testimony by the State's expert, Ms. Parsons, that Jane was "sexually abused," in the absence of physical evidence confirming Parsons's opinion, constituted plain error under this Court's decision in *State v. Towe*, 366 N.C. 56 (2012). When trial counsel fails to object to the admission of evidence, the trial court's admission of the evidence is reviewed for plain error. *State v. Lee*, 348 N.C. 474, 482 (1998) "[T]o establish plain error defendant must show that a fundamental error occurred at his trial and that the error had a probable impact on the jury's finding that the defendant was guilty." *Towe*, 366 N.C. at 62 (cleaned up). We agree and conclude that the Court of Appeals misapplied our decision in *Towe*.

¶ 17 We first consider whether Ms. Parsons's testimony was improper. Rule 702 of the North Carolina Rules of Evidence provides that experts may testify in the form of an opinion when they have "scientific, technical or other specialized knowledge [which] will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." N.C.G.S. § 8C-1, Rule 702 (2019). However, this Court has repeatedly held that "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *Stancil*, 355 N.C. 266, 266–67 (2002) (emphasis in original) (cleaned up).

> Moreover, even when physical evidence of abuse existed and was the basis of an expert's opinion, where the expert added that she would have determined a child to be sexually abused on the basis of the child's story alone even had there been no physical evidence, we found this additional testimony inadmissible. However, if a proper foundation has been laid, an expert may testify about the characteristics of sexually abused children and whether an alleged victim exhibits such characteristics.

Towe, 366 N.C. at 61–62 (cleaned up).

¶ 18 Here, Ms. Parsons testified that there were no injuries or physical symptoms of sexual abuse. Rather, Ms. Parsons testified that she based her diagnosis of sexual abuse "predominantly [on] the history of [Jane's] disclosures to family, law enforcement and Ms. [ ]Hankerson at TEDI Bear, and her behavioral change." But evidence of the victim's history of disclosures to family, social workers, and others in the absence of physical evidence is precisely the evidentiary basis we held in *Towe* was "insufficient to support an expert opinion that a child was sexually abused." *Id.* at 62. The Court of Appeals unanimously concluded this testimony was improper vouching and hence its admission by the trial court was improper. We agree.

¶ 19 Nevertheless, the State argues that this Court should hold that Ms. Parsons's expert testimony about the diagnosis of sexual abuse was admissible because it was "based on her examination of the child and based on her expert knowledge concerning abused children in general." The State relies upon *State v. Bailey*, 89 N.C. App. 212 (1988), a decision of the Court of Appeals that is not binding on this Court and that precedes our decision in *Towe* by over twenty years. In *Bailey*, the defendant was convicted of sex offenses against a child, and, on appeal, the defendant argued the trial court erred in admitting the expert testimony of a social worker and a pediatrician who both testified that the victim had been sexually abused, based on the contention that their testimony was impermissible vouching. *Id.* at 219. The Court of Appeals rejected that argument on the basis that "cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness," citing cases from this Court in which the expert's testimony to diagnoses of assault was admissible where the diagnosis was on the basis of physical evidence. *See id.* at 219 (citing *State v. Smith*, 315 N.C.

76 (1985); *State v. Stanley*, 310 N.C. 353 (1984); *State v. Starnes*, 308 N.C. 720 (1983)). The *Bailey* decision did not indicate whether the expert opinions of sexual abuse expressed therein were based on physical evidence. Nevertheless, in both the decisions of this Court relied on in *Bailey* and those decided since, this Court has permitted an expert to testify to a diagnosis of sexual abuse only where there has been some physical evidence upon which to base the opinion. *See*, *e.g.*, *Stancil*, 355 N.C. at 266–67 ("In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion, that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility."); *Towe*, 366 N.C. at 57–58; *State v. Chandler*, 364 N.C. 313, 318 (2010); *State v. Hammett*, 361 N.C. 92, 94 (2006). Accordingly, whether *Bailey* is entirely consistent with these decisions or not, it cannot support the State's position. We hold the trial court erred in permitting Ms. Parsons to testify that she diagnosed Jane as sexually abused on the evidence before us.[4]

¶ 20 We must next consider whether admission of this testimony was plain error.

> To establish plain error, defendant must show that a fundamental error occurred at his trial and that the error had a probable impact on the jury's finding that the defendant was guilty. 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.

Towe, 366 N.C. at 62 (cleaned up). "Thus, we must consider whether the erroneous admission of expert testimony had the 'prejudicial effect necessary to establish that the error was a fundamental error.' " *Id.* at 62–63 (quoting *State v. Lawrence*, 365 N.C. 506, 519 (2012)).

¶ 21 In *Towe*, the victim testified that the defendant, her father, sexually assaulted her by rubbing her vagina and by penetrating her with his

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4. Notably, the State does not argue in its brief that Jane's subsequent behaviors, including bed-wetting, nightmares, and social withdrawal, could form an independent basis for the expert's diagnosis of sexual abuse, either because they are psychological and hence physical evidence, or because behavioral evidence taken alone is sufficient. Even if that argument were made, however, there is no support in our caselaw for the proposition that such evidence is sufficient, absent other physical evidence, to render an expert's testimony admissible and not impermissible vouching for the victim's credibility.

fingers three times and with his penis at least twice. *Id.* at 57. A pediatrician testified that the victim's vagina was red and inflamed, and the victim relayed through her mother that the defendant had been touching her private parts all the time. *Id.* A detective testified that the victim told him that her father had touched her genitals with his fingers and penis and had asked if he could put his penis in her vagina. *Id.* at 58. Although this Court noted that the mother testified to the victim's behavior, and the victim's aunt testified to a similar prior assault on her by the defendant under N.C.G.S. § 8C–1, Rule 404(b), we reasoned that *Towe* "turned on the credibility of the victim, who provided the only direct evidence against defendant." *Id.* at 63. In particular, we noted there were "discrepancies in the record" that impacted the evaluation of the improper expert testimony on the jury's verdict. *Id.* We held that, due to the expert's testimony that "even absent physical symptoms, the victim had been sexually abused, we [were] satisfied that [the expert]'s testimony stilled any doubts the jury might have had about the victim's credibility or defendant's culpability, and thus had a probable impact on the jury's finding that [the] defendant [was] guilty." *Id.* at 64.

¶ 22 Here, as in *Towe*, the only direct evidence of sexual abuse was the statements of the victim from her testimony at trial and her video-recorded interview, as well as corroborative evidence through testimony regarding her accounts to family, law enforcement, and medical personnel. Accordingly, the evidence in this case "turned on the credibility of the victim." *Id.* at 63.

¶ 23 The Court of Appeals majority held and the State on appeal argues that evidence of changes in Jane's behavior following the incident, namely "bed-wetting, nightmares, and social withdrawal," *Clark*, 2020 WL 1274899 at *4, is substantial evidence that is a sufficient substitute for physical evidence of sexual abuse. But bedwetting, nightmares, and social withdrawal and other behavioral or psychological changes may have causes besides sexual abuse. As one of our sister supreme courts has reasoned, "[m]any of the symptoms considered to be indicators of sexual abuse, such as nightmares, forgetfulness, and overeating, could just as easily be the result of some other problem, or simply may be appearing in the natural course of the children's development." *New Hampshire v. Cressey*, 137 N.H. 402, 408 (1993). While behavioral change such as bedwetting, nightmares, and social withdrawal is relevant circumstantial evidence of sexual abuse, it can have many other causes; therefore, it cannot serve as substantial evidence that supports a verdict for a sexual offense independent of testimony of the victim or other direct evidence of abuse. In contrast, physical evidence of sexual

abuse of a child can be substantial evidence of abuse even independent of testimony alleging abuse. Circumstantial evidence in the form of testimony about changes in a victim's behavior must be coupled with some other direct evidence, either physical evidence or testimony from the victim or another alleging that abuse occurred that causally links the behavior changes to abuse.

¶ 24 In summary, where, as here, the sole direct evidence of sexual abuse is testimony from the victim, the case necessarily "turn[s] on the credibility of the victim," and expert opinion to the effect that the victim was sexually abused based on a combination of the victim's testimony and behaviors of the victim in the absence of "definitive" physical evidence is likely to weigh heavily on the jury's assessment of the victim's credibility. *Towe*, 366 N.C. at 64; *Chandler*, 364 at 318. Thus, admission of the improper testimony here had a probable impact on the jury's finding that defendant was guilty of taking indecent liberties with a child, and we must conclude the error had the "prejudicial effect necessary to establish that the error was a fundamental error." *Lawrence*, 365 N.C. at 519. Accordingly, we hold that permitting Ms. Parsons to testify that Jane was "sexually assaulted" in the absence of definitive physical evidence, irrespective of testimony concerning the victim's behavioral changes, constituted plain error.

B. The State's expert's opinion identifying defendant as the perpetrator

¶ 25 **[2]** Defendant next argues the Court of Appeals erred in holding admission of Ms. Parsons's expert testimony identifying defendant as the perpetrator of the victim's assault while describing her treatment recommendations was not plain error. Again, we agree.

¶ 26 In *State v. Aguallo*, this Court held that an expert opinion by a doctor that the physical trauma to the genitals revealed by physical examination "was consistent with the abuse the child alleged had been inflicted upon her" was admissible. 322 N.C. 818, 822 (1988). In so holding, we distinguished that circumstance from one in which the expert states "that the victim is 'believable' or 'is not lying.' " *Id.* Our reasoning for this distinction was that "[t]he important difference in the two statements is that the latter implicates the accused as the perpetrator of the crime by affirming the victim's account of the facts. The former does not." *Id.*

¶ 27 In *State v. Hammett*, this Court relied on *Aguallo* to hold that a doctor's expert opinion diagnosing the victim with sexual abuse based in part on a physical examination was admissible where the doctor "testified that her findings were consistent with abuse, though not necessarily

by defendant," although a subsequent statement by the doctor that she would hold the same opinion without considering the physical examination was held to be improper. 361 N.C. 92, 96–97 (2006). We specifically summarized the rationale in *Aguallo* as follows: "Because the expert's opinion never implicated the defendant as the perpetrator, we held the opinion that the trauma was consistent with the victim's story was not the same as an opinion that the witness was telling the truth." *Id.* at 96 (citing *Aguallo*, 322 N.C. at 822–23). The Court of Appeals has similarly held that an expert opinion that victims were sexually abused by the defendant in particular was inadmissible because it "did not relate to a diagnosis derived from his expert examination of the prosecuting witnesses in the course of treatment," and, accordingly, "constituted improper opinion testimony as to the credibility of the victims' testimony." *State v. Figured*, 116 N.C. App. 1, 9 (1994). More recently, in *State v. Ryan*, the Court of Appeals held that an expert's testimony expressing the opinion that "there was no evidence of any other perpetrators" other than the defendant, based on the witness's interview with the child, amounted to plain error. 223 N.C. App. 325, 340–41 (2012).

¶ 28 Here, Ms. Parsons not only testified that she diagnosed Jane as "sexually abused" but also testified about medical recommendations for treatment that included as recommendations that Jane have "no contact with [defendant] during the investigation," and have "any future contact with [defendant] only to address therapeutic needs as determined by [Jane's] therapist." Moreover, a written report summarizing these recommendations was published to the jury. While we have held that permitting Ms. Parsons to testify to the diagnosis of sexual abuse in the absence of physical evidence was error, testimony and a written report identifying defendant as the perpetrator whether explicitly or by implication compounds that error. Under *Aguallo* and its progeny, this testimony is precisely the sort that we have held is impermissible because it "implicates the accused as the perpetrator of the crime by affirming the victim's account of events." 322 N.C. at 822. As in *Figured*, this testimony "constituted improper opinion testimony as to the credibility of the victims' testimony." *Figured*, 116 N.C. App. at 9.

¶ 29 The State argues *Aguallo*, *Hammett*, and *Figured* are inapplicable because the expert here did not expressly identify defendant as the perpetrator. But the distinction between an explicit identification of the defendant as the perpetrator and an implicit one is not a distinction recognized by our caselaw. In both cases, the statement "*implicates* the accused as the perpetrator of the crime" and hence runs afoul of the prohibition against vouching for the victim. *Aguallo*, 322 N.C. at 822 (emphasis added).

¶ 30 The Court of Appeals majority similarly rejected defendant's argument by reasoning that the medical recommendations "in no way amounted to an assertion that Defendant was, in fact, responsible for Jane's alleged sexual abuse," and "[a]t most, this testimony implies that Jane should not have continued contact with Defendant because she subjectively believes Defendant to be her abuser." *Clark*, 2020 WL 1274899 at *3. We believe the Court of Appeals misconstrues the import of this testimony. Even if one implication of the recommendation is that Jane believed defendant to be her abuser, another reasonable implication is that Ms. Parsons believed Jane's allegation enough to recommend she not see defendant out of concern for her health and safety. In *Aguallo*, we held this sort of implication impermissible. Moreover, since this case turns on the credibility of the victim, even an implicit statement that the defendant is the one who committed the crime is plain error necessitating a new trial. *See Ryan*, 223 N.C. App. at 341. Accordingly, we hold the trial court also committed plain error in permitting Ms. Parsons to testify to the medical recommendations identifying defendant as the perpetrator and in publishing the same recommendations to the jury.

C. Ineffective assistance of counsel

¶ 31 Finally, defendant argues, following Judge Arrowood in his dissent, that the record of this case is sufficient to determine that Mr. Clark's trial counsel committed ineffective assistance of counsel by failing to object. Whether a defendant was denied the effective assistance of counsel is a question of law that is reviewed de novo. *State v. Braswell*, 312 N.C. 553 (1985).

> To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, he must show that the error was so serious that a reasonable probability exists that the trial result would have been different absent the error.

State v. Blakeney, 352 N.C. 287, 307–08 (2000) (cleaned up). Although ineffective assistance of counsel (IAC) claims are generally litigated in a motion for appropriate relief, we have held admissible that:

> IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary

> procedures as the appointment of investigators or an evidentiary hearing. This rule is consistent with the general principle that, on direct appeal, the reviewing court ordinarily limits its review to material included in "the record on appeal and the verbatim transcript of proceedings, if one is designated."

State v. Fair, 354 N.C. 131, 166 (cleaned up) (quoting N.C. R. App. P. 9(a)).

¶ 32 Here, the majority determined that defendant's IAC claim was premature and dismissed it without prejudice to defendant's ability to file a later motion. *Clark*, 2020 WL 1274899 at *5. Defendant asks this Court to instead adopt Judge Arrowood's approach in his dissenting opinion, in which he would have held that the face of the record showed sufficient evidence of ineffective assistance of counsel to decide the claim. *Id.* at *6 (Arrowood, J., dissenting). After reviewing the record, we conclude that the majority did not err in dismissing defendant's IAC claim without prejudice to defendant's right to file a subsequent motion for appropriate relief, and in light of our disposition of the case, we decline to address the issue further. Accordingly, we affirm the Court of Appeals majority on this issue.

III. Conclusion

¶ 33 We conclude the Court of Appeals majority erred in part in holding there was no plain error below. First, we hold that the trial court committed plain error in permitting Ms. Parsons to testify in the absence of physical evidence that Jane was "sexually abused." Second, we hold the trial court also committed plain error by permitting Ms. Parsons to implicitly identify defendant as the perpetrator of the alleged abuse. However, we affirm the Court of Appeals' dismissal of defendant's IAC claim. For the foregoing reasons, we conclude defendant is entitled to a new trial. Accordingly, we affirm in part and reverse in part the decision of the Court of Appeals.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

Chief Justice NEWBY dissenting.

¶ 34 This case requires us to determine whether the trial court plainly erred when it permitted Ann Parsons—a qualified nurse practitioner—to

testify based on her education, training, and experience that she diagnosed the seven-year-old Jane as sexually abused. To demonstrate plain error, defendant must show that the error deprived him of a fair trial and that it prejudiced the outcome—i.e., that the error had a probable impact on the jury's verdict. When viewed as a whole, the record shows the physical and psychological evidence corroborates the victim's consistent account of the sexual abuse she suffered. Thus, defendant cannot show that the alleged error in admitting Parsons's testimony had a probable impact on the jury's verdict. I respectfully dissent.

¶ 35 Where a defendant does not object to an error at trial, appellate review is limited to determining whether the trial court committed plain error. *See State v. Hammett*, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006) (holding claimed error in admission of expert vouching testimony was subject to plain error review). "[P]lain error is to be 'applied cautiously and only in the exceptional case.' " *State v. Towe*, 366 N.C. 56, 65, 732 S.E.2d 564, 569 (2012) (Newby, J., dissenting) (alteration in original) (quoting *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012)). "Under *Lawrence* 'a defendant must demonstrate that a fundamental error occurred at trial' and 'must establish prejudice.' " *Id.*, 732 S.E.2d at 570 (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334). A fundamental error is "something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or that "amounts to a denial of a fundamental right of the accused." *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). A fundamental error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (alteration in original) (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). Moreover, the error must be prejudicial to the defendant. To demonstrate prejudice, a defendant must show "that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334).

¶ 36 Given the consistency of Jane's testimony during the investigation and at trial, as well as the physical and psychological evidence, Parsons's challenged testimony did not rise to the level of plain error. The jury's verdict did not hinge on Parsons's allegedly erroneous testimony. Rather, a review of the record shows Jane's credibility was well established through other means. Jane, seven years old at the time, gave a consistent account of the abuse in multiple conversations with her stepmother, law enforcement, and two different experts in forensic child abuse investigation at the Child Advocacy Clinic. Then, three years after the abuse, Jane's testimony at trial was consistent with this

account. Jane's stepmother also testified that when Jane originally told her of the abuse, her stepmother "could see that [Jane] was troubled and worried about something." Andora Hankerson, the forensic interviewer at the Child Advocacy Center, testified that Jane did not appear to be "coached" as to the details of the story. The State published Hankerson's report and played a video recording of Hankerson's interview of Jane for the jury, which were also consistent with Jane's account.

¶ 37 The jury also heard significant evidence regarding Jane's physical and psychological symptoms that supported her account. Though Jane was an outgoing, confident child, when the abuse occurred, Jane's behavior changed drastically. She became "fearful around strangers" and would "cling to [her stepmother] more in public," behaviors her stepmother "hadn't noticed before." Jane also began "wetting her bed four and five times a week. She became withdrawn. She had nightmares. She would wake up crying sometimes." Though Jane had successfully overcome bedwetting in the past and had experienced "a long stretch of time where she wasn't wetting the bed," her bedwetting began again after the sexual abuse. After receiving trauma therapy, Jane's symptoms subsided, though not completely.

¶ 38 Parsons, on the other hand, testified for approximately ninety minutes during the two-and-a-half-day trial. When asked "what was [her] diagnosis" of Jane, Parsons stated that she diagnosed Jane as "sexual[ly] abuse[d]." After discussing the foundation for her diagnosis, Parsons again stated that her finding was "that [Jane] had been sexually abused." Moreover, Parsons testified that her treatment report recommended that Jane have "[n]o contact with [defendant] during the investigation" and that "any future contact with [defendant be] only to address therapeutic needs as determined by [Jane]'s therapist." Parsons's report was admitted into evidence and published to the jury. Even assuming these portions of Parsons's testimony were admitted in error,[1] defendant cannot

1. While the Court of Appeals and the majority of this Court have determined that Parsons's testimony regarding Jane's diagnosis is error, this is a unique case. Here the State laid the proper foundation for expert opinion testimony by demonstrating Parsons's education, training, and experience in "child maltreatment and the healthcare needs and requirements of children in that circumstance." The trial court then admitted Parsons to testify on "child abuse and forensic evaluation of children that have been abused." Parsons, along with Jane's stepmother, testified that Jane's psychological symptoms manifested physically in the form of Jane's bedwetting. Thus, it is questionable whether Parsons's testimony about Jane's diagnosis constitutes error. *See State v. Stancil*, 355 N.C. 266, 266–67, 559 S.E.2d 788, 789 (2002) (holding that expert witness may testify as to sexual abuse diagnosis when there is physical evidence of the abuse). Notably, however, the State did not petition this Court for review of that issue.

demonstrate plain error because he cannot show prejudice—i.e., that these alleged errors had a probable impact on the jury's verdict.

¶ 39 The majority mischaracterizes this record and holds this case turned on Jane's credibility alone because there was no "direct evidence of sexual abuse." Therefore, the majority concludes that Parsons's testimony "stilled any doubts" in the jury's mind and had a probable impact on the jury's verdict. In so concluding, the majority erroneously relies on *State v. Towe*, which is distinguishable from this case. In *Towe*, this Court stated that the case "turned on the credibility of the victim" because the victim's "recitations of defendant's actions were not entirely consistent" and there was no physical evidence of the abuse. *Towe*, 366 N.C. at 63, 732 S.E.2d at 568. Here, however, Jane's testimony was consistent every time she recounted the events; her testimony did not raise the issue of credibility in the same manner as the victim's inconsistent testimony in *Towe*. Moreover, Jane's consistent testimony was supported by testimony about her physical symptoms—i.e., bedwetting—as well as psychological symptoms, including fearfulness, social withdrawal, and nightmares. Thus, *Towe* presented a different factual scenario than the case here.

¶ 40 When the evidence is viewed as a whole, taking into account the several witnesses who testified and the nature of Jane's symptoms, it is unlikely that Parsons's isolated statements regarding Jane's diagnosis or the treatment recommendations in her report had a probable impact on the jury's verdict. As such, defendant cannot demonstrate prejudice and these alleged errors did not amount to plain error. Therefore, the opinion of the Court of Appeals should be affirmed. I respectfully dissent.

Justice BARRINGER joins in this dissenting opinion.

The majority of this Court also concludes that admission of Parsons's written report containing her treatment recommendations, along with Parsons's testimony about those recommendations, is error because Parsons's recommendations identified "defendant [a]s the one who committed the crime." As the Court of Appeals correctly noted, however, "[t]hat Jane alleged [d]efendant of the abuse cannot reasonably be disputed." *State v. Clark*, No. COA19-634, 2020 WL 1274899, at *3 (N.C. Ct. App. March 17, 2020) (unpublished). Simply put, it was not disputed at trial that Jane alleged defendant was the person who committed the sexual abuse. Thus, Parsons's testimony purportedly identifying defendant as the perpetrator cannot be error.

STATE v. CROMPTON

[380 N.C. 220, 2022-NCSC-14]

STATE OF NORTH CAROLINA
v.
JUSTIN BLAKE CROMPTON

No. 180A20

Filed 11 February 2022

Probation and Parole—probation revocation—absconding—sufficiency of allegations

Where probation violation reports alleged that defendant had absconded in violation of N.C.G.S. § 15A-1343(b)(3a) during a specifically alleged time period by failing to report, failing to return phone calls, failing to provide a certifiable address, and failing to make himself available, the violation reports sufficiently alleged defendant's commission of the revocable violation of absconding supervision. The trial court did not abuse its discretion by revoking defendant's probation upon defendant's admission to the violations.

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, *State v. Crompton*, 270 N.C. App. 439 (2020), affirming six judgments revoking defendant's probation entered on 25 October 2018 by Judge Marvin P. Pope Jr. in Superior Court, Buncombe County. Heard in the Supreme Court on 17 May 2021.

Joshua H. Stein, *Attorney General*, *by Brenda Eaddy*, *Special Deputy Attorney General*, *and Caden W. Hayes*, *Assistant Attorney General*, *for the State-appellee.*

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

MORGAN, Justice.

¶ 1 Defendant challenges the sufficiency of the allegations against him, contained in six probation violation reports, that he committed the revocable probation violation of absconding. Defendant also disputes the sufficiency of the State's factual basis for its absconding allegation, contending that even if the charge is taken as true, it cannot serve as the basis for a finding that defendant had in fact absconded. In this case,

we determine that the probation violation reports at issue effectively pleaded that defendant absconded probation and that the trial court did not abuse its discretion in revoking defendant's probation upon concluding that defendant had, in fact, absconded his probation. We therefore affirm the trial court's decision.

I. Background

¶ 2 Defendant pleaded guilty to one count each of felony breaking and entering, felony larceny after breaking and entering, felony breaking and entering a motor vehicle, felony altering the serial number of a firearm, and misdemeanor carrying a concealed gun, along with three counts of felony obtaining property by false pretenses, on 24 April 2017. The Superior Court, Buncombe County entered six consecutive judgments sentencing defendant to a minimum of 36 months and a maximum of 102 months of imprisonment, but suspended the activation of this sentence in favor of 36 months of supervised probation. Among the terms of defendant's probation were his requirements to (1) report regularly as instructed by the probation officer; (2) answer the reasonable inquiries of the officer; (3) report and obtain approval for any change in address; (4) report and obtain approval before leaving the jurisdiction of the trial court; (5) abstain from using drugs; and (6) "not abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer."

¶ 3 Defendant soon began to violate the terms of his probation, resulting in his supervising probation officer issuing violation reports on each of defendant's cases two months later on 28 June 2017. The probation violation reports alleged that defendant missed curfew on several dates, left the jurisdiction of the trial court without permission on multiple dates, and admitted to the usage of marijuana while on probation. The violation reports were called for consideration by the trial court on 7 September 2017; defendant admitted that he violated the conditions of his probation as alleged. The trial court found defendant to be in willful violation of his probation and ordered him to serve a 90-day term of confinement with the North Carolina Division of Adult Correction and to complete 90 days of house arrest upon release from his prison confinement.

¶ 4 Defendant tested positive for marijuana again in April of 2018, after completing his period of confinement and subsequent house arrest as the consequences for the probation violations which he admitted on 7 September 2017. On 14 May 2018, which was the day that defendant was scheduled to report to the probation office for an appointment, defendant called his supervising probation officer Jamie Harris by telephone

and left a voicemail message that defendant would be unable to keep the day's appointment due to an altercation which occurred on the previous night between defendant and defendant's brother with whom the probationer lived. Officer Harris returned defendant's telephone call and left a voicemail message instructing defendant to provide updated information concerning defendant's residential situation and to report to the probation office on 16 May 2018. Contrary to Officer Harris' directive, defendant did not contact the probation officer again. Defendant's whereabouts were unknown to the State until defendant's arrest almost three months later on 8 August 2018.

¶ 5 Officer Harris conducted an absconding investigation in which the probation officer visited defendant's last known address on two occasions, called all of the references and telephone contact numbers that defendant had provided during defendant's term of probation, called the local hospital by telephone to determine if defendant had been admitted, reviewed law enforcement databases to ensure that defendant was not in custody, and called a vocational rehabilitation program in which defendant was enrolled in order to determine if the program providers had any knowledge of defendant's whereabouts. Having exhausted all available avenues of contacting defendant, and being cognizant of defendant's earlier probation violation which Officer Harris considered to have put defendant on notice of "the ramifications of absconding," on 23 May 2018 defendant's probation officer issued another probation violation report and accompanying order for arrest in each of defendant's cases. The probation violation report in each case alleged that defendant had willfully violated the following conditions of probation:

> 1. Regular Condition of Probation: General Statute 15A-1343(b)(3a) "Not to abscond, by willfully avoiding supervision or willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, THE DEFENDANT HAS FAILED TO REPORT[] AS DIRECTED BY THE OFFICER, HAS FAILED TO RETURN THE OFFICER[']S PHONE CALLS, AND HAS FAILED TO PROVIDE THE OFFICER WITH A CER[T]IFIABLE ADDRESS. THE DEFENDANT HAS FAILED TO MAKE HIMSELF AVAILABLE FOR SUPERVISION AS DIRECTED BY HIS OFFICER, THEREBY ABSCONDING SUPERVISION. THE OFFICER[']S LAST FACE TO FACE CONTACT WITH THE OFFENDER WAS DURING A HOME CONTACT ON 4/16/18.

> 2. Condition of Probation "Not use, possess or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it . . ." in that THE DEFENDANT TESTED POSITIVE FOR MARIJUANA ON 4/16/18.
>
> 3. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places . . ." in that THE DEFENDANT FAILED TO REPORT AS DIRECTED ON 5/14/18, 5/16/18, AND 5/23/18.
>
> 4. Condition of Probation "The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" as directed by the Court or probation officer" in that THE DEFENDANT HAS FAILED TO MAKE ANY PAYMENTS TOWARD HIS COURT INDEBTEDNESS AND RESTITUTION.[1]

¶ 6 Defendant was arrested on 8 August 2018 and his alleged probation violations came on for hearing on 25 October 2018. At the hearing, Officer Harris provided the trial court with a synopsis of the investigation which he conducted, along with a factual basis for the non-absconding alleged probation violations listed on the violation reports. Defendant admitted his commission of all of the alleged probation violations as detailed—including the allegation of absconding supervision—and represented that he had turned himself in for the purposes of arrest and for "the sake of . . . his family." Defendant offered these explanations to the trial court in an effort to persuade the trial court to allow defendant to serve his underlying sentences concurrently, rather than consecutively as the initial sentencing trial court had ordered. In accepting defendant's admission to a revocable probation violation, the trial court revoked defendant's probation, denied defendant's request that his sentences be served concurrently, and activated defendant's sentences as originally determined. Defendant verbally noticed his appeal.

¶ 7 The Court of Appeals issued a divided opinion in which the majority held that the State had met its burden of proof to show that

1. While five of defendant's cases of probation had associated court-ordered fees and restitution, defendant's sixth case, which concerned his conviction for felony larceny after breaking and entering, did not have associated fees or restitution; therefore, the corresponding violation report omitted allegation #4.

defendant willfully violated a revocable condition of probation and that the trial court's revocation of defendant's probation was not an abuse of discretion. *State v. Crompton*, 270 N.C. App. 439, 448–49 (2020). The dissenting opinion considered the absconding allegation in the probation violation reports to allege only violations of regular conditions of probation found in N.C.G.S. § 15A-1343(b)(3), and therefore the absconding allegation itself was insufficient here to allege a revocable condition of probation under N.C.G.S. § 15A-1343(b)(3a), pursuant to the Court of Appeals decision in *State v. Williams*, 243 N.C. App. 198, 199–200 (2015). *Crompton*, 270 N.C. App. at 454–55 (McGee, C.J. dissenting). Even assuming that the alleged facts contained within the claimed absconding violation were not limited to violations of N.C.G.S. § 15A-1343(b)(3), the dissent deemed that the allegations "taken together[ ] still do not establish a violation of N.C.G.S. § 15A-1343(b)(3a)[ ] because they do not adequately allege willfulness by [d]efendant" as required by the Court of Appeals opinion in *State v. Melton*, 258 N.C. App. 134, 139 (2018). *Id.* at 455. The dissent reasoned that, although defendant admitted to the absconding violation as alleged and Officer Harris testified to exhausting all methods of contact with defendant, nonetheless the allegations in the probation violation report failed to charge that defendant actually knew that his supervising officer was trying to contact him. *Id.* Consequently, the dissenting view would have decided that "the State's evidence was insufficient to support a finding of absconding." *Id.* at 457. Defendant appealed to this Court as a matter of right based upon the issues raised in the dissent.

II. Analysis

¶ 8 The trial court's decision to revoke a defendant's term of probation pursuant to a valid probation violation report is reviewed for abuse of discretion on appeal. *State v. Murchison*, 367 N.C. 461, 464 (2014).

¶ 9 Defendant argues that the absconding allegation contained within each of the probation violation reports was "merely an assertion that [defendant] failed to report, failed to return phone calls, and failed to provide a certifiable address," which merely amount to violations of the regular conditions of probation codified in N.C.G.S. § 15A-1343(b)(3) (2019). According to defendant's construction of *Williams*, *Melton*, and *State v. Krider*, 258 N.C. App. 111, *aff'd per curiam in part*, *disavowed per curiam in part*, 371 N.C. 466 (2018)[2], these allegations fail as a matter of law to allege a revocable probation violation. Defendant also

2. Our per curiam affirmance of *Krider* is inapplicable to the case at bar. In *Krider*, the defendant denied absconding probation and testified at the probation violation hearing about his attempts to contact his supervising officer "plenty of times" during the time

argues that "[c]onsidering N.C.G.S. § 15A-1343 as a whole and construing its various subsections *in pari materia*, it is clear the legislature intended 'absconding' to have a unique, limited, and heightened meaning – separate and apart from violations of other conditions of probation."

¶ 10 First, this Court must determine whether the probation violation reports sufficiently alleged that defendant absconded supervision. Our analysis is guided by our discussion in *State v. Moore*, 370 N.C. 338 (2017), in which this Court addressed whether a probation violation report sufficiently alleged that the defendant had committed the revocable violation of committing a new criminal offense while on probation as prohibited by N.C.G.S. § 15A-1343(b)(1). The defendant in *Moore* had been placed on probation for the commission of two different sets of identical criminal offenses which he perpetrated in two consecutive months. *Moore*, 370 N.C. at 338–39. The judgments in that defendant's cases contained many of the "regular conditions of probation" found in N.C.G.S. § 15A-1343(b) and included the condition that defendant must "commit no criminal offense in any jurisdiction." *Id.* at 339. Subsequently, the State filed two probation violation reports—one for each of the crimes which caused the defendant to be placed on probation—with each of the probation violation reports alleging violations of the monetary conditions of probation and the following "Other Violation":

> The defendant has the following pending charges in Orange County. 15CR 051315 No Operators License 6/8/15, 15CR 51309 Flee/Elude Arrest w/MV 6/8/15. 13CR 709525 No Operators License 6/15/15, 14CR 052225 Possess Drug Paraphernalia 6/16/15, 14CR 052224 Resisting Public Officer 6/16/15, 14CR 706236 No Motorcycle Endorsement 6/29/15, 14CR 706235 Cover Reg Sticker/Plate 6/29/15, and 14CR 706234 Reg Card Address Change Violation.

Id.

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period in which the probation officer accused the defendant of absconding. The supervising officer testified that the defendant maintained regular contact with the officer following the defendant's arrest for absconding, during which time the defendant made progress on several conditions of his probation. *Krider*, 258 N.C. App. at 112, 116–17. In vacating the trial court's orders in *Krider* revoking the defendant's probation, the Court of Appeals' reasoning—which we endorsed—was predicated on the conclusion that "the State's *evidence* was insufficient to support [the] allegation" of absconding. *Id.* at 118. However, at issue in the present case is the sufficiency of the probation violation report's allegation of the revocable offense of absconding. In addition to this essential distinction between the current case and *Krider*, defendant here admitted the absconding allegation, and the State therefore was under no burden of production of evidence where defendant waived formal reading of the violation report and a formal hearing.

¶ 11 At the probation violation hearing, the defendant Moore's probation officer testified about the probationer's alleged criminal offenses that were identified in each of the probation violation reports. *Id.* at 339–40. Additionally, two law enforcement officers offered testimony about the defendant's alleged commission of one of the identified offenses among those listed in the probation violation reports; namely, fleeing to elude arrest. *Id.* at 340. The trial court found that the defendant had violated the condition of his probation to "commit no criminal offense." Based upon the defendant's commission of this revocable violation, the trial court revoked his probation and activated both original suspended sentences. *Id.*

¶ 12 Just like defendant in the instant case, the defendant in *Moore* contended on appeal that "the probation violation reports did not give him adequate notice because they did not specifically state the condition of probation that he allegedly violated." Here, defendant claims that there was not sufficient notice of an absconding allegation which was "separate and apart from violations of other conditions of probation"; in *Moore,* the defendant contended that "because the probation violation reports did not specifically list the 'commit no criminal offense' condition as the condition violated, the reports did not provide the notice . . . require[d]." *Id.* In upholding the trial court's revocation of the defendant's probation in *Moore*, we explained that

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

Id. at 341.

¶ 13 The absconding allegation in the case at bar satisfies the notice requirement for probation violation reports established in *Moore.* Each report alleged that defendant willfully (1) failed to report to the office as directed by his supervising officer, (2) failed to return his supervising officer's telephone calls, (3) failed to provide a certifiable address, and (4) generally failed to make himself available for supervision as directed by his officer. The absconding allegation in each violation report provided further notice to defendant of the details of the charge by specifying the time period of defendant's alleged conduct by alerting him and the trial court that defendant was last seen in person on 16 April 2018,

and therefore he could not be held accountable for absconding prior to that date. Defendant's admission to all of the probation violations as alleged connotes the effectiveness of the sufficiency of the notice to defendant. More specifically, defendant's admission that he willfully failed to make himself available for supervision demonstrates that defendant absconded "by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising officer." N.C.G.S. § 15A-1343(b)(3a).

¶ 14 Defendant's argument that his failures to report to his probation officer as directed, to return his probation officer's telephone calls, and to provide a legitimate address could not independently serve as the bases for both violating the regular conditions of probation as codified in N.C.G.S. § 15A-1343(b)(3) and the revocable violation of absconding supervision is meritless. As the Court of Appeals majority reasoned in its opinion, such an interpretation as submitted by defendant

> would also operate to eliminate absconding as a ground for probation revocation. As a practical matter, those conditions laid out in Section 15A-1343(b)(3) make up the necessary elements of "avoiding supervision" or "making [one's] whereabouts unknown." A defendant cannot avoid supervision without failing to report as directed to his probation officer at reasonable times and places. Neither can a defendant make his whereabouts unknown without failing to answer reasonable inquiries or notify his probation officer of a change of address.

Crompton, 270 N.C. App. at 446. This Court is constrained from interpreting N.C.G.S. § 15A-1343(b)(3a) to reach such an absurd result. *State v. Beck*, 359 N.C. 611, 614–15 (2005) (rejecting a criminal defendant's interpretation of a statute that "could lead to absurd results.").

¶ 15 In applying the principles espoused and established in *Moore* to the present case, there was no abuse of discretion committed by the trial court in its decision to revoke defendant's probation and to activate his suspended sentences upon defendant's admission of his commission of the revocable violation of absconding probation. Sufficient notice of the absconding allegations was provided to defendant in the probation violation reports; the fact that defendant's alleged violations of "regular conditions of probation" likewise served to constitute grounds for his commission of the expressly alleged probation violation of absconding did not prevent these violations from operating in such a dual capacity.

Similarly, the State's factual basis for its absconding allegation constituted sufficient notice to defendant of the basis for the State's claim of a revocable violation of probation. Defendant's admission of the probation violations as alleged, including the absconding allegation, confirms the effectiveness of the notice which informed defendant of the individual absconding allegation. Defendant's knowledge of the individual allegation of absconding through the notice provided to him in the probation violation reports is buttressed by his awareness of the trial court's ability to activate his suspended sentences upon defendant's admission to absconding, as defendant capably addressed the trial court in an unsuccessful effort to convert his multiple terms of incarceration to concurrent sentences rather than consecutive sentences. In compliance with this Court's determinations in *Moore*, defendant here was sufficiently and properly informed by the probation violation reports of his alleged violations and his alleged conduct which constituted the alleged violations, including the alleged absconding behavior which defendant admitted.

III. Conclusion

¶ 16 The trial court did not abuse its discretion in revoking defendant's probation. The Court of Appeals opinion upholding the trial court's judgments is affirmed.

AFFIRMED.

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

Justice EARLS dissenting.

¶ 17 In 2011, the General Assembly passed the Justice Reinvestment Act (JRA) as "part of a national criminal justice reform effort" the purpose of which was to reduce corrections spending and reinvest the savings in strategies that reduce recidivism and improve public safety. *State v. Johnson*, 246 N.C. App. 139, 143 (2016) (quoting Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. Rev. 1935, 1947 (2014)). Among other changes, the JRA "made it more difficult to revoke offenders' probation and send them to prison." *Id.* The General Assembly was seeking to address a significant problem: "Before the JRA was enacted, over half of the individuals entering North Carolina prisons were doing so because of violations of conditions of probation." *State v. Moore*, 370 N.C. 338, 344 (2017) (citing James M. Markham, *The North Carolina Justice Reinvestment Act* 1 (2012)).

¶ 18 With today's decision, the Court potentially takes an unwarranted step toward rolling back a critical part of those reforms. By failing to sharply distinguish between "absconding," which permits a trial court to immediately revoke a defendant's probation, and other probation violations, which do not, the majority's opinion in this case could be seen to be changing the law to permit the revocation of probation for failing to report, failing to answer a probation officer's phone calls, and failing to notify a probation officer of a change in address. I am sure that is not the course this Court intends to take. I dissent from the application of the JRA in this case and write separately to observe that prior precedents enforcing the distinction embodied in the JRA between failing to report and willfully absconding remain good law.

¶ 19 The defendant, Justin Blake Crompton, pleaded guilty to breaking and/or entering, larceny after breaking and/or entering, three counts of obtaining property by false pretenses, breaking or entering a motor vehicle, possessing a firearm with an altered or removed serial number, and carrying a concealed gun on 24 April 2017. The trial court imposed six consecutive sentences of 6 to 17 months' imprisonment, each of which was suspended and subject to a 36-month period of supervised probation. Following probation violations in May and June of 2017, Mr. Crompton was ordered to complete a 90-day period of confinement in response to violation (CRV) pursuant to N.C.G.S. § 15A-1344(d2), followed by a 90-day period of house arrest.

¶ 20 Approximately a year into his probation, on 14 May 2018, Mr. Crompton called his probation officer. Mr. Crompton told his probation officer that he had gotten into a fight with his brother and would not be able to attend his appointment that day. The officer called back and left a message, saying "let me know what you work out for housing and report two days later." The probation officer did not hear back from Mr. Crompton and initiated an absconding investigation.[1]

¶ 21 On 23 May 2018, the probation officer filed violation reports against Mr. Crompton. The reports alleged that Mr. Crompton had absconded supervision, used a controlled substance, failed to report to his probation officer, and failed to make mandatory payments. The factual allegations

1. The majority details the extent of the investigation as support for its conclusion that the trial court did not err in determining that Mr. Crompton had, in fact, absconded within the meaning of the statute. However, in the instant case the relevant question is not the extent of the investigation conducted by the probation officer—it is what the defendant did. By focusing on the extent of the investigation, the majority suggests that we can infer that a defendant absconded in violation of N.C.G.S. § 15A-1343(b)(3a) because a probation officer conducted a thorough investigation. However, neither the existence nor the quality of an investigation is evidence of guilt.

in the reports that supported the allegation of absconding were that Mr. Crompton had "failed to report[ ] as directed by the officer," "failed to provide the officer with a cer[t]ifiable address," "failed to make himself available for supervision as directed by his officer," and that "the officer[']s last face to face contact with [Mr. Crompton] was during a home contact on 4/16/18." At a hearing on 22 October 2018, Mr. Crompton admitted the violations. The trial court found that Mr. Crompton "willfully and intentionally violated the terms and conditions of the probationary sentencing by absconding" and activated his sentences.

¶ 22 The majority holds that the trial court did not err in finding that Mr. Crompton had absconded and activating Mr. Crompton's sentences. However, doing so based on the factual allegations in the probation violation report is, at best, inferring evidence of willfulness that is not in the report itself.

¶ 23 There are two categories of probation violations relevant to the instant case. In the first category, consisting of most probation violations, "[t]he court may not revoke probation unless the defendant has previously received a total of two periods of confinement under this subsection. [CRVs]." N.C.G.S. § 15A-1344(d2) (2019). However, if a defendant commits a criminal offense or absconds from supervision while on probation, the two probation violations which are in the second category, then the court may revoke probation regardless of whether the defendant has received two CRVs. N.C.G.S. § 15A-1344(a); *see also State v. Moore*, 370 N.C. 338, 344 (2017) ("The changes to the law that the JRA effected were consistent with these concerns because subsection 15A-1344(a), as amended by the JRA, now makes only committing a new criminal offense or absconding revocation-eligible unless a defendant has already served two periods of confinement for violating other conditions of probation.").

¶ 24 The violation reports filed by Mr. Crompton's probation officer only allege, and Mr. Crompton therefore only admitted to, conduct which amounts to violations of Section 15A-1343(b)(3)—a violation in the first category, for which a court "may not revoke probation unless the defendant has previously received" two CRVs. N.C.G.S. § 15A-1344(d2); *see also* N.C.G.S. § 15A-1344(a) ("The Court may only revoke probation for a violation of a condition of probation under [N.C.]G.S. 15A-1343(b)(1) or [N.C.]G.S. 15A-1343(b)(3a), except as provided in [N.C.]G.S. 15A-1344(d2)."). The violation reports alleged that Mr. Crompton "failed to report[ ] as directed by the officer." However, this is a violation of Section 15A-1343(b)(3), which requires that a defendant "[r]eport as

directed by the court or his probation officer." The violation reports also allege that Mr. Crompton "failed to return the officer['s] phone calls," which is a violation of the requirement in Section 15A-1343(b)(3) that a defendant "answer all reasonable inquiries by the officer." The violation reports further allege that Mr. Crompton "failed to provide the officer with a [certifiable] address."[2] This is a violation only of Section 15A-1343(b)(3)'s directive that a defendant must "obtain prior approval from the officer for, and notify the officer of, any change in address."

¶ 25 While the facts alleged are violations of Subsection 15A-1343(b)(3), they are alleged as violations of Subsection 15A-1343(b)(3a), absconding. This misapprehension of the statutory provisions does not, however, somehow transform Mr. Crompton's conduct into absconding. *See*, *e.g.*, *State v. Williams*, 243 N.C. App. 198, 205 (2015) ("Although the report alleged that Defendant's actions constituted 'abscond[ing] supervision,' this wording cannot convert violations of [N.C.G.S.] §§ 15A-1343(b)(2) and (3) into a violation of [N.C.G.S.] § 15A-1343(b)(3a)."). The majority notes that Mr. Crompton relies on *Williams*, but the majority does not distinguish that case or explain why its holding is wrong. In fact, *Williams* has been followed at least seven other times on this same point. *See State v. McAbee*, No. COA18-25, 2018 WL 6613936 (N.C. Ct. App. Dec. 18, 2018) (unpublished) (holding the evidence did not support a conclusion defendant absconded where violations of regular conditions of probation did not authorize revocation based upon violations of those conditions); *State v. Melton*, 258 N.C. App. 134 (2018) (emphasizing that there was insufficient evidence that defendant willfully refused to make herself available for supervision merely because she failed to attend scheduled meetings and the probation officer was unable to reach defendant after two days of attempts); *State v. Krider*, 258 N.C. App. 111 (2018) (reasoning that the State's allegations and supporting evidence were very similar to those rejected in *Williams* because defendant's actions only amounted to a violation of N.C.G.S. § 15A-1343(b)(3) and did not rise to the distinct violation of absconding supervision); *State v. Booker*, No. COA 16-1142, 2017 WL 3863881 (N.C. Ct. App. Sept. 5, 2017) (holding that defendant's actions, without more, did not violate N.C.G.S. § 15A–1343(b)(3a) when those actions violated the explicit language of "a wholly separate" regular condition of probation which did

2. The violation reports also state that "[t]he defendant has failed to make himself available for supervision as directed by his officer, thereby absconding supervision. The officer's last face to face contact with the offender was during a home contact on 4/16/18." A review of the hearing transcript reveals no facts other than those listed above on which these statements might be based, suggesting that they are merely a summary of the facts above.

not allow probation revocation and activation of a suspended sentence); *State v. Batiste*, No. COA16-1186, 2017 WL 3863538 (N.C. Ct. App. Sept. 5, 2017) (concluding that because defendant's alleged violations of probation could not be meaningfully distinguished from those at issue in *Williams*, the evidence failed to support the trial court's conclusion that defendant willfully absconded from supervision); *State v. Brown*, No. COA 15-847, 2016 WL 4608187 (N.C. Ct. App. Sept. 6, 2016) (holding that the trial court was not authorized to revoke defendant's probation based on allegations in the violation report which were virtually identical to those in the *Williams* report; allegations tracked the language of N.C.G.S. § 15A-1343(b)(2) and (b)(3) but not statutory absconding); *State v. Johnson*, 246 N.C. App. 139 (2016) (relying on its interpretation of *Williams* and *Tindall*, the court held that defendant's actions without more could not serve as a basis to revoke defendant's probation).

¶ 26 The only possible conclusion from the majority's silence on this point is that these cases remain good law. A defendant absconds by "willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." N.C.G.S. § 15A-1343(b)(3a). Because a violation of this provision permits the revocation of probation while a violation of Subsection 1343(b)(3) does not, *see* N.C.G.S. § 15A-1344(a), logically, it must be true that absconding is something different than a violation of Subsection 1343(b)(3)—it cannot be true that the same conduct both prohibits a trial court from revoking probation and permits the trial court to revoke probation.

¶ 27 The majority errs by concluding in this case that the alleged conduct will support a finding that Mr. Crompton has absconded. Allowing actions which explicitly violate a regular condition of probation other than those found in N.C.G.S. § 15A-1343(b)(3a) to also serve, without the State showing more, as a violation of that very same provision, renders portions of the statutory language in § 15A-1343 superfluous. The General Assembly did not intend for a violation of a condition of probation other than absconding to result in revocation. The probation violation report's use of the term "absconding" to describe Mr. Crompton's noncompliance with the regular condition of probation under § 15A-1343(b)(3) has the effect of overstepping the trial court's limited revocation authority under the JRA, which does not include this condition.

¶ 28 The majority's logic is that if the allegations in this case do not suffice to establish absconding, then no allegations could achieve that end because such conduct is the only possible way to prove a defendant

absconded within the meaning of the statute. However, the distinction between failing to report and willfully avoiding supervision gives legal significance to the differences between negligence and intent; accident and willfulness. These are common distinctions throughout civil and criminal law. And in this context, other cases provide clear examples of allegations that are sufficient to show willful avoidance of supervision. *See*, *e.g.*, *State v. West*, No. COA18-242, 2019 WL 190239 (N.C. Ct. App. Jan 15, 2019) (unpublished). In *West*, the probation violation report alleged that, among other things, defendant was aware his probation officer was looking for him, demonstrably lied about whether he had transportation, and was instructed by his probation officer to remain at his house until she could arrive. Instead, defendant disregarded that instruction and the urging of his family by leaving before his probation officer got to his home. The trial court correctly concluded that "the violation reports filed by [the probation officer] expressly alleged willful conduct distinct from Defendant's mere failure to report." *Id.* at *4.

¶ 29 In contrast, there are no allegations in this case that Mr. Crompton willfully avoided supervision, only that he failed to call, he failed to provide an address, he failed to report, and he failed to make mandatory payments. Following established and well-reasoned precedent from the Court of Appeals on this point, and understanding the logic of the statutory structure, I would conclude that these allegations are not sufficient to establish willful absconding.

¶ 30 "The JRA's purpose was 'to reduce prison populations and spending on corrections and then to reinvest the savings in community-based programs.' " *Moore*, 370 N.C. at 343 (quoting James M. Markham, *The North Carolina Justice Reinvestment Act* 1 (2012)). It accomplished this objective by restricting the situations for which a defendant's probation could be revoked to those wherein a defendant has committed a new criminal offense, absconded supervision, or already served two CRVs for other probation violations. *Id.* at 344; *see also* N.C.G.S. § 15A-1344(a). The General Assembly has defined absconding to mean "willfully avoiding supervision" or "willfully making the defendant's whereabouts unknown to the supervising probation officer," N.C.G.S. § 15A-1343(b)(3a), and it separated that violation from other probation violations. N.C.G.S. § 15A-1344(a). The allegations in this case did not sufficiently allege willfulness and therefore, I dissent.

STATE OF NORTH CAROLINA
v.
MITCHELL ANDREW TUCKER

No. 385PA20

Filed 11 February 2022

Domestic Violence—violation of protective order—knowledge of order—sufficiency of evidence

In a trial for multiple charges including violating a domestic violence protective order (DVPO) while in possession of a deadly weapon, the trial court properly denied defendant's motion to dismiss where substantial evidence supported a reasonable inference that defendant had knowledge of a valid DVPO when he broke into his girlfriend's apartment and assaulted her. The Court of Appeals' determination that the evidence was too tenuous to support the knowledge element—including defendant's response "Yeah, I know you did" when the victim told him "I got a restraining order"—improperly evaluated the weight, and not the sufficiency, of the evidence.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a divided decision of the Court of Appeals, 273 N.C. App. 174 (2020), reversing in part and vacating in part judgments entered on 30 May 2018 by Judge Jesse B. Caldwell III in Superior Court, Mecklenburg County. Heard in the Supreme Court on 9 November 2021.

Joshua H. Stein, Attorney General, by Bethany A. Burgon, Assistant Attorney General, for the State-appellant.

Guy J. Loranger for defendant-appellee.

BARRINGER, Justice.

¶ 1 In this matter, we consider whether the Court of Appeals erred by reversing several of defendant's convictions for insufficient evidence. After careful review, we conclude the Court of Appeals erred. Thus, we reverse the decision of the Court of Appeals.

I. Procedural Background

¶ 2 Defendant was indicted by a grand jury for violating a civil domestic violence protective order while in possession of a deadly weapon,

felonious breaking or entering, assault with a deadly weapon, and assault on a female. The grand jury subsequently indicted defendant for the status offenses of habitual breaking and entering and habitual felon.

¶ 3 During trial, defendant twice moved to dismiss the charges relating to the violation of the civil domestic violence protective order. Defendant argued that the State had failed to prove that defendant had knowledge of the 6 September 2017 domestic violence protective order (6 September 2017 DVPO) in effect at the time of the alleged crimes. The trial court denied the motions to dismiss.

¶ 4 The jury returned verdicts finding defendant guilty of violating a civil domestic violence protective order while in possession of a deadly weapon, felonious breaking or entering in violation of a valid domestic violence protective order, assault with a deadly weapon, and assault on a female. Defendant pleaded guilty to attaining habitual felon status, and the trial court dismissed the habitual breaking and entering charge pursuant to the plea arrangement.

¶ 5 The trial court consolidated the convictions of violating a civil domestic violence protective order while in possession of a deadly weapon, felonious breaking or entering, and habitual felon and sentenced defendant to a minimum of 95 months and a maximum of 126 months of imprisonment. The trial court separately sentenced defendant to 60 days for assault with a deadly weapon and 30 days for assault on a female, both to be served consecutive to the first sentence. All time was to be served in the custody of the North Carolina Department of Adult Correction and Juvenile Justice.

¶ 6 Defendant appealed. On appeal, defendant presented two issues:

> I. Did the trial court err by denying [defendant's] motion to dismiss the charge of violating a domestic violence protective order while in possession of a deadly weapon where the State failed to present evidence that [defendant] had knowledge of the 6 September 2017 [DVPO]?
>
> II. Did the trial court err or commit plain error in violation of [defendant's] right to a unanimous verdict by instructing the jury that it could find him guilty of felony breaking and entering based on one alternative theory of guilt[ ]—[defendant] intended to commit a felony domestic violence protective order violation—which the evidence failed to support?

¶ 7 The Court of Appeals majority opinion concluded that the State "presented no evidence that defendant received notice or was otherwise aware of the [6 September 2017] DVPO." *State v. Tucker*, 273 N.C. App. 174, 178 (2020). The Court of Appeals viewed defendant's statement—"I know" in response to the victim's statement, "I got a restraining order"[1] —to be "evidence" that "is simply too tenuous to form a basis for a reasonable inference by the jury," *id.* at 179. The Court of Appeals therefore concluded that the trial court erred by "denying defendant's motions to dismiss the charge of violation of a protective order while in possession of a deadly weapon, as the State failed to present sufficient evidence of defendant's knowledge of the [6 September 2017] DVPO." *Id.* at 180.

¶ 8 Since the COA concluded that the State did not present sufficient evidence of defendant's knowledge of the 6 September 2017 DVPO, the Court of Appeals additionally determined that the trial court plainly erred in permitting the jury to convict defendant of felonious breaking or entering in violation of the 6 September 2017 DVPO. *Id.* at 180–81. The Court of Appeals thus reversed defendant's convictions for violation of a protective order while in possession of a deadly weapon and felonious breaking or entering. *Id.* at 181. As these charges formed the basis of defendant's habitual felon plea, the Court of Appeals also vacated the plea. *Id.*

¶ 9 The State petitioned for discretionary review pursuant to N.C.G.S. § 7A-31, arguing that the Court of Appeals erred by reversing the aforementioned convictions for insufficient evidence. This Court allowed discretionary review.

II. Standard of Review

¶ 10 "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. Crockett*, 368 N.C. 717, 720 (2016). The question for a court on a motion to dismiss for insufficient evidence "is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense."

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1. This Court has ordered that State's Exhibit 14 be added to the record on appeal, pursuant to Rule 9(b)(5)(b) of the North Carolina Rules of Appellate Procedure. State's Exhibit 14 is the recording played to the jury capturing the exchange between the victim, Pasquarella, and defendant. The recording is from the responding officer's body camera. The Court of Appeals used slightly different quotes in its opinion when describing the exchange, *State v. Tucker*, 273 N.C. App. 174, 177–78 (2020), but the Court of Appeals does not appear to have requested or had access to State's Exhibit 14.

State v. Powell, 299 N.C. 95, 98 (1980). "If so, the motion is properly denied." *Id.* Substantial evidence is the same as more than a scintilla of evidence. *Id.* at 99.

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. 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.

State v. Barnes, 334 N.C. 67, 75–76 (1993) (cleaned up). In making this determination, a court "is to consider all evidence actually admitted, competent or incompetent, which is favorable to the State, disregarding defendant's evidence unless favorable to the State." *State v. Baker*, 338 N.C. 526, 558–59 (1994). "When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *State v. Fritsch*, 351 N.C. 373, 379 (2000).

III. Analysis

¶ 11 To sustain a charge of violating a civil domestic violence protective order while in possession of a deadly weapon, the State must present substantial evidence that a defendant:

> while in possession of a deadly weapon on or about his or her person or within close proximity to his or her person, knowingly violate[d] a valid protective order as provided in subsection (a) of this section by failing to stay away from a place, or a person, as so directed under the terms of the order.

N.C.G.S. § 50B-4.1(g) (2021). In this matter, the valid protective order is the civil domestic violence protective order entered on 6 September 2017.

¶ 12 Defendant argued before the trial court, the Court of Appeals, and now this Court that the State failed to present substantial evidence of defendant's knowledge—namely, his knowledge of the 6 September 2017 DVPO. We disagree. Under the well-established standard of review, substantial evidence existed from which the jury could infer that defendant "knowingly violate[d]" the 6 September 2017 DVPO. *See* N.C.G.S. § 50B-4.1(g).

¶ 13 The State's evidence at trial showed the following: Deanna Pasquarella and defendant were girlfriend and boyfriend for about six- or seven-months. They were both homeless when they met in 2016.

¶ 14 In August 2017, Pasquarella applied for and obtained an ex parte domestic violence protective order (ex parte DVPO) after defendant repeatedly struck her with an umbrella as they were crossing the street at the Lynx light rail station. The ex parte DVPO was effective until 6 September 2017. An employee of the Sheriff's Office Domestic Violence Enforcement Team read the ex parte DVPO to defendant; answered defendant's questions; and served defendant with the ex parte DVPO, the civil summons, and the Notice of Hearing on Domestic Violence Protective Order. The Notice states that the hearing would be held on 6 September 2017 at 1:30 p.m. in Courtroom 4110, Mecklenburg County Courthouse, and "[a]t that hearing[,] it will be determined whether the Order will be continued."

¶ 15 At the 6 September 2017 hearing, Pasquarella obtained the 6 September 2017 DVPO. This DVPO was issued on 6 September 2017 and effective until 6 September 2018. Pasquarella attended the hearing, but defendant was not present.

¶ 16 On the morning of 7 September 2017, Pasquarella heard a knock on her apartment door. She looked through the peephole on her door and saw that defendant was there. Pasquarella called the police and locked herself in the closet. Defendant broke a window in her apartment, climbed through the window into the apartment, and opened the door to the closet where Pasquarella was hiding. Defendant grabbed her cell phone and then started hitting her, punching her, and grabbing her by the collar of her shirt. Eventually, he retrieved a knife from his backpack. Defendant then put the knife to Pasquarella's throat and said, "I'm going to jail anyway. I might as well kill you, bitch."

¶ 17 The police officer responding to Pasquarella's domestic violence call entered the apartment through the front door and observed defendant

on top of Pasquarella. The police officer instructed defendant to get off Pasquarella. Defendant then started repeating, "I'm going to jail." The police officer then handcuffed defendant as defendant stepped away from Pasquarella. Pasquarella shortly thereafter asked, "Well, why'd you do it?" and defendant responded, "Why'd you do it?" Defendant later said, "Man, I messed up." Pasquarella stated, "I got a restraining order," to which defendant responded, "Yeah, I know you did."

¶ 18 The State contends the Court of Appeals misapplied the standard of review and erroneously analyzed the evidence in the light most favorable to defendant. We agree that the Court of Appeals erred.

¶ 19 The Court of Appeals identified that a court must view the evidence in the light most favorable to the State and resolve every reasonable inference in favor of the State. *Tucker*, 273 N.C. App. at 177. Nonetheless, the Court of Appeals failed to follow this standard. It initially ignored the State's evidence of defendant's statement, "I know," by concluding that "the State presented *no* evidence that defendant received notice or was otherwise aware of the [6 September 2017] DVPO." *Id.* at 178 (emphasis added). Yet, the Court of Appeals then determined that defendant's statement, "I know," which the State argued showed defendant was aware of the second DVPO, was "too tenuous to form a basis for a reasonable inference by the jury." *Id.* at 179.

¶ 20 The State introduced, and the trial court allowed into evidence, the recording from the responding officer's body camera. The State then played for the jury the recording. That recording captured Pasquarella saying, "I got a restraining order," and defendant responding, "Yeah, I know you did." The State replayed the recording for the trial court when defendant first moved to dismiss for insufficient evidence.

¶ 21 Defendant's statement that he was aware of the existence of the DVPO was evidence that could be viewed in different lights. However, the applicable standard of review for a motion to dismiss for insufficient evidence requires a court to view the evidence in the light most favorable to the State. *Barnes*, 334 N.C. at 75. Therefore, the Court of Appeals was required to consider this evidence in the light most favorable to the State when reviewing de novo the trial court's denial of the motion to dismiss for sufficiency of the evidence. The Court of Appeals erred by not viewing the evidence in this light.

¶ 22 Defendant argued that his statement could refer to the ex parte DVPO, which expired on 6 September 2017, *Tucker*, 273 N.C. App. at 178, and the Court of Appeals adopted defendant's view, ignoring other possible meanings of defendant's declaration, *id.* at 178. By determining

that the State's evidence was "too tenuous," *id.* at 178–79, the analysis by the Court of Appeals impermissibly focused on the weight, not the sufficiency, of the evidence. However, that was the task of the jury—not the court. The proper application of the standard of review does not involve weighing the evidence, *Fritsch*, 351 N.C. at 379, considering defendant's evidence that is not favorable to the State, *Baker*, 338 N.C. at 558–59, or contemplating what evidence the State "should have presented," *State v. Miller*, 363 N.C. 96, 100–01 (2009).

¶ 23 Applying the proper standard of review, we hold that the properly considered evidence, taken in the light most favorable to the State, was sufficient to support a determination that defendant "knowingly violate[d]" the 6 September 2017 DVPO. *See* N.C.G.S. § 50B-4.1(g). Defendant's statement, "I know," in addition to his other statements, conduct, and the timing of such conduct, supports this holding. The existence of evidence that could support different inferences is not determinative of a motion to dismiss for insufficient evidence. *See Barnes*, 334 N.C. at 75. The evidence need only be sufficient to support a reasonable inference. *See id.*

IV. Conclusion

¶ 24 As we conclude that the Court of Appeals erred and that there is sufficient evidence of defendant's knowledge of the 6 September 2017 DVPO for his convictions, we reverse the decision of the Court of Appeals. Accordingly, because we reverse the Court of Appeals on the issue of defendant's violation of the domestic violence protective order, we reinstate defendant's convictions that were reversed or vacated by the Court of Appeals—violating a civil domestic violence protective order while in possession of a deadly weapon, felonious breaking or entering, and habitual felon.

REVERSED.

STATE v. PABON

[380 N.C. 241, 2022-NCSC-16]

STATE OF NORTH CAROLINA
v.
RAFAEL ALFREDO PABON

No. 467A20

Filed 11 February 2022

1. Constitutional Law—Confrontation Clause—test performed by nontestifying chemical analyst—prejudice analysis—overwhelming evidence

Even assuming, without deciding, that in defendant's trial for rape and kidnapping, the trial court violated defendant's rights under the Confrontation Clause by overruling his objections to the testimony of a forensic scientist manager from the State Crime Laboratory regarding testing performed by a nontestifying chemical analyst—that a confirmatory test detected the drug Clonazepam (a date rape drug) in the victim's urine—the State met its burden under N.C.G.S. § 15A-1443(b) of demonstrating that the alleged error was harmless beyond a reasonable doubt. In the first place, other evidence established that the crime lab's initial testing detected Clonazepam in the victim's urine; moreover, even without the evidence of Clonazepam in the victim's urine, there was overwhelming evidence of defendant's guilt before the jury, including evidence of the drug Cyclobenzaprine (another date rape drug) in the victim's hair sample, surveillance footage showing the victim in an impaired state with defendant, the testimony of a restaurant waitress to the same effect, the testimony of a sexual assault nurse examiner, the testimony of the victim and her mother regarding the victim's impaired state, and DNA evidence.

2. Evidence—prior bad acts—prior sexual assaults—prejudice analysis—overwhelming evidence

Even assuming, without deciding, that in defendant's trial for rape and kidnapping, the trial court erred by allowing two women to give Evidence Rule 404(b) testimony that defendant had previously sexually assaulted them, defendant failed to demonstrate a reasonable possibility that, absent the error, the jury would have reached a different verdict, pursuant to N.C.G.S. § 15A-1443(a). This case was not a credibility contest; rather, there was overwhelming evidence of defendant's guilt before the jury, including evidence of the drug Cyclobenzaprine (a date rape drug) in the victim's hair sample, surveillance footage showing the victim in an impaired state

with defendant, the testimony of a restaurant waitress to the same effect, the testimony of the sexual assault nurse examiner, the testimony of the victim and her mother regarding her impaired state, and DNA evidence.

Chief Justice NEWBY concurring.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 273 N.C. App. 645 (2020), finding no prejudicial error in judgments entered on 14 December 2018 by Judge Christopher W. Bragg in Superior Court, Cabarrus County. On 15 December 2020, the Supreme Court allowed defendant's petition for discretionary review of an additional issue pursuant to N.C.G.S. § 7A-31. Heard in the Supreme Court on 9 November 2021.

Joshua H. Stein, Attorney General, by Jeffrey B. Welty, Special Deputy Attorney General, for the State-appellee.

George B. Currin, for defendant-appellant.

HUDSON, Justice.

¶ 1 Here we consider whether defendant was prejudiced by the trial court's admission of certain testimony that we assume without deciding violated the Confrontation Clause of the Sixth Amendment and Rule 404(b) of the North Carolina Rules of Evidence. Because we conclude that even assuming there was error, defendant was not prejudiced, we modify and affirm the ruling of the Court of Appeals.

I. Factual and Procedural Background

A. Trial

¶ 2 On 23 January 2017, a Cabarrus County grand jury indicted defendant Rafael Pabon for the second-degree forcible rape and first-degree kidnapping of Samantha Camejo-Forero (Forero). On 6 March 2017, superseding indictments were issued for the same charges. Beginning on 4 December 2018, defendant was tried by a jury in Superior Court, Cabarrus County, with Judge Christopher W. Bragg presiding.

¶ 3 At trial, the State's evidence tended to show as follows: Defendant first met Forero in November 2015 to discuss a roof repair warranty. At the time, Forero worked "flipping houses" in the Charlotte area,

and defendant worked as a construction contractor. After their initial meeting, defendant and Forero communicated periodically via text or phone call about work projects, their professions, and their families. Defendant was married and had a daughter; Forero was unmarried and had a son. Forero testified that she developed a friendship with defendant and that they would occasionally get together for lunch or coffee.

¶ 4 On the morning of 4 January 2017, defendant and Forero planned to get breakfast together. Forero testified that she had recently purchased a house and wanted to see if defendant could help her find a painter. Shortly after 8:30am, defendant picked Forero up at her house in Matthews. Defendant had—unprompted—brought Forero a latte, which he handed to her to drink. Very quickly after starting to drink the latte, Forero began "feeling weird." Forero testified feeling as if "you were in a movie[,] like . . . it wasn't your body but you know you're there but you're not." Forero began having difficulty moving and could not think clearly.

¶ 5 After driving for around forty-five minutes from Matthews to Concord, defendant and Forero arrived at a Denny's restaurant. Forero testified that she could not read the menu, had difficulty controlling her body and mind, and could not remember if she ate. Video surveillance footage from the Denny's, which was played at trial, showed Forero slouching at the table, staring into space, struggling to put food into her mouth, nodding off, falling over, and having difficulty walking while leaving. Demekia Harold-Strod, the waitress who served defendant and Forero, testified that Forero looked as if she was on drugs, was moving very slowly, had her head down a lot, and made little or no eye contact.

¶ 6 After leaving Denny's around 10:30 a.m., defendant drove Forero about thirty minutes away to his friend Mark Stones's house. Defendant claimed that he needed to pick up Stones's mail while Stones was out of town. Stones' house was located in a secluded, wooded area without any close neighbors. When defendant and Forero entered the house, Forero sat on a couch. Forero testified that defendant then sat next to her on the couch and began making unwanted sexual advances toward her, including kissing and touching her, pulling up her sweater, and kissing her breast. Forero testified that although she did not want or consent to defendant's advances, she was mentally and physically incapacitated and unable to stop them. Forero testified that defendant then picked her up, carried her to a nearby bedroom, and laid her on a bed. Defendant removed his clothes, removed Forero's underwear, and continued to kiss and touch her. Forero testified that defendant then engaged in nonconsensual vaginal intercourse with her. Forero testified that she later

walked to a nearby bathroom, where she saw a used condom on the floor. Afterward, defendant acted "like nothing happened."

¶ 7 Around 12:45 p.m., defendant and Forero left Stones's house and began driving back to Forero's house. During the drive, Forero's mother, Aura Forero de Camejo (Camejo), who lived with Forero, called Forero's cell phone. Camejo testified that she called Forero "because [she] thought it was strange that a breakfast would have lasted so long." Forero answered, and the two had a short conversation. Camejo testified that Forero's speech was significantly slurred, that she had difficulty speaking, and that she had never sounded like that before. Forero did not remember talking to Camejo. Forero still could "not feel anything" and "didn't feel [herself]." She could not remember most of the drive home.

¶ 8 Around 1:30 p.m., defendant dropped Forero back off at her home. Camejo testified that upon arriving, Forero was very pale, was swaying as she walked, and "looked like a zombie or a dead person." Forero immediately threw herself onto Camejo's bed and went to sleep. Forero slept through an alarm at 3:10 p.m. to pick her son up from the bus stop and still could not get up when her son arrived home and began shaking her and calling for her to wake up.

¶ 9 Around 5:00 p.m., Forero woke up and still felt "weird[,]" "couldn't walk straight[,]" and "couldn't think." Forero testified that "the first thing I ha[d] on my mind when I woke up . . . was him, it was his face all over me, and I knew what happen[ed]." At 5:23 p.m., Forero texted defendant to ask him what had happened because although she knew, she "want[ed] him to tell [her]." At 5:28 p.m., defendant called Forero and told her that nothing had happened—that after having breakfast at Denny's he had picked up the mail at Stones's house while she waited in the car, and then took her back home. After talking to defendant on the phone, Forero fell back asleep for the rest of the evening.

¶ 10 The next day, 5 January 2017, Forero again called defendant to ask him what had happened. Forero told defendant that she still did not feel well from the previous day and that she couldn't remember what had happened. Defendant again claimed that nothing unusual had happened, that they had just eaten breakfast and went to Stones's house to pick up the mail.

¶ 11 Forero then began researching online about "resources for victims of rape" and "how to report a rape." She contacted the Matthews Police Department and was directed to take a rape test at a hospital. She then left for the hospital "dressed the exact same way that she was [the] night before."

¶ 12 Forero went to Novant Health Presbyterian Medical Center in Charlotte. There, Lucille Montminy, a sexual assault nurse examiner, conducted Forero's sexual assault examination. During the pre-examination interview, Forero told Montminy that defendant had raped her the day before and recounted her memory of the events surrounding the rape. At trial, Montminy testified that Forero's account of the events during this interview was fully consistent with Montminy's knowledge of drug-assisted sexual assaults, including memory loss, confusion about the events, and feeling sick. During the subsequent physical examination, Montminy noted injuries to Forero's vaginal area that were "indicative of a penetration injury" from a penis. After the physical examination, Montminy collected blood and urine samples to be used in subsequent testing.

¶ 13 The next day, 6 January 2017, Forero gave a formal statement to detectives at the Matthews Police Department, who later transferred the case to the Cabarrus County Sheriff's Office. Forero granted detectives access to her phone, including her text messages, call records, and location data. Forero also provided detectives a hair sample to be used in subsequent testing.

¶ 14 At trial, the State presented testimony from two forensic toxicologists involved in the testing and analysis of Forero's biological samples: Frank Lewallen and Dr. Ernest Lykissa. Frank Lewallen was the forensic scientist manager at the Triad Regional Laboratory of the North Carolina State Crime Laboratory, located in Greensboro. Lewallen testified that his lab analyzed samples of Forero's blood and urine collected on 5 January 2017 during the sexual assault examination. Lewallen specified that he did not personally perform any of the testing of Forero's samples; rather, the testing was performed by two other forensic toxicologists, Brian Morse and Megan Deitz, and Lewallen subsequently reviewed their analysis. Lewallen noted that at the time of trial, Morse and Deitz were attending a training in Indiana.

¶ 15 Lewallen testified that while the initial screening of Forero's blood samples screened negative for drugs or alcohol, the initial screening of her urine sample revealed "a positive indication for Amphetamine and Methylenedioxyamphetamine and for Benzodiazepines." Next, Lewallen testified that a subsequent confirmatory analysis test performed by Deitz again detected these results. Specifically, the following exchange took place regarding Lewallen's review of Deitz's confirmatory testing:

> [Prosecutor]: So was this test performed in accordance with the state crime lab operating procedures?
>
> [Defense Counsel]: Objection. Hearsay and confrontation.

THE COURT: Overruled.

[Lewallen]: Yes, ma'am, it was.

[Prosecutor]: And were you able to personally review all of the data that the test produced?

[Defense Counsel]: Objection. Hearsay and confrontation.

THE COURT: Overruled.

[Lewallen]: Yes, ma'am, I was.

[Prosecutor]: Okay. Were you able to form an opinion about that test?

[Defense Counsel]: Objection. Hearsay and confrontation.

THE COURT: Overruled.

[Lewallen]: Yes, ma'am, I was.

[Prosecutor]: What was the result of that test?

[Defense Counsel]: Objection. Hearsay and confrontation.

THE COURT: Overruled.

[Lewallen]: For the blood, no substances were found present in the blood sample. In the urine sample, 7-aminoclonazepam was detected.

[Prosecutor]: And what is 7-aminoclonazepam?

[Lewallen]: That is a biological metabolite or breakdown product of Clonazepam[,] which is a Benzodiazepine.

¶ 16 Lewallen then explained that Clonazepam is an anticonvulsant drug with potential side effects including decreased pulse, decreased blood pressure, drowsiness, dizziness, sedation, muscular incoordination, and amnesia. Lewallen testified that a person who ingests Clonazepam could be significantly impaired, including not remembering events, experiencing a dreamlike state, and exhibiting speech impairment. Lewallen further noted that Clonazepam "has been documented to be used in [drug-facilitated sexual assault] cases."

¶ 17 The State also presented testimony from Dr. Lykissa. Dr. Lykissa was the director of ExperTox Laboratories in Houston, Texas, which analyzed Forero's hair sample. After testing the hair sample, Dr. Lykissa determined that Forero's hair contained significant levels of

Cyclobenzaprine, a muscle relaxant. Lykissa testified that, as a muscle relaxant, Cyclobenzaprine "floods the brain with serotonin," the neurotransmitter that causes sleep. Lykissa noted that, in excess, Cyclobenzaprine could "numb you to death[,]" and that drugs of this type "ha[ve] been known for a lot of overdoses out there."

¶ 18 In addition to his testimony regarding the hair analysis, Dr. Lykissa confirmed that the State Crime Lab found Clonazepam in Forero's urine sample. Dr. Lykissa testified that, if ingested together, Cyclobenzaprine and Clonazepam can have a "[s]ynergistic effect" resulting in "[v]ery serious impairment of [the person's] mental and physical faculties." These effects would likely be intensified, Lykissa testified, by a combination of the drugs with caffeine. Lykissa testified that a mix of these types of drugs are common in drug-facilitated sexual assaults, and that Forero's symptoms were consistent with such a combination.

¶ 19 The State also presented testimony from Kari Norquist, a former forensic scientist at the State Crime Lab. Norquist testified that she conducted a DNA analysis of Forero's rape test samples, including a swab from Forero's breast. Norquist determined that there were substantial amounts of defendant's DNA on Forero's breast swab and that the amount of defendant's DNA present was not common from a "casual transfer."

¶ 20 After Norquist, the State sought to present testimony from two of defendant's sisters-in-law: Chanel Samonds and Elise Weyersberg. In a voir dire hearing outside the presence of the jury, Samonds and Weyersberg both testified that defendant had previously sexually assaulted them. Based on the voir dire testimony and the arguments by the State and defense counsel, the trial court determined that Samonds and Weyersberg 's testimony was admissible under Rule 404(b) of the North Carolina Rules of Evidence as tending to illustrate intent and a common scheme or plan. The court further determined that the danger of unfair prejudice from the testimony did not substantially outweigh its probative value and that the testimony was therefore also admissible under Rule 403. Finally, the trial court informed counsel that it would provide the jury with a limiting instruction regarding their testimony. With these preliminary issues resolved, the State was allowed to present Samonds's and Weyersberg 's testimony to the jury.

¶ 21 Samonds, the wife of defendant's brother-in-law, testified first. Samonds testified that defendant raped her on 8 September 2008. Specifically, Samonds testified that defendant came to her house, began making unwanted sexual advances while the two sat on the couch, and engaged in forcible, nonconsensual vaginal intercourse after Samonds

repeatedly told him to stop. On cross-examination, Samonds testified that defendant was not prosecuted for this alleged rape.

¶ 22 Weyersberg, the sister of defendant's wife, testified next. Weyersberg testified that in 2006 or 2007, when she was nineteen or twenty years old, defendant made several unwanted sexual advances towards her while she lived at her parent's house. Weyersberg testified that during the first incident defendant came up behind her, started rubbing her shoulders, and began moving toward her breasts. When Weyersberg walked away, defendant followed and began rubbing her shoulders again. During this incident, defendant "was telling [Weyersberg] about how he had an orgy in Bolivia[,]" which made her "very uncomfortable." On a different occasion, when Weyersberg was alone downstairs in her parent's house, defendant asked her if she wanted to use massage oils with him and tried putting his hand up her pant leg. Weyersberg testified that defendant finally stopped when she went upstairs to her room.

¶ 23 After both Samonds's and Weyersberg 's testimony, the trial court gave the jury the following instruction:

> [T]he testimony of [the witness] is received solely for the purpose of showing that the defendant had the intent which is a necessary element of the crime charged in this case[,] and/or that there existed in the mind of the defendant a plan, scheme, system, or design involving the crime charged in this case. If you believe this evidence, you may consider it but only for the limited purpose for which it was received. You may not consider it for any other purpose.

¶ 24 After the State completed its evidentiary showing, defendant testified in his own defense. Defendant claimed that he and Forero had a romantic relationship beyond a common friendship. Regarding the events of 4 January 2017, defendant testified that he and Forero went to breakfast at Denny's, stopped at Stones's house, and engaged in consensual sexual activity short of intercourse at Stones's house. Regarding Forero's abnormal state of mind and body that day, defendant suggested that perhaps Forero had a virus, but conceded that he "did not [know] at the time."

¶ 25 On 14 December 2018, the jury found defendant guilty of second-degree forcible rape and first-degree kidnapping. The trial court sentenced defendant to consecutive terms of 104 to 185 months' imprisonment for the rape conviction and 104 to 137 months' imprisonment for the kidnapping conviction. Based on the rape conviction, the trial court

ordered defendant to enroll in lifetime satellite-based monitoring upon his release from imprisonment. Defendant timely appealed.

B. Court of Appeals

¶ 26 On appeal, defendant alleged seven trial court errors: (1) that the trial court erred when it denied his motions to dismiss; (2) that the trial court erred when it admitted 404(b) evidence of alleged prior wrongs; (3) that the trial court erred when it admitted expert testimony in violation of the Confrontation Clause; (4) that the indictments were facially invalid; (5) that the trial court erred when it failed to properly instruct the jury; (6) that the trial court erred when it allowed the jury to consider evidence of aggravating factors; and (7) that the trial court erred when it ordered defendant to enroll in satellite-based monitoring.

¶ 27 On 6 October 2020, the Court of Appeals filed an opinion rejecting each of defendant's arguments and "find[ing] that [d]efendant received a fair trial free of prejudicial error." *State v. Pabon*, 273 N.C. App. 645, 671 (2020). Specifically, two of the seven issues raised by defendant are pertinent to this appeal.

¶ 28 First, the Court of Appeals rejected defendant's argument that the trial court erred in admitting the testimony of Lewallen in violation of the Confrontation Clause of the Sixth Amendment. *Id.* at 661. Defendant argued that "Lewallen failed to provide an independent opinion regarding the testing and analysis of [Forero]'s blood and urine samples because both tests were performed by two nontestifying forensic toxicologists." *Id.* Defendant further asserted that because the nontestifying experts were not unavailable to testify and he did not have a prior opportunity to cross-examine them, the admission of Lewallen's testimony regarding the test results violated defendant's rights under the Confrontation Clause. *Id.*

¶ 29 The Court of Appeals disagreed. Specifically, the court held that Lewallen "offered his own opinion, without reference to or reliance upon the opinions or conclusions of the nontestifying technicians." *Id.* at 666. "Thus," the court held, "Lewallen's opinion was based on his own analysis and was not merely surrogate testimony for an otherwise inadmissible lab report or signed affidavit certifying the nontestifying technician's results." *Id.* Further, because Lewallen's independent expert opinion was the substantive evidence that defendant had the right to, and did in fact, confront through cross-examination, the court held that "[d]efendant's Confrontation Clause rights were not violated, [and] the trial court did not err in admitting Lewallen's expert testimony." *Id.* at 667.

¶ 30 Second, the Court of Appeals rejected defendant's argument regarding Rule 404(b) evidence. Defendant argued that the trial court erred in admitting Samonds's and Weyersberg's testimony regarding defendant's alleged prior sexual assaults under Rule 404(b). Noting that "[t]his Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant for purposes [outlined] in Rule 404(b)[,]" the Court of Appeals agreed with the trial court that the Samonds and Weyersberg testimony contained sufficient similarities with the present allegations to be admissible as evidence of a common plan or scheme under that rule. *Id.* at 659 (second alteration in original) (quoting *State v. Bagley*, 321 N.C. 201, 207 (1987)). Specifically, the Court of Appeals highlighted three similarities between all three allegations: (1) "each woman testified that [d]efendant gained their trust prior to each incident"; (2) "[d]efendant utilized that position of trust to sexually assault each woman"; and (3) "[d]efendant tried to persuade each victim that he had not sexually assaulted them." *Pabon*, 273 N.C. App. at 659–60.

¶ 31 Regarding the temporal proximity element of Rule 404(b) analysis, the Court of Appeals held that "[b]ecause these acts were performed continuously over a period of years, the acts were not too remote to be considered for the purposes of 404(b)." *Id.* at 660. Finally, the Court of Appeals held that the trial court did not abuse its discretion in ruling that the probative value of the Samonds and Weyersberg testimony was not substantially outweighed by the danger of unfair prejudice under Rule 403. *Id.* at 661. Accordingly, the Court of Appeals held that the trial court did not err in admitting the State's Rule 404(b) evidence. *Id.*

¶ 32 Judge Murphy dissented in part from the Court of Appeals' majority opinion. While Judge Murphy concurred with the majority's analysis regarding the motion to dismiss, the Rule 404(b) evidence, and the indictment, he disagreed with the majority's Confrontation Clause analysis. *Id.* at 675 (Murphy, J., concurring in part and dissenting in part). Specifically, the dissent would have found that Lewallen's testimony regarding the forensic reports did not provide an independent expert opinion but rather "simply parroted the conclusions of a test performed by another person not subject to the confrontation required by the United States Constitution." *Id.* at 674–75. Accordingly, the dissent would have held that "Lewallen's testimony was inadmissible and [d]efendant is entitled to a new trial free from this prejudicial violation of his constitutional rights." *Id.* at 675.

C. Present Appeal

¶ 33 On 10 November 2020, defendant simultaneously gave notice of appeal based on the Confrontation Clause issue raised in Judge Murphy's

dissent and petitioned this Court for discretionary review on the other issues he raised before the Court of Appeals. On 15 December 2020, this Court allowed defendant's petition for discretionary review as to one additional issue: the admission of the Samonds and Weyersberg testimony under Rule 404(b).

¶ 34 Before this Court, defendant asserts that the trial court committed two prejudicial errors: (1) overruling his Confrontation Clause objections to the testimony of Lewallen regarding the tests performed by a nontestifying chemical analyst; and (2) overruling his objections to the Rule 404(b) testimony of Samonds and Weyersberg.

¶ 35 First, defendant argues that the trial court erred in overruling his Confrontation Clause objections to the testimony of Lewallen, the State's expert from the State Crime Lab, regarding the forensic tests performed by a nontestifying chemical analyst. In alignment with the Court of Appeals dissent, defendant argues that Lewallen did not provide an independent opinion as to the presence of the Clonazepam in Forero's urine sample but merely parroted the results of the test of a nontestifying analyst. Further, defendant alleges that this error was prejudicial because Lewallen's testimony regarding the presence of Clonazepam in Forero's urine sample was "crucial to the State's case." Specifically, defendant contends that because the State emphasized the "synergistic effect of mixing the two drugs and how this mixture would cause very serious impairment of a person's mental and physical faculties[,] . . . the State would have been hard pressed to prove its case" in the absence of Lewallen's testimony.

¶ 36 Second, defendant argues that the trial court erred in overruling his objections to the Rule 404(b) testimony of Samonds and Weyersberg. Defendant asserts that the Samonds and Weyersberg testimony fall short of both requirements of Rule 404(b): sufficient similarity and temporal proximity. Regarding the first requirement, defendant argues that any similarities between the alleged prior bad acts and the crimes for which he was charged were too generic in light of the stark dissimilarities between the alleged acts to be considered admissible. Regarding the second requirement, defendant argues that the elapsed time between the alleged prior bad acts and the current charges—eight and one-half years and ten years, respectively—renders them too attenuated to reasonably suggest intent or any common scheme or plan. Finally, defendant asserts that the trial court's erroneous admission of the Samonds and Weyersberg testimony was prejudicial because "[t]here was not overwhelming evidence of [d]efendant's guilt and [d]efendant testified at trial and denied [Forero]'s allegations." Rather, defendant contends that

the case boiled down to a "credibility contest" between him and Forero, and that the improper admission of the Samonds and Weyersberg testimony of alleged prior sexual assaults therefore prejudicially bolstered Forero's credibility with the jury while undermining his own.

¶ 37 In response, the State contends that neither the Confrontation Clause issue nor the Rule 404(b) issue amounted to trial court error, and even assuming they did, neither error would be prejudicial. Regarding the first issue, the State argues that Lewallen's testimony offered his independent expert opinion on the forensic analysis, therefore complying with the requirements of the Confrontation Clause. Regarding the second issue, the State argues that the Samonds and Weyersberg testimony, for the reasons expressed by the Court of Appeals, was both sufficiently similar and temporally proximate to the present charges to be properly admitted under Rule 404(b). In any event, the State argues, even assuming that these issues constituted errors, neither would be prejudicial. The State contends that even without the testimony in question, "[i]n light of the supporting testimony and physical evidence, no reasonable juror would have been left with the impression that . . . [d]efendant's version of events was truthful."

II. Analysis

¶ 38 After careful consideration, we assume, without deciding, that the trial court erred on both the Confrontation Clause issue and the Rule 404(b) issue, but nevertheless determine that neither assumed error was prejudicial.

A. Confrontation Clause: Independent Expert Opinion Testimony

¶ 39 **[1]** First, we consider defendant's Confrontation Clause claim. This Court reviews alleged constitutional errors in the admission of testimony in violation of the Confrontation Clause de novo. *State v. Ortiz-Zape*, 367 N.C. 1, 10 (2013).

¶ 40 The Sixth Amendment to the United States Constitution establishes that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend VI. This "bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (citing *Pointer v. Texas*, 380 U.S. 400, 406 (1965)). Although the basic theory of the right to confront one's accusers "dates back to Roman times[,]" our country's "immediate source of the concept . . . was the [English] common law. *Crawford*, 541 U.S. at 43.

¶ 41 Modern times and technologies introduced a new question to this old right: who does the accused have the right to confront when the "accuser" is a not a person, but a forensic report? In 2011, the Supreme Court of the United States answered this question in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). There, the principal evidence presented against defendant Donald Bullcoming in his trial for driving while intoxicated was "a forensic laboratory report certifying that [his] blood-alcohol concentration was well above the [legal] threshold." *Id.* at 651. "At trial, the prosecution did not call as a witness the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." *Id.* The Court held that this did not satisfy Bullcoming's rights under the Confrontation Clause because the testifying analyst provided mere "surrogate testimony" without expressing any " 'independent opinion' concerning Bullcoming's BAC."

¶ 42 Since *Bullcoming*, this Court has sought to apply this constitutional protection with fidelity. In *Ortiz-Zape*, for instance, because a forensic scientist "testified as to her opinion that a substance was cocaine based upon her independent analysis of testing performed by another analyst in her laboratory[,]" this Court held that "the testifying expert was the witness whom defendant had the right to confront." 367 N.C. 1, at 2, 12–13 (2013). Accordingly, we reversed the Court of Appeals' holding that the expert's testimony violated the Confrontation Clause. *Id.* at 14.

¶ 43 In *State v. Craven*, 367 N.C. 51, (2013), this Court reached the opposite conclusion on the same question where a forensic chemist who had not personally performed the testing of the alleged cocaine "testified about the identity, composition, and weight of the substances recovered" from the defendant. *Id.* at 54. However, based on a review of the testimony, this Court determined that the testifying witness "did not offer—or even purport to offer—her own independent analysis or opinion on the . . . samples. Instead, [she] merely parroted [the nontestifying analysts'] conclusions from their lab reports." *Id.* at 56–57. Accordingly, this Court held that the testifying expert's "surrogate testimony violated defendant's Sixth Amendment right to confrontation." *Id.* at 57.

¶ 44 When a Confrontation Clause violation is established, the reviewing court must then "determine if the admission of [the offending] evidence . . . was such prejudicial error as to require a new trial." *State v. Watson*, 281 N.C. 221, 232 (1972). "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C.G.S. § 15A-1443(b). "The burden is upon the State to demonstrate, beyond a

reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b). If it does so, the jury's verdict is not disturbed on appeal, in spite of a Confrontation Clause violation. *See Watson*, 281 N.C. at 233 (determining that a Confrontation Clause error was harmless beyond a reasonable doubt).

¶ 45 Here, we assume without deciding that the trial court's admission of Lewallen's testimony regarding the results of Deitz's confirmatory test of Forero's urine sample violated defendant's right to confrontation under the Sixth Amendment. However, because we conclude that this assumed error was harmless beyond a reasonable doubt, we modify and affirm the holding Court of Appeals finding no prejudicial error on this issue.

¶ 46 First, any improper testimony from Lewallen was not the only evidence of Clonazepam in Forero's urine sample. Rather, Lewallen testified about two distinct findings of Clonazepam in Forero's sample: first describing the "initial" or "preliminary" testing, and then describing the "confirmatory" testing. As to Deitz's confirmatory testing, Lewallen testified as follows:

> [Prosecutor]: What was the result of that test?
>
> [Defense Counsel]: Objection. Hearsay and confrontation.
>
> THE COURT: Overruled.
>
> [Lewallen]: For the blood, no substances were found present in the blood sample. In the urine sample, 7-aminoclonazepam was detected.
>
> [Prosecutor]: And what is 7-aminoclonazepam?
>
> [Lewallen]: That is a biological metabolite or breakdown product of Clonazepam[,] which is a Benzodiazepine.

This quoted testimony formed the basis of defendant's Confrontation Clause argument on appeal and is the testimony which we assume without deciding violated the Confrontation Clause.

¶ 47 As to the "initial" or "preliminary" testing, though, Lewallen testified as follows:

> [Prosecutor]: Okay. What opinion did you form about that initial screening test?
>
> [Defense Counsel]: Objection. Hearsay and confrontation.
>
> THE COURT: Overruled.

> [Lewallen]: For the blood it was negative for all 12 assays. For the urine we had a positive indication for Amphetamine and Methylenedioxyamphetamine and for Benzodiazepines.

Although defendant objected to this testimony at trial, this was not the testimony upon which defendant based his Confrontation Clause argument on appeal and is not part of any assumed error.

¶ 48 Accordingly, based on Lewallen's testimony regarding the initial testing, even in the absence of his subsequent testimony regarding the confirmatory testing, there was still competent evidence before the jury of the presence of Clonazepam in Forero's urine sample. Therefore, Dr. Lykissa's testimony regarding the "synergistic effect" of the combination of both Clonazepam and Cyclobenzaprine in drug-facilitated sexual assaults would still have been grounded in the evidence.

¶ 49 Next, the State has demonstrated that even in the absence of *any* of Lewallen's testimony regarding the presence of Clonazepam in Forero's urine sample, the jury would still have had ample evidence of Cyclobenzaprine in Forero's hair sample through Dr. Lykissa's testimony. Although defendant correctly notes that the State emphasized the synergistic effect of the combination of the two drugs, Dr. Lykissa also testified about the potential impact of Cyclobenzaprine alone. Specifically, Dr. Lykissa noted that Cyclobenzaprine is a "muscle relaxant," "it floods the brain with serotonin[,]" "it can numb you to death," it "is notorious," its effects would be heightened by the ingestion of caffeine, and "[i]t's in the same family of Amitriptyline, [which] has been known for a lot of overdoses out there."

¶ 50 This evidence, even in the absence of Lewallen's testimony regarding Clonazepam and the synergistic effects, still supports the State's evidence of Forero's symptoms on 4 January 2017—namely dizziness, rapid decline of motor skills, confusion, drowsiness, memory loss, and a generally dreamlike state. Notably, these symptoms were not established by Lewallen's testimony, or even by Lykissa's, but by the testimony of those who observed them firsthand: Forero's mother, the sexual assault nurse examiner, the Denny's waitress, the Denny's surveillance video, and, of course, Forero herself. The ample evidence of the presence of Cyclobenzaprine in Forero's hair sample, the known effects of Cyclobenzaprine, and the evidence of Forero's symptoms strongly supported the State's case of drug-facilitated sexual assault. Accordingly, the State has demonstrated that even without Lewallen's testimony, any reasonable jury would likely have reached the same conclusion based on the other evidence.

¶ 51 Moreover, even setting aside the assumedly improper Lewallen testimony would neither disturb nor undermine the other overwhelming evidence of defendant's guilt. The jury was presented with extensive testimony from eighteen witnesses supporting the State's theory of defendant's actions, filling nearly one thousand transcript pages. The State also submitted 146 exhibits for the jury's consideration.

¶ 52 Of course, sheer volume is not dispositive; the State has also demonstrated that Forero's testimony was extensive, detailed, and consistent, revealing numerous indications of drug-facilitated sexual assault. Further, her testimony was corroborated by that of Forero's mother and the Denny's waitress, who directly witnessed her appearance, behavior, speech, and demeanor on 4 January 2017. Next, a procession of highly trained and experienced medical, forensic, and law enforcement professionals further supported Forero's claims, including Montminy (the sexual assault nurse examiner), Norquist (the rape kit examiner), Dr. Lykissa, Detective Danielle Helms (Matthews Police Department), Lieutenant Kevin Pfister (Cabarrus County Sheriff's Office), and Detective Sergeant April Samples (Cabarrus County Sheriff's Office), among several others. Finally, the State's exhibits were also potent and corroborative, particularly the Denny's surveillance video, Dr. Lykissa's report, the rape kit evidence, and the DNA evidence. In considering this overwhelming evidence against defendant, we conclude that the State met its burden of demonstrating that, even assuming that the admission of the Lewallen testimony was erroneous, "the minds of an average jury would not have found the [remaining] evidence less persuasive had the [erroneous] evidence . . . been excluded." *Watson*, 281 N.C. at 233. As such, any Confrontation Clause error was harmless beyond a reasonable doubt.

¶ 53 Defendant's attempts to undermine the State's demonstration of no prejudice are unavailing. Specifically, defendant asserts that "[t]he prejudice . . . is manifest as th[e] improperly admitted evidence was crucial to the State's case." Defendant contends that because the State emphasized the "synergistic effects" of combining Clonazepam and Cyclobenzaprine, "it is obvious that without Lewallen's inadmissible testimony . . . , the State would have been hard pressed to prove its case."

¶ 54 We cannot agree. As noted above: (1) other portions of Lewallen's testimony also established his opinion that Clonazepam was detected in Forero's urine sample; (2) Lykissa's testimony independently established the presence of another drug common in drug-facilitated sexual assaults in Forero's hair sample; and (3) the State presented other overwhelming testimony and evidence tending to prove defendant's guilt.

¶ 55 Defendant presented eight witnesses and thirteen exhibits to support his claim that he and Forero had a romantic relationship and had engaged in consensual sexual activity short of intercourse. In response to the overwhelming evidence of Forero's incapacitation, defendant suggested that Forero may have had a virus, but then conceded that he "did not [know] at the time." Defendant's evidence did not address Montminy's finding of vaginal injuries consistent with penetration from a penis, did not undermine Dr. Lykissa's forensic report, and did not provide an alternative explanation as to why Forero might have had Cyclobenzaprine in her system when she was not taking any medications at the time.

¶ 56 To be clear, defendant, like all criminal defendants, enjoyed a presumption of innocence until proven guilty by the State beyond a reasonable doubt, and therefore was not required to put forth any testimony or evidence whatsoever. Likewise, the burden of demonstrating a lack of prejudice beyond a reasonable doubt upon a constitutional error lies with the State, and defendant was not required to affirmatively demonstrate prejudice on this issue. But the State's voluminous and comprehensive evidence of defendant's guilt amply satisfies its burden.

¶ 57 As shown through its verdict, this evidence persuaded the jury beyond a reasonable doubt that defendant committed the second-degree forcible rape and first-degree kidnapping of Forero on 4 January 2017. Although the assumedly erroneous Lewallen testimony confirmed the presence of Clonazepam in Forero's urine sample and emphasized the potential "synergistic effects" of the combination of Clonazepam and Cyclobenzaprine, its admission does not require a new trial, in light of the overwhelming nature of the remaining evidence. Accordingly, we modify and affirm the holding of the Court of Appeals finding no prejudicial error on this issue.

B. Rule 404(b): Evidence of Prior Bad Acts

¶ 58 **[2]** Second, we consider defendant's Rule 404(b) claim.

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b).

State v. Beckelheimer, 366 N.C. 127, 130 (2012).

¶ 59 Rule 404(b) of the North Carolina Rules of Evidence establishes that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (2021).

¶ 60 Generally, Rule 404 acts as a gatekeeper against "character evidence": evidence of a defendant's character—as illustrated through either direct testimony or evidence of prior bad acts—admitted "for the purpose of proving that he acted in conformity therewith on a particular occasion." N.C.G.S. § 8C-1, Rule 404(a). It has long been observed that character evidence "is objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge." John Henry Wigmore, *Evidence* § 58.2 (Peter Tillers ed. 1983). Accordingly, Rule 404(b) evidence "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. Al-Bayyinah*, 356 N.C. 150, 154 (2002).

¶ 61 This important protective role notwithstanding, this Court has repeatedly held that "Rule 404(b) state[s] a clear general rule of *inclusion*." *State v. Coffey*, 326 N.C. 268, 278–79 (1990); s*ee Al-Bayyinah*, 356 N.C. at 153–54 (quoting *Coffey* for this same proposition). That is, relevant evidence of past crimes, wrongs, or acts by a defendant are generally admissible for any one or more of the purposes enumerated in Rule 404(b)'s non-exhaustive list, "subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Coffey*, 326 N.C. at 279 (emphasis in original); *see Beckelheimer*, 366 N.C. at 130 (noting that "[Rule 404(b)'s] list 'is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime' " (quoting *State v. White*, 340 N.C. 264, 284 (1995))).

¶ 62 Rule 404(b) has particular salience in trials for sexual offenses. On the one hand, "this Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant." *State v. Bagley*, 321 N.C. 201, 207 (1987) (quoting *State v. Cotton*, 318 N.C. 663, 666 (1987)). On the other hand, though, the high potency of prior sex offense testimony brings a correspondingly high risk of improper sway upon the jury's determination. *See State v. Gray*, 210 N.C. App. 493, 521 (2011) (noting that "[t]he improper admission of a prior sexual assault by a defendant tends to bolster an alleged victim's testimony that an assault occurred *and* that the defendant was the perpetrator, since such evidence informs the jury that the defendant has committed sexual assault in the past."); *State v. McClain*, 240 N.C. 171, 174 (1954) (noting that "[p]roof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the [defendant is] guilty, and thus effectually to strip him of the presumption of innocence.").

¶ 63 In order to navigate this terrain, this Court has looked toward the useful guidance of twin north stars: similarity and temporal proximity. *See Al-Bayyinah*, 356 N.C. at 154 ("To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity."). Regarding the first, prior acts are considered sufficiently similar under Rule 404(b) " 'if there are some unusual facts present in both crimes' that would indicate that the same person committed them." *Beckelheimer*, 366 N.C. at 131 (quoting S*tate v. Stager*, 329 N.C. 278, 304 (1991)). While these similarities must be specific enough to distinguish the acts from any generalized commission of the crime, "[w]e do not require that [they] 'rise to the level of the unique and bizarre.' " *Beckelheimer*, 366 N.C. at 131 (quoting *State v. Green*, 321 N.C. 594, 604, *cert. denied*, 488 U.S. 900 (1988)). Regarding the second, while a greater lapse in time between the prior and present acts generally indicate a weaker case for admissibility under Rule 404(b), *see, e.g.*, *Jones*, 322 N.C. at 586, 591 (holding that admission of Rule 404(b) testimony of a prior sexual assault that took place "some seven years before in much the same manner as the [allegations] in the case *sub judice*" was "prejudicial to the defendant's fundamental right to a fair trial on the charges for which he was indicted because the prior acts were too remote in time"), "remoteness for purposes of 404(b) must be considered in light of the specific facts of each case[,] . . . [and t]he purpose underlying the evidence also affects the analysis." *Beckelheimer*, 366 N.C. at 132 (cleaned up).

¶ 64 Finally, if an appellate court reviewing a trial court's Rule 404(b) ruling determines in accordance with these guiding principles that the admission of the Rule 404(b) testimony was erroneous, it must then determine whether that error was prejudicial. *See Scott*, 331 N.C. at 46 (engaging in prejudice analysis after finding Rule 404(b) error). In accordance with N.C.G.S. § 15A-1443(a), "[t]he test for prejudicial error is whether there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *Id.* "The burden of showing such prejudice . . . is upon the defendant." N.C.G.S. § 15A-1443(a). Notably, while for the reasons noted above there is a "high *potential* for prejudice inherent in the introduction of evidence of prior [sex] offenses," such evidence is not prejudicial per se. *Scott*, 331 N.C. at 46 (emphasis added).

¶ 65 Here, as in the Confrontation Clause analysis above, we assume without deciding that the Samonds and Weyersberg testimony was erroneously admitted under Rule 404(b). However, because we conclude that this assumed error was not prejudicial, we modify and affirm the ruling Court of Appeals finding no prejudicial error on this issue.

¶ 66 In determining whether a Rule 404(b) error creates "a reasonable possibility that, had the error not been committed, a different result would have been reached at trial[,]" the burden of demonstrating prejudice lies with defendant. *Id.*; *see* N.C.G.S. § 15A-1443(a). Here, after careful consideration, we conclude that defendant has failed to demonstrate a reasonable possibility that the jury would have reached a different verdict if the Samonds and Weyersberg testimony had been excluded at trial.

¶ 67 In his arguments regarding Rule 404(b) prejudice, defendant asserted that "[t]here was not overwhelming evidence of [d]efendant's guilt." "Rather," defendant claimed, "this case boiled down to" a credibility contest: "the credibility of the prosecuting witness . . . versus the credibility of [d]efendant." "Given th[is] lack of overwhelming evidence and the central importance of the credibility of [d]efendant versus the credibility of [Forero]," defendant argued, "the erroneous admission of the prior bad acts evidence . . . was highly prejudicial."

¶ 68 We cannot agree. In a simple "credibility contest," there is little or no physical or corroborating evidence of the incident in question, leaving the competing stories of the two internal participants and whom to believe as the only real question for the factfinder. In such an instance, any evidence of prior acts that tends to bolster or undermine the credibility of one of the primary participants may be particularly influential

in the ultimate outcome. *See*, *e.g.*, *Scott*, 331 N.C. at 46 (determining that the erroneous admission of testimony regarding a prior sexual assault allegation was prejudicial when the "[b]oth the State's evidence and the defendant's were corroborated to some extent by the testimony of other witnesses").

¶ 69 That is plainly not the case here. Although defendant and Forero did present two contrasting stories about the events of 4 January 2017, Forero's version of the events was then corroborated by extensive supporting external testimony and evidence. As discussed in more detail above, this corroborating evidence included: Camejo and Harold-Strod's testimony regarding Forero's apparent incapacitation; surveillance video footage demonstrating this incapacitation; Montminy's testimony regarding Forero's description of the alleged rape during the sexual assault examination; Montminy's testimony regarding Forero's vaginal injury consistent with penetration by a penis; subsequent DNA testing of the rape kit; Detective Helms's testimony regarding her interview with Forero and subsequent investigation; Lieutenant Pfister's testimony regarding his review of the evidence and investigation of the scene of the alleged crime; Detective Samples' testimony regarding the investigation process; and Dr. Lykissa's testimony regarding the presence of a drug common in drug-facilitated sexual assaults in Forero's hair sample, among other testimony and evidence. We see this case not as simply a "credibility contest," but as one with overwhelming evidence of defendant's guilt.

¶ 70 It is within the context of this overwhelming evidence that we must consider the relative impact of the Samonds and Weyersberg testimony alleging past sexual assault. By the time Samonds and Weyersberg shared their allegations with the jury, Dr. Lykissa, Montminy, Camejo, Norquist, Detective Helms, Harold-Strod, and Lieutenant Pfister, among others, had already corroborated Forero's testimony, with additional supporting testimony to come later. Under these circumstances, we cannot conclude that a reasonable possibility exists that the jury would have reached a different verdict but for the assumedly erroneous admission of the Samonds and Weyersberg testimony. Accordingly, defendant has failed to meet his burden of showing prejudice, and we modify and affirm the holding of the Court of Appeals finding no prejudicial error on this issue.

III. Conclusion

¶ 71 Assuming without deciding that the trial court's admission of the Lewallen testimony violated defendant's rights under the Confrontation

Clause and that the Samonds and Weyersberg testimony violated Rule 404(b) of North Carolina Rules of Evidence, we nevertheless conclude that these assumed errors were not prejudicial. Regarding the Lewallen testimony, the State has met its burden under N.C.G.S. § 15A-1443(b) of demonstrating that the assumed Confrontation Clause error was harmless beyond a reasonable doubt. As for the Samonds and Weyersberg testimony, defendant has failed to meet his burden under N.C.G.S. § 15A-1443(a) of demonstrating that there is a reasonable possibility that had the assumed Rule 404(b) error not been committed, a different result would have been reached at trial. Accordingly, we modify and affirm the holding of the Court of Appeals finding no prejudicial error on these issues.

MODIFIED AND AFFIRMED.

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

Chief Justice NEWBY concurring.

¶ 72 I concur in the portion of the majority's opinion holding that defendant was not prejudiced by the alleged errors in this case. I do not, however, join the portions of the majority opinion that discuss defendant's arguments regarding the trial court's alleged error under the Confrontation Clause of the Sixth Amendment and N.C.G.S. § 8C–1, Rule 404(b). We have assumed without deciding that the trial court erred. Thus, discussion of the merits of these arguments is unnecessary. *Tr. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985). Accordingly, I concur.

N.C. NAACP v. MOORE

[380 N.C. 263 (2022)]

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,	)	
PLAINTIFF-APPELLANT,	)	WAKE COUNTY
v.	)	
TIM MOORE, IN HIS OFFICIAL CAPACITY, PHIL BERGER, IN HIS OFFICIAL CAPACITY,	)	
DEFENDANT-APPELLEES	)	

No. 261A18-3

ORDER

Pursuant to an administrative order entered by this Court on December 23, 2021, and having considered precedent established by this Court, the North Carolina Code of Judicial Conduct, and the arguments of the parties, plaintiffs' motion to disqualify the undersigned is denied.

This Court has repeatedly held that "[a] suit against a public official in his official capacity is a suit against the State." *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013). *See also Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 725 (1998) ("official-capacity suits are merely another way of pleading an action against the governmental entity."); *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997) (official capacity "is a legal term of art with a narrow meaning—the suit is in effect one against the entity.") (Citation omitted); *Harwood v. Johnson*, 326 N.C. 231, 238, 388 S.E.2d 439, 443 (1990) ("A suit against defendants in their official capacities, as public officials or a public employee of the Parole Commission acting pursuant to its direction, is a suit against the State.); and *Est. of Long by & through Long v. Fowler*, 378 N.C. 138, 861 S.E.2d 686 (2021) ("a suit against a State employee in that employee's official capacity is a suit against the State[.]"). Stated a different way by the Supreme Court of the United States, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

With this straightforward precedent, a reasonable person would understand that a suit against a government official in his or her official capacity is not a suit against the individual. *See Matter of Mason*, 916 F.2d 384, 386 (7th Cir. 1990) ("Judges must imagine how a

reasonable, well-informed observer of the judicial system would react." The question is "how things appear to the well-informed, thoughtful observer rather than to a hypersensitive or unduly suspicious person.") *See also United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995) ("we ask how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person.").

There can be no question that this is a suit against the State. Plaintiff's motion seeks to disqualify the undersigned from performing constitutionally prescribed duties because my father is named in this action in his official capacity. Indeed, my father's name appears in the caption only as a matter of procedure.

> It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch[.]

N.C.G.S. § 1-72.2. Moreover, Rule 19(d) of the Rules of Civil Procedure requires that the President Pro Tempore of the Senate "must be joined as [a] defendant[] in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law." N.C.G.S. § 1A-1, 19 (2019).

More than 2.7 million North Carolinians, knowing or at least having information available to them concerning my father's service in the Legislature, elected me to consider and resolve significant constitutional questions like the one at issue here. The ultimate question, and indeed the touchstone of all recusal issues, is "whether the justice can be fair and impartial?" Because this case is a suit against the State, and because I can and will be fair and impartial carrying out my duties in this case, plaintiff's motion is denied.

This the 7th day of January, 2022.

s/Berger, J.
Philip E. Berger, Jr.,
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of January, 2022.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE	)	
v.	)	WAKE COUNTY
TIM MOORE, IN HIS OFFICIAL CAPACITY, PHILIP BERGER, IN HIS OFFICIAL CAPACITY	)	

No. 261A18-3

ORDER

Pursuant to this Court's administrative order of 23 December 2021, after months of thorough and thoughtful deliberation, I have concluded that I can and will be fair and impartial in deciding *North Carolina State Conference of the National Association for the Advancement of Colored People v. Moore, et al.* (No. 261A18-3). Accordingly, the 23 July 2021 Motion to Disqualify filed therein is denied insofar as it requested my disqualification.

In reaching this conclusion, I thoughtfully considered: (1) the arguments presented by the appellate and amicus parties; (2) my ethical responsibilities as an Associate Justice of the Supreme Court of North Carolina under our Code of Judicial Conduct; (3) my solemn oath to serve on our state's Court of last resort—rather than recusing myself or being disqualified to avoid controversy; and (4) my resulting judicial duty to all North Carolinians—including the 2,746,362 who voted for me and the 2,616,265 who did not—to prevent any ideological or political affiliation from tainting my legal analysis. Finally, I am following a strong and firmly rooted tradition in reaching the conclusion not to recuse myself due to my prior legislative service. As the 101st Justice on our Court since its founding in 1819, I am following the precedent established by the 51 of my 100 predecessor Justices who first served in the legislature and later went on to fairly and impartially judge various statutes that were passed or amended during their legislative tenure before they joined the North Carolina Supreme Court. These 51 include 18 former Chief Justices of our Court—including Joseph Branch, James G. Exum, Jr. and Henry E. Frye; five former Speakers of our House of Representatives; and over two dozen associate justices—including eventual U.S. Senator Samuel. J. Ervin, Jr., former Governor Dan K. Moore, and Willis P. Whichard.

For the reasons summarized above, the relevant portion of the Motion to Disqualify is denied. This the 7th day of January 2022.

s/Barringer, J.
Tamara Patterson Barringer

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of January, 2022.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

COMMUNITY SUCCESS INITIATIVE, ET AL.,)
)
PLAINTIFFS,)
)
v.)
)
TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, ET AL.,)
)
DEFENDANTS.)

TENTH DISTRICT

No. 331P21

ORDER

Pursuant to an administrative order entered by this Court on December 23, 2021, and having reviewed and considered precedent established by this Court, the North Carolina Code of Judicial Conduct, and the arguments of the parties, plaintiffs' motion to disqualify the undersigned is denied.

This the 31st day of January, 2022.

s/Berger, J.
Philip E. Berger, Jr.,
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31 day of January 2022.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

HARPER v. HALL

[380 N.C. 269 (2022)]

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., ET. AL.	)	
COMMON CAUSE	)	
v.	)	Wake County
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING, ET. AL	)	
REBECCA HARPER, ET AL.	)	
v.	)	
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING, ET. AL.	)	

No. 413PA21

EXPEDITED BRIEFING ORDER

On 11 January 2022, the trial court entered an order in favor of defendants that resolved all claims raised by plaintiffs in the consolidated cases captioned above.

The Court sets the following expedited briefing schedule in this case: Appellants' briefs and the Record on Appeal shall be due on or before 21 January 2022; appellees' briefs shall be due on or before 28 January 2022; and reply briefs, if any, shall be due on or before 31 January 2022. Oral argument will be heard virtually on 2 February 2022 at 9:30 a.m.

By order of the Court in Conference, this the 14th day of January 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of January 2022.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

REBECCA HARPER, ET AL.,

PLAINTIFFS,

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., ET AL.,

PLAINTIFFS,

COMMON CAUSE,

PLAINTIFF-INTERVENOR,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING, ET AL.,

DEFENDANTS.

Wake County

No. 413PA21

ORDER

The NCLCV Plaintiffs', Harper Plaintiffs', and Plaintiff-Intervenor Common Cause's (together, "plaintiffs-appellants") motion to extend the time allowed for oral argument is allowed only as follows: the time for oral argument will be extended both for the plaintiffs-appellants collectively, and for the defendants-appellees collectively, to forty-five minutes for each side pursuant to North Carolina Rule of Appellate Procedure 30(b). The plaintiffs-appellants' collective total of forty-five minutes for oral argument, including main argument and rebuttal, shall be divided equally among the three plaintiffs-appellants unless they agree otherwise. The defendants-appellees' collective total of forty-five minutes for oral argument shall be divided equally between the two defendants-appellees unless they agree otherwise.

By order of this Court in Conference, this 26th day of January, 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26 day of January, 2022.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
Clerk

HARPER v. HALL

[380 N.C. 272 (2022)]

REBECCA HARPER, ET AL.,	)
	)
PLAINTIFFS,	)
	)
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; ET AL.,	)
	)
PLAINTIFFS	)
	)
COMMON CAUSE	)
	)
PLAINTIFF-INTERVENOR	)
	)
v.	)
	)
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; ET AL.,	)
	)
DEFENDANTS.	)

TENTH DISTRICT

No. 413PA21

ORDER

Pursuant to an administrative order entered by this Court on December 23, 2021, and having reviewed and considered precedent established by this Court, the North Carolina Code of Judicial Conduct, and the arguments of the parties, plaintiffs' motions to disqualify the undersigned is denied.

This the 31st day of January, 2022.

s/Berger, J.
Philip E. Berger, Jr.,
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31 day of January 2022.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; AND DAVID DWIGHT BROWN	)	
v.	)	
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH HISE, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY	)	Wake County
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; AND COSMOS GEORGE	)	
v.	)	

HARPER v. HALL

[380 N.C. 274 (2022)]

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH E. HISE, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; REPRESENTATIVE TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; SENATOR PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STELLA ANDERSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON III, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STACY EGGERS IV, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; TOMMY TUCKER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND KAREN BRINSON BELL, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

No. 413PA21

ORDER

After careful consideration of the Court's 23 December 2021 administrative order relating to recusal motions, the arguments advanced for and against the request for my recusal in this case, and an examination of the provisions of the Code of Judicial Conduct and other authorities

in light of the relevant facts, I have concluded that there is no reasonable basis for questioning my ability to fairly and impartially decide this case. As a result, I have elected to retain responsibility for evaluating the merits of the recusal motion and conclude that it should be denied.

The issue raised by the motion seeking my recusal is the extent to which my "impartiality may reasonably be questioned," North Carolina Code of Judicial Conduct Canon 3.C(1), on the theory that I have "such a personal bias, prejudice or interest" that I "would be unable to rule impartially," *State v. Fie*, 320 N.C. 626, 627 (1987), in this case, which arises from a challenge to the lawfulness of Congressional and legislative districts established by the General Assembly. I was not elected from and am not seeking reelection in any of the districts that are at issue in this case (or any other district, for that matter) and, for that reason, I have no personal interest in how this case is decided.

Aside from the fact that the Code of Judicial Conduct requires recusal only when my impartiality can "reasonably" be questioned under Canon 3.C(1), rather than whether there is "the slightest concern about my impartiality," I am unable to see how either the Court's 8 December 2021 decision to stay further filing and postpone the primary or any decision that the Court might make concerning the merits of this case in the future will have any substantial or measurable impact upon my ability to obtain reelection to the Court later this year. Simply put, any attempt to determine the effect of the 8 December 2021 order upon the outcome of this year's judicial elections is nothing more than an exercise in speculation, particularly given that the 8 December 2021 order has the same effect upon my reelection campaign that it does upon the campaigns of every other candidate who has announced or will announce that he or she intends to seek election to the seat on the Court that I now occupy. As a result, the present situation differs markedly from the one at issue in *Faires v. State Board of Elections*, 368 N.C. 825 (2016), which addressed the constitutionality of a statute that would, if upheld, have prevented anyone from running against a previously elected member of the Court, including a member of the Court who was seeking reelection that year.

The prior decisions of this Court do not require that its members recuse themselves in cases involving the lawfulness of Congressional and legislative districts heard during the year in which they are seeking election or reelection. *Pender County v. Bartlett*, 361 N.C. 491 (2007), supports, rather than undercuts, my decision to deny the recusal motion. Although Justice Hudson did not participate in *Pender County*, she was not yet a member of the Court when the case was argued, and this Court's opinion provides no indication that her decision to recuse

herself stemmed from the fact that she had been on the ballot in 2006. 361 N.C. at 511. In addition, then-Chief Justice Parker and then-Justices Martin and Timmons-Goodson, all of whom ran for reelection in 2006, participated in deciding *Pender County*. 361 N.C. at 493.

A similar pattern can be seen in other redistricting-related cases since *Pender County*. For example, then-Justice Newby does not appear to have recused himself when the Court (1) entered an order on 11 May 2012 expediting appellate review of a redistricting-related discovery order, *Dickson v. Rucho*, 366 N.C. 206, 208 (2012), and (2) filed an opinion on 25 January 2013 addressing the lawfulness of that order on the merits, *Dickson v. Rucho*, 366 N.C. 332 (2013), despite the fact that he was a candidate for reelection to the Court in 2012. Similarly, neither Justice Hudson, then-Chief Justice Martin, nor then-Justice Beasley recused themselves from the Court's 19 December 2014 decision in *Dickson v. Rucho*, 367 N.C. 542 (2014), even though all three of them sought election or reelection in 2014. Thus, the established practice at this Court is for justices who are in the process of running for election or reelection to participate in deciding redistricting-related cases like this one.

Finally, I note that no other justice is available to serve in my stead if I recuse myself. For that reason, members of this Court occupy a different position than members of the trial bench and the Court of Appeals, all of whom can be replaced by other judges if they refrain from participating in a particular case. In light of that fact, the members of this Court, including me, have an obligation to accept the responsibility that results from hearing and deciding controversial cases unless a provision of the Code requires them to do otherwise. In my opinion, no such obligation exists here.

As a result, I do not believe that there is any reasonable basis for believing that any interest that I may have, including my hope of being reelected, will preclude me from fairly and impartially deciding this case. On the contrary, I am satisfied that I can decide this case fairly and impartially and that there is no reasonable basis for believing otherwise. Thus, the Legislative Defendant's recusal motion is denied.

This the 31st day of January 2022.

s/Ervin, J.
Samuel J. Ervin, IV
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31st day of January 2022.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

HARPER v. HALL

[380 N.C. 279 (2022)]

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; AND DAVID DWIGHT BROWN	)	
v.	)	
REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH HISE, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY	)	Wake County
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; AND COSMOS GEORGE	)	
v.	)	

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections

No. 413PA21

ORDER

A Motion for Recusal of Justice Anita S. Earls was filed herein by defendants Representative Destin Hall, Senator Warren Daniel, Senator Ralph Hise, Senator Paul Newton, Representative Timothy K. Moore, and Senator Philip E. Berger. Pursuant to this Court's

administrative order dated 23 December 2021 addressing the procedure to be followed in these circumstances, the motion was assigned to me for final determination.

Because the motion is without basis in fact or law and raises many of the same issues as those raised in a similar motion filed in 2019 by many of the same defendants, *see* Legislative Defendants' Mot. To Recuse Justice Earls, *Common Cause v. Lewis*, 373 N.C. 258, No. 417P19 (Nov. 6, 2019) that previously was denied by the Court, *see* Order Denying Legislative Defendants' Mot. to Recuse Justice Earls, *Common Cause v. Lewis*, 373 N.C. 258 (Nov. 15, 2019), 2019 N.C. LEXIS 1143, it is appropriate for me to rule on this motion at this time.

With regard to both the prior motion and this one, "[b]ecause these motions for disqualification touch me personally, I resolved, when they were filed, to give defendants' arguments the fullest possible consideration." *Pennsylvania v. Int'l Union of Operating Eng'rs*, 388 F. Supp. 155, 160 (E.D. Pa. 1974) (Judge Higginbotham denying motions to disqualify himself because of his public statements concerning social injustice and civil rights). For the reasons that follow, the motion is denied.

Two sources of law govern when a Justice of this Court should voluntarily recuse herself from participation in the deliberation and decision of a pending case: (1) the North Carolina Code of Judicial Conduct and (2) the due process clause of the Fourteenth Amendment, as interpreted by the United States Supreme Court in cases such as *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) and *Williams v. Pennsylvania*, 579 U.S. 1 (2016). Turning first to the North Carolina Code of Judicial Conduct, the provision of the Code relevant to the defendants' motion in this case is Canon 3(c)(1), which states:

> C. Disqualification.
>
> (1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:
>
> (a) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> (b) The judge served as lawyer in the matter in controversy, or a lawyer with whom

> the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (c) The judge knows that he/she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

There is both a subjective and an objective component to a Justice's ethical obligation under Canon 3(c). Subjectively, a Justice must be satisfied that she can be fair and impartial and that she can rule on the case based on the facts and the law. I have subjectively determined that I can and will be fair and impartial in carrying out my duties in this case.

The balance of this motion is addressed to the objective component, as defendants "assert that there is a financial interest and personal bias on the part of the justice that makes her unable to rule impartially." Of the four concerns that defendants contend demonstrate my financial interest and personal bias, three are the same as those raised in the recusal

motion in *Common Cause v. Lewis*, namely that my 2018 campaign for election to the Court was financially supported by the North Carolina Democratic Party, that I have a personal bias against defendants because in my prior career I represented clients who were adverse parties to the State, and that in various speeches or public statements before becoming a Justice I made statements expressing views about redistricting. The motion raising these concerns in the *Common Cause v. Lewis* litigation in 2019 was denied by the Court in conference. There is no reason why these concerns would have greater force in this litigation over an entirely new redistricting plan that was drawn years after I joined the Court, particularly given the passage of even more time.

I have no financial interest whatsoever in the outcome of this case and no member of my family or any person within the third degree of relationship to me or my spouse has any interest, financial or otherwise, in the outcome. Thus, subsections 3(C)(1)(c) and 3(C)(1)(d) of the Code are not implicated here.

With regard to subsection 3(C)(1)(a), personal prejudice against defendants cannot be inferred from my prior role as counsel in voting rights litigation. It is well established that my past career as an attorney who litigated civil rights matters occurring more than four years ago is not disqualifying.[1] In general, in this context, "[b]ias or prejudice does not refer to any views a judge may entertain toward the subject matter involved in the case." *State v. Kennedy*, 110 N.C. App. 302, 305 (1993). Every Justice comes to the Court having had a prior career in some substantive area of law. As Justice Scalia observed in a case squarely addressing the meaning of impartiality in the judicial context:

> A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of

1. In December 2017, I resigned from my job, and withdrew from practicing law and representing clients, in order to campaign for election to this Court.

> the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."

Republican Party v. White, 536 U.S. 765, 777–78 (2002) (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum opinion)).

No one suggests that a former prosecutor now serving as a Justice must be disqualified from criminal cases because of a bias against criminal defendants. For similar reasons, multiple courts have repudiated the argument that a judge should be disqualified based on prior work as a civil rights lawyer. *United States v. Alabama*, 828 F.2d 1532, 1543 (11th Cir. 1987) ("Nor can we countenance defendants' claim that [a judge] is prejudiced and no longer impartial by virtue of his background as a civil rights lawyer."), *cert. denied*, 487 U.S. 1210 (1988); *United States v. Black*, 490 F. Supp. 2d 630, 661 (E.D.N.C. 2007) ("[F]ormer civil rights attorneys are not necessarily barred from presiding as a judge in civil rights cases."); *United States v. Fiat*, 512 F. Supp. 247, 251–52 (D.D.C. 1981) (collecting cases rejecting arguments that a judge should recuse from discrimination cases based on prior advocacy for civil rights and racial justice causes); *see also MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 157 F.3d 956, 963 (2d Cir. 1998) ("[I]t is intolerable for a litigant, without any factual basis, to suggest that a judge cannot be impartial because of his or her race and political background.").

Nor does my prior work with non-partisan civil rights organizations require my recusal. As Federal District Court Judge Nancy Gertner explained regarding her work with the Lawyers' Committee for Civil Rights:

> Former association with such an organization alone cannot and should not be seen as undermining one's neutrality as a judge. The Supreme Court has said as much on several occasions when they were applying to themselves the

> same standards of recusal mandated for district court judges. The fact that a judge actively advocated a legal, constitutional or political policy or opinion before being a judge is not a bar to adjudicating a case that implicates that opinion or policy.

Wessmann by Wessmann v. Bos. Sch. Comm., 979 F. Supp. 915, 916–17 (D. Mass. 1997) (citations omitted). There is simply no factual or legal basis for the assertion that I cannot be fair and impartial in this matter now because of my prior career as a civil rights attorney or because of statements I made before joining the Court.

The one new assertion not raised in the *Common Cause v. Lewis* motion is defendants' contention that my prior professional association with one of the many attorneys of record in this matter is a disqualifying factor. Advancing what they acknowledge is a "broad reading of Cannon [sic] 3(C)(1)(b)," they assert, without citation, that other judges read the canon so broadly as to counsel recusal under circumstances such as these. In fact, the precedent in North Carolina is precisely the opposite. Under Judicial Standards Commission's Formal Advisory Opinion 2009-02,[2] disqualification is not required based on this type of prior association. In that Opinion, the Commission advised that "the best practice is for judges to follow a 'Six Month Rule' whereby newly installed judges, for a minimum of 6 months after taking judicial office, refrain from presiding over any adjudicatory proceeding wherein an attorney associated with the judge's prior employer provides legal representation to a party in the proceeding." *Id.* Although the Opinion notes that "specific circumstances may necessitate a deviation from the 'Six Month Rule,' " it is unclear whether the referenced deviation contemplates a shorter or longer period of time. Nevertheless, it has now been years since I worked with that former colleague, and my previous professional association therefore is not disqualifying.

Applying the more general constitutional due process standards in these circumstances also leads to an obvious answer. The contributions to my campaign identified by defendants are far less significant in both absolute and relative terms than the spending in *Caperton v. A.T. Massey Coal Company* that the United States Supreme Court recognized as implicating a due process concern. 556 U.S. at 885. In that

2. https://www.nccourts.gov/assets/inline-files/09-02.pdf?ZUcwTcUAKlVHRO9m57DRJbWI4mgEWpXV

case, unlike here, the Justice whose impartiality was being challenged was up for election, and a party to the proceeding before the court spent "three times the amount spent by [the Justice's] own committee" and "$1 million more than the total amount spent by the campaign committees of both candidates combined." *Id.* at 873. Here, the entities contributing to my 2018 campaign are not parties to this lawsuit, and my campaign received 92 other contributions close to or at the statutory limit of $5,200 for that election. Moreover, in North Carolina, it is common for political parties to contribute to judicial campaigns. The in-kind contributions to my campaign from the North Carolina Democratic Party were only roughly 13% of my overall total committee spending, a small fraction of the contributions deemed problematic in *Caperton*.

There is relevant North Carolina precedent on this point as well. In 2012, this Court summarily denied a motion to recuse then-Associate Justice Newby in an appeal involving North Carolina's legislative redistricting plans. *See* Order Denying Plaintiffs' Mot. for Recusal of Justice Paul Newby, *Dickson v. Rucho*, 366 N.C. 425 (2012) (Dec. 17, 2012), 2012 N.C. LEXIS 1015. The plaintiffs in *Dickson* sought recusal in light of campaign expenditures supporting then-Associate Justice Newby made by the Republican State Leadership Conference (RSLC), a political committee focused on electing Republicans in state elections. The RSLC's own documents stated that they retained the consultant who drew the redistricting maps at issue in that litigation. *See* Pl.-Appellants' Mot. for Recusal of Justice Paul Newby at 9, *Dickson v. Rucho*, 366 N.C. 425 (2012), No. 201PA12-1 (Nov. 21, 2012). Campaign finance disclosure reports showed that the RSLC spent hundreds of thousands of dollars in support of then-Associate Justice Newby's candidacy in the final months of the campaign. *Id.* at 27–29. It also donated $1.17 million to a political action committee that supported then-Associate Justice Newby's campaign, which amounted to well over half the money spent on advertising in support of his candidacy. *Id.* Independent expenditures supporting then-Associate Justice Newby were more than three times greater than the total expenditures of both candidates' campaigns in what was a closely contested election while the appeal was pending before this Court. *Id.* at 28. If the spending at issue in *Dickson* was insufficient to warrant recusal, then so too are the contributions identified by defendants here—which are far less substantial both in absolute terms and relative to total spending in the race, and which occurred years before the redistricting maps at issue were even drawn.

This Court's prior recusal decisions are relevant to any recusal inquiry. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S.

913, 924–26 (2004). There is ample precedent demonstrating that none of the reasons advanced by defendants require my disqualification. Therefore, the motion is denied.

This the 31st day of January 2022.

s/Earls, J.
Anita Earls
Associate Justice

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31 day of January 2022.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburks
~~M.C. Hackney~~
~~Assistant~~ Clerk, Supreme Court of
North Carolina

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

11 FEBRUARY 2022

1P22	State v. Quinton Lajuan Duncan	Def's Petition for Writ of Habeas Corpus (COAP21-515)	Denied **01/04/2022**
2P22	Thomasina Gean v. Novant Health	Plt's Pro Se Motion to Review the Case	Dismissed
3P22	Michael Buttacavoli v. Katherine Langley	1. Plt's Pro Se Motion for Time Extension to File Appeal 2. Plt's Pro Se Motion to Compel Inspection and Discovery	1. Dismissed **01/10/2022** 2. Dismissed **01/10/2022** **Berger, J., recused**
4P22	State v. Marquell Q. Hunter	Def's Pro Se Motion to Re-Calculate Sentence	Dismissed
6P22	Julia Love Hall v. TalentBridge	Plt's Pro Se Motion for Private Investigation	Dismissed
12P22	State v. Rose Williams	Def's Pro Se Motion for Appropriate Relief	Dismissed
15P22	State v. Keith Aaron Bucklew	1. Def's Motion for Temporary Stay (COA20-556) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/12/2022** 2. 3.
17P22	Glenn Henderson v. Target, 7 Does, Brian Cornell, Sedgwick Dave North, Jaylynn Crawford	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA21-259) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
20P22	Katie Hoppe Smith v. Allan Michael Smith	Def's Pro Se Motion for Writ: Have Body(s)	Dismissed
21P22	State v. Broderick Tywone Ruth	1. State's Motion for Temporary Stay (COA20-657) 2. State's Petition for Writ of Supersedeas 3. State's Motion for Extension of Time to File PDR	1. Allowed **01/19/2022** 2. 3. Allowed **01/25/2022**
23P22	State v. Eric Pierre Stewart	1. State's Motion for Temporary Stay (COA21-101) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/21/2022** 2. 3.

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

11 FEBRUARY 2022

24A21	In the Matter of B.B., S.B., S.B.	Respondent-Mother's Motion for Additional Time to Hear Issues Remanded to the Trial Court	Allowed **12/30/2021**
41A22	State v. Mark Brichikov	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **02/04/2022** 2.
49P21	State v. Jeffrey Scott Thomas	Def's PDR Under N.C.G.S. § 7A-31 (COA19-594)	Denied
50P21	Richard C. Semelka, M.D. v. The University of North Carolina and The University of North Carolina at Chapel Hill	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-1076) 2. Respondants' Conditional PDR	1. Denied 2. Dismissed as moot **Barringer, J., recused**
54A19-3	State v. Rogelio Albino Diaz-Tomas	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent 4. Def's PDR as to Additional Issues 5. Def's Conditional Petition for Writ of Certiorari to Review Order of the COA 6. Def's Conditional Petition for Writ of Certiorari to Review Order of District Court, Wake County 7. Def's Conditional Petition for Writ of Mandamus 8. Def's Motion to Expedite the Consideration of Defendant's Matters 9. Def's Motion to Proceed *In Forma Pauperis* 10. Def's Motion to Take Judicial Notice 11. Def's Motion for Leave to Amend Notice of Appeal 12. Def's Motion for Summary Reversal	1. Allowed **04/21/2020** 2. Allowed **06/03/2020** 3. --- 4. Special Order **12/15/2020** 5. Allowed **12/15/2020** 6. Allowed **12/15/2020** 7. 8. Dismissed as moot **12/15/2020** 9. Allowed **12/15/2020** 10. Dismissed as moot **12/15/2020** 11. Allowed **12/15/2020** 12. Dismissed **12/15/2020**

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

11 FEBRUARY 2022

		13. Def's Motion to Supplement Record on Appeal	13. Allowed **12/15/2020**
		14. Def's Motion to Consolidate Diaz-Tomas and Nunez Matters	14. Allowed **06/30/2020**
		15. Def's Motion to Clarify the Extent of Supersedeas Order	15. Dismissed **12/15/2020**
		16. Def's Motion in the Alternative to Hold Certiorari and Mandamus Petitions in Abeyance	16. Allowed **12/15/2020**
		17. Def's Motion to File Memorandum of Additional Authority	17. Dismissed **07/08/2020**
		18. Def's Motion for Petition for Writ of Procedendo	18. Dismissed **12/15/2020**
		19. Def's Motion for Printing and Mailing of PDR on Additional Issues	19. Dismissed **12/15/2020**
		20. Def's Motion for the Production of Discovery Under Seal	20. Denied **12/15/2020**
		21. Def's Motion to Amend Certificate of Service	21. Allowed **12/15/2020**
		22. Def's Motion to Amend Motion for Petition for Writ of Procedendo	22. Dismissed as moot **12/15/2020**
		23. Def's Motion to Unconsolidate Cases for Oral Argument	23. Special Order **08/31/2021**
		24. The North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief	24. Allowed **03/02/2021**
		25. State's Motion for Oral Argument to be Heard Via Webex and not in Person	25. Allowed **12/29/2021**
			Berger, J., recused
61P21	State v. Benny Ray Robinson	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1149)	Denied
76P01-2	State v. Timothy Wayne Youngs	Def's Pro Se Motion to Review Case (COA99-1449)	Dismissed
76P21	State v. Nicholas Burnette Clark	1. Def's Pro Se Motion to Dismiss All Charges	1. Dismissed
		2. Def's Pro Se Motion in Arrest of Judgment	2. Dismissed
		3. Def's Pro Se Motion for Request for Documents	3. Dismissed
		4. Def's Pro Se Motion for the Appointment of Counsel	4. Dismissed as moot

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

11 FEBRUARY 2022

84P21	Nowak v. Metropolitan Sewerage District of Buncombe County, et. al.	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA19-797) 2. Plt's Conditional PDR	1. Denied 2. Dismissed as moot **Berger, J., recused**
100P21	State v. James Earl Cummings, Jr.	Def's Pro Se Motion for Double Jeopardy	Dismissed
108A21	Volvo Group North America, LLC, et al. v. Roberts Truck Center, Ltd., et al.	Plts' and Defs' Joint Motion to Dismiss Appeal	Allowed **12/16/2021**
131P16-22	State v. Somchai Noonsab	1. Def's Pro Se Motion for Objection 2. Def's Pro Se Motion for Order Compelling Discoveries 3. Def's Pro Se Motion to Produce Lower Court Documents and Procedures 4. Def's Pro Se Motion for Production of Documents	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
181A21	Toshiba Global Commerce Solutions, Inc. v. Smart & Final Stores LLC	Def's Motion to Continue Oral Argument	Allowed **01/12/2022**
203P21	State v. Marcia Carson Finney	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-354) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed

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

11 FEBRUARY 2022

228A21	C Investments 2, LLC v. Arlene P. Auger, Herbert W. Auger, Eric E. Craig, Gina Craig, Laura DuPuy, Stephen Ezzo, Janice Huff Ezzo, Anne Carr Gilman Wood, as Trustee of the Francis Davidson Gilman, III Trust fbo Pets UW Dated June 20, 2007, Lauren Heaney, Bridget Holdings, LLC, Ginner Hudson, Jack Hudson, Chad Julka, Sabrina Julka, Arthur Maki, Ruth Maki, Jennie Raubacher, Matthew Raubacher, as Co-Trustees of the Raubacher/Cheung Family Trust Dated November 11, 2018, Lawrence Tillman, Linda Tillman, Ashfaq Uraizee, Jabeen Uraizee, Jeffrey Stegall, and Valerie Stegall	1. Defs' (Arlene P. Auger, Herbert W. Auger, Eric E. Craig, Gina Craig, Stephen Ezzo, Janice Huff Ezzo, Ashfaq Uraizee, and Jabeen Uraizee) Notice of Appeal Based Upon a Dissent (COA19-976) 2. Defs' (Arlene P. Auger, Herbert W. Auger, Eric E. Craig, Gina Craig, Stephen Ezzo, Janice Huff Ezzo, Ashfaq Uraizee, and Jabeen Uraizee) PDR as To Additional Issues	1. --- 2. Allowed
230P21-2	State v. Jordan Nathaniel Mitchell	1. Def's Pro Se Motion for Prayer for Judgment 2. Def's Pro Se Motion for Production of Documents 3. Def's Pro Se Motion for Court Appointed Lawyer with a Speedy Trial 4. Def's Pro Se Motion for Payment of All Royalties	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed

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

11 FEBRUARY 2022

240P21	In the Matter of the Foreclosure of a Lien by Executive Office Park of Durham Association, Inc. v. Martin E. Rock a/k/a Martin A. Rock Lien Dated: October 23, 2018 Lien Recorded 18 M 1195 In the Clerk's Office, Durham County Courthouse	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA20-405) 2. Respondent's Motion to Dismiss PDR 3. Petitioner's Motion for Temporary Stay 4. Petitioner's Petition for Writ of Supersedeas 5. Respondent's Motion that Petitioner be Taxed Costs or Fines 6. Respondent's Petition for Writ of Mandamus 7. Respondent's Motion in the Alternative for Order Directing the Durham County Clerk of Superior Court to Set a Hearing as to the Release of Appeal Bond	1. Allowed 2. Denied 3. Allowed **09/01/2021** 4. Allowed 5. 6. Denied **10/06/2021** 7. Denied **10/06/2021**
244P21-2	David Meyers v. Todd Ishee, Warden Denise Jackson, Governor Roy Cooper, Secretary of North Carolina Department of Public Safety Erik Hooks, Assistant Commissioner of Prisons of North Carolina of Public Safety Brandeshawn Harris	1. Petitioner's Pro Se Motion for Recall 2. Petitioner's Pro Se Petition for Writ of Mandamus 3. Petitioner's Pro Se Motion for Petition for Writ of Quo Warranto 4. Petitioner's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed 2. Denied 3. Dismissed 4. Denied **02/01/2022**
248A21	State v. Amy Regina Atwell	1. Def's Notice of Appeal Based Upon a Dissent (COA20-496) 2. Def's PDR as to Additional Issues	1. --- 2. Denied
255P21	State v. Joshua Blake Taylor	Def's PDR Under N.C.G.S. § 7A-31	Denied
255PA20	State v. Edgardo Gandarilla Nunez	State's Motion for Oral Argument to be Heard Via Webex and not in Person	Allowed **12/29/2021** **Berger, J., recused**

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261A18-3	North Carolina State Conference of the National Association for the Advancement of Colored People v. Tim Moore, in his official capacity, Philip Berger, in his official capacity	1. Plt's Motion to Disqualify Justice Barringer and Justice Berger (COA19-384)	1. Special Order **01/07/2022**
		2. Plt's Motion to Disqualify Justice Barringer	2. Special Order **01/07/2022**
		3. Former Chairs of the North Carolina Judicial Standards Commission's Motion for Leave to File Amicus Brief	3. Allowed **10/29/2021**
		4. North Carolina Professors of Professional Responsibility's Motion for Leave to File Amicus Brief	4. Allowed **11/02/2021**
		5. North Carolina Professors of Constitutional Law's Motion for Leave to File Amicus Brief	5. Allowed **11/02/2021**
		6. North Carolina Institute for Constitutional Law and the John Locke Foundation's Motion for Leave to File Amicus Brief	6. Allowed **11/04/2021**
		7. Scholars of Judicial Ethics and Professional Responsibility's Motion for Leave to File Amicus Brief	7. Allowed **11/05/2021**
		8. Brennan Center for Justice at New York University School of Law's Motion for Leave to File Amicus Brief	8. Allowed **11/05/2021**
		9. North Carolina Legislative Black Caucus's Motion for Leave to File Amicus Brief	9. Allowed **11/05/2021**
		10. Legislative Black Caucus's Motion to Admit Aaron Marcu Pro Hac Vice	10. Allowed **11/15/2021**
		11. Legislative Black Caucus's Motion to Admit Shannon McGovern Pro Hac Vice	11. Allowed **11/15/2021**
270P21	State v. Tony Bernard Simmons, Jr.	Def's Pro Se Motion to Resolve Charges	Dismissed
293P21	State v. Kevin Christopher Michael Tripp	Def's Pro Se Motion for Counsel	Dismissed
304P20-5	Clyde Junior Meris v. Guilford County Sheriffs	1. Petitioner's Pro Se Petition for Writ of Certiorari	1. Denied
		2. Petitioner's Pro Se Motion for Judicial Notice	2. Dismissed

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316P21	State v. Demarcus Antonio Blakley	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-239) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
326PA21-2	Christine Alden v. Lisa Osborne	Respondent's Motion for Extension of Time to Respond to Motion to Dismiss up to and including the Day Reply Brief Will be Due (COAP21-200)	Allowed **12/17/2021**
331P21	Community Success Initiative et al. v. Moore, et al.	1. Plts' Emergency Motion for Temporary Stay (COAP21-340) 2. Plts' Petition for Writ of Supersedeas 3. Legislative Defs' Motion to Admit David H. Thompson Pro Hac Vice 4. Legislative Defs' Motion to Admit Peter A. Patterson Pro Hac Vice 5. Legislative Defs' Motion to Admit Joseph O. Masterman Pro Hac Vice 6. Legislative Defs' Motion to Admit William V. Bergstrom Pro Hac Vice 7. Plts' Motion for Leave to File Reply 8. Counsel for Plts' Motion to Withdraw as Counsel 9. Plts' Motion for Prompt Disqualification of Justice Berger, Jr. 10. Plts' Motion in the Alternative for Deferred Disqualification Following the Court's Resolution of Plaintiffs' Petition for Writ of Supersedeas and Motion for Temporary Stay	1. Special Order **09/10/2021** 2. Special Order **09/10/2021** 3. Allowed **09/10/2021** 4. Allowed **09/10/2021** 5. Allowed **09/10/2021** 6. Allowed **09/10/2021** 7. Dismissed as moot **09/10/2021** 8. Allowed **09/10/2021** 9. Special Order **01/31/2022** 10. Special Order **01/31/2022**
349P21	Angela Wilson Freeman v. Tommie Lee Glenn	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-478)	Denied
353P21-3	State v. Travis Wayne Baxter	Def's Pro Se Motion for PDR	Dismissed
362P17-5	State v. James Cornell Howard	1. Def's Pro Se Petition for Writ of Mandamus (COA17-77) 2. Def's Pro Se Motion for Immediate Release from Custody	1. Denied **01/07/2022** 2. Denied **01/07/2022**

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364P21-2	Thomasina Gean v. Mecklenburg County Schools EEOC Huntingtowne Farms Classroom Teachers Association	Plt's Pro Se Motion for Supreme Court to Review How Other Courts Handled Cases	Dismissed
370P04-19	State v. Anthony Leon Hoover	Def's Pro Se Motion for Averment of Jurisdiction	Dismissed
373P21	State v. Nathaniel Lee Joyner	Def's PDR Under N.C.G.S. § 7A-31 (COA20-156)	Denied
374A14-2	Lewis, et al. v. Flue-Cured Tobacco Cooperative	1. Plts' PDR Prior to a Determination by COA 2. Plts' Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Wake County 3. Plts' and Defs' Joint Motion to Stay Proceedings Pending Final Approval of Settlement	1. 2. 3. Allowed **02/04/2022**
376A21	Woodcock, et al. v. Cumberland County Hospital System, et al.	Defs' Motion to File Documents Under Seal	Allowed **12/22/2021**
383P21	State v. Christopher Gene Crawford	1. Def's Pro Se Motion for Leave to File PDR 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed as moot 2. Denied 3. Allowed
385P21	State v. William Anthony France	Def's PDR Under N.C.G.S. § 7A-31 (COA20-487)	Denied
393PA20	In the Matter of L.N.H.	Petitioner's Motion to Deem New Brief Timely Filed and Served	Allowed **01/25/2022**
397P21	State v. Joseph Cornell Corbett, III	Def's PDR Under N.C.G.S. § 7A-31 (COA20-155)	Denied

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398P21	Duke Energy Carolinas, LLC, Plaintiff v. Michael L. Kiser, Robin S. Kiser, and Sunset Keys, LLC, Defendants/Third-Party Plaintiffs v. Thomas E. Schmitt and Karen A. Schmitt, et al., Third-Party Defendants	1. Plt's Motion for Temporary Stay (COA20-333) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31 4. Third-Party Defs' (Schmitts, et al.) PDR Under N.C.G.S. § 7A-31 5. Third-Party Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **11/15/2021** 2. Allowed 3. Allowed 4. Allowed 5. Allowed **Ervin, J., recused**
400P21-2	Frederick Wilson v. Ken Osadnick, et al.	1. Plt's Pro Se Motion for Subpoena 2. Plt's Pro Se Motion for Subpoena 3. Plt's Pro Se Motion for Subpoena 4. Plt's Pro Se Motion for Subpoena 5. Plt's Pro Se Motion for Subpoena	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed
403P21	Louis M. Bouvier, Jr., Karen Andrea Niehans, Samuel R. Niehans, and Joseph D. Golden v. William Clark Porter, IV, Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriella Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund	Defs' (Holtzman Vogel Josefiak Torchinsky PLLC, Steve Roberts, Erin Clark, Gabriela Fallon, Steven Saxe, and the Pat McCrory Committee Legal Defense Fund) Motion to Recuse (COA20-441)	Dismissed as moot **01/18/2022** **Earls, J., recused**
407P20-5	State v. Archie M. Sampson	Def's Pro Se Motion to Fire and Replace Staff	Dismissed
408P21	State v. Ricardo Vernar Hale	Def's PDR Under N.C.G.S. § 7A-31 (COA20-716)	Denied
409P04-2	Mary Carter v. Global Tel-Link/ Department of Public Safety	1. Plt's Pro Se Motion for Complaint (COA03-318) 2. Plt's Pro Se Petition for Writ of Certiorari 3. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Denied 3. Allowed
411P21	State v. Joseph Earl Clark, II	Def's Pro Se Motion for PDR (COAP21-326)	Dismissed

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412P21	State v. Roger Levern Sanders	1. Def's Motion for Temporary Stay (COA21-89)	1. Allowed **12/03/2021** Dissolved **02/09/2022**
		2. Def's Petition for Writ of Supersedeas	2. Denied
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Denied
413PA21	Harper, et al. v. Hall, et al., and NC League of Conservation Voters, et al. v. Hall, et al.	1. Plts' (Harper, et al.) PDR Prior to Determination by COA (COAP21-525)	1. Special Order **12/08/2021**
		2. Plts' (Harper, et al.) Motion to Suspend Appellate Rules to Expedite a Decision	2. Special Order **12/08/2021**
		3. Plts' (Harper, et al.) Motion for Prompt Disqualification of Justice Berger, Jr.	3. Special Order **01/31/2022**
		4. Plts' (Harper, et al.) Motion in the Alternative for Deferred Consideration of Disqualification Following the Court's Resolution of PDR Prior to a Determination by COA	4.
		5. Plts' (N.C. League of Conservation Voters, Inc., et al.) PDR Prior to Determination by COA	5. Special Order **12/08/2021**
		6. Plts' (N.C. League of Conservation Voters, Inc., et al.) Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Wake County	6. Special Order **12/08/2021**
		7. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion to Suspend Appellate Rules and Expedite Schedule	7. Special Order **12/08/2021**
		8. Plts' (N.C. League of Conservation Voters, Inc., et al.) Petition for Writ of Supersedeas or Prohibition	8. Special Order **12/08/2021**
		9. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion for Temporary Stay	9.
		10. Plts' (Harper, et al.) Notice of Joinder of Motion for Temporary Stay	10.
		11. Defs' (Hall, et al.) Notice of Intent to Respond	11.
		12. Intervenors' (NC Sheriffs' Association, NC District Attorneys Association, and NC Association of Clerks of Superior Court) Motion to Intervene as Parties	12. Denied **01/24/2022**

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	13. Intervenors' (NC Sheriffs' Association, NC District Attorneys Association, and NC Association of Clerks of Superior Court) Motion for Reconsideration of the Court's 8 December 2021 Order Staying the Candidate Filing Period	13. Dismissed **01/24/2022**
	14. Legislative-Defs' Motion for Recusal of Justice Samuel J. Ervin, IV	14. Special Order **01/31/2022**
	15. Plt's Notice of Appeal Based Upon a Constitutional Question	15.
	16. Plt's Notice of Appeal Based Upon a Constitutional Question	16.
	17. Plts' (Harper, et al.) Renewed Motion for Disqualification of Justice Berger, Jr.	17. Special Order **01/31/2022**
	18. Notice of Appeal Based Upon a Constitutional Question 1	18.
	9. Legislative-Defs' Motion for Recusal of Justice Anita S. Earls	19. Special Order **01/31/2022**
	20. Plt-Intervenor's (Common Cause) Motion for Disqualification of Justice Berger, Jr.	20. Special Order **01/31/2022**
	21. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion to Admit Sam Hirsch, Jessica Ring Amunson, Zachary C. Schauf, Urja Mittal, and Karthik P. Reddy Pro Hac Vice	21. Allowed **01/21/2022**
	22. Plt-Intervenor's (Common Cause) Motion to Admit J. Tom Boer and Olivia T. Molodanof Pro Hac Vice	22. Allowed **01/21/2022**
	23. Legislative-Defs' Motion to Admit Mark Braden Pro Hac Vice	23. Allowed **01/21/2022**
	24. Legislative-Defs' Motion to Admit Katherine McKnight Pro Hac Vice	24. Allowed **01/21/2022**
	25. Plts' (Harper, et al.) Motion to Admit Elisabeth S. Theodore, R. Stanton Jones, Samuel F. Callahan, Abha Khanna, Lalitha D. Madduri, Jacob D. Shelly, and Graham W. White Pro Hac Vice	25. Motion Allowed in Part; Denied in Part **01/21/2022**
	26. Buncombe County Board of Commissioners' Motion for Leave to File Amicus Brief	26. Allowed **01/24/2022**
	27. Campaign Legal Center's Motion for Leave to File Amicus Brief	27. Allowed **01/24/2022**

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		28. Campaign Legal Center's Motion to Admit Christopher Lamar and Orion de Nevers Pro Hac Vice	28. Allowed **01/24/2022**
		29. Bipartisan Former Governors Michael F. Easley, Arnold Schwarzenegger, Christine Todd Whitman, and William Weld's Motion for Leave to File Amicus Brief	29. Allowed **01/24/2022**
		30. Plts' (Harper, et al.) Renewed Motion to Admit Elisabeth S. Theodore, R. Stanton Jones, Samuel F. Callahan, Jacob D. Shelly, and Graham W. White Pro Hac Vice	30. Allowed **01/24/2022**
		31. Professor Charles Fried's Motion to Admit Ruth M. Greenwood, Theresa J. Lee, and Nicholas O. Stephanopoulos Pro Hac Vice	31. Allowed **01/24/2022**
		32. NCLCV Plts', Harper Plts, and Plt-Intervenor Common Cause's Motion for Extension of Time Allowed for Oral Argument	32. Special Order **01/26/2022**
423P21	State v. Michael J. Grace	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Alamance County (COAP20-588)	1. Dismissed
		2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	2. Allowed
		3. Def's Pro Se Motion to Appoint Counsel	3. Dismissed as moot
424P14-4	John S. Stritzinger v. Bank of America	Plt's Pro Se Motion for a Formal Bill of Exception	Dismissed
427P21	State v. Kevin Hart, Jr.	Def's Pro Se Motion to Take Care of Problem with Undue Delay	Denied **01/04/2022**
429P21	State v. Justin Marcellus Norman	Def's Pro Se Motion to Resolve All Pending Charges	Dismissed
430P21	In the Matter of A.C.	1. Petitioner's Motion for Temporary Stay (COA20-508)	1. Denied **12/28/2021**
		2. Petitioner's Petition for Writ of Supersedeas	2. Denied
		3. Petitioner's PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Guardian ad Litem's PDR Under N.C.G.S. § 7A-31	4. Denied

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432P21	State v. Arthur Vladimir Kochetkov	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-774) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
433P21	State v. Daniel Raymond Jonas	1. State's Motion for Temporary Stay (COA20-712) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 12/22/2021 2. 3.
437P21	Thomasina Gean v. Quick Trip	Plt's Pro Se Motion to Review this Case	Dismissed
505P20	State v. Rayquan Jamal Borum	1. State's PDR Under N.C.G.S. § 7A-31 (COA19-1022) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. State's Motion for Temporary Stay 4. State's Petition for Writ of Supersedeas	1. Allowed 2. Denied 3. Allowed **01/27/2021** 4. Allowed
580P05-24	In re David Lee Smith	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Petition for Writ of Mandamus 3. Def's Pro Se Emergency Petition for Writ of Mandamus	1. Denied **12/20/2021** 2. Denied **12/20/2021** 3. Denied **12/20/2021** **Ervin, J., recused**
580P05-25	In re David Lee Smith	Def's Pro Se Emergency Petition for Writ of Mandamus	Dismissed **Ervin, J., recused**

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